

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 DAVID WING, *
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 Appellant, *
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 v. *
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 President, UNIVERSITY OF *
 WISCONSIN SYSTEM, *
 *
 Respondent. *
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 Case No. 85-0058-PC *
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INTERIM
 DECISION
 AND
 ORDER

The Commission issued an interim decision and order in this matter on August 15, 1985. In that decision, the Commission considered the respondent's jurisdictional objections and granted respondent's motion to dismiss in part and denied it in part. In reaching its decision, the Commission noted that the appellant had failed to file a brief. The Commission was informed after August 15th that appellant had, in fact, filed a brief. The Commission construes the last paragraph of appellant's letter of August 16, 1985, which was received August 22, 1985, as a petition for rehearing and now reconsiders its August 15th decision in light of appellant's brief. Rather than amending the August 15 decision, the Commission will simply issue a new decision on respondent's motion to dismiss.

On April 19, 1985, appellant filed with the Commission an appeal of two grievances, described simply as #9 and #10.

At a prehearing conference held on May 20, 1985, a schedule was established for briefing jurisdictional objections. Both parties subsequently filed briefs, although neither party provided the Commission with a copy of the two grievances. The Commission is left with characterizations

of the grievances as related in the parties' briefs. The respondent's brief describes the grievances as follows:

As to the merits of the grievances, one is an appeal of two letters of reprimand, while the other concerns the denial of a request for four hours of paid release time for the purpose of conducting an investigation apparently related to yet another grievance.

On the other hand, the appellant's lengthy brief never does specifically identify these actions taken by the respondent that were the subject of grievances "#9 and #10." The appellants brief does describe certain "facts". Basically, appellant states that: 1) he was given a work assignment in July of 1984 but was unable to obtain information from his work unit that was necessary to complete the assignment; 2) in attempting to verify that he had made requests for the necessary information, appellant sought to use a tape recorder issued to him by the respondent but was directed not to use the recorder for that purpose and the recorder was taken away; 3) he was issued a written reprimand on January 11, 1985, for not completing the work assignment and the respondent refused to withdraw the reprimand after the necessary information was obtained and the assignment completed. The appellant also states as a "related fact" that on July 11, 1984, he filed a grievance regarding respondent's requirement that he report any contacts made in his efforts to be reinstated and that the grievance "forced" the respondent to withdraw their demand.

Of the various allegations suggested in appellant's brief, all appear to fall within the extensive exceptions to the issues made grievable under ch. ER 46, Wis. Adm. Code. The scope of the grievance procedure is established by §§ER 46.03 and .04, Wis Adm. Code, which provides:

ER 46.03 Scope. (1) Under this chapter, an employe may grieve issues which affect an individual's ability to perform assigned responsibilities satisfactorily and effectively, including any matter on which the employe

alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

(2) An employe may not use this chapter to grieve:

(a) A personnel action or decision of the administrator or the secretary that is directly appealable to the personnel commission under s. 230.44, Stats.;

(b) An action delegated by the administration or by the secretary to an appointing authority;

(c) A demotion, suspension, discharge, removal, layoff or reduction in base pay;

(d) A personnel action after certification which is related to the hiring process;

(e) Denial of hazardous employment benefits under s. 230.36(4), Stats.;

(f) The reassignment of a career executive employe under s. ER-Pers 30.07(1);

(g) The failure of a supervisor to process a reclassification request.

(h) An oral reprimand;

(i) The content of written agency rules and policies;
or

(j) A condition of employment which is a right of the employer as defined in s. ER 46.04.

ER 46.04 Management rights. (1) Nothing in this chapter is intended to interfere with the sole right of the employer to carry out its statutory mandate and goals.

(2) For the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

(a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency.

(b) Determining the size and composition of the work force.

(c) Managing and directing the employes of the agency.

(d) Hiring, promoting, transferring, assigning or retaining employes.

(e) Establishing reasonable work rules.

(f) Taking disciplinary action for just cause against an employe.

(g) Laying off employes due to lack of work or funds or organizational changes.

Those types of issues that may be appealed to the Personnel Commission at the fourth step of the grievance procedure are further restricted by the language of §ER46.07, Wis. Adm. Code:

ER 46.07 Personnel commission. (1) If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step under s. ER 46.06(2)(c)2., the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II, ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, the rules of the secretary promulgated under ch. 230, Stats., or written agency rules, policies, or procedures, except that decisions involving the following personnel transactions may not be grieved:

(a) A written reprimand;

(b) A performance evaluation; or

(c) The evaluation methodology used by an employe to determine a discretionary pay award, or the amount of the award.

As respondent correctly notes in her brief, written reprimands are specifically excluded from those matters that are grievable to the Commission as the fourth step in the non-contractual grievance procedure by §ER 46.07(1)(a), Wis. Adm. Code. Therefore, the January 11, 1985 reprimand may not be grieved to the Commission. Appellant's brief suggests that the reference in §ER46.03 to the grievability of "any matter on which the employe alleges that coercion or retaliation has been practiced" means that as long as either retaliation (as defined in §ER 46.02(8), Wis. Adm. Code) or coercion is alleged, an issue may be grieved. This contention fails to reflect the exceptions set forth in §ER 46.03(2) and .07(1), Wis. Adm. Code.

Appellant's statement that he was not provided information necessary to complete his July, 1984 work assignment falls within the §ER 46.04(2)(a) and (c), Wis. Adm. Code, exceptions to the grievance procedure. The same can be said for appellant's statement that he was not permitted to use a tape recorder for a certain purpose.

The only aspect of this case that is within the Commission's jurisdiction is that allegation described by the respondent as "the denial of a request for four hours paid release time for the purpose of conducting an investigation apparently related to yet another grievance." In §ER 46.04, Wis. Adm. Code, "management rights" are defined as including, inter alia, "(a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency." However, under §46.09(2), Wis. Adm. Code:

The employe and representative, if a state employe, shall be allowed a reasonable period of time during normal work hours, without loss of pay, to investigate, prepare and present the grievance upon reasonable notice, as determined by the employer.

The last phrase in this provision is subject to two interpretations. The first is that, as between the employe and the employer, it is the employer who decides the reasonableness of the time spent for investigating, preparing or presenting a grievance. The second interpretation is that the phrase "as determined by the employer" gives the employer an unreviewable right to determine how much time is permissible for investigating, preparing or presenting a grievance. The latter interpretation would equate an employer's decision on this subject to a "management right," even though the provision clearly gives each employe a right to "a reasonable period of time" and even though the provision makes no express mention of either unreviewability or management rights. For those reasons

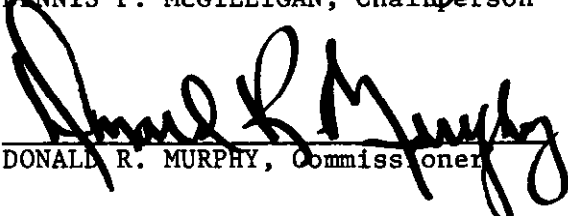
the Commission adopts the first interpretation of the provision set out above, and concludes that this more specific provision prevents the application of the more general management rights provisions (s.46.04(2)(a), Wis. Adm. Code.), to a grievance arising from a request for release time to conduct an investigation as part of pursuing another grievance.^{FN}

ORDER

The respondent's motion to dismiss for lack of subject matter jurisdiction is granted as to the grievance arising from the reprimands but is denied as to the grievance arising from the denial of appellant's request for release time.

Dated: September 20, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

KMS:jmf
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Note: Commissioner Laurie R. McCallum did not participate in the decision in this matter.

Parties:

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^{FN} In Wing v. UW, 79-20-PC (7/5/79), the Commission considered the appellant's request "for a blanket ten percent per week time to gather information for other appeals and grievances presently pending." At the time of that decision the standard for determining if a grievance could be appealed to the Commission was whether appellant had alleged a violation of a civil service rule or statute. That standard was replaced when Ch. 46, Wis. Adm. Code was adopted in 1984.