

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 DAVID L. WING, *
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 Appellant, *
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 v. *
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 UNIVERSTIY OF WISCONSIN, *
 *
 Respondent. *
 *
 Case No. 78-137-PC *
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 * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal of the decision of a unilateral (non-contractual) grievance. The respondent raised a number of objections to subject-matter jurisdiction which are addressed by this decision. The findings which follow are based on material in the file which appears to be undisputed.

FINDINGS OF FACT

1. The appellant appealed the decision of his non-contractual grievance at the third step by a letter received at the Personnel Commission on August 10, 1978.

2. This decision was contained in a letter from Mr. Alesch to Mr. Wing dated July 11, 1978.

3. The grievance concerned appellant's complaint that he was not receiving from U.W. - Stout administrators cooperative and confidential assistance regarding his rights and alternatives in his employment as an administrative budget and management analyst 4, and a request for legal fees if the remedy he sought as to the first matter (confidential assistance of a person of his choice) were not granted.

CONCLUSIONS OF LAW

1. This appeal was filed in a timely manner.
2. Section Pers. 26.02(8), WAC, has been superseded by Chapter 196, Laws of 1977, except to the extent that it might be interpreted as a provision for appeals pursuant to §230.44(1)(d), Wis. Stats., (1977).
3. The appellant's grievance did not involve an allegation of agency violation, through incorrect interpretation or unfair application, a personnel rule or civil service statute, or a function where the administrator of the Division of Personnel has expressly delegated his or her authority to the appointing authority.
4. The Personnel Commission lacks jurisdiction over this appeal.

OPINION

The respondent raises several objections to the jurisdiction of the Commission over this appeal. The first objection is that the appeal is untimely filed.

The parties are in agreement that pursuant to the transitional provisions of Chapter 196, Laws of 1977, §129(4q), and in the absence of the promulgation of new rules by the secretary of DER pursuant to §230.45(1)(c), Stats. (1977), §Pers. 25.01, WAC, and the APM setting forth the director's standards for agency grievance procedures, remain in effect. That grievance procedure provides a 15 work day period in which to appeal grievances to the Personnel Board.

However, the appellant has submitted a copy of the U.W. grievance procedure which contains a time limit of 30 calendar days. In the opinion of the Commission the agency time limit is controlling in this case, on an equitable estoppel basis if for no other reasons. The Commission also

notes that this time limit is in accordance with the new statutory time limit set forth in §230.44(3), Stats. (1977).

The second objection is that the grievance is not appealable at the fourth step under the grievance procedure. Section I.D. 1.b. of the APM provides for appeals to the Personnel Board only of:

"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 (§ 16.01 - 16.38, Wis. Stats.)

or

2) a function where the Director of the State Bureau of Personnel expressly delegated his authority to the appointing officer"

The respondent makes the following argument:

"The appellant's complaint is that respondent has not provided him with 'confidential assistance of his choice' or 'reimbursed for costs incurred because of denial of (my) request.' (Respondent's Exhibit 2)

A search of the Civil Service Statutes and delegated functions of the Director of the Bureau of Personnel reveals no rules or regulations requiring respondent to provide appellant with such assistance. It is academic that non-existing functions, rules or laws cannot be violated. Appellant, therefore fails to meet the standards of appealable grievances to the Commission.

However, the appellant argues that pursuant to §Pers. 26.02(8) he is entitled to appeal actions alleged to be illegal or an abuse of discretion. The appellant alleges an abuse of discretion in a violation of §I.D. 1. m. of the APM, which provides in part:

"An employe shall have the right to assistance by a representative of his own choosing in processing his grievance at any level in the process. Employe representatives and grievants will receive their regular rate of pay for time spent processing grievances during their regularly scheduled hours of employment."

In the case herein involved, and as the records on file indicate, Mr. Wing was involved in a collateral hearing matter involving a reallocation. Despite his repeated attempts to receive information from the Personnel office at the University of Wisconsin - Stout, he was not advised of the availability of an assistant under I.B. 1) of the aforementioned rules. As a consequence, Mr. Wing obtained privately, and was required to compensate, legal counsel to determine his rights?

In the opinion of the Commission, although the APM only requires an allegation of a violation of a civil service rule or statute, such allegation must be at least arguable to withstand scrutiny on a jurisdictional objection. To take an extreme example, an employe might file a grievance about the order in which paychecks are distributed in his or her office, and allege that it constituted a violation of §230.15(3), Stats.:

"No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means, except as provided in this subchapter."

Although the allegation is made, the Commission is not required to take jurisdiction over the appeal unless the statute at least arguably applies to the subject-matter jurisdiction of the grievance.

The instant case by no means presents a situation as extreme as set forth in the example, but the same principle applies.

The appellant cites §Pers. 26.02(8), WAC:

"Personnel actions which are appealable include ... actions alleged to be illegal or an abuse of discretion."

This rule was enacted in 1972 when the statutes provided for appeals to the director of the Bureau of Personnel from "personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion ...," §16.03(4)(a), Stats.

This subsection was repealed by Chapter 196, Laws of 1977, and the only similar language is now found in §230.44(1)(d), Stats. (1977):

"A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission."

The administrative code provision, §Pers. 26.02(8), must be read in the context of the existing statutes. Section Pers. 26.03(1) specifically made reference to §16.03(4)(a), Stats., in deliberating which appeals might be heard by the director. With the repeal of §16.03(4)(a), it must be concluded that these sections of the administrative code have been superseded except to the extent that they might be construed in the context of §230.44(1)(a), Stats. (1977). It is clear that this statutory provision has no relationship to the subject matter of this grievance.

The appellant also cites §I.D.1. m. of the APM. Assuming for the moment that the APM has the status of a rule or statute, having been promulgated pursuant to §16.05(7), Stats. (1975), and §Pers. 25.01, WAC, could the provision arguably be violated by the subject matter of this grievance?

The appellant argues that:

"In the case herein involved, and as the records on file indicate, Mr. Wing was involved in a collateral hearing matter involving a reallocation. Despite his repeated attempts to receive information from the Personnel office at the University of Wisconsin - Stout, he was not advised of the availability of an assistant under I.B. 1) of the aforementioned rules. As a consequence, Mr. Wing obtained privately, and was required to compensate, legal counsel to determine his rights."

It is not suggested that this "collateral hearing matter" involved a grievance. Indeed, reallocations are appealable directly to the Commission,

and the Commission notes that the matter involved an appeal to the Personnel Board. See Wing v. Knoll, Wis. Pers. Commn. 77-63 (10/27/78).

For the various reasons discussed above the Commission concludes that it lacks jurisdiction over the subject matter of this appeal. The current statutory and regulatory framework simply does not provide for an administrative review by this Commission of all disputes between employe and employer which are personnel related.

ORDER

This appeal is dismissed for lack of subject-matter jurisdiction.

Dated: _____

April 19

, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley

Joseph W. Wiley
Chairperson

Edward D. Durkin

Edward D. Durkin
Commissioner

Charlotte M. Higbee

Charlotte M. Higbee
Commissioner

AJT:jmg

4/4/79