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STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
DAVID WING,  
Appellant,  
v.  
President, UNIVERSITY OF  
WISCONSIN SYSTEM,  
Respondent.  
Case No. 85-0065-PC  
\* \* \* \* \*

DECISION  
AND  
ORDER

This is an appeal pursuant to §230.45(1)(c), stats., of a non-contractual grievance. Pursuant to a conference report dated May 30, 1985, this matter is being submitted for decision "on the issue of whether the respondent violated §ER 46.01(2), Wis. Adm. Code, in its hearing of the underlying grievance at the third step, by certain comments of Mr. Alesch which allegedly had the effect of denying Mr. Wing the opportunity to be heard." By order dated January 21, 1986, the Commission appointed the undersigned as examiner with authority to make a final decision, pursuant to §227.09(2), stats.

The parties have submitted written arguments. Additionally, Mr. Wing has submitted a partial transcript of the grievance hearing in question, setting forth those sections which he alleges violated his right to be heard, and the respondent submitted a tape recording of parts of said hearing to augment the partial transcript submitted by Mr. Wing.

Based on the material and arguments submitted by the parties, the basic facts appear to be undisputed. The subject matter of the underlying non-contractual grievance involved a dispute over what data Mr. Wing, a

classified civil service employee at UW-Stout, needed to perform his job duties. On November 28, 1984, Robert Alesch, a personnel officer of the UW-System acting as the designated representative of the respondent for hearing classified staff employee grievances at the third step, conducted a third step hearing on the grievance at UW-Stout. This hearing lasted 4-5 hours. The parts which Mr. Wing allege denied him the opportunity to be heard are set forth in the partial transcript included in his brief filed September 16, 1985.

The first question to be considered is whether the Commission has jurisdiction over this matter. In its brief, the respondent argues as follows:

. . .The scope of the grievance procedure, as defined by the secretary, is set forth in s. ER 46.03(1), Wis. Adm. Code, as follows:

(1) Under this chapter, an employee may grieve issues which affect an individual's ability to perform assigned responsibilities satisfactorily and effectively, including any matter on which the employee alleges that coercion or retaliation has been practiced against the employee except as provided in sub. (2).

Applying these provisions to the facts of the instant appeal indicates that the Commission lacks jurisdiction. The subject of Mr. Wing's grievance is not related to any condition of his employment, as required by the statute. It is not, moreover, within the scope of the procedure established by the DER Secretary because it has nothing to do with Mr. Wing's ability to perform his assigned responsibilities satisfactorily and effectively.

As is clear from the appeal documents and the prehearing conference report, the subject of this grievance is whether comments made by the hearing officer at the third step hearing on a different grievance deprived Mr. Wing of an opportunity to be heard. Statements made during the course of a hearing simply do not involve any condition of employment and are plainly unrelated to the employee's ability to perform his job effectively. . . .

However, if, as alleged, the respondent denied Mr. Wing the opportunity to be heard concerning the substance of a different grievance, this could affect his "ability to perform assigned responsibilities satisfactorily and

effectively." That is, by denying the grievant the opportunity to be heard, this arguably would make it less likely that the underlying grievance would be resolved correctly, resulting in an effect on the grievant's ability to perform assigned responsibilities satisfactorily and effectively.

Furthermore, this matter is grievable to the Commission at the fourth step, since it meets the requirement contained at §ER 46.07(1), Wis. Adm. Code, that the grievant allege the employer abused its discretion in applying the rules of the secretary. Mr. Wing is alleging the employer abused its discretion in applying §ER 46.01(2), Wis. Adm. Code, which provides as follows:

"This grievance procedure shall ensure that each employe may, without prejudice, express and present a grievance through proper channels with the assurance of timely and thorough consideration."

The respondent argues that this subsection is a statement of policy which imposes no duties or responsibilities on the employer, and therefore cannot give rise to an abuse of discretion. However, in the Commission's opinion, the employer has some discretion to exercise in processing grievances, and a grievance process which failed to provide "timely and thorough consideration" to the presentation of the grievance might well contribute to the determination that the employer had abused its discretion in administering the grievance process.

Turning to the merits, the issue is "whether the respondent violated §ER 46.01(2), Wis. Adm. Code, in its hearing of the underlying grievance at the third step, by certain comments of Mr. Alesch which allegedly had the effect of denying Mr. Wing the opportunity to be heard." The Commission has considered Mr. Wing's brief, which contains transcripts of the alleged offending statements, as well as the partial tape recording of the grievance hearing submitted by respondent. A copy of Mr. Wing's brief is attached to this decision.

After having received this material and considered the parties' arguments, the Commission is unable to ascertain any way in which the remarks of Mr. Alesch had the effect of denying Mr. Wing an opportunity to be heard. While there was some expression of differing opinions and criticisms, and some harsh language, there is nothing which could be construed as denying, or having the effect of denying, Mr. Wing the opportunity to be heard. There simply is nothing which appears to the Commission that would have had a coercive effect, or which otherwise would have prevented Mr. Wing from saying whatever he might have thought was appropriate, given all the circumstances, including the individuals involved.

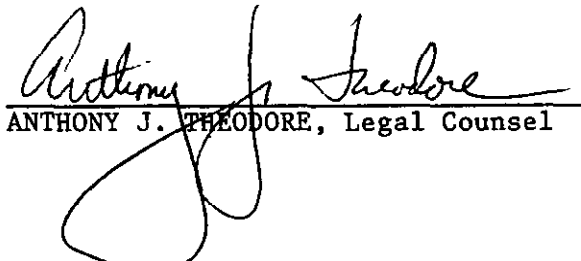
ORDER

The respondent's denial of this grievance at the third step is affirmed and this appeal is dismissed.

Dated: February 12, 1986

STATE PERSONNEL COMMISSION

Attachment

  
ANTHONY J. THEODORE, Legal Counsel

AJT:vic  
VIC02/2

Parties

David Wing  
RPS 307A  
UW-Stout  
Menomonie, WI 54751

Katharine C. Lyall  
Acting President  
University of Wisconsin  
1700 Van Hise Hall  
Madison, WI 53706

✓

To: Mr. Tony Theodore/Hurst Stage P.O. Let Hadalik  
From: David L. Wong  
Subject: Case 85-0085 v.l., partial transcript.

9/11/85

Attached please find my partial written transcript for this case.

RECEIVED

SEP 16 1985

Personnel  
Commission

Authority

I respectfully call attention to the following.

Guidance procedures. ER 46.01(2) clearly states:

"This guidance procedure shall ensure that each employee may, without prejudice, express and present a grievance through proper channels with the assurance of timely and thorough consideration." encl. added

Mr. Afesh has also stipulated to the following.

1) It is his responsibility to hear grievances at the 3rd step, speaking for the New System President Robert O'Neil, has direct work responsibility.

Also he has stated in a formal grievance hearing 7/30/85,

"It is the policy of the New System that all of its employees comply with all statutes, rules and procedures that are relevant to assigned work responsibilities." encl. added

Thus I contend it is clear when considering the tone and language of Mr. Afesh's attributed statements, ER 46.01(2) (which guarantees myself expressions against prejudice) and the New System's own policy concerning compliance with all rules etc. that I have not been afforded my full due process rights again by the New System.

Case 85-0065-P.C., statements dated and taped on 11/25/84 by both parties, Robert Alisch and David L. Wing.

### Introduction

Wing - "... I will be trying to express and present my grievance both this morning and this afternoon and to follow all procedures, know procedures for this grievance presentation. I will be asking several procedural questions, background questions as to this matter before us today.

1) Another denial for reinstatement to a vacant position UW Stout

Alisch - if you wanted out of Stout and don't believe your going to get equal consideration why did you apply?

Wing - Why did I apply well because I presumed that I might of ... I am a really foolish fellow, I kept thinking that people will honor, will eventually learn and honor persons rights and follow their procedures not violate their rights and these kind of things I live shall we say in faith. eventually they will start paying attention to particularly after the number of times we done battle with them but every time I do it seems like I am disappointed.

Alisch - Will this prove again your not wanted here if you don't get the job?

Wing - Probly

Alsech - Is that your motive for .....

Wing - No that's not my motive, it was my motive as for as the Settlement package that we talked about, as I identified a potential job for a settlement agreement.

1) Demanding full compliance with the guidance steps

Wing - quite on the bottom on this memo to Dr. Face that as a I believe the rules are clear that he is required to meet with me but anyway it was coincidental that he used the same basic language

Alsech - I'm not quite sure how that relates to the guidance but I would like to point out to you that the meeting will hold, .... 2nd step was held and that's the important aspect of the thing.

Wing - I think the important aspect of it is that unfortunately he had to insist, jump up and down, as we have said on tape demand that they comply with the guidance process, whatever the procedures are.

1) Trying to portray yourself as a good guy.

Alsech - you're portraying yourself as the good guy and a we are kind of bad guys and a

Wing - well if that's your conclusion fine, is all I am saying what ever there is a right Mr. Alsech I want it if the law does not give it, grant it or specify I don't want it.

Alsech - Alright

Wing - OK that's the point I am trying to make with both you and Dr. Face

Alisch - Alright

Wing - please comply with all procedures this is why I went to the laborous task of just explaining a minute ago my interpretation quite unquote of the eye ball to eye ball resolution.

4) They won't sin again / then you can do whatever you want

Wing - I cited this one before, Mr. Wing shall be provided with necessary productive assignments then I use eg. Teaching accounting next store, I could just see myself being happy happy happy here, item #6 no additional correction or reprisals, some kind of thing you know, there will be no follow up or get evens or anything else its gone, deadwood, judged only on whats happening from that date forward, its hard to do it in peoples mind.

Alisch - you want a guarantee they won't sin again?

Wing - its hard to do that isn't it ok, I have some language I would propose on that... ok it would be similar to the Settlement agreement language,

Alisch - then you could do whatever you wanted

Wing - Oh No Sir, but you go back to 5 where was it 4

Alisch - OK

Wing - I want a two edge sword there, neither I fought for that hold in the whistle blower bill, to have a two edge sword. OK, No Sir I don't want a cold blade that I



to cuss the Vulgarly P out the window without any accountability for it, Not show up to teach the class or not be held accountable for it or anything, I want as much accountability on my back as I want on their backs. OK, I would be happy to work up ball to up ball with you or anyone else to come to some kind of resolution, OK. The most important thing to me Bob is to get that retirement and that triple life insurance for my family which they well deserve and naturally to have a satisfying career and to feel totally as much as possible satisfied in the daily efforts in the work I am trying to do.

I find those statements to be self serving  
~~I find those statements to be self serving and a related to the first grievance.~~

tendency to have a different agenda, whilst blowing  
ing - Take these notes and put it in my Grants Manual, I don't know how to be more implicit than that, but no I don't want to go to the Personnel Office and see confidential information or go to interview Eva Rogers....  
isn't Are you willing to work a protocol out, <sup>that</sup> when you need information or when you're having ...

Wing - it would help me get my tools  
Aliseh - Well a but you having a tendency to have a different agenda(s) than your supervisor.  
Wing - what agenda(s), give me an example  
Aliseh - whistle blowing  
Wing - OK  
Aliseh - that may not have any purpose for Jerry Anderson  
Wing - true  
Aliseh - You may be interested in .... you know a a a  
Wing - I said within the assignment  
Aliseh - Alright  
Wing - All I want him to do is either give me the tools directly or help me get the tools.

7) I sure as hell hope not I'll turn off the thing and leave.  
Wing - reminds Jerry's between a shoe and a hard place he is academic staff he lives at the ... I'm not going into the hole Beel State thing  
Aliseh - Well I sure as hell hope not I'll turn off the thing and leave if you get into that sort of thing.

3) You expect I buy the Bull Shit

Wise - you expect I buy the bull shit that you're not doing this  
in your own personnel interest

King - I am not saying that

Wise - in demeaning me ... you sure as hell can't convince me  
of that

King - I am not trying to convince you of that, I telling you  
where I come from

(reference to the Wise 7/6/79 memo page 2, concealment of  
investigative rights withheld)

2) Keep your mouth shut and ears open

Wise - Please keep your mouth shut and ears open

King - I beg your pardon

# The University of Wisconsin System

OFFICE OF PERSONNEL, EMPLOYEE RELATIONS, STAFF DEVELOPMENT AND PAYROLL SERVICES  
1930 Monroe Street / P.O. Box 8010 / Madison, Wisconsin 53708



Personnel (608) 263-4390  
Employee Relations 263-4386  
Staff Development 263-4383  
Payroll Services 263-4389

July 6, 1979

TO: John Bloodhart

FROM: Bob Alesch *BA*

I called today but you were on vacation. A good decision. It is a beautiful day!

You will get the enclosed when the general distribution on this case is made. I thought it relevant in view of our recent phone conversation with you, Bob Swanson, Don Murphy and myself.

The attached was an addendum to a decision on an Extension employee (Jensen). You will note the very legalistic approach suggested by Don which was rejected by the Commission.

While Dave Wing has caused Stout, although System Administration has come in for its share, an increase in its administrative workload, the UW System has prevailed with the Personnel Commission in those decisions made to date on his appeals and grievances. I would hate to see us be censured because we are denying procedural rights which might have a carryover if the Commission has to make judgments on some of the cases. My policy has always been to stay clean on the rights and procedures which I believe employees have the right to expect. The bonus is that one gains a positive reputation with the Commission which is helpful if any close calls are being made. So far, with Wing, I think Stout and we have been circumspect and Wing has developed a reputation (along with his attorney) of being way out in left field. *Prior to winning any case(s) 74-146/173 & 80-65-RE, 81-420/328-RE*

While I am comfortable with drawing the line on information that Bob Swanson has done, I think some clarification is necessary. Wing has had a tendency to go fishing plus he does not clarify his issues. His most prevalent tactic is to smear and discredit so that any of his suspicions (formalized under the guise of a grievance) are true because all of the administrators are bad guys (that's the way he thinks). Since most of us, including the Personnel Commission, do not think along this line, we come to different conclusions based upon facts.

Wing's tactics of attempting to set up the people who are in the due process (Szymanski, Runnels, Face, Swanson, Alesch) have to be resisted and rebuffed. If he comes to us for information or positions on grievances he contemplates filing, has pending with us, or before the Commission, we should not interact with him. I have fallen victim to this until I sorted out what was happening and now feel pretty comfortable (but wary) as to how I am dealing with him.

July 6, 1979

The attached case shows that Wing and his attorney do have a right to engage in formal investigative techniques. The Commission takes the position that this can occur during working hours of the grievant and the potential witnesses. Wing would want to do this all behind the scenes with complete freedom to roam the Campus, but I think we can insist on supervisory control.

~~Wing and his attorney are not and possibly will not be aware of this decision, thus, we have control.~~ I suggest that Stout proceed carefully with Wing in light of the Commission approach so we do not lose control which would allow him to roam freely on the Campus or at least more than he has most recently.

One caution: Do not overreact to this letter or the opinion. Read it...think about it...read it again and then call. This process should occur over one day--not in a fifteen-minute period.

to

Enc.

*Is this a planned conspiracy?  
- as a lawful or lawful purpose....*