

\* \* \* \* \*  
 DAVID WING,  
                   Appellant,  
 v.  
 President, UNIVERSITY OF  
 WISCONSIN SYSTEM,  
                   Respondent.  
 Case Nos. 85-0122 & 0173-PC  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

These cases are before the Commission on respondent's motion to dismiss. Both cases arise from grievances filed by the appellant, whose position is outside of a bargaining unit. The appellant failed to provide copies of his underlying grievances. However, the third step responses to the grievances were attached to the letter of appeal. In addition, the parties commented on the subject matter of the grievances within their written arguments on jurisdiction.

Case No. 85-0122-PC

The third step response to this grievance states, in part:

Mr. Wing alleges in this grievance that the three following incidents have resulted in the creation of false information and that his supervisor is coercing him because he is filing grievances (prohibited by ER 46.03(1) and has been a whistleblower prohibited by ER Pers. 24.04(2)(c):

1. Key Request - Anderson Memo to Wing 1-9-85.
2. Absence From Work - Anderson Memo to Wing 1-9-85.
3. Work Assignment - Anderson Memo to Wing 1-9-85.

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Master Key Incident:

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Dr. Anderson, in writing his 1-9-85 memo, assumed that a master key would provide Mr. Wing with access to all offices in the building (Bowman Hall). Secondly, he believed that Dave Wing had bypassed the proper request procedure.

Mr. Wing, believing that the memo charged him with not following the standard procedure, checked out the details and made them known to Dr. Anderson. On 1-11-85, Dr. Anderson sent out a memo which verified that Mr. Wing had followed the proper procedure.

The record shows that Mr. Wing followed the correct procedure to apply for a key. There is a written record to back up that conclusion. Since Dr. Anderson has corrected his earlier memo, the charge of false information is not valid. The incident is evidence of good performance and reflects favorably on Mr. Wing.

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Absence from Work Without Prior Communication:

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Mr. Wing claims that Dr. Anderson is establishing false information in his memo. The parties are in dispute over whether Dr. Anderson saw Mr. Wing's absence notice before January 7. Dr. Anderson was on vacation from December 24, 1984 to January 7, 1985. As he recalls, he stopped at the office unexpectedly for a short time during the vacation period. He said he never saw Mr. Wing's notice. Mr. Wing could present no direct evidence that Dr. Anderson had seen the document. It is a fact, however, that Mr. Wing was absent for four hours on January 4, 1985.

In December, 1983, a settlement was reached between David Wing, the Department of Employment Relations, and the UW System. As a part of that settlement, Mr. Wing was to be granted up to 16 hours of paid time for interviews for other positions in state government. On December 29, 1983, Dennis McGilligan sent a memo to Mr. Wing and Attorney Kathryn Anderson of DER in which he spelled out details of the settlement. Among other things, Mr. McGilligan stated that Mr. Wing was to give five days of written notice if he was to be absent with pay for an interview. Secondly, he was to record these absences in a manner in which UW-Stout could administer the 16 hours.

When Mr. Wing turned in his time sheet, he recorded eight hours of actual work. Mr. Wing did not record four hours of work and four hours of "other hours," with an explanation. In his memo, Dr. Anderson was advising Mr. Wing that he was not to record his time away for interviews as time worked. Dr. Anderson was correctly requiring Mr. Wing to live up to the directive of the Personnel Commission. This directive had been reinforced in a memo from Pam

Thornburg, UW-Stout, Assistant Personnel Director, to Mr. Wing in November, 1984.

Neither the third step grievance response itself nor any other documents submitted by the parties describes the "Work Assignment" incident referred to at the beginning of the third step response.

Respondent contends that the Commission lacks subject matter jurisdiction over the grievance and that the grievance was not, in fact, denied at the third step:

The alleged creation of "false" information is not a condition of appellant's employment and the underlying dispute concerns the employer's right to manage and direct its employees. (Respondent's brief, page 3).

The administrative rules covering the non-contractual grievance procedure establish a series of requirements that a grievance must meet in order to reach the Commission at the fourth step of that procedure. Of those requirements, the collection of limitations generally referred to as "management rights" are key to respondent's motion. Pursuant to §ER 46.04, Wis. Adm. Code:

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 employee.

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

The two known actions at issue here (relating to the issuance of a key and "leave" reporting) are not the type of policy decisions related to the agency's statutory mandate and goals that are covered by the management rights exception to the grievance procedure.

However, the third step response indicates (and appellant does not contest) that the respondent effectively reversed its master key decision soon after the original decision (in the January 9, 1985 memo) was issued. While the Commission presumably would have been in a position to hear a grievance arising from the first decision, that decision is no longer in effect. Therefore, there is no basis on which to review the so-called master key incident.

The available documents suggest that the "absence from work" decision is still in effect. Neither party has addressed the "work assignment" memo. The Commission construes the absence of any discussion as an indication that this topic was not part of appellant's appeal to the fourth step. Even if appellant's letter of appeal had covered the work assignment question, the subject would fall within the list of rights reserved to the respondent and, therefore, is not grievable as provided in §ER 46.01(2)(a) and (c), Wis. Adm. Code.

Case No. 85-0173-PC

The parties agree that the subject matter of this case is "failure of the appellant's supervisors at the UW-Stout to conduct a second step hearing on another grievance within the time limits prescribed by ch. ER 46, Wis.

Adm. Code". Respondent argues that because the underlying grievance (relating to a reprimand and matters arising from work assignments) was dismissed by a September 20, 1985 order of the Commission (Case No. 85-0112-PC) for lack of subject matter jurisdiction, no jurisdiction can exist over an alleged procedure error occurring during the processing of that grievance. Respondent also argues that the case should be dismissed because the appellant failed to agree to extend the time limits for hearing the grievance even though the wife of the UW-Stout officer responsible for hearing grievances at the second step was in her final illness.

The Commission has reviewed the various limitations found within ch. ER 46, Wis. Adm. Code, and has found none that would prohibit an employe from grieving an alleged failure of his employer to properly follow the grievance procedure. The Commission has previously held that it has jurisdiction over a grievance based on an alleged refusal to allow an employe to tape record the first step meeting in the grievance procedure. Wing v. UW, 85-0007-PC (9/20/85). The fact that the underlying grievance (Case No. 85-0112-PC) which served as the genesis of the instant case was dismissed for lack of jurisdiction is not determinative here. The respondent's procedure in processing of the grievance at least arguably affected the appellant's "ability to perform assigned responsibilities satisfactorily and effectively". The finding of lack of jurisdiction in Case No. 85-0112-PC referred to the subject of that case rather than to actions taken in processing that grievance.

While the Commission concludes that it has jurisdiction over the failure to timely process a grievance, the language of §ER 46.08, Wis. Adm. Code, establishes specific rights for an employe whose grievance is not answered within the established time limits:

ER 46.08 Failure to meet time limits. (1) The employer shall reject any grievances not filed or any decision not grieved in accordance with the time limits set forth in this chapter. Any decision not grieved in a timely manner shall be decided on the basis of the last preceding decision.

(2) If the grievance is not answered within the time limits set forth in this chapter, the grievant may proceed to the next step under §ER 46.06(2) within 7 calendar days after the last day on which the grievance could have been timely answered.

(3) If the grievance at the third step under §ER 46.06(2)(c) 2. is not answered within the time limits set forth in this chapter, the grievant may proceed directly to the personnel commission in accordance with §ER 46.07.

In its third step answer, the respondent admitted that it did not respond within the seven day time limit. There is still a question as to whether these time limits are directory or mandatory. In the event the respondent is found to have violated the rules, the question of remedy must be addressed: specifically, whether any remedy in addition to §ER46.08(2), Wis. Adm. Code, is appropriate.

The parties agreed to consolidate Case No. 85-0173-PC with 85-0007, 0058, and 0122-PC subject to a ruling on respondent's jurisdictional objection. Therefore, the remaining issues identified above may be addressed in a hearing on the consolidated cases or in a post hearing brief as may be appropriate.

ORDER

Respondent's motion to dismiss is denied with respect to Case No. 85-0173-PC and as to the absence from work decision in Case No. 85-0122-PC. The motion is granted as to the other issues grieved in Case No. 85-0122-PC.

Dated: February 6, 1986

STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

KMS:jgf  
JGF002/2

\*Commissioner Laurie R. McCallum did not participate in the consideration of this matter.

Parties

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