

# OFFICIAL

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
\*  
JOHN BARTOL, \*  
\*  
Appellant, \*  
\*  
v. \*  
\*  
Secretary, DEPARTMENT OF \*  
TRANSPORTATION, \*  
\*  
Respondent. \*  
\*  
Case No. 79-309-PC \*  
\*  
\* \* \* \* \*

INTERIM DECISION  
AND ORDER

## NATURE OF THE CASE

This is an appeal of the denial of a non-contractual grievance. The respondent has objected to jurisdiction on a number of grounds. The facts relating to jurisdiction do not appear to be in dispute. The following findings are made solely for the purpose of resolving the jurisdictional issue.

## FINDINGS OF FACT

1. The appellant, an employe in the classified civil service, and a State Patrol Sergeant not in a bargaining unit, submitted a non-contractual grievance complaining of the respondent's failures to award him a full 2 percent merit pay raise (discretionary performance award).

2. Following denials at the first two steps, he submitted the grievance at the third step on an "Employe Contract Grievance Report," striking out the word "Contract" and writing in the word "Non-Contractual" in its place.

3. The respondent denied the grievance at the third step on the same form and returned it to the appellant.

4. The appellant received the denial on or about October 10, 1979.

5. The form on which the third step was written had printed instructions on the bottom which cautioned the employe to check the employe's collective bargaining agreement for time limits with respect to processing grievances. See Respondent's Exhibit 2.

6. After receiving the third step response, the appellant read §230.44(3), Stats., and reached the conclusion that the 30 day time limit set forth therein applied to an appeal to the Commission.

7. Acting in reliance on the aforesaid conclusion, the appellant proceeded to file his appeal with the Commission on November 7, 1979.

8. The DOT non-contractual grievance procedure, Respondent's Exhibit 1, provides that appeals of third step decisions must be filed within 10 working days following receipt by the employe of the step three decision.

9. The aforesaid grievance procedure also provides, at paragraph 17, that the employe cannot appeal the agency's final decision if the "subject involved was wholly within the discretion of the Department of Transportation."

#### CONCLUSIONS OF LAW

1. As an appeal of a grievance pursuant to §230.45(1)(c), Stats., the time limit for appeals derives from the agency non-contractual grievance procedure.

2. The time limits set forth in the non-contractual grievance procedure are not jurisdictional in nature.

3. This appeal will not be dismissed as untimely because the circumstances are such that it would be unreasonable to require strict compliance with the time limits set forth in the aforesaid grievance procedure.

4. The Commission is not deprived of subject-matter jurisdiction either on the ground that the subject matter of the grievance is wholly within the

discretion of management or on the ground that the Secretary, DER, has not promulgated rules pursuant to §230.45(1)(c), Stats..

OPINION

With respect to the question of whether this appeal was timely filed, the Commission has held that the time limits for appeals pursuant to §230.45(1)(c), Stats., are as set forth in the applicable non-contractual grievance procedure. See Wing v. UW, Wis. Pers. Commn., No. 78-159-PC, (4/19/79). However, the Commission also held in that decision that those time limits were not of jurisdictional nature, citing Schaut v. Schmidt, Wis. Pers. Bd., No. 74-67, (11/24/75).

In the Schaut case, the Board cited Elkouri and Elkouri, How Arbitration Works, pp 148-149 (3d Ed. 1973), in part as follows:

"Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement."

In this case the third step grievance was processed on the contract grievance form. The only information as to time limits was by way of a reference to the collective bargaining agreement which of course was not applicable. The appellant then referred to §230.44(3), Stats., and concluded that the 30 day time limit set forth there applied to this appeal and proceeded to file his appeal in accordance with the provision.

Inasmuch as the time for appeal set forth in §230.44(3), Stats., applies only to appeals filed under §230.44, it is not applicable to this appeal, which is cognizable only under §230.44(1)(c), Stats. However, while the appellant's reliance on §230.44(1), was mistaken, it was not totally unreasonable. If he had looked to §230.45(1)(c), he would have seen that

the "minimum requirements" or the grievance procedure are subject to rules of the Secretary of DER, which to date have not been promulgated. He would have had to have been familiar with Commission precedent or have made reference to and interpreted §129 (4g), Ch. 196, Laws of 1977, to have reached the conclusion that the agency procedure governed time limits in the absence of the DER rules. In the Wing case the Commission held that although the agency grievance procedure was effective and does provide time limits, these time limits are non-jurisdictional and directory rather than mandatory in nature. While the appeal was not timely filed with respect to the time limits set forth in the grievance procedure, it was only about two weeks late with respect to that deadline, and there has been no allegation of any prejudice to the respondent by the late filing. Given these factors and the definite potential for confusion as to what time limit applies, in the Commission's opinion the respondent's objection to jurisdiction on the ground that the appeal was not timely filed should be overruled.

The respondent raised a number of other jurisdictional objections at the prehearing conference, as follows:

"3. The DOT grievance procedure provides that those matters which are discretionary with management cannot be appealed to fourth step."

The grievance procedure, Respondent's Exhibit 1, paragraph 17, limits appeals of matters "Wholly within the discretion of the Department of Transportation." (emphasis supplied.) The distribution of discretionary performance awards is not wholly within the discretion of management. See, e.g., Peterson v. DOR, Wis. Pers. Comm., No. 78-178-PC (10/12/79).

"4. In the absence of the promulgation of rules of the

Secretary of DER pursuant to §230.45(1)(c), Stats., the Commission lacks jurisdiction."

The Commission has held that in the absence of the promulgation of these rules there is a jurisdictional basis for appeals of non-contractual grievance denials under §230.45(1)(c). The transition provisions of chapter 196, Laws of 1977, §129 (4g) provide for the continuation of the rules of the Director until modified, and Pers. 25.01 and the derivative APM and departmental grievance procedures remain in effect. See, e.g., Gohl v. DOR, Wis. Pers. Commn., No. 79-67-PC, (11/22/79).

"2. Under §230.45(1)(c), non-contract grievances are limited to conditions of employment and this grievance involves wages."

The respondent declined to brief this issue, believing the timeliness objection to be dispositive. The Commission does not wish to delay this appeal any further, but this is an issue of first impression and it would like to have the benefit of argument before ruling. Therefore, the Commission will proceed to schedule this matter for hearing on the merits on a tentative basis while providing the opportunity for briefs on this issue in advance of hearing. If this objection is sustained, the appeal will be dismissed and the hearing canceled.

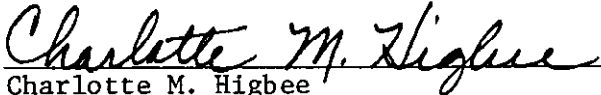
#### ORDER

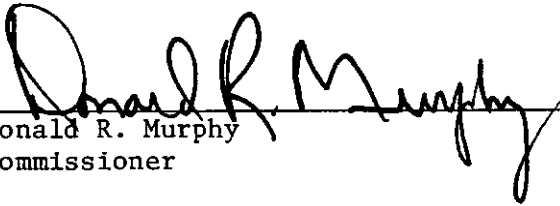
The respondent's objections on the grounds that the appeal was untimely filed and as numbered 3 and 4 above are overruled. The Commission defers a ruling on the objection numbered 2, above, and pending that ruling a hearing on the merits is scheduled for July 23, 1980, at 9:00 a.m. in Room 803, 131 West Wilson Street, Madison. The parties


may submit arguments on objection number 2 pursuant to the following  
schedule:

Respondent: May 9, 1980  
Appellant: May 23, 1980  
Respondent's reply (if any): May 30, 1980

Dated: April 25, 1980. STATE PERSONNEL COMMISSION

  
Charlotte M. Higbee  
Commissioner

  
Donald R. Murphy  
Commissioner

  
Gordon H. Brehm  
Commissioner

AJT:arl  
4/25/80