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DAVID WING, *

Appellant, *

v. *

President, UNIVERSITY OF WISCONSIN-STOUT, *

Respondent. *

Case No. 81-328-PC *

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DAVID WING, *

Appellant, *

v. *

President, UNIVERSITY OF WISCONSIN-STOUT, *

Respondent. *

Case No. 81-420-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

These matters are before the Commission pursuant to §230.45(1)(c), Wis. Stats., at the final step in a state employe grievance procedure. At the respective prehearing conferences, the respondent raised jurisdictional objections. Both parties filed briefs. The following Findings of Fact are based upon matters that appear to be undisputed.

FINDINGS OF FACT

Case No. 81-328-PC

1. On June 22, 1981, the appellant filed a non-contract grievance alleging violation of §Pers. 24.02(2)(c), Wis. Adm. Code and §19.21, Wis. Stats. Instead of describing the nature of grievance, the form merely referred to two memos said to have been attached. For relief, appellant sought, inter alia, discontinuance of all forms of reprisals.

2. On June 24, 1981, the appellant submitted another grievance form so as to correct the reference from Pers. 24.02(2)(c), Wis. Adm. Code, to Pers. 24.04(2)(c), Wis. Adm. Code.

3. On July 1, 1981, Ray Szymanski issued the Step 1 response regarding "Grievance of 6/24/81," stating:

I am not accepting the grievance on 6/24/81 for the following reasons:

- (1) It is not in the correct form--a copy of the proper form is attached.
- (2) No attachments were included with the grievance as noted on your grievance report.
- (3) The grievance report submitted was not legible; and in the future, only the original copy will be accepted for further action.

4. Pursuant to provision I.D.1.e. in the Administrative Practice Manual regarding the non-contractual employe grievance procedure:

- e. Agency grievance procedures shall provide that the employe shall first discuss any problem or complaint with his/her immediate supervisor within 10 work days from the date of awareness of the action or condition giving rise to the problem or complaint. Within 5 work days thereafter the supervisor shall give the employe a decision on the problem or complaint. If no settlement is reached and the matter is within the scope of the grievance procedure, the employe may file a written grievance within 5 work days following the date of the supervisor's decision. If no decision is made by the supervisor within the 5 work days, the employe may file a written grievance within 5 work days following the date the decision was to have been rendered.

5. On June 29, 1981, appellant submitted his grievance to the 2nd level.

6. In a memo dated July 2, 1981, and received by the appellant on July 6, 1981, the appellant was advised by Mr. Wesley L. Face that the grievance was not accepted at the second level:

In summary, it would be my judgment that since the application was amended and received on June 24 by Mr. Szymanski, he had until July 1 to respond. He did respond to you on July 1, indicating the inadequacies of your grievance application. Since you have not responded in the sense of furnishing either the appropriate form, the attachments, or a legible copy, I would indicate that there has been no grievance filed at this time. Thus, I am not accepting a grievance at step two, but would ask that you re-submit in the appropriate form and begin with step one.

7. Appellant subsequently submitted his grievance at the 3rd level.

8. In a letter to the appellant dated July 23, 1981, Robert A. Alesch,

Director, Personnel and Employee Relations at respondent agency stated:

I am returning the grievance which was received on Monday, July 20, 1981.

I support the contention of the Stout Administration that this grievance was not properly filed at the first step of the UW System grievance procedure. Secondly, the grievance subject matter as expressed in your documents fails to meet the definition of a unilateral grievance.

9. Appellant filed a letter of appeal with the Commission on July 29, 1981.

Case No. 81-420-PC

10. On October 30, 1981, the appellant filed an appeal with the Commission from the 3rd step response of Mr. Alesch to a grievance alleging a retaliatory reduction in his work responsibilities. Appellant alleged that the retaliation or reprisal violated §Pers. 24.04(c), Wis. Adm. Code, and had occurred because he had "blown-the-whistle" on the respondent.

CONCLUSION OF LAW

The Commission has subject matter jurisdiction over Case Nos. 81-420-PC and 81-328-PC.

OPINION

The Commission's jurisdiction over grievances is premised on §230.45(1)(c), Wis. Stats., which requires the Commission to:

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

This provision has been interpreted to mean that only those non-contract grievances that involve a violation of civil service law or personnel rule of the Administrator of the Division of Personnel are reviewable by the Commission. Department of Transportation v. Wisconsin Personnel Commission, Dane County Circuit Court, Case No. 79-CV-1312, (7/21/80). This result is based upon the provisions of the Administrative Practices Manual (APM) which were construed by the court in the DOT case as establishing the minimum requirements and scope of the statewide grievance procedure. The APM provisions only permit appeals of

....those complaints which allege that an agency has violated, through incorrect interpretation or unfair application:

- 1) a rule of the [Administrator, Division] of Personnel or Civil Service Statute....

This language is still in force statewide, irrespective of any procedures that may have been adopted by individual agencies.

Case No. 81-328-PC

This grievance was originally filed based upon an alleged violation of §Pers. 24.02(2)(c), Wis. Adm. Code (subsequently amended to read §Pers. 24.04(2)(c), Wis. Adm. Code), and §19.21, Wis. Stats. The grievance was not accepted at the 1st, 2nd or 3rd steps due to various alleged procedural deficiencies on the part of the grievance document itself.

Given the respondent's decision not to accept the grievance, the Commission is now precluded from reaching the merits of appellant's allegations. An opposite result would vitiate the procedural requirements that apply to the first three steps of the grievance mechanism. However, the Commission must retain the power, under certain circumstances, to review a procedural decision such as the respondent's decision in this instance not to accept appellant's grievance. Those circumstances exist when the grievant alleges that the procedural decision constitutes a violation of the grievance procedure set out in the Administrative Practices Manual or of other rules of the administrator, thereby complying with the DOT requirements.

In this case, the appellant has alleged that respondent failed to timely file a response at the first step resulting in a loss of any claims the respondent might have that the initial grievance did not meet the filing requirements. Appellant also alleges that the failure to attach documents to a grievance form is an insufficient or illegal basis for not accepting a grievance.

Due to the existence of these allegations of violations of the grievance procedure, the Commission may hear this matter at the fourth step. However, the scope of the Commission's proceedings will be limited to determining whether the respondent complied with the APM's requirements regarding the non-contract grievance procedure.

Case No. 81-420-PC

Appellant's second grievance was also premised as an alleged violation of §Pers. 24.04(2)(c), Wis. Adm. Code. This grievance was denied on the merits at the third step of the grievance procedure and no question as to the timeliness of the appeal to the Commission has been raised.

Respondent argues that because the disputed action involved the assignment of duties, the Commission lacks subject matter jurisdiction. Numerous cases decided by the Commission have ruled that, as a general matter, the Commission lacks jurisdiction over appeals regarding the assignment of duties. See Teggatz v. DHSS, Case No. 79-73-PC (12/13/79) as appealed in Teggatz v. State of Wisconsin (Personnel Commission) No. 80CV0098 (Winnebago County Circuit Court); Request for Declaratory Ruling, Case No. 77-187, (6/1/81). In Request for Declaratory Ruling, the Commission specifically noted that an assignment of duties constituting a constructive demotion would be appealable under §230.44(1)(c), Wis. Stats. However, none of the Commission's prior decisions in this area specifically address the situation where the assignment of duties has been grieved and there is an arguable violation of a provision of the civil service statutes or rules.

In a fact situation analogous to the instant matter, the Commission has indicated that it will exercise jurisdiction over grievances involving matters that are not directly appealable to the Commission under §230.44, Wis. Stats. In Briggs v. DILHR, Case No. 81-172-PC etc. (1/8/82), the Commission concluded it had subject matter jurisdiction over grievances arising from reprimands where the appellant alleged violations of the personnel rules found in the administrative code, even though reprimands are not a form of discipline appealable to the Commission under §230.44(1)(c), Wis. Stats. Based on Briggs, as long as the appellant meets the requirements for bringing a non-contract grievance before the Commission, i.e., alleging a violation of the civil service statutes or rules, a work assignment may be reviewed by the Commission under §230.45(1)(c), Wis. Stats.

The second issue then becomes one of determining whether, in this case, the appellant has alleged a violation of a personnel rule or civil service statute. Just as in the Briggs case cited above, Mr. Wing has alleged a violation of §Pers. 24.04(2)(c), Wis. Adm. Code, prohibiting reprisals against employes for the release of information to the public, as long as the information is neither confidential nor released for the employes' personal gain. On page 4 of his reply brief, the appellant states:

Also I contend that with my whistleblowing testimony before JCRAR, Senate Bill 524, and before U.W. Board of Regents, Sept. 1981, cause the current reduction of duties. This action is contra to this Wis. Administrative Code Pers. 24.04(2)(c), 230.06(1)(a), 230.01(2) and the case law cited on page 2 of this brief.

The statutory provisions referred to do not in themselves create any specific requirements that would result in jurisdiction by the Commission. §230.01(2), Wis. Stats., is merely a statement of general employment policy and §230.06(1)(a), Wis. Stats., requires the appointing authority to conform with applicable personnel rules. However, as previously ruled by the Commission in Briggs v. DILHR (supra), reliance on Pers. 24.04(2)(c), Wis. Adm. Code, provides the Commission with a jurisdictional basis for proceeding under §230.45(1)(c), Wis. Stats.

Respondent argues that the alleged violations of the code of ethics (Ch. Pers. 24, Wis. Adm. Code) must be directed to the administrator of the Division of Personnel:

Notice of alleged violations of this chapter shall be directed to the administrator, who may then refer the allegations to the appropriate authority. §Pers. 24.06, Wis. Adm. Code.

In this case, as in Briggs, the appellant is alleging reprisals on the part of the appointing authority. Under chapter Pers 24, Wis. Adm. Code, the administrator has little, if any, remedial authority. He can issue advisory opinions, s.Pers 24.05(3), consult with the ethics board s.Pers 24.05(4), and refer allegations of violations of Chapter Pers 24 to the appropriate authority, s.Pers 24.06. The administrator is not equipped by rule to handle complaints from employes of alleged individualized misconduct by appointing authorities. In the Commission's view, the right of employes to seek remedies from the Commission pursuant to subchapter II, chapter 230, stats., regarding transactions which may also raise questions of possible ethics code violations, constitutes more specific enactments, and are separate and distinct from the provisions of chapter Pers 24 for referral of code of ethics matters to the administrator. For example, if Mr. Wing had been discharged he presumably would have had a right to appeal to the Commission pursuant to s.230.44(1)(c), stats. However, the respondent's position on the instant appeal presumably would lead to the result that appeal right would be barred because of the allegation that the hypothetical discharge constituted retaliation in violation of chapter Pers 24.

Wing v. UW
Case Nos. 81-328 & 420-PC

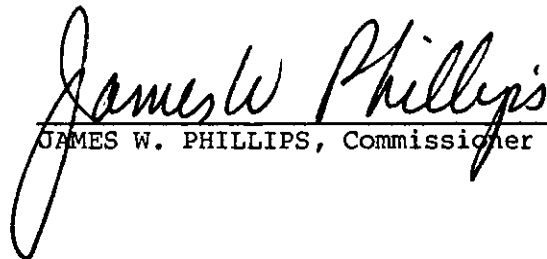
ORDER

Respondent's motions to dismiss as to Case Nos. 81-328-PC and 81-420-PC are denied, and additional prehearing conferences will be scheduled.

Dated: June 25, 1982 STATE PERSONNEL COMMISSION

KMS:jmf


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

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*Commissioner Murphy abstained from voting in this decision due to his employment with the University of Wisconsin at the time this appeal was filed.