

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 DAVID L. WING, \*  
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 Appellant, \*  
 \*  
 v. \*  
 \*  
 UNIVERSITY OF WISCONSIN, \*  
 \*  
 Respondent. \*  
 \*  
 Case No. 78-159-PC \*  
 \*  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(c), Stats. (1977), of the denial of a grievance. The respondent raised a number of jurisdictional objections at the prehearing conference, and the parties, through counsel, have filed briefs on the issues raised thereby. The findings which follow are based on matter submitted by the parties which appears to be undisputed.

FINDINGS OF FACT

1. The appellant at all relevant times has been employed by the respondent in the unclassified civil service at the University of Wisconsin - Stout.

2. The appellant was denied a discretionary performance award (DPA) for 1976 (1976-1977 fiscal year) on performance grounds and was informed of this denial on July 14, 1976.

3. The appellant was denied a DPA for 1977 (1977-1978 fiscal year) on performance grounds and was informed of this denial on May 25, 1977.

4. The University of Wisconsin - Stout policy on exceptional performance awards (EPA's) for 1977 (1976-77 fiscal year) and 1978

(1977-1978 fiscal year) was that persons denied the previous DPA on performance grounds would not be eligible for an EPA, and the appellant was denied EPA's for those years.

5. The appellant filed a non-contractual grievance on May 10, 1978.

6. The third step grievance decision was returned to the appellant on July 31, 1978.

7. The third step decision denied the grievance as to the 1976 and 1977 DPA's, as untimely filed and, as to the 1978 EPA, on the merits.

8. In a letter to the appellant accompanying the third step decision it was stated that the appellant had 30 days in which to appeal to the Commission.

9. The appellant filed an appeal of the third step grievance decision with the Commission on August 30, 1978.

#### CONCLUSIONS OF LAW

1. The respondent is estopped from arguing that this appeal was not filed with the Commission in a timely fashion.

2. The appellant did not file the grievance at the first step in a timely manner with respect to the 1976 and 1977 DPA's and the 1977 EPA.

3. The time limit set forth in the U.W. non-contract grievance procedure for filing grievances at the first step is not jurisdictional or mandatory in nature and can be waived.

4. The respondent waived its objection to the untimely filing of the grievance as to the 1978 EPA by not raising it during the grievance.

5. The subject matter of this appeal is properly before the Commission.

OPINION

The respondent argues that the appellant's appeal to this Commission was not timely filed. The appeal letter was filed on August 30, 1978. The third step grievance indicates that it was returned to the employe on July 31, 1978. In the letter from the respondent to the appellant accompanying the third step grievance a 30 day appeal period is mentioned. The appeal was filed within the 30 days indicated, and the respondent now is estopped from arguing that the appeal was untimely filed with the Commission.

The respondent also objects that the non-contractual grievance itself was not timely filed in the first instance.

The grievance in question was filed initially on May 10, 1978. The grievance was modified verbally during the third step meeting with the respondent. The grievance involved four transactions:

Non-receipt of discretionary performance awards (DPA's) for the following years;

1976 (1976-1977 fiscal year)

1977 (1977-1978 fiscal year)

Non-receipt of exceptional performance awards (EPA's) for the following years;

1977 (1976-1977 fiscal year)

1978 (1977-1978 fiscal year)

The 1976 DPA denial was discussed with the appellant on July 14, 1976. The 1977 DPA denial was discussed with the appellant on May 13, 1977.

From the documents submitted with the briefs, it is not completely clear when appellant had notice of the denial of the 1977 and 1978 EPA's.

The U.W. non-contractual grievance procedure submitted by the respondent contains the following statement on time limits:

"Prior to filing a written grievance, an employe who has a personnel problem or complaint must try to get it settled through discussion with his immediate supervisor within fourteen (14) days from the date of awareness of the action or condition giving rise to the problem. If the employe is not in agreement with the informal decision reached by this discussion, which must take place within (4) days of presentation, he may file a grievance in writing.

First Level of Review

The grievance shall be presented in writing on the appropriate forms, to the section chief and the immediate supervisor, within four (4) days of receipt of the immediate verbal supervisor's response to the initial complaint.

The respondent accepted the third step of appellant's grievance for the 1978 EPA as timely and answered it on the merits. This fact leads to a possible waiver of the objection that the grievance was not timely filed at the first step with respect to this transaction, if the time limit set forth in the grievance procedure for filing at the first step is determined not to be jurisdictional or mandatory in nature.

The time limits set forth in the U.W. grievance procedure are not prescribed by statute nor even administrative rule. Section Pers. 25.01, WAC, provides in part:

"... each department shall, as required by the director, establish a written grievance procedure. Such procedure shall meet standards established by the director."

Pursuant to this provision the director established a model non-contractual employe grievance procedure, Administrative Procedures Manual, Bulletin Number 1, effective August 24, 1966, revised October 1, 1974.

This model grievance procedure provides a time limit for the filing of grievances at the first step of five work days following the supervisor's

decision or the date the decision was to have been rendered. The procedure provides that agencies may provide for shorter time limits so long as there is an orderly and systematic time sequence between the successive steps. The University has provided for a time limit of four calendar days for the filing of the first step grievance.

It is axiomatic that administrative agencies are creatures of statute and must ascertain the extent of their power and authority from the statutes. Where a statute provides a time limit for appeal to the agency and denies the exercise of the agency power if the appeal is not timely, as in §230.44(3), Stats. (1977), then the time limit is jurisdictional in nature. See Van Laanen v. Wettengel & Schmidt, Wis. Pers. Bd. No. 74-17 (1/2/75). State ex rel DOA v. Personnel Board, Dane Co. Circuit Court No. 149-295 (1976).

The legislature has provided for the existence of a non-contractual grievance procedure, but has left the terms and specific provisions up to the administrative rule-making process, see §230.45(1)(c), Stats. (1977):

"The Commission shall:

\* \* \*

(c) Serve as final step arbiter in a state employe grievance procedure relating to conditions or employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure."<sup>1</sup>

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<sup>1</sup>While the secretary has not yet promulgated such rules, the transition provisions of Chapter 196, Laws of 1977, provide for the continuation of the rules of the director until modified, see §129 (4q), and thus §Pers. 25.01 and the derivative APM and departmental grievance procedures, including the University's, remain in effect.

While the University may have the authority to impose a four day time limit on grievances, the grievance procedure, which is three steps removed from the statutory framework, should not be interpreted as jurisdictional in nature and incapable of waiver.

This opinion is reinforced by other factors in addition to the remoteness of the grievance procedure from the statutes. The Commission also notes the juxtaposition of the words "must," "will," and "shall" in the U.W. grievance procedure. The time limit for filing at the first step utilizes the word "shall." The Wisconsin Supreme Court relied in part on this type of usage in determining that a time limit was directory rather than mandatory in Will v. H&SS Department, 44 Wis. 2d 507, 518, 171 N.W. 2d 378 (1969).

The Commission also believes that a directory, non-jurisdictional approach is in keeping with general principles of statutory construction:

" ... provisions are normally considered directory 'which are not of the essence of the thing to be done but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.'" State ex rel Werlein v. Elamore, 33 Wis. 2d 288, 293, 147 N.W. 2d 252 (1967).

Finally, this interpretation is in keeping with the approach taken by the predecessor agency to this Commission, the Personnel Board. See Schaut v. Schmidt, Wis. Pers. Bd No. 74-67 (11/24/75).

If the grievance procedure time limit is not jurisdictional or mandatory, this removes the main impediment to the application of a waiver theory. There also are certain policy interests served by a holding that an objection on timely filing of a grievance is waived unless asserted during the grievance procedure. Otherwise the facts

related to timeliness may not be preserved, and grievances may be pursued unnecessarily. See, e.g., Verson Allsteel Press Co. and Intl. Bro. of Pottery and Allied Workers, Local 357, 66 Labor Arbitration Reports 643, 644 (41,176):

"And arbitrators, for good reason, have ruled that the party who wishes to raise the issue of untimeliness ought to do so during the grievance procedure for at least two sound reasons: the parties involved then could examine the date during the grievance procedure to see, indeed, if it was an untimely grievance (or be ready to testify concerning that information during the arbitration), or the party could withdraw the case if the evidence concerning untimeliness was sufficient that the party involved felt it inappropriate to carry the case forward to the arbitrator.... In short, by not raising it in the grievance procedure, it prevented the possible resolution of that issue during the grievance procedure which is the goal of such a procedure."

See also, Dept. of the Army and American Federation of Government Employes, Watervliet Arsenal Local 2352, 63 Labor Arbitration Reports 924 (11/18/74).

With respect to the specific transactions in question, the grievance was clearly untimely with respect to the 1976 and 1977 DPA's. The appellant's attorney argues in his letter-brief dated February 7, 1979:

"... Mr. Wing has never been provided the kind of information which allows him to exercise his rights under Wisconsin law and procedure. Mr. Alesch states in the third page of his attachment of July 31, 1978, 'Mr. Wing has a responsibility as an employe to know or to seek out his rights.' Mr. Wing attempted to do so, but met with little cooperation from the Stout administration."

The appellant has not alleged that the respondent gave him incorrect information or refused to supply information in response to an inquiry as to whether or not the discretionary performance awards were appealable or grievable, nor that he made such inquiries during the period of time when he might have filed timely grievances with respect to those

transactions. In this setting, the requirement that an employe is responsible for ascertaining his or her rights comes in to play.

See Jabs v. State Board of Personnel, 34 Wis. 2d 245 (1967).

With respect to the 1977 EPA, this record does not indicate that the appellant was given specific notice of the denial as he was of the DPA's. The respondent's position on untimeliness is premised on the fact that the University written policy on EPA's was to exclude from consideration employes denied a DPA. Therefore, the appellant theoretically would have had notice of his EPA denial when he received the denial of his DPA each year.

The appellant states that it has not been established that he ever received a copy of the written policy in question. The Commission does not need to consider this argument as to the 1977 EPA because regardless of appellant's notice of the EPA policy, it is inconceivable that he was not aware that he did not receive an EPA for 1977 (1976-1977 fiscal year) many months prior to the commencement of his grievance.

As to the 1978 EPA, the respondent accepted the grievance as timely with respect to that transaction, and, as discussed above, waived any timeliness objection as to that transaction.

The final argument made by the respondent is that the subject matter of the grievance is not appealable to the Commission because it involves neither a function of the administrator or director nor an allegation of a violation of the civil service rules or statutes. However, discretionary and exceptional performance awards are governed explicitly by §230.12(5) and (7), Stats. (1977), and in the opinion of the Commission this matter is properly before the Commission.



ORDER

So much of this appeal as relates to the denial of the appellant's 1976 and 1977 discretionary performance awards and 1977 exceptional performance award is dismissed on the ground that the grievance was not timely filed with respect to those transactions. The respondent's objections to subject-matter jurisdiction on the grounds of an untimely appeal with the Commission and non-appealable subject matter, and the objection that the grievance was not timely filed as to the 1978 EPA, are overruled. It is ordered that this case be scheduled for hearing, preceded by a prehearing if necessary or desirable, on the matter of the denial of appellant's 1978 EPA.

Dated: \_\_\_\_\_

*April 19*

, 1979.

STATE PERSONNEL COMMISSION

*Joseph W. Wiley*  
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Joseph W. Wiley  
Chairperson

*Edward D. Durkin*  
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Edward D. Durkin  
Commissioner

*Charlotte M. Higbee*  
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Charlotte M. Higbee  
Commissioner

AJT:jmg

4/10/79