
SUE A. SCHAUT,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary,
Department of Health & Social Services,
and
C. K. WETTENGEL, Director,
State Bureau of Personnel,

Respondents.

Case No. 74-67

JUDI OLSON and SHIRLEY WINKELMANN,

Appellants,

v.

WILBUR J. SCHMIDT, Secretary,
Department of Health & Social Services,
and C. K. WETTENGEL, Director,
State Bureau of Personnel,

Respondents.

Case No. 74-130

Before: JULIAN, Chairperson, SERPE, STEININGER and WILSON, Board Members

OFFICIAL

OPINION AND ORDER

ON

JURISDICTIONAL ISSUES

OPINION

I. Facts

Grievants are permanent employees working for the Department of Health and Social Services (hereinafter called the Department). Their positions are presently classified as Cosmetology Inspectors 2 (PR 5-10).

A survey on the Cosmetology Inspector classification was conducted in 1973 by the Bureau of Personnel. The recommendation made on November 9, 1973 to the Personnel Board was to establish a Cosmetology Inspector 2 (PR 5-10) and to retitle and revise the classification of Cosmetology Inspector (PR 5-09) to Cosmetology Inspector 1

(PR 5-9). This recommendation was resubmitted at the February 1, 1974 Board meeting at which it was unanimously passed.

In March, 1974 all Grievants were reallocated from Cosmetology Inspectors (PR 5-09) to Cosmetology Inspectors 2 (PR 5-10). The notice date of Grievant Schaut's reallocation was March 7, 1974. However, the parties stipulated at the second prehearing conference that she received the notice on March 26, 1974. (Conference Report, March 7, 1975.)

Grievant Schaut filed a grievance on April 29, 1974. She claimed that Barber Inspectors were paid more money to perform the same duties and responsibilities as Cosmetology Inspectors. She further alleged that this difference in pay was based on sex discrimination. There are apparently two Barber Inspectors both of whom are men. The majority of Cosmetology Inspectors are alleged to be women.

Grievant Schaut requested as relief the following:

1. Back pay from starting work to reimburse what was denied due to discrimination.
2. Reallocation to where we would be had we been hired at a level equal to Barber Inspectors.
3. Cosmetology Inspectors 1 and 2 dropped and hiring done equal with Barber Inspectors.
4. Statutes stating requirements equalized or dropped.

(Excerpted from Grievant Schaut's Employee Grievance Form - Step 1; see also letter to Bureau of Personnel, dated June 17, 1974.)

This first step of the grievance and the two subsequent ones were denied because the Department stated it could not grant the requested relief. The final step was returned to Grievant Schaut on June 11, 1974. On June 17, 1974 she wrote the Bureau of Personnel, enclosing in the letter copies of the three steps of her grievance. On June 24, 1974 Respondent Wettengel sent a memorandum to Edward Main,

Attorney for the Bureau of Personnel, requesting him to "take the necessary action to reply." On July 2, 1974 Respondent Wettengel sent a letter to William Ahrens, then Chairman of the Personnel Board, enclosing Grievant Schaut's letter of June 17, 1974 plus her grievance forms. As a postscript to this letter, Respondent Wettengel wrote:

P.S. I assume that the delays in processing to the inappropriate sources will not jeopardize the time limits for filing with your Board.

Pursuant to the Grievance Procedure of the Department, Respondent Wettengel through Dale Bruhn, his Investigating Officer, conducted an investigation of the grievance. He concluded that the Department had acted properly in denying the grievance.

Grievants Olson and Winkelmann filed virtually identical grievances as Grievant Schaut's. The first step was filed on June 25, 1974. This step and the following two were denied. At the third step it was agreed to waive the third step meeting and to settle the grievance "according to the decision of the appeal of the grievance filed by Suanne Schaut." This final step was signed by Respondent Schmidt and dated September 26, 1974. The parties stipulated at the second pre-hearing conference that it was received September 30, 1974. (Conference Report, March 7, 1975.) On December 9, 1974 they wrote the Personnel Board, appealing the third step. This letter was received December 10, 1974.

On July 1, 1973 before Grievants were reallocated to Cosmetology Inspectors 2, they all came under a collective bargaining agreement with the State. They are members of the "Security and Public Safety" collective bargaining unit established pursuant to Sec. 111.81(3)(a), Wis. Stats. Barber Inspectors are also members of this collective

bargaining unit and, of course, came under the terms of the labor agreement with the State at the same time.

Grievants have also filed a complaint with the Department of Labor and Human Relations, Equal Rights Division. A preliminary investigation was made. An Initial Determination dated April 24, 1974 and signed by Barbara Ellingson-Waugh, Field Representative found that "there is probable cause to believe discrimination on the basis of sex in reference to wages occurred."

II. Conclusions

The Personnel Board Has Jurisdiction Over The Issues Raised By These Grievances

According to the Grievance Procedure developed by the Department for a grievance to qualify as appealable, "it must allege unfair treatment or misinterpretation or misapplication of a specific policy, rule or administrative order." (Manual of Instructions and Administrative Orders - Personnel, Department of Health and Social Services, Subject: Employee Relations, Chapter XIII, p. 3, Date revised: 7-23-70, hereinafter cited as Manual.) Furthermore, the Grievance Procedure states:

The decision of the Secretary will be final and binding on all grievances filed under the Department procedure, except those which allege a violation, incorrect interpretation or unfair application of:

1. A rule of the Personnel Board or a civil service statute (S. 16.01 - 16.32).
2. A function which the Director of Personnel has affirmatively delegated his authority to the Department. (Supra, p. 4)

Grievants did not recite a specific number or title of a rule, regulation, policy, or statute when they filled out their grievances.

However, their allegations were specific enough so that the Department should have been apprised of what they were grieving. The first step description of the grievance which was the same for all three grievances stated:

The Department employs Barber Inspectors at one pay level above Cosmetology Inspectors. I believe this is based on the fact that Barbers are in the majority men and Cosmetologists women. The Affirmative Action Officer for the Department agrees the situation is discrimination based on sex. Recently Cosmetology Inspector 1 and 2 positions have been created which has not eliminated the discrimination and was granted due to added work load and responsibility rather than to eliminate discrimination.

It is clear that Grievants were alleging the distinction between the pay ranges for Cosmetology Inspectors and Barber Inspectors was based on sex discrimination. At the very least this allegation if true would violate the spirit and intent of the civil service law. Under Section 16.01(2), it is stated:

It is the policy of the state to maintain a strong coordinated personnel management program and to assure that positions in the classified service are filled through methods which apply the merit principle, with adequate civil service safeguards. To these ends the Bureau of Personnel with advice and quasi-judicial assistance by the Personnel Board shall develop, improve and protect a statewide personnel management program which assures that the state hires the best qualified persons available and bases the treatment of its employees upon the relative value of each employe's services and his demonstrated competence and fitness. (Emphasis added.)

Certainly if as claimed Cosmetology Inspectors perform the same duties and carry the same responsibilities as Barber Inspectors, then there should be equal compensation. Section 16.07(1) in pertinent part states:

Each classification so established shall include positions which are substantially similar in respect to authority, responsibility and nature of work required. In addition, each class shall:

. . .

(c) Be so constituted that the same evaluated grade level within a pay schedule can be applied to all positions in the class under similar working conditions.

, Development of a classification plan including determination of duties and responsibilities and pay ranges is the first step in the employment process. A person is only hired after a position is created and defined. If a particular classification is based on sex discrimination, then this violates the civil service law. Section 16.14 states in pertinent part:

No discrimination shall be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of his political or religious opinions or affiliations or because of his age, sex, handicap, race, color, national origin or ancestry except as otherwise provided.

Therefore, we conclude that Grievants have alleged a violation of the civil service law in claiming that Cosmetology Inspectors are paid less than Barber Inspectors because of sex discrimination. The spirit and intent of the civil service law and Section 16.14, Wis. Stats., quoted above, are being violated if what Grievants allege is true as stated above. Under the Department's grievance procedure, the Personnel Board is the next step when a violation of a civil service law is alleged. (Manual, p. 3) We conclude, therefore, that we have jurisdiction as the fourth step in the Department's grievance procedure over these grievances.

Furthermore, we claim jurisdiction under Section 16.05(4), Wis. Stats. This section empowers the Personnel Board to conduct investigations. Grievants have brought to the Board's attention an ongoing problem which is in violation of the civil service law.

The problem itself involves an important policy matter, that is, the prohibition against discrimination by sex. We have held that our power to investigate should generally be invoked when broad policy questions are involved. (Schwartz v. Schmidt, Case No. 74-18, January 17, 1975; Maegli v. Schmidt, Case Nos. 74-6, 74-13, January 20, 1975.) Therefore, we conclude we have jurisdiction under this subsection.

The Grievances
Were Timely Filed

A timeliness issue is raised for two aspects of these grievances. First, the Respondents question whether the grievances were timely filed at the first step. Second, they raise the same issue with respect to the filing at the fourth step.

The instant grievances are not appealing the reallocation actions themselves. Rather, the grievances are appealing an alleged continuing condition which if true is a violation of the civil service law.

The Department's grievance procedure provides that:

All grievances must be presented promptly at Step 1 and no later than ten workdays from the date the grievant first becomes aware of, or should have become aware of, with the exercise of reasonable diligence, the cause of such grievance. (Manual, p. 4a, no. 5.)

Grievant Schaut evidently has been aware of the disparity in pay between Cosmetology Inspectors and Barber Inspectors for quite awhile before she filed her grievance. On May 2, 1973 she wrote a memorandum to Delores S. Greene, Affirmative Action Officer with the Department, on this very problem. She evidently received back a memorandum dated May 10, 1973 in which Ms. Greene indicated that the Department was aware of the discrepancies of the two classifications. Further cor-

respondence dated September 17, 1973 from Grievant Schaut to Ms. Greene again requested that more be done to eliminate the discrepancies. Ms. Greene responded on October 9, 1973 that the Bureau of Personnel, Department of Administration, was submitting a new proposal to relieve the problem. This proposal was undoubtedly the one first submitted at the Personnel Board's November, 1973 meeting and eventually passed in February, 1974.

Nothing in our record to date reveals when Grievants Winkelmann and Olson first became aware of the problem which is the subject matter of these grievances.

If we construe the time limit found in the Department's grievance procedure strictly and as a jurisdictional requirement, then apparently we could not hear these grievances as the fourth step. In labor arbitration cases the time limits in grievance procedures have received the following interpretation¹:

If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. (Cases footnoted.) Thus the practical effect of late filing in many instances is that the merits of the dispute are never decided. (Cases footnoted.)

It has been held that doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance. (Cases footnoted.) Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement. (Cases footnoted.) (Emphasis added.)

1. Elkouri and Elkouri, How Arbitration Works, p. 148-149 (3rd ed. 1973).

Unlike the time limits which control the jurisdiction of the Personnel Board (Section 16.05(2), Wis. Stats.), the procedure does not state that the Department cannot proceed to hear the grievance if the filing is not timely. We do not construe the time limits as jurisdictional so that noncompliance means the grievance will go unheard. Rather, the time limits are directory.

The issue of whether the grievances were initially timely filed was raised for the first time at the fourth step. The grievances up until that time had been denied on the merits. We conclude, therefore, that unless the Department raises the timeliness issue in a timely manner that issue is waived. The Department had ample opportunity at the first steps of the grievances to raise the timeliness issue. But it failed to do so.

Whether the grievances were timely filed at the fourth step was raised in a timely manner and, therefore, is not waived. We conclude, however, that the grievances were timely filed.

Grievant Schaut evidenced her intent to appeal the third step decision of Respondent Schmidt. She also filed her appeal within the ten working day period required under the grievance procedure. (Manual, p. 4.) What she failed to do is send it to the Personnel Board, instead she filed her appeal with the Bureau of Personnel.

Her confusion as to which agency her grievance ought to be sent should not bar the Personnel Board from hearing her. She met all requirements except sending it to the Personnel Board. Respondent Wettengel forwarded to the Board on July 21, 1974 her letter plus her grievance forms. Indeed, it is arguable that he waived his right

to raise the issue of timeliness by his postscript in transmittal letter.

As we concluded above, the time limits of the grievance procedure are not jurisdictional such that noncompliance means automatic denial of the grievance. Here, where the time limit was met in that Grievant Schaut actively and in a timely manner pursued her right to appeal the third step decision, we conclude that there was a timely filing with the Board.

Grievants Olson and Winkelmann did not file with the Personnel Board nor the Bureau of Personnel within the ten working day period. However, under the circumstances we conclude that it would be unreasonable to expect strict compliance with the time limits.

Grievants claim that they had been told by Omer Jones of the Department of Health and Social Services in a telephone conversation of September 18, 1974 that their verbal consent to have their grievances heard with Grievant Schaut's was sufficient. Evidently they understood this to mean that they did not have to appeal the third step decision. Furthermore, they misunderstood who Mr. Jones was, thinking that he worked for the Personnel Board.

This confusion is understandable, especially in light of the wording of the third step decision. The decision signed by Respondent Schmidt stated:

It is agreed to waive the third step meeting and that the grievance will be settled according to the decision of the appeal of the grievance filed by Suanne Schaut. Grievance denied at the third step.

Although the last sentence clearly denies the third step, the rest of the decision seems to state that these two grievances would be at least held in abeyance until the Schaut grievance was settled.

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Another equally valid interpretation would be that there was some sort of automatic consolidation of the three grievances at the fourth step.

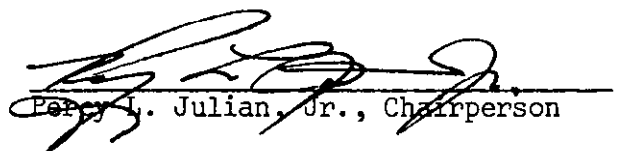
, As we stated above, the time limits in the grievance procedure are not jurisdictional. Here, Grievants were understandably confused as to the proper procedure. They attempted to correct the situation and thereby preserve their grievances as soon as they found out that a written appeal was necessary. We conclude that it is unreasonable under these circumstances to apply the time limits strictly to these Grievants and, therefore, conclude that their appeal from the third step decision was timely.

ORDER

IT IS HEREBY ORDERED that in light of the above Opinion a hearing on the merits be scheduled.

Dated November 24, 1975.

STATE PERSONNEL BOARD


Percy L. Julian, Jr., Chairperson