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 JAMES BRENNAN,  
                           Appellant,  
 v.  
 DAVID ADAMANY, Secretary,  
 Department of Revenue,  
                           Respondent.  
 Case Nos. 76-53 and 76-133  
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**OFFICIAL**

INTERIM  
OPINION  
AND  
ORDER

Before: DEWITT, Chairperson, MORGAN, WARREN and HESSERT, Board Members.

NATURE OF THE CASES

These consolidated cases are appeals pursuant to Section 16.05(7), stats. of denials of non-contractual grievances at the third step. The respondent has moved to dismiss on the grounds of failure of subject matter jurisdiction.

OPINION

Respondent's theory is premised on the departmental grievance procedure, Department of Revenue Administrative Directive dated February 10, 1975. This procedure limits appeals to the personnel board to grievances in which:

"... it is alleged in the grievance that the department has violated, through incorrect interpretation or unfair application either of the following:

- (1) A rule of the Director of Personnel or a Civil Service Statute (section 16.01 - 16.38, Wisconsin Statutes); or
- (2) A function which the Director of the State Bureau of Personnel has affirmatively delegated to the Department of Revenue;"

Respondent argues that appellant's grievances do not fall within these areas and that therefore the board does not have jurisdiction to hear these appeals.

In case no. 76-53, the appellant complained about being sent from the Eau Claire office to the Hayward office to fill in for another employe that had

become ill, and the reversion of his assignment to a second employe. The appellant stated that he felt that this second employe should go to Hayward since he was junior in point of service with the department. He also argued that he previously had accepted a demotion from Tax Compliance Supervisor 1 to Tax Representative 3 only for the Wausau area. He also asked that in the event that his orders to Hayward were not changed that he receive compensation for all hours in excess of forty per week.

In case no. 76-133, he complained about his employe performance summary. He alleges that he was evaluated unfavorably because of the fact that he filed the grievance in 76-53, discussed above. He also stated that there were internal inconsistencies in the evaluation.

In Graham v. Weaver, Wis. Pers. Bd. No. 76-124 (3/11/76), it was held that the language from the grievance procedure quoted above "does not require an allegation that the grievance involves the various categories mentioned but only that the grievance involves the subject matter which falls within those categories." In respondent's brief in support of motion to dismiss he argues that the appellant's grievances "did not allege the grievances involved the various categories mentioned nor did they involve the subject matter that falls within those categories."

A recent case, Shew v. Weaver, Wis. Pers. Bd. 76-213 (3/21/77) discussed the interpretation of the statewide unilateral grievance procedure which the respondent essentially has adopted by reference as regards matters which are appealable to the board:

". . . Section 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.' Section 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 Section 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 Section Pers. 26.03(1), W.A.C., and Section 16.03(4)(a), stats., had he filed an appeal with the director it would have been objectionable pursuant to Section Pers. 26.03(1), W.A.C., and Section 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 Section 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."

With respect to no. 76-53, we conclude the appellant's reassignment, change of post, or however the transaction is characterized, is a personnel action and that the grievance adequately alleges that the respondent's action was illegal or an abuse of discretion to invoke the subject matter jurisdiction of the personnel board. This case also involves a question of compensation (over-time pay) that relates to subchapter II of Chapter 16.

No. 76-133 also involves a personnel action and an allegation of illegal action or an abuse of discretion. Additionally this grievance involves a specific statutory requirement for performance evaluations, Section 16.32(1), stats. In ruling that this board erred in refusing to take jurisdiction over an appeal of a grievance alleging failure of compliance with this subsection, the Dane County Circuit Court held: "This statute imposes the duty upon the department to fairly and accurately evaluate the work of its employes in considering their eligibility for merit salary increases." Waggoner & Denniston v. State of Wisconsin (Personnel Board), No. 134-442 (7/21/72).

ORDER

The motion to dismiss is denied.

Dated

June 13, 1977.

STATE PERSONNEL BOARD

  
Laurene DeWitt, Chairperson