
REBECCA A. KOPRAS,

Appellant,

v.

EUGENE LEHRMANN, Director,
State Board of Vocational, Technical
and Adult Education,

Respondent.

Case No. 76-15

OFFICIAL
OPINION AND ORDER

Before: Percy L. Julian, Jr., Laurene DeWitt, John Serpe, Susan Steininger

NATURE OF THE CASE

This is an appeal of the denial of a grievance pursuant to Section 16.05(7), stats. At the prehearing conference the Respondent raised the question of whether the Appellant completed the first step of the grievance in accordance with the grievance procedure.

FINDINGS OF FACT

A copy of a factual stipulation between the parties is attached to this decision and is incorporated by reference as if fully set forth. It establishes, among other things, that the Appellant was employed by the Respondent at all relevant times as a Clerk III-Receptionist in the Bureau of Administrative Services. Her immediate supervisor was Mary Jane Turnbull and the Bureau director was Roy Ustby. Appellant received a letter of reprimand from Mr. Ustby on November 24, 1975. She filed a first step non-contractual grievance on December 9, 1975. The agency non-contractual grievance procedure cited as State Office Policy Manual, revised 8/15/75, was in effect on November 24, 1975. A copy of this grievance procedure is also attached.

In their briefs filed on this issue, the parties made certain factual allegations. The following findings are based on facts set forth in letter briefs filed by Appellant's counsel.

Immediately after receiving the letter of reprimand dated November 24, 1975, Appellant spoke with Mr. Ustby and attempted to convince him to withdraw or otherwise rescind the letter of reprimand, but he refused to do so. She then, through a representative, discussed the matter with Frederick Hiestand, Administrator of the Division of Planning and Assistant State Director, on December 8, 1975. Mr. Hiestand refused to have the letter removed or rescinded from Appellant's personnel file, but directed or advised the representative to ". . . take it through the grievance procedure."

CONCLUSIONS OF LAW

Appellant has argued that any defect in the filing of the grievance at the first step would not go to our subject-matter jurisdiction which in this case is conferred by Section 16.05(7), stats. While we agree with this proposition, we also conclude that no hearing is required where the operative facts necessary for a final disposition are the subject of a formal stipulation or admission. See S. 227.07(5), stats.¹ In this case, while we agree that adherence to the requirements of the grievance procedure is not jurisdictional, this does not mean that failure to follow the grievance procedure has no significance. In Schaut v. Schmidt, Wis. Pers. Bd. 74-67, 74-130, November 24, 1975, we cited a rule frequently applied in labor arbitration cases as follows:

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.

1. In this case, the board members participating in the decision have read the entire record.

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

In the case before us, the Appellant never at anytime discussed the grievance with her immediate supervisor, which is required by the grievance procedure. Even if her conversation with Mr. Ustby were considered some sort of constructive compliance with the requirement that she first consult with her immediate supervisor, she did not file a written grievance until December 9, 1975, which was more than the five working days after Mr. Ustby's response which was required by the grievance procedure. Therefore, while counsel argues that the agency grievance procedure is confusing because it expresses time in terms of working days except for the reference to the initial discussion with the immediate supervisor, this does not really come into play here because the Appellant never at any time had the conference with her immediate supervisor. Had the Appellant had the conference with her immediate supervisor within 10 working days, or had she filed the written grievance within five working days after her conference with Mr. Ustby, we might be inclined to conclude, in keeping with the above authority, that circumstances might be such that it would be unreasonable to require strict compliance with the grievance procedure. However, Appellant's arguments really require that at least two omissions be excused, and the rationale or suggested bases for possible confusion are in our opinion not sufficiently convincing to support an exception to compliance with the

grievance procedure.²

The Appellant has raised an equitable estoppel argument based on the comments made by Mr. Hiestand on December 9, 1975, that Appellant take the matter through the grievance procedure. Before there can be an equitable estoppel, there must be "inequitable conduct by the estoppel party and irreparable injury to the other parties honestly and in good faith acting in reliance thereon." Pulliam and Rose v. Wettengel, Wis. Pers. Bd. 75-51 (11/25/75). Here, the Appellant had already missed the deadline for discussion with her immediate supervisor and alternatively the deadline for filing the first step written grievance at the time Mr. Hiestand made this statement. Although she may have been misled to some extent, there was no irreparable injury even if there had been inequitable conduct, an element we need not reach.³

The Appellant also argues that the time limits set forth in the agency's grievance procedure are more restrictive than those set forth in the DOA Administrative Practices Manual. However, that document provides that an agency may establish shorter time limits "provided that there is an orderly and systematic time sequence between the successive steps." While the agency's use of two different time frames—"work days" and "days" raises a question of compliance with the requirement of "an orderly and systematic time sequence," Appellant's basic argument is not responsive to the point that the Appellant never discussed the problem with her immediate supervisor. Even if we concluded that the Respondent's variation from the standard grievance

2. We also note that this is not the only place in the grievance procedure where the terminology "days" instead of "working days" is used. See p. 3.

3. Mr. Hiestand's comments could not have constituted a waiver of the time limits since this would require written consent under the grievance procedure. Further, we do not believe the terms he used signify a waiver, in any event.

procedure by substituting 10 days for 10 working days was unreasonable, this would still not avoid the fact that Appellant never discussed the letter with her immediate supervisor. To reiterate our earlier discussion, we would give some consideration to an argument that the discussion with Mr. Ustby, the author of the letter of reprimand, somehow excused compliance with the requirement of a conference with the immediate supervisor. However, the same cannot be said of the conference with Mr. Hiestand, and there was no written grievance filed within five working days of the conference with Mr. Ustby.

Appellant also argues that the agency neither alleged nor demonstrated prejudice on account of the failure of the Appellant to comply with the grievance procedure. We conclude that while lack of prejudice is a possible criterion in determining whether non-compliance should be excused, prejudice is not essential to a conclusion that an appeal should be dismissed on this basis, and we conclude that the failure to allege prejudice here does not require a ruling in favor of the Appellant.

Finally, the Appellant argues that the Respondent is attempting to impose a double standard because it maintains the position that the Appellant must adhere to the grievance procedure while it utilized more than a month to process the grievance at the third level. The agency grievance procedure requires that the State Director or his representative within 10 days of receipt of the grievance confer with the employe, the supervisor, and the Division Administrator about the grievance, and respond in writing to the grievance within five working days after the date of the conference. The Respondent replied to this argument that the time limits at the third step were waived by express mutual agreement. While the Respondent does not make any representation that this agreement was in writing, this

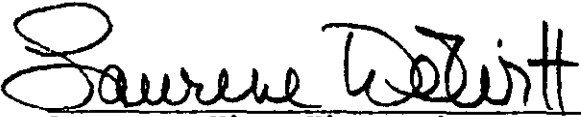
is not material. The grievance procedure provides that if management fails to make a timely response at any level, the employe may appeal directly to the next level. This must be done within five working days of the decision not received. If the employe fails to take timely necessary action after receipt of, the agency action at any level, the grievance "will be considered to have been satisfied." In translation, this means that if the employe fails to appeal in a timely manner a response by management the grievance is terminated at that level, and the employe has no further recourse. If the agency fails to make a timely response, however, the grievance is not terminated favorably to the employe, he or she can simply appeal to the next stage at that point. Even if there were no mutual agreement to extend the time for processing grievances at the third step, a point we do not reach, the agency would not be attempting to impose a dual standard. Any dual standard which exists is imposed by the agency's grievance procedure, which in turn is in conformity with the standard grievance procedure promulgated by the Director pursuant to S. Pers. 25.01, W.A.C.

ORDER

IT IS ORDERED that this appeal is dismissed.

Dated December 21, 1976.

STATE PERSONNEL BOARD



Laurene DeWitt, Vice Chairperson

BEFORE THE STATE PERSONNEL BOARD

REBECCA A. KOPRAS,
Appellant

vs.

EUGENE LEHRMAN, Director,
State Board of Vocational,
Technical and Adult Education,
Respondent.

Case No. 76-15

STIPULATION

As per mutual agreement at the pre-hearing conference held on April 15, 1976 before Kathryn R. Anderson, Attorney, State Personnel Board, the parties stipulated on April 28, 1976 to the following facts and agreed to submit other facts and argument in the form of briefs, since mutual agreement was not reached on several material factual issues. However, the parties would submit that the following facts are not in dispute:

- 1) At all times material hereto the Appellant was employed by the Respondent in its Bureau of Administrative Services as a Clerk III - Receptionist.
- 2) The Appellant's immediate supervisor was at all times material hereto one Ms. Mary Jane Turnbull.
- 3) Mr. Ray Utsby is the bureau director of the Respondent's Bureau of Administrative Services.
- 4) On November 24, 1975 in the late afternoon the Appellant received a letter of reprimand (Board's Exhibit #2) from Mr. Ray Utsby.
- 5) The Appellant filed a first step non-contractual grievance (Board's Exhibit #3) on December 9, 1975.
- 6) The Non-Contractual Grievance Procedure cited as State Office Policy Manual revised 8/15/75 was in effect on November 24, 1975.

Further facts will be stated and argued in the respective briefs of the parties.

Rebecca Kopras

APPELLANT
Rebecca Kopras

E. Lehrman

RESPONDENT

NON-CONTRACTUAL GRIEVANCE PROCEDURE

POLICY

This procedure is established pursuant to Wis. Adm. Code section Pers. 25, Rules of the Director, to provide department employes, who are not covered by a collective bargaining agreement, with a specified procedure for filing grievances with the Board of Vocational, Technical and Adult Education officials.

CONCEPTS

Any permanent employe in the service of the Wisconsin Board of Vocational, Technical and Adult Education (WBVTAE) who has a personnel problem involving a feeling of unfair treatment or dissatisfaction with his/her working conditions which are outside his/her control may present the problem through this grievance procedure. However, only those grievances which allege that the agency has violated, through incorrect interpretation or unfair application:

- 1) a rule of the Director, State Bureau of Personnel or a Civil Service Statute (16.01 - 16.38, Wis. Stats.)

or

- 2) a function where the Director of the State Bureau of Personnel has expressly delegated his authority to the appointing officer (excluding all classification, reclassification, and reallocation actions and decisions not to submit non-delegated reclassification to the State Bureau of Personnel)

may be appealed to the State Personnel Board.

This procedure shall not preclude or otherwise interfere with statutory appeal rights provided to an employe for appeal from disciplinary actions under s. 16.28(1), Wis. Stats., or from direct actions of the Director of the State Bureau of Personnel or from decisions of appointing authorities under ss. 16.01(1)(c) and (f) Wis. Stats.

This grievance procedure shall not apply to:

- 1) employes covered by a collective bargaining agreement for the subjects of collective bargaining
- 2) employes in a certified collective bargaining unit prior to execution of an agreement when the grievance seeks to change an existing condition of employment that is a bargainable subject
- 3) employes in a potential bargaining unit where a question of representation exists and the grievance seeks to change an existing condition of employment that is a bargainable subject. (A potential unit is one where either a stipulation or petition for a unit has been filed with the Wisconsin Employment Relations Commission or a labor organization has presented a demand for recognition.)

- 4) the retention or release of employes on probation or trial
- 5) delegated classification, reclassification or reallocation actions taken by appointing authorities or decisions made by appointing authorities relative to submission of non-delegated reclassification actions to the State Bureau of Personnel

An employe shall have the right to assistance by a representative of his/her own choosing in processing a grievance at any level in the process. A reasonable amount of paid work time shall be allowed the employe as determined by management and also his/her representative, if any, who is an employe of WBVTAE, in processing the grievance. This time must be authorized by the appropriate supervisor. WBVTAE employes will not be released during their normal work hours to assist employes of other state agencies in processing grievances.

The time limits outlined in the procedure portion of the grievance process can be extended by the mutual written consent of the parties when desired.

If the employe fails to take necessary further action within five (5) work days after the receipt of the management response at any level, unless extended by mutual consent of both parties in writing, the grievance will be considered to have been satisfied.

If a written decision at any level is not received in the time limits imposed, the employe may appeal directly to the next level. Such appeal must be made within five (5) work days of the due date of the decision not received.

Whenever the grievance is satisfactorily concluded or is dropped by the employe before reaching the Personnel Board, then the complete record of all responses shall be filed with the Bureau of Administrative Services, Office of Personnel Development, who in turn will submit one copy to the Director, State Bureau of Personnel.

PROCEDURE

<u>Oral</u>	Employe	Discuss grievance with immediate supervisor within 10 days from date of awareness of the grieved action or condition.
	Supervisor	The supervisor shall orally give the employe his/her decision within five (5) work days of the original discussion.
<u>Written - Step 1</u>	Employe	If grievance is not resolved, present the grievance in writing, using the employe Grievance Report, to your immediate supervisor, within five (5) work days of receipt of supervisor's response to your initial complaint.
	Supervisor	Discuss the written grievance with the employe before deciding on your written response. Return your written response to the employe within five (5) work days after receiving the written grievance.

Step 2
Employee

If grievance has not been satisfied, present grievance to the Division Administrator within five (5) work days after receiving a written response from your supervisor.

Division
Administrator

Review the stated grievance and the supervisor's response.

Confer with the employe and supervisor about the grievance.

Respond in writing to the employe's grievance within five (5) work days after receiving the written grievance from the employe.

Step 3
Employee

If grievance has not been satisfied, present written grievance to the State Director or his representative within five (5) work days after receiving a written response from the agency Personnel Officer.

State Director
or represen-
tative

Review the stated grievance, the supervisor's and the Division Administrator's response.

Within 10 days of receipt of the grievance, confer with the employe, the supervisor, and the Division Administrator about the grievance.

Respond in writing to employe's grievance within five (5) work days after date of conference.

Personnel Board
Employee

Make written appeal to the Personnel Board if grievance is within its jurisdiction, within fifteen (15) work days after receiving written response from the State Director if your grievance is not now satisfied. Failure to process the grievance within this time limit will mean that the grievance shall be considered as adjudicated on the basis of the agency answer.

EMPLOYEE NON-CONTRACTUAL GRIEVANCE REPORT

WISCONSIN BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION

No.

Last		First		Grievance Step - Circle One		
				1	2	3
Division/Unit			Bureau			

DESCRIPTION OF GRIEVANCE - State all facts, including date, time, place of incident and names of persons involved, etc..
Use additional page if necessary.

Result Sought

Submitted	Employee's Signature
Received	Employer's Response:

Employee's Signature	Title	Date Returned
----------------------	-------	---------------

INSTRUCTIONS

Individual employees have the right to present grievances in person or through representatives of their own choosing at any step of the grievance procedure. For group grievances attach names of all employees involved.

In the event that the employee is not satisfied with the employer's written decision, or, if the employer does not return an answer within the time limits defined in the agency grievance policy, to be considered further, the grievance must be appealed to the next higher step within the time limits set forth.

//