

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 DAVID WING,
 Appellant,
 v.
 President, UNIVERSITY OF
 WISCONSIN SYSTEM (Stout),
 Respondent.
 Case No. 85-0007-PC
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

In an interim decision and order dated May 22, 1985, the Commission ordered the appeal to be dismissed "with the exception of that part which alleges the appellant's rights were violated by respondent's refusal to permit him to tape record the step one meeting." In a document dated June 10, 1985, the appellant petitioned for a rehearing of the case. During a prehearing conference held on June 24, 1985, the parties agreed to a briefing schedule on appellant's petition.

The Commission has reviewed the various documents submitted by the appellant in this matter. Those documents include the initial letter of appeal, a copy of the first step grievance filed by the appellant and letters to the Commission dated April 10, 1985, June 10, 1985 and August 16, 1985. Based on those documents it is apparent that a memo dated August 15, 1984 from a Mr. Anderson to a Mr. Dougherty caused the appellant to file a non-contractual grievance on August 24, 1984. Although no copy of the August 15th memo was ever supplied to the Commission, the underlying issue in appellant's grievance was his allegation that he was denied access to data bases covering UW-Stout's faculty and classified employees which appellant

feels is necessary for him to perform his job responsibilities. Appellant alleges that at the first step grievance hearing he was denied permission to tape record the proceedings. The appellant alleges that at the second step of the grievance procedure a vice-chancellor "made a proposal to buy me off, purchase of my contract and must leave state service." The grievance was appealed to the third step on October 1, 1984 and Mr. Robert Alesch issued respondent's third step decision on December 17, 1984. Appellant then appealed to the Commission by letter dated January 15, 1985.

In his briefs, the appellant refers often to a "pattern" of retaliatory/coercive actions being taken against him and it is difficult to separate those actions and the subject of the instant grievance from the other grievances the appellant has filed. Clearly, allegations of an unjustified reprimand issued on January 11, 1985 or of a "threat of action beyond suspension" on May 13, 1985 may not be part of the subject of the grievance being reviewed here which was filed at the first step on August 24, 1984.

The scope of the grievance procedure is established by §§ER 46.03 and .04, Wis Adm. Code, which provides:

ER 46.03 Scope. (1) Under this chapter, an employe may grieve issues which affect an individual's ability to perform assigned responsibilities satisfactorily and effectively, including any matter on which the employe alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

(2) An employe may not use this chapter to grieve:

(a) A personnel action or decision of the administrator or the secretary that is directly appealable to the personnel commission under s. 230.44, Stats.;

(b) An action delegated by the administration or by the secretary to an appointing authority;

(c) A demotion, suspension, discharge, removal, layoff or reduction in base pay;

(d) A personnel action after certification which is related to the hiring process;

(e) Denial of hazardous employment benefits under s. 230.36(4), Stats.;

(f) The reassignment of a career executive employe under s. ER-Pers 30.07(1);

(g) The failure of a supervisor to process a reclassification request.

(h) An oral reprimand;

(i) The content of written agency rules and policies;
or

(j) A condition of employment which is a right of the employer as defined in s. ER 46.04.

ER 46.04 Management rights. (1) Nothing in this chapter is intended to interfere with the sole right of the employer to carry out its statutory mandate and goals.

(2) For the purpose of this chapter, the management rights of the employer include, but are not limited to, the following:

(a) Utilizing personnel, methods and means to carry out the statutory mandate and goals of the agency.

(b) Determining the size and composition of the work force.

(c) Managing and directing the employes of the agency.

(d) Hiring, promoting, transferring, assigning or retaining employes.

(e) Establishing reasonable work rules.

(f) Taking disciplinary action for just cause against an employe.

(g) Laying off employes due to lack of work or funds or organizational changes.

Those types of issues that may be appealed to the Personnel Commission at the fourth step of the grievance procedure are further restricted by the language of §ER46.07, Wis. Adm. Code:

ER 46.07 Personnel commission. (1) If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step under s. ER 46.06(2)(c)2., the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II, ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, the rules of the secretary promulgated under ch. 230, Stats., or written agency rules, policies, or procedures, except that decisions involving the following personnel transactions may not be grieved:

- (a) A written reprimand;
- (b) A performance evaluation; or
- (c) The evaluation methodology used by an employe to determine a discretionary pay award, or the amount of the award.

Appellant's brief suggests that the reference in §ER46.03 to the grievability of "any matter on which the employe alleges that coercion or retaliation has been practiced" means that as long as either retaliation (as defined in §ER 46.02(8), Wis. Adm. Code) or coercion is alleged, an issue may be grieved. This contention fails to reflect the exceptions set forth in §ER 46.03(2) and .07(1), Wis. Adm. Code. The denial of access to certain data bases which is the subject of the grievance filed by the appellant on August 24, 1984, falls within the listing of management rights found in §ER 46.04(2)(a) and (c), Wis. Adm. Code. Based on those definitions, the Commission reaffirms its analysis in the May 22nd interim decision which provided:

A determination by management concerning the information to be made available to Mr. Wing for the performance of his duties clearly falls within the aforesaid definition of management rights and accordingly is excluded from coverage by the grievance procedure.

With respect to the alleged violation of Mr. Wing's procedural rights under the grievance procedure, this is not a matter of management rights and Mr. Wing has alleged a transgression of Chapter ER 46, Wis. Adm. Code. as required for Commission jurisdiction under §ER 46.07(1), Wis. Adm. Code.

The alleged procedural rights violation referred to in the May 22nd decision was appellant's allegation that he was improperly prohibited from tape recording the step one hearing. The appellant has also referred to remarks made by Vice-Chancellor Face at the second step in the grievance procedure. These remarks arguably were made in an attempt to settle this grievance, presumably along with the appellant's other cases that are pending. Nevertheless, the appellant has alleged that the offer somehow constituted retaliation for prior disclosures and/or grievances, thereby violating, inter alia, §ER Pers. 24.04(2)(c) and §ER 46.10, Wis. Adm. Code. Mr. Face's action does not fall within the listing of management rights in §ER 46.04, Wis. Adm. Code. Therefore, the Commission may also exercise jurisdiction over appellant's allegation arising from the vice-chancellor's remarks.

The Commission denies the appellant's request to orally argue this matter. The appellant has failed to point out why such arguments are necessary in light of the extensive opportunity to submit written arguments.


ORDER

The Commission grants the appellant's petition for rehearing/reconsideration in part and denies it in part. This appeal, with the exception of those parts which allege the appellant's rights were violated by respondent's refusal to permit him to tape record the step one hearing and by the vice-chancellor's settlement offer, is dismissed for lack of subject matter jurisdiction.

Dated: September 20, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

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Note: Laurie R. McCallum, Commissioner, did not participate in this decision.

Parties

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