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EUGENE F. SHEW,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 76-213

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OFFICIAL
INTERIM
OPINION AND ORDER

Before: DEWITT, Chairperson, WILSON, STEININGER, MORGAN and WARREN, Members.

This is an appeal of a grievance concerning the reassignment of appellant from first to second shift duties. The respondent has moved to dismiss the appeal on the grounds that the grievance procedure limits appeals to the Personnel Board to:

". . . complaints which allege that an agency has violated, through incorrect interpretation or unfair application:

1) a rule of the Director, State Bureau of Personnel or a Civil Service Statute (S. 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" Administrative Practices Manual, DOA, Personnel Administration, effective 8/24/66, revised 10/1/74.

Respondent argues that appellant makes no such allegation in this case. However, among other things alleged is that the respondent's action amounted to an abuse of discretion, and contrary to Section 16.01(2), stats., "assures that the state . . . bases the treatment of its employes upon the relative value of each employe's services and his demonstrated competence and fitness."

This case is controlled by the interim opinion and order entered in

Graham v. Weaver, Wis. Pers. Bd. No. 75-124 (3/11/76). We noted there that S. Pers. 26.02(8), W.A.C., provides that "Personnel actions which are appealable include . . . actions alleged to be illegal or an abuse of discretion." S. Pers. 26.03(1), W.A.C., provides that decisions alleged to be illegal, or an abuse of discretion which are not subject to "consideration under the grievance procedure . . . collective bargaining or hearing by the board," are appealable to the director. See also S. 16.03(4)(a), stats.

The grievance procedure defines a grievance as "a personnel problem involving an employe's . . . expressed feelings of unfair treatment or dissatisfaction with aspects of his/her working conditions within the agency which are outside his/her control." This definition clearly covers the appellant's complaint in this case. Therefore, in accordance with S. Pers. 26.03(1), W.A.C, and S. 16.03(4)(a), stats., had he filed an appeal with the director it would have been objectionable pursuant to S. Pers. 26.03(1), W.A.C., and S. 16.03(4)(a), stats., quoted above, because these provisions prevent the director from hearing matters which are subject to the grievance procedure. So, although S. Pers. 26.02(8), W.A.C, clearly provides that actions alleged to be illegal or an abuse of discretion are appealable, there theoretically would be no appeal to the director, and pursuant to respondent's theory there would be no appeal to the Personnel Board from the denial of the grievance at the third step.

The administrative practices manual does not have the force of law accorded the administrative code. Provisions of the manual should be interpreted, if at all possible, in a manner consistent with the administrative code provisions, and not in a manner that would prevent the appeal of matters that the code makes appealable. Therefore, consistent with the holding in Graham, we interpret the APM to encompass allegations of abuse

of discretion within matters appealable to the board. The APM provides for appeals where there is an allegation of a violation, through incorrect interpretation or unfair application, a rule of the director or a civil service statute. The provisions of Sections Pers. 26.02(8) and 26.03(1), W.A.C., and 16.03(4)(a), stats., providing for appeals of personnel actions which are alleged to be illegal or an abuse of discretion are procedural but also create substantive rights. The right to appeal actions which allegedly involve an abuse of discretion necessarily implies that if the reviewing body finds that the appointing authority abused its discretion, the action must be rejected. Thus, while neither the legislature by statute nor the director by rule has promulgated an admonition to agencies not to abuse their discretion in the administration of personnel matters, the provision to employes of a right to appeal actions alleged to be an abuse of discretion provides for the functional equivalent. Accordingly, such an allegation in a grievance invokes paragraph I. D. 1. b. 1) and is appealable to this board.

ORDER

The Respondent's motion to dismiss is denied.

Dated March 21, 1977.

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson