STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT FLANNERY,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 91-0047-PC

INTERIM DECISION AND ORDER

This matter is before the Commission upon respondent's motion to dismiss filed on October 1, 1991. In its motion, the respondent contends that the various allegations being raised by the appellant at the fourth step raise "issues not raised at the first, second and third step grievance as required by ER 46.06 of the Wisconsin Administrative Code." Respondent also contends that issues raised in an amended filing with the Commission were "not timely at the time of filing the original grievance." The Commission established a schedule for submitting briefs on the motion but this schedule was interrupted when on October 24, 1991, the petitioner filed a "Motion to Strike" the respondent's motion.

In its December 19, 1991 ruling on the motion to strike, the Commission addressed the question of whether, in determining what issues were raised during the first three steps of the grievance process, the Commission is restricted to the information found on the grievance forms or whether the Commission can consider comments made during the first, second and third step meetings. The Commission held it is restricted to the face of the grievance form, denied the motion to strike and the parties were then given an opportunity to file additional arguments regarding respondent's pending motion to dismiss.

FINDINGS OF FACT

1. The appellant's first step grievance, submitted on September 26, 1990, and received by the institution superintendent on October 1, 1990, included the following information under the heading of "Describe the grievance - state all facts, including time, place of incident, names of persons involved, etc.":

> Harassment--violation of department policy.
> Retaliatory conduct--violation of Wisconsin Statutes

Harassment--from the time of my first contact with Officer Somers at McNaughton CC, I have been subject to harassment by him. This harassment includes, but is not limited to, officer Somers soliciting statements from others on the subject of whether I have been harassing him. Officer Somer's attempts in this regard have been reported to me, and I have passed them on to all levels of personnel in the Department. However, no action has been taken to eliminate this problem, and although the Department has recognized the need to instruct Officer Somers [to] desist, it has neglected to do so. This is in violation of the Division/Department of Corrections Policy on harassment. The Department has also engaged in groundless investigation of me on repeated occasions. The Department has withheld from me information it has obtained in the course of its investigations, despite my requests and my representative's requests to be provided with the same, in violation of my due process rights to confront my accusers and adequately prepare an answer to them. Furthermore, the Department's investigation continues in the form of interviews of third parties, at which I have not been allowed to be present or cross-examine. This investigation is allegedly in response to a complaint by Officer Somers against the Department of Corrections for racial discrimination; the contents of the file partially revealed to me are primarily unsupported allegations of misconduct on my part, unrelated to either my relationship with Officer Somers or his complaint. The above actions suggest that the true purpose of Officer Somers and the investigation is the harassment of your grievant and the destruction of his career.

Retaliation--Your grievant reported and imposed a recommended discipline against Officer Somers for having failed with another, to complete a timely and effective search of an escaped inmate's belongings as instructed. Ultimately, this discipline resulted in no action taken against either of the officers involved. However, from that moment, Officer Somers has undertaken the activities outlined in the paragraph above. Statements reported to me by others are that Officer Somers intends to have me fired. The Department later investigated an incident regarding inmate urine samples. This investigation has been satisfactorily concluded. However, some three months following this conclusion, the Department reopened its investigation without disclosing why or by what authority it did so. In its investigation of the discrimination claim by Officer Somers, the Department's activities, rather than being fair and impartial investigation, show every appearance of being retaliation against your grievant for having dared to attempt to perform a supervisory function by disciplining his officers. The above actions, and other similar to it, constitute a violation of Wisconsin whistle blower's statute, Section 230.80, et. sec., Wis. Stats., in that these actions are an arbitrary and capricious exercise of departmental power.

The grievance forms also identified the following relief sought:

1. Appropriate effective action by the department ending its harassment and retaliatory conduct.
2. Payment by the department of such expenses and damages as to make this grievant whole.

2. The employer's first step decision was signed by Superintendent James Borman and returned on October 8, 1990. It reads:

> Officer Somers was questioned on various occasions as part of the investigatory process. Allegations regarding improper communication and solicitations were reviewed. Proper action followed that review. Officer Somers was counselled regarding this situation.
>
> Investigation was completed and investigatory interview was completed on September 21, 1989. Pre-disciplinary interview was completed on November 9, 1989. A counseling interview was conducted by Warden Phillip Kingston.
>
> The Department has not withheld any information from previous investigations. Review requests for information regarding situations that did not include the disciplinary process will be provided by the Department. Per direction from the Department of Corrections, Bureau of Personnel, appropriate information has been given regarding the disciplinary process.
>
> As management has been aware of addional [sic] information, investigations have been initiated and completed.
>
> Grievants recommendation of discipline was supported by the institution.
>
> Grievant questions investigation that was reopened regarding a strip search. This investigation was prompted by information that went directly to the Division Administrators office. Upon review the institution conducted further investigation into this matter. Personnel due process procedures were followed throughout this investigation and disposition.
>
> Decision: Grievance denied. There has been no harassment or retaliatory action.

3. The appellant's second step grievance, submitted on October 11, 1990, included the same description as was used for the first step and stated it was an appeal from the first step decision.

4. The employer's second step decision was prepared by Warden Phil Kingston and returned on November 10, 1990, with the notation that the time limits were mutually waived. The decision reads:

> No harassment, no discrimination. Sgt. Somers has lodged discrimination complaints through the Personnel Commission, a right of employees who believe they have been discriminated against.
>
> Sgt. Somers has been counselled regarding improper communication. All allegations of improper behavior have been investigated by management.
>
> Management did investigate Mr. Flannery's actions in regard to an inmate strip search after the incident was reviewed.

> Department Attorney Ellefson was representing the DOC in the Somers' dispositions [sic]. If Mr. Flannery is unsatisfied with her representation, he has the right to hire private counsel.
>
> Relief Sought
>
> Grievance denied.
>
> No attorney fees and no pay at the rate of a Center Superintendent since January 1989.

5. Appellant's third step grievance, submitted on November 20, 1990, identified itself as "an appeal from the decision of Warden Phil Kingston" and otherwise included the same information as at the first step.

6. The third step response was signed by an Employment Relations Specialist and returned on March 22, 1991. It merely stated: "The relief you are seeking will not be granted. Grievance Denied."

7. The appellant filed a fourth step grievance with the Commission on April 18, 1991, attaching copies of the the grievance reports from the first three steps.

8. On May 22, 1991, the appellant filed what he referred to as an "amended complaint." It included the following description of "alleged retaliatory and/or harassment actions":

> 5. Mr. Flannery was denied a wage increase. In January, 1990, Mr. Flannery filed a grievance with Mr. Kingston because he received a 2.5% salary increase rather than a 3.75% increase which was given to other similarly situated state employees. In March, 1990, in a formal hearing with Ken Sondalle by telephone, Mr. Sondalle, Assistant Administrator of Division of Adult Institutions, advised that effective July 1, 1990, Robert Flannery would receive a 6% increase with consisted of the 4.5% increase all employees got at that time, together with a 1.75% increase to correct the previous wrongdoing on his earlier raise. This commitment made in March, 1990 was never complied with and to this date Mr. Flannery has not received the agreed-upon salary increase.
>
> 6. Mr. Flannery was denied a promotion to Camp Superintendent, McNaughton Correctional Center. In June, 1988, Mr. Flannery transferred to McNaughton Correctional Center. In January, 1989 he became acting Superintendent of the Center. At that time the state had a policy against lateral transfers by center directors. In May, 1989 James Boorman was appointed Superintendent of the McNaughton Correctional Center. This was a lateral transfer for Mr. Boorman. Mr. Flannery was never interviewed, even though he had indicated interest in the position. He was the only candidate on the list who was from northern Wisconsin and a likely choice to take the position.

7. Improper investigation has been conducted of Mr. Flannery's activities. The Department of Corrections has filed informal Answers to Interrogatories in a case pending before the Personnel Commission as Case Number 89-0133 and 90-0095 indicated that William Schmidt, Field Representative, AFCSME Council 24, obtained statements from inmates, former inmates, and state employees which relate to Mr. Flannery and his work performance. Such statement gathering and information collection techniques are clearly improper when there are specific statutory rules and guidelines governing investigations into employee disciplinary matters. Further, inmates are not to be interviewed for such purposes. Moreover, these investigations were ongoing long after Mr. Flannery's disciplinary matter had been disposed of. Specifically, inmate Troy Virch made a complaint against Officer Flannery on April 8, 1989. Flannery dismissed the complaint on April 13, 1989. The matter was fully investigated and acting Superintendent Lori Boardman approved the recommendation by Flannery on June 15, 1989. Her approval was conditioned upon one modification which was: "A clarification (of internal management procedures) will be sought from Department of Corrections management." No appeal was ever made from that decision by any party and as such it should have stood as the final decision.

8. Notwithstanding the foregoing allegation, the Department, for some unknown reason to your complainant, dispatched Bill Grosshans, Unit 103 Supervisor, to conduct a "fact-finding assignment" with regard to certain activities at the McNaughton Correctional Center. Specifically, in a letter to Stephen Bablitch from Phil Kingston, he attaches a memo from Bill Grosshans relating to allegations concerning Assistant Superintendent Flannery. On page 2 of the letter to Bablitch.... Kingston states: "There are reports furnished by the union, and Mr. Grosshans' report, that indicate inappropriate measures were taken during an inmate strip search. These charges against Assistant Superintendent Flannery need to be fully investigated." In fact, that investigation had already occurred and as referenced by the Grosshans memo itself on page 5, paragraph 3, he states; "The inmate complaint was heard by Lori Boardman or reviewed by her and she affirmed Mr. Flannery's position that this was a strip search." Subsequently on 9-27-89 an investigatory hearing was held relating to the actions of Robert Flannery by investigator Sandra Sweeney. This investigatory process began on that date and concluded in December of 1989 when an oral reprimand was made to Mr. Flannery by Mr. Phil Kingston. During all hearings and official proceedings on this second investigatory hearing, the complaints of Mr. Flannery that he was being subjected to double jeopardy and a deprivation of his due process rights were made at the outset of the hearings. In addition, the Department was made aware at all times that their activities constituted administrative harassment of Mr. Flannery and furthermore, that their activities were causing him incredible stress, embarrassment, anxiety and physical discomfort.

9. The stress, embarrassment, anxiety and discomfort referred to in the preceding paragraphs, culminated in severe stomach problems for Mr. Flannery in October-December, 1989, and January, February and March, 1990. In addition, he was hospitalized in October of 1989 for one week as a result of these problems.

10. William Schmidt contacted three local employers to discuss their interactions with Mr. Flannery in the work release program at McNaughton Correctional Center. Not only was this action by a union representative not criticized or ordered to be curtailed, in fact the statements taken by Mr. Schmidt were used by the state's own investigator, Mr. Grosshans, as evidenced by the memorandum to Stephen Bablitch dated August 31, 1989 and prepared by Mr. Grosshans. Those statements are set forth in detail in that memorandum and they serve to seriously damage Mr. Flannery's work reputation. No attempt was made by Mr. Grosshans to determine the veracity of those statements.

11. Mr. Flannery has in his possession several pages of complaints, all of which groundless, filed by Mr. Somers against Mr. Flannery. Those complaints did not receive an appropriate response from the Department and have in fact permitted the activities of Mr. Somers to continue and escalate. An example of those complaints is contained in the file under Case Number 90-0095-PC-ER. Those documents can be produced upon request if the Personnel Commission will pay for the cost of copying the same since the copies number in excess of 150.

12. Attorney Sheila C. Ellefson, Assistant Legal Counsel for the Department of Corrections, was somehow appointed to represent Officer Flannery at a deposition which was scheduled in mid-August, 1990. Ms. Ellefson did not prepare Mr. Flannery at all for the deposition. The first time that she met with him was within 10 to 15 minutes prior to his deposition being taken. It was apparent that the principal focus of the deposition was Mr. Flannery, yet she had not taken the time to notify Mr. Flannery of any of the complaints that had been filed by Mr. Somers against him. In effect, Mr. Flannery was "thrown to the wolves".

DISCUSSION

Comparing the amended appeal with the grievance forms

In its December 19, 1991, ruling in which the Commission denied the appellant's motion to strike, the Commission held that "the subject of the grievance must be found on the face of the grievance form and not merely described verbally by the grievant during the course of the grievance meeting." This conclusion was based on the following analysis:

> The relevant administrative rules support a conclusion that in determining the subject of allegations raised during the first three steps of the non-contractual grievance process, the Commission is properly restricted to the face of the grievance forms themselves. Pursuant to §ER 46.02(4), Wis. Adm. Code:
>
> > "Grievance" means a *written* complaint by an employe requesting relief in a matter which is of concern or dissatisfaction relating to conditions of employment and which is subject to the control of the employer and within the limitations of this chapter. [emphasis added]

Other rules provide that each grievance may relate to no more than one subject and that informal discussions may relate to other topics. According to §ER 46.05:

> (1) Grievances shall be submitted to the designated employer representative on the forms provided by the employer.
> (2) *Only one subject matter shall be covered in any one grievance.*
> (3) A grievance *shall* describe:
> (a) The condition of employment which is the subject of the grievance.
> (b) The facts upon which the grievance is based.
> (c) The relief sought by the employe. [emphasis added]

Once the grievance has been filed, the rules call for the employer's representative to meet with the "grievant and representative to hear *the grievance* and deliver a written decision *on the grievance.*" §ER 46.06(2)(a). According to §ER 46.13:

> Nothing in this chapter precludes an employe from informally discussing with the employer any matter of concern, whether grievable or not.

These rules, when read together, support the conclusion that the subject of the grievance must be found on the face of the grievance form and not merely described verbally by the grievant during the course of the grievance meeting. This requirement allows the parties to the dispute to know the scope of the matter at issue. Here, the third step grievance form described the grievance as arising from harassment and retaliatory conduct.... The petitioner's current allegations... describe various personnel actions which are not specifically mentioned in the description of the grievance at the third step nor in the employer's decision at the third step. Based both on these facts and the language of the administrative rules, the petitioner's motion to strike must be denied.

It should be noted that in considering the appellant's motion, the Commission failed to identify the specific reference in the respondent's second step answer to the role of DOC Attorney Ellefson during the appellant's deposition.[1] This reference was found on an attachment to the grievance form, which is why it was overlooked during the course of the Commission's review of the appellant's motion to strike. By clearly referencing this issue in its answer and by denying the grievance, the respondent effectively waived any objection to the appellant's failure to have identified the matter on the face of the grievance as a subject of that grievance. After the employer's second step answer, the appellant filed at the third step. He made specific reference on the grievance form to taking "an appeal from the [second step] decision of Warden Phil Kingston." When the third step answer again came back as "Grievance Denied," the denial must be construed as including a refusal to grant

[1]Ms. Ellefson's alleged conduct before and during the deposition during August of 1990 is described by the appellant in paragraph 12 of his amended appeal, set forth in finding of fact 8.

that portion of the appellant's grievance relating to Attorney Ellefson's role during the appellant's deposition. Therefore, the Commission holds that the appellant did adequately reference this issue on the face of his third step grievance so as to give the Commission the authority to consider it at the fourth step.

As to the other issues referenced by the appellant in his May 22nd amendment, some are clearly outside the subject of the allegations raised at the third step, as reflected by the description of the grievance at the third step and by the employer's decision at that step. The clearest method of analysis is to summarize the allegations set forth 1) on the face of the grievance and 2) in the amended appeal and to then compare the two. The first step grievance form, filed on September 6, 1990, set forth five allegations:

1. Respondent took no action to eliminate harassment by Officer Somers directed at the appellant.

2. Respondent has engaged in groundless investigation of the appellant on repeated occasions.

3. Respondent has withheld from the appellant information obtained during the course of its investigations.

4. The respondent's investigation in response to Officer Somers' complaint of racial discrimination continues in the form of interviews of third parties, where the appellant has not been allowed to be present or to cross-examine.

5. The respondent reopened its investigation of an incident regarding inmate urine samples after having satisfactorily concluded that investigation.

The employer's first and second step answers to the grievance also made specific reference to:

6. Respondent's action of reopening an investigation regarding appellant's actions with respect to an inmate strip search.

The employer's second step answer to the grievance also made specific reference to:

7. Appellant's allegation relating to the adequacy of representation provided to the appellant by DOC Attorney Ellefson during appellant's deposition in the Somers proceeding.

The appellant's amended complaint, filed on May 22, 1991, identified the following conduct by the respondent:

a. Denial of appellant's wage increase. (¶5)

b. Denial of a promotion to Camp Superintendent. (¶6)

c. Statement gathering and information collection by union representative William Schmidt who obtained statements from inmates, former inmates and state employes regarding the appellant and appellant's work performance. (¶7)

d. Reopening of the investigation of a complaint made by inmate Virch against the appellant regarding a strip search. The second investigation resulted in an oral reprimand of the appellant in December of 1989. (¶7 and 8)

e. Reopening the investigation. In deciding to reopen, the respondent relied on statements obtained by Mr. Schmidt who had contacted three local employers regarding the appellant. The respondent made no attempt to verify the truthfulness of the statements or to halt Mr. Schmidt's conduct. (¶10)

f. Failing to appropriately respond to groundless complaints filed by Officer Somers against the appellant, including a complaint filed with the Personnel Commission. (¶11)

g. Adequacy of representation provided to the appellant by DOC Attorney Ellefson for the appellant's deposition in the Somers proceeding. (¶12)

Paragraph 9 of the amended appeal, which refers to stress resulting in hospitalization of the appellant is merely a statement as to alleged consequences of other conduct.

None of the first three allegations (a, b and c) in the amended appeal are described on the grievance forms. The fourth and fifth allegations (d and e) relating to the reopening of the investigation, are the same as either allegation 5 or 6 on the grievance forms. Appellant's sixth allegation (f) in his amended appeal is the same as allegation 1 of the grievance form. Finally, as has already been noted above, appellant's contention regarding the adequacy of representation provided by Attorney Ellefson at the deposition (g) is the same as allegation 7 on the grievance form.

The appellant's primary argument in opposition to the respondent's motion is that by having alleged in the grievance that the respondent harassed him, he is free to later amend his grievance to add the specific "factual details," i.e. to identify any incidents of such harassment:

> The Department is attempting to limit facts that the Appellant will utilize in proving that he was harassed in violation of Department policy before there has even been a hearing. In essence, the Department is contending that an appellant has to present each and every single factual matter that relates to a violation of policy, i.e. harassment, and then if there are any of those facts that do not fall within a thirty day period immediately preceding the filing of the grievance, that those are to be excluded from the hearing. That, however, is not what the administrative rules say. *ER 46.05(3)* states a grievance shall describe: (b) the facts upon which the grievance is based.

> Nowhere in the statute does it say that all of the facts must be stated, nor does it make any logical sense that an employee should be required to state with specificity each and every single fact that relate[s] to a violation within thirty days of the date the violation occurred. In a case such as this, it is difficult for an employee to be able to recognize all aspects of harassment within thirty days after the[y] occur. If it were the case that all facts had to be alleged then, there would be no reason to have a hearing at all. Moreover, the reason why you have hearings and the reason why you have lawsuits is because facts are in dispute.

The appellant's argument is inconsistent with the plain meaning of §ER 46.05(3), Wis. Adm. Code:

> (3) A grievance *shall* describe:
> (a) The condition of employment which is the subject of the grievance.
> (b) The facts upon which the grievance is based.
> (c) The relief sought by the employe. (emphasis added)

A grievance which merely alleges that an employe has been harassed by his employer without describing the conduct which is alleged to constitute harassment can hardly be said to describe "the condition of employment which is the subject of the grievance" or the "facts upon which the grievance is based." When the appellant failed to state on his grievance form that he was grieving the failure to promote him in May of 1989, and when the respondent's answer did not respond to such an allegation, the appellant is barred from seeking to later amend his fourth step grievance pending before the Commission to refer to the failure to promote.

Timeliness

In its original brief in this matter, respondent argued:

> Each of the issues raised in the amended grievance was known to the Appellant, but not raised at the time of filing the original grievance on October 1, 1990.
>
> With the exception of number 12 of the "retaliatory or harassment actions" listed in the amendment, none of the issues raised by the amendment was timely at the time of filing the original grievance. Number 12 is not timely even for a first step grievance, because it was not raised until May 22, 1991.

The time limit for filing a first step grievance is set forth in §46.06(1), Wis. Adm. Code:

> All grievances shall be filed with the designated employer representative no later than 30 calendar days from the date the employe first became aware or should have become aware of the matter grieved.

The initial issue is whether the 30 day filing period is in the nature of a statute of limitations, and waivable, or whether it is considered mandatory and therefore jurisdictional in nature. Here, the determination of whether the time limit is directory or mandatory revolves around three separate provisions within ch. ER 46. The first is the time limit itself which is found within §46.06(1), set out above. The second is §ER 46.08(1), which identifies the consequences of failing to meet the time limits set forth elsewhere in ch. ER 46:

> 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.

The third relevant provision is §ER 46.06(5), which provides: "The employer and grievant may mutually agree in writing to waive the time limits at any step under sub. (2)." Subsection (2) of §ER 46.06 sets forth the time limits for the employer to meet with the grievant and issue its written decision at the 1st, 2nd and 3rd steps and also establishes the time limits for the employe to grieve the employer's decision to the 2nd and 3rd steps. Therefore, the reference in §ER 46.06(5) to waiving "any step under sub. (2)" means that the parties are expressly granted the authority to extend the time limits for grieving a 2nd step decision despite the language of §ER 46.08(1) which, if viewed alone, would suggest that the employer has to reject a 2nd step grievance filed more than 7 days after receipt of the 1st step decision, irrespective of any agreement by the parties. Once the parties have complied with §ER 46.06(5) and waived the 7 day time limit in §ER 46.06(2)(b)1., an employer may not turn around and invoke §ER 46.08(1) to reject the grievance at the 2nd step, even though that subsection, on its face, would appear to require rejection of the grievance because the decision was "not grieved in accordance with the time limits set forth in this chapter." The rule's waiver language is clearly inconsistent with interpreting §ER 46.08(1) as being designed to make ch. ER 46 time limits into jurisdictional requirements which are, by definition, not subject to waiver or to equitable tolling.

The Commission recognizes that the 30 day time limit for the employe to file at the 1st step is found in sub. (1) rather than in sub. (2), and, as a result is not expressly made waivable under §ER 46.04(5). However, as long as *some* of the "time limits set forth in this chapter" and referenced in §ER 46.08(1) are in the nature of statutes of limitation, other such time limits cannot be found to be jurisdictional. Once it becomes apparent that §ER 46.08(1) is waivable, the general nature of the grievance procedure and the absence of a penalty provision support the conclusion that the 30 day time limit for filing at the 1st step

is not jurisdictional but is in the nature of a statute of limitations that is subject to waiver if not raised by the employer.[2] This result is supported by the Commission's previous decision in *Wing v. UW*, 78-159-PC, 4/19/79, where the Commission analyzed the time limits in effect before the promulgation of §ER 46.06(1). In *Wing*, the time limits were not prescribed by statute or administrative rule but by the employing agency exercising authority granted to it by the director of the Division of Personnel. The employing agency's grievance procedure contained the following statement regarding time limits:

> Prior to filing a written grievance, an employe who has a personnel problem or complaint must try to get it settled through discussion with his immediate supervisor within fourteen (14) days from the date of awareness of the action or condition giving rise to the problem. If the employe is not in agreement with the informal decision reached by this discussion, which must take place within (4) days of presentation, he may file a grievance in writing.
>
> First Level of Review
>
> The grievance shall be presented in writing on the appropriate forms, to the section chief and the immediate supervisor, within four (4) days of receipt of the immediate verbal [sic] supervisor's response to the initial complaint.

The Commission held that the agency's four day time limit on filing grievances should not be interpreted as jurisdictional in nature, explaining:

> While the University may have the authority to impose a four day time limit on grievances, the grievance procedure, which is three steps removed from the statutory framework, should not be interpreted as jurisdictional in nature and incapable of waiver.
>
> This opinion is reinforced by other factors in addition to the remoteness of the grievance procedure from the statutes. The Commission also notes the juxtaposition of the words "must," "will," and "shall" in the U.W. grievance procedure. The time limit for filing at the first step utilizes the word "shall." The Wisconsin Supreme court relied in part on this type of usage in determining that a time limit was directory rather than mandatory in

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[2] In *Masear v. DILHR*, 89-0065-PC, 1/1/89, the Commission analyzed the 30 day time limit for filing a fourth step grievance with the Commission. Pursuant to §ER 46.07(2):

> Grievances to the commission must be filed within 30 calendar days after service of a decision issued at the third step of the grievance procedure under s. ER 46.06(2)(c)2., or within 30 calendar days after the last day on which the employer could have served a timely decision, whichever is sooner.

The Commission held that this provision was "akin to a statute of limitations" because it did not contain any language similar to that found in §230.44(3), Stats., which provides that appeals under that section "may not be heard" unless the 30 day time limit is satisfied. See *Richter v. DP*, 78-261-PC, 1/30/79. The Commission's analysis in *Masear* did not mention §ER 46.08(1), and therefore did not consider whether that language was applicable to the time limit for filing at the fourth step.

Will v. H&SS Department, 44 Wis. 2d 507, 518, 171 N.W. 2d 378 (1969).

The Commission also believes that a directory, non-jurisdictional approach is in keeping with general principles of statutory construction:

> "... provisions are normally considered directory 'which are not of the essence of the thing to be done but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.'" *State ex rel. Werlein v. Elamore*, 33 Wis. 2d 288, 293, 147 N.W. 2d 252 (1967).

Finally, this interpretation is in keeping with the approach taken by the predecessor agency to this Commission, the Personnel Board. See *Schaut v. Schmidt*, Wis. Pers. Bd No. 74-67 (11/24/75).

If the grievance procedure time limit is not jurisdictional or mandatory, this removes the main impediment to the application of a waiver theory. There also are certain policy interests served by a holding that an objection on timely filing of a grievance is waived unless asserted during the grievance procedure. Otherwise the facts related to timeliness may not be preserved, and grievances may be pursued unnecessarily. See, e.g., *Verson Allsteel Press Co. and Intl. Bro. of Pottery and Allied Workers*, Local 357, 66 Labor Arbitration Reports 643, 644 (41,176):

> "And arbitrators, for good reason, have ruled that the party who wishes to raise the issue of untimeliness ought to do so during the grievance procedure for at least two sound reasons: the parties involved then could examine the date during the grievance procedure to see, indeed, if it was an untimely grievance (or be ready to testify concerning that information during the arbitration), or the party could withdraw the case if the evidence concerning untimeliness was sufficient that the party involved felt it inappropriate to carry the case forward to the arbitrator.... In short, by not raising it in the grievance procedure, it prevented the possible resolution of that issue during the grievance procedure which is the goal of such a procedure."

The portion of the Commission's decision in *Wing* quoted above also addresses the second aspect of the timeliness issue, i.e. whether the failure to raise a timeliness defense at any of the first three steps in the grievance procedure should act as a waiver of the defense. This question has been addressed in many reported arbitration decisions. In a recent decision involving a fact situation comparable to that in the instant case, *Teledyne Monarch Rubber Co. and the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 99*, 91-2 Lab. Arb. Awards (CCH) 5188, 7/22/91, the arbitrator wrote:

> On the basis of the evidence relevant to the issue of timeliness, it is clearly established that the grievance was filed considerably more than 30-days af-

> ter the occurrence. Pursuant to Section 1(b), of Article IV, "no grievance will be considered by either party unless" the grievance is presented "within 30 working dads[sic] from the date of the incident out of which the grievance arose." The 30-day limitation is inapplicable to occurrences involving discharge, or suspension. In which cases, a written grievance must be filed within 15 working days otherwise, the "right to complain" is barren. (Section 2(k).
>
> It is indisputably clear that the grievance charging harassment, intimidation, and threats, was filed well beyond the 30 day time limitation, and therefore, would be barred from arbitration on the merits, providing, the defense of timeliness had been raised at some stage during the grievance procedure. An examination of the grievance proceedings indicates that the Company limited its response to the assertion that no contract violation was involved, and by reason of which the grievance was denied. One may argue that the defense of untimeliness may be implied from the Company's answer; however, it lacked specificity so as to apprise the Union of the Company's position, and the basis for its denial.
>
> It is generally recognized in industrial relations that, although time proscriptions are to be observed, they are deemed of a procedural nature, and subject to waiver in absence of timely assertion of such defense. The Union is entitled to be specifically informed that the Company is asserting untimeliness, and thereby be accorded an opportunity to evaluate its position, and whether to incur the expense, and burden of processing the grievance to arbitration. Failure of the Company to assert the defense of untimeliness prior to arbitration, constitutes a waiver, by reason of which it may not be advanced at the arbitration hearing as a bar to consideration of the grievance on the merits. 91-2 Lab. Arb. Awards (CCH) 5188, 5189-90.

Even though filing a 4th step grievance with the Commission does not involve the identical costs associated with taking a contractual grievance to an arbitrator, the considerations of expense and time identified in *Teledyne* also relate to the matter before the Commission. The materials in the file indicate that the appellant's counsel has served as the appellant's representative at all four steps of the grievance process and it is reasonable to conclude that the appellant has incurred expense at each step because of this representation. By failing to have raised the timeliness issue at any previous stage in the grievance process, the respondent is barred from raising it at the 4th step.[3]

[3]The Commission does not reach the question of whether there would have been a waiver if the timeliness issue had first been raised at either the 2nd or 3rd steps.

ORDER

The respondent's motion to dismiss is granted as to allegations a, b and c (¶5, 6 and 7) of the amended appeal. The respondent's motion is denied as to the other allegations.

Dated: February 21, 1992

STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner