



MILWAUKEE COUNTY PERSONNEL REVIEW BOARD

Veronica W. Robinson · Executive Secretary

INTEROFFICE MEMO

Date: January 27, 2012

To: Supervisor Lee Holloway, Chairman, Board of Supervisors
Joe Sanfelippo, Chair, Personnel Committee

From: Veronica W. Robinson

Subject: Commentary re Personnel Committee Agenda Item 11-414 – Request to Amend
17.207 C.G.O.

I respectfully submit the following comments regarding this item, which is scheduled for discussion at the January 27, 2012 Personnel Committee meeting.

- **Wis. Stat. 66.0509(1m)(c) and (e)**

Issue: Prior to the passage of 2011 Wisconsin Act 10 (Budget Repair Bill) and Act 32 (Budget Bill), represented employees in the classified civil service had a negotiated grievance procedure that was outlined in the various labor contracts. Non-represented employees in the classified civil service had a grievance procedure that was outlined in Chapter 17, C.G.O., specifically, 17.207. Wisconsin State Statute 66.0509(1m)(e) states:

“If an employee of a local governmental unit is covered by a civil service system on June 29, 2011, and if that system contains provisions that address the provisions specified in par. (c), the provisions that apply to the employee under his or her existing civil service system continue to apply to that employee.”

Paragraph (c) of that section states:

“Any civil service system that is established under any provision of law, and any grievance procedure that is created under this subsection, shall contain *at least all* of the following provisions:

1. A *grievance procedure that addresses* employee terminations.
2. *Employee discipline.*
3. *Workplace safety.*” (Emphasis added.)

The cover letter accompanying the most recent resolution and proposed change to 17.207 C.G.O. states the following in paragraph three:

“State statutes . . . require that a classified employee who is suspended for more than ten days, or for a second time within six months . . . are entitled to a hearing. Chapter 33 of the County ordinances already provides for that hearing by the Personnel Review Board. Thus, Chapter 33 already satisfies all of the recent state law requirements for all classified employees related to discipline, demotion, or discharge. The recent state law does not *require* any review hearing for any discipline less than a ten-day suspension. *County ordinances have not provided for any such review or appeal for non-represented employees that is greater than that provided to non-represented employees.*” (Emphasis added.)

The fourth bulleted paragraph in the “Recommendation” section of the cover letter accompanying the resolution and proposed ordinance change states:

“Provide clarification that the grievance procedure does not cover disciplinary suspensions and oral and written reprimands. . . Represented employees who currently have the ability under a union contract to appeal a suspension of ten days or less to an arbitrator would no longer have that right, since it is not a grievable [sic] issue per Act 10. *Consistent with past provisions for non-represented employees, there is no provision for an appeal process for suspensions of ten days or less.*” (Emphasis added.)

Clarification: The Personnel Review Board has already received several formal opinions from its outside attorneys (see Excerpts 1-4) that 17.207 C.G.O. does allow a non-represented employee in the classified civil service to grieve a suspension of ten (10) days or less that is also not a second in six months using the procedure outlined in this *ordinance*. The grievances are appropriately before the Personnel Review Board provided the employee has followed all required steps in the process and that the employee appeals to the Personnel Review Board as the last step in the grievance process. Wis. Stat. 63.10 does not require hearings of disciplinary suspensions (less than 10 days; not second in six months), demotions, or discharges; it simply gives employees a right to a hearing if they wish to exercise that right. In a similar fashion, although there is no requirement that employees exercise their option to grieve a matter, 17.207 C.G.O. provides non-represented employees with a review or appeal option of equal – but not greater – value as the grievance option represented employees formerly had by means of their labor contracts.

Comment: The proposed resolution intends to modify 17.207 C.G.O. so that it applies to *all* employees in the classified civil service. The proposed ordinance change inserts new language at lines 151 and 152, which will specifically remove the opportunity for non-represented employees in the classified civil service to grieve suspensions not subject to review by the Personnel Review Board; i.e., suspensions of ten (10) days or less that are not a second suspension or more in a six month period. The language states “The grievance procedure shall not be used to appeal disciplinary suspensions or oral written reprimands . . .” As indicated earlier, item two (2) of Wis. Stats. 66.0509(1m)(c) requires a grievance procedure that addresses employee discipline. However, discipline is not defined by the statute, thereby leaving that determination up to Milwaukee County.

- **Wis. Stat. 66.0509(1m)(d)**

Issue: The fourth bulleted paragraph in the “Recommendation” section of the cover letter accompanying the resolution and proposed ordinance change also states: “Instead, it is our intention that employees will escalate such concerns through either management or Human Resources for review and protection, and they will enjoy the protections of the Civil Service.”

Comment: Wisconsin State Statute 66.0509(1m)(d) states:

If a local governmental unit creates a grievance procedure under this subsection, the procedure shall contain at least all of the following elements:

1. A written document specifying the process that a grievant and an employer must follow.
2. A hearing before an *impartial* hearing officer.
3. An *appeal process* in which *the highest level of appeal is the governing body of the local governmental unit.* (Emphasis added.)

Just as the statute does not define discipline, it also does not define what constitutes an impartial hearing officer. Some agencies in the State of Wisconsin have identified an impartial hearing officer as one who is not an employee of a public agency; who was not involved in actions leading up to the discipline of the employee; who has no personal or financial conflict of interest in the outcome of the disciplinary review; and who has appropriate knowledge and experience in public sector human resources, labor and employment law, and/or mediation/arbitration to review the matter at hand. Regarding appellate review by the governing body of the local governmental unit, please review item number 5 of the attachment “*Overview of Grievance Procedure Principles.*” This document was prepared by the general counsel for the Wisconsin Counties Association and seems to indicate that after hearing by the impartial hearing body, a grievance would be appealed to the County Board prior to appeal to circuit court.

- **Involvement of the Personnel Review Board**

Clarification: The September 8, 2011 report and resolution that was submitted to the Personnel Committee included the name of the Personnel Review Board in the “From” category. The Personnel Review Board was not involved in any discussions related to the proposed ordinance change, did not see the proposed ordinance change before it was submitted to the Personnel Committee, and therefore did not issue a statement supporting or opposing the change.

However, because this matter is expected to be considered at the January 27, 2012 Personnel Committee meeting and may affect the Personnel Review Board, I asked the Personnel Review Board at its January 24, 2012 meeting if it would like to comment. The Personnel Review Board has not seen the current proposed ordinance change and did not express an interest in taking a position in support of or in opposition to the change. However, the Personnel Review Board expressed the following:

Milwaukee County should have a formal, organized, trackable system to allow Milwaukee County employees to air their grievances. This system should include and support a cost-effective means by which employee grievances can be handled internally, as practical or appropriate. A provision for peer review of grievances might also be appropriate.

Cc: Chris Abele, Chief Executive
Tia Torhorst, Director of Legislative Affairs
Terrence Cooley, Chief of Staff
Jerry Heer, County Auditor
Steve Cady, County Board Fiscal and Budget Analyst
Rick Ceschin, County Board Analyst
Scott Manske, Controller
Fred Bau, Labor Relations Specialist
Kerry Mitchell, Interim Human Resources Director
Matthew Hanchek, Interim Director Employee Benefits
Jacqueline Russell, Employee Relations Manager
Sue Drummond, Payroll Manager
Mark Grady, Deputy Corporation Counsel
Personnel Committee
Personnel Review Board

Excerpt 1

December 29, 2000 Opinion: “[An argument was made that] Chapter 17.207, county Government Ordinance, (hereinafter “C.G.O.”), is a description of the grievance appeal process and its provisions does not apply to a one-day suspension...further...that section 63.10 and 63.12, Wis. Stats., specified: “Nothing in this subsection shall limit the power of a department head to suspend a subordinate for a reasonable period not exceeding 10 days.”

“In reviewing relevant portions of the Wisconsin Statutes, Milwaukee County General Ordinances, Rules of the Milwaukee County Personnel Review Board and Wisconsin case law, the following opinion is rendered on the jurisdictional authority regarding a one-day disciplinary suspension:

“The [Personnel Review] Board has jurisdiction over matters that come before it under Sections 63.10 and 63.12 of the Wisconsin Statutes and Section 17.207 of the County Government Ordinance. As it relates to the [Personnel Review]Board, Section 63.10, Wis. Stats., deals principally with demotions and dismissals of Milwaukee County employees after charges have been brought against an employee. Charges may be brought by an appointing authority or through a citizen complaint...Section 63.12, Wis. Stats. deals with investigations, testimonial powers and witnesses.

“Section 17.207(1), C.G.O. defines a grievance, the individuals who may file a grievance and some exceptions thereto.

A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by a non-represented employe...concerning the application of wage schedules and provisions relating to hours of work and working conditions...The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under existing procedures.”

“There is no dispute that a controversy exists...There is no evidence that [the employee’s] grievance is an attempt to change existing wage schedule, hours of work, working conditions or other matters established by existing rules or ordinances. [The employee’s] appeal to the [Personnel Review Board] appears to be an attempt to have the record of the case reviewed by the [Personnel Review Board]. Therefore, [the employee’s] grievance clearly falls within Section 17.207(1) and is properly before the [Personnel Review] Board.

“As the fifth and final step in the grievance process, Section 17.207(7)(e), C.G.O. specifically gives the Board jurisdiction to hear an employee grievance. In relevant part, Section 17.207(7)(e) states:

If the grievance is not settled at the second step or if applicable the fourth step, the employe may appeal to the Personnel Review Board...The Board will review the record of the case, hold a hearing thereon and soon as practical, notify all interested persons of the time and place of the hearing, and notify all interested persons of its decision in writing...

“In Section 17.207(7)(e) the word “may” is permissive as it relates to the employee. Meaning, the employee may choose to file or choose not to file an appeal to the [Personnel Review] Board. However, the ordinance states the [Personnel Review] Board “will review the record of the case.” That language not only gives the [Personnel Review Board] jurisdiction to hear a properly appealed employee grievance, it also appears to make it mandatory for the Board to review the case as the final step in the grievance process. In reviewing a particular case, the [Personnel Review] Board may come to the same or a different decision than the last stage determination. Regardless of how the Board ultimately decides a particular case, it has jurisdiction to hear a case as the final step in the grievance process.”

Excerpt 2

November 5, 2001 Opinion: “Section 17.207, C.G.O. **appears to allow** a non-represented county employee to file a grievance for a first suspension or for a suspension of less than ten days. [The argument has been made] that Section 63.10 of Wis. Stats. is applicable because Section 17.207, C.G.O. does not specifically address the issue of whether a non-represented employee may file a grievance for a suspension of less than 10 days. In fact, [the argument has been made] that section 63.10 prohibits the filing of a grievance under those circumstances. That argument appears inconsistent with the plain meaning of Section 17.207 C.G.O. and 63.10 Wis. Stats.

“Section 17.207(1) defines a grievance, the individuals who may file a grievance and some exceptions thereto. It states, in relevant part:

A grievance shall mean **any controversy** which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by a nonrepresented employe...concerning the application of wage schedules and provisions relating to hours of work and working conditions...The grievance **procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications** established by ordinances and rules which are matters processed under existing procedures.” [Emphasis added.]

“This Ordinance gives a non-represented employee with “any controversy” permission to file a grievance as long as the grievance does not attempt to change wage schedules, hours of work, working conditions, fringe benefits and position classifications. Any matter “which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute” may be grieved. Based upon the plain meaning of Section 17.207(1), all matters – except wage schedules, hours, benefits and classification – fall within the meaning of a grievance and a non-represented employee may invoke the grievance procedure. The [Personnel Review] board has jurisdiction over grievances only at the final stage of the grievance process. See Section 17.207(7).

“Section 63.10, Wis. Stats. is caption “Demotion; dismissal; procedure” and covers an ‘officer or employe in the classified service.’ Section 63.1091) addresses the issue of suspensions for not less than ten days. It states, in relevant part:

Nothing in this subsection shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding 10 days. In case an employe is again suspended within 6 months for any period whatever, the employe so suspended shall have the right of hearing by the commission on the second suspension or any subsequent suspension within said period the same as herein provided for in demotion or dismissal proceedings.

“The reference language simple makes it clear that a department head is not prohibited from suspending a subordinate for any period of time. It prescribes the means and circumstances by which an employ [sic] must be given a due process hearing before the Board. A hearing **must** be held if an employee is suspended for more than ten days or is suspended for a second time within six months. This language **requires a hearing** under specific circumstances; **it does not prohibit** a hearing under others. Section 63.10, Wis. Stats. deals with demotions and discharges of classified employees, citizen complaints and the circumstances under which a due process hearing must be held, it does not address ho can file and under what circumstances a grievance can be filed. Since Section 63.10, Wis. Stats. is not applicable to the filing of grievances, Section 17.207, C.G.O. must be applied. As indicated above, Section 17.207 allows a non-represented employee to file a grievance concerning **any controversy** as long as the grievance does not attempt to change wage schedules, hours of work, working conditions, fringe benefits and position classifications.”

Excerpt 3

September 25, 2003 Opinion: “Personal jurisdiction is an administrative board’s power to bring a person into its adjudicative process. §17.207(1), C.G.O., which defines the types of cases that may be grieved before the Board, states:

A grievance shall mean *any controversy* which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by a *non-represented employe*
(Emphasis added.)

Therefore , in order for the Board to have personal jurisdiction over [an employee], [the employe] must be a non-represented employee with a grievance.”

Excerpt 4

February 5, 2007 Opinion: “As I understand it . . . [the] argument was that the [Personnel Review] Board had no jurisdiction due to the following language in 63.10:

Nothing in this subsection shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding 10 days.

First, this language does not empower the department head to suspend the subordinate; it only denotes that the power is not limited by this particular section of the statutes. More importantly, it

fails to limit the affect other statutes may have on the power of the department head to suspend a subordinate such as that found in §59.52(8).”

Phillips Borowski, S.C.

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Overview of Grievance Procedure Principles

Overview of Grievance Procedure

This is a guide for Wisconsin counties explaining the implications of the Grievance Procedure as outlined in the Budget Repair Bill. The policy strikes a balance between giving counties the discretion to manage operations under the BRB and provides employees with a fair and equitable working environment.

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THE GRIEVANCE PROCEDURE

The purpose of this memo is to address some of the key decisions that have been made with respect to the _____ County Grievance Procedure that you are being asked to adopt. The Grievance Procedure being presented to you is the product of several hours of thought, work and decision-making relating to the grievance process. The emphasis in developing the Grievance Procedure has been on striking a balance between the discretion provided to the County to manage operations under the BRB and the need to provide County employees with a fair and equitable working environment.

A. The Budget Repair Bill's Requirements

The Budget Repair Bill (BRB) created Wis. Stat. § 66.0509(1m) which requires local governments that do not have civil service systems to adopt a grievance system no later than October 1, 2011. To comply with the grievance system requirement, a local government may establish either a civil service system under any provision authorized by law or establish a grievance procedure.

_____ County has elected to satisfy the BRB's grievance system requirement through the adoption of a grievance procedure. Under the BRB, a grievance procedure must have at least all of the following three elements:

- (1) a written document specifying the process that a grievant and an employer must follow;
- (2) a hearing before an impartial hearing officer; and
- (3) an appeal process in which the highest level of appeal is the governing body of the local governmental unit.

The BRB also requires the grievance procedure to contain at least all of the following provisions:

- (1) A grievance procedure that addresses employee terminations;
- (2) Employee discipline; and
- (3) Workplace safety.

The BRB is silent with respect to the particulars of the mandated grievance procedure including definitions of terms such as "employee," "termination," "discipline" and "workplace safety" as well as the requirements of the hearing before the impartial hearing officer as well as the appeal before the governing body of the local governmental unit. Therefore, in many respects, the legislature granted counties the power to draft a grievance procedure that suits their particular needs and strikes the balance between the authority granted to the County under the

BRB to manage its affairs and the interest of providing a fair and equitable working environment for County employees.

B. Features Of The County's Grievance Procedure

1. Definitions

The definitions of the Grievance Procedure act as the "gate" for access to the procedure. The definitions establish what employees may utilize the procedure and what may be grieved.

Not every person that is legally considered an "employee" of the county is able to file a grievance. The term "employee" is generally defined in a manner consistent with the County's personnel policies.

The terms "discipline" and "termination" are also defined. You will note that these terms have been defined to apply in circumstances where the County has taken disciplinary action against an employee. The definitions exclude employment actions unrelated to discipline such as layoffs and reductions in workforce, performance reviews, non-disciplinary wage or benefit adjustments and performance improvement plans.

Finally, "workplace safety" is defined. The definition of "workplace safety" sets forth the conditions which must exist in order for an employee to file a workplace safety grievance. Workplace safety generally excludes conditions unrelated to the safety of the physical workplace environment such as hours, overtime, sick, family or medical leave, work schedules and breaks.

2. Procedural Matters Relating to a Grievance

The Grievance Procedure has been drafted to avoid disputes and questions surrounding who may file a grievance, when it must be filed, with whom it must be filed and what information must be included in the filing. Having these procedures spelled out serves important purposes.

First, employees are advised of how they take action to preserve their grievance rights. The Grievance Procedure provides simple, but thorough, instructions explaining how a grievance is filed, with whom it is filed and the deadlines associated with the filings. The procedure has been drafted to provide employees with a full and fair opportunity to present their grievance as long as they take action in a timely fashion and provide the required information.

Second, the Grievance Procedure requires the employee to provide detailed information regarding the basis for the grievance, i.e., why the employee believes the County's decision to discipline or terminate was wrong or why the employee believes a workplace safety violation exists. This requirement not only helps avoid nuisance grievances but it enables the County to determine the strength of the employee's grievance and identify any information regarding the grievance which may not have been previously known. In addition, it helps uncover any potential discrimination-related matters that may not have been identified in the pre-discipline process, but are very important to consider given potential legal ramifications.

3. Hearing Before the Impartial Hearing Officer

The BRB does not define the process that an impartial hearing officer must follow when adjudicating a grievance. Therefore, the Grievance Procedure sets forth procedures which the impartial hearing officer must follow in reviewing a decision to discipline or terminate an employee or an alleged workplace safety violation. These procedures are consistent with rules of procedure typically found in other civil and administrative proceedings and are designed to accord an employee with a fair hearing while, at the same time, allow for an expedited review and decision by the impartial hearing officer.

The Grievance Procedure contains the rules related to: exchange of information between a grievant and the county prior the hearing, timelines for the hearing and any pre-hearing matters, whether briefs may be filed, presentation of witnesses and other evidence and whether the hearing may be recorded. Most importantly, the Procedure contains rules on the burden of proof and standard of review. In simple terms, the burden of proof identifies which party will be required to prove that a decision should be overturned and under what circumstances a decision may be overturned. The assignment of the burdens of proof and standards of review adopted by the Grievance Procedure are consistent with existing civil and administrative standards.

4. Workplace Safety Grievances

Matters relating to workplace safety are different than matters involving discipline or termination. Unlike matters involving discipline and termination, workplace safety conditions and issues are typically not initiated by the County but, rather, arise during the County's operations. There is little dispute that the County should provide employees with a safe workplace which is in accordance with state and federal regulations and that when conditions arise which are unsafe, the County should immediately address them. For these reasons, the Grievance Procedure treats workplace safety grievances different than those relating to discipline and termination.

The goal of the Grievance Procedure relating to workplace safety is to provide the county with an early opportunity to learn of, and correct, workplace safety matters before they evolve into larger issues. As a result, the procedure emphasizes a proactive approach to workplace safety matters and only those workplace safety issues which are truly without merit will reach the grievance hearing stage.

If a workplace safety matter cannot be resolved and eventually transforms into an official grievance, the Procedure provides a separate process than that employed in the context of discipline or termination matters. The process is different for the simple reason that workplace safety matters raise distinct and unique issues given their very nature and cannot be treated the same as discipline or termination issues.

One of the more important distinctions is the ability of the impartial hearing officer to require the County to undertake any particular correction when a workplace safety violation exists. The Grievance Procedure limits the ability of the impartial hearing officer to order a

specific remedy thereby allowing the County the discretion to determine the nature and extent of the remedy necessary to correct a workplace safety violation in accordance with law.

5. County Board Appeal

The new law requires that the county board act as the final appellate body on all grievances covered by the Grievance Procedure. Like other aspects of the statute, the BRB does not impose any specific requirements for appellate review.

The Grievance Procedure strikes a balance between the need for a thorough and meaningful review of the impartial hearing officer's decision and the fact that county boards are not designed to be appellate courts. Therefore, the scope of review has been limited so that a county board may intervene only in circumstances where the impartial hearing officer's decision is clearly wrong. This concept is taken directly from the case law establishing that appellate courts will not intervene into the affairs of a lower court unless there is a clear error in need of correction.

By drafting the review process so that it is limited, the county is serving three purposes. First, and foremost, limiting County board review demonstrates to the grieving employee that the procedure is fair. The County board cannot simply reverse a decision on a whim but, rather, may only reverse the decision when it is clearly wrong. This will instill confidence in employees that the hearing before the impartial hearing officer is meaningful and that the result of that hearing will not be reversed unless the impartial hearing officer is wrong. Second, having a limited review process will avoid lengthy and contentious county board meetings. Instead, the standards by which an impartial hearing officer's decision is judged are clearly defined and boards know exactly what materials and arguments to consider. Third, the County board is removed from making what may be an emotionally and politically charged decision. The Grievance Procedure assures this by requiring the County board to make a decision based upon the facts and the appropriate standard of review. If the County board disregards these standards, it faces the real probability that its decision will be overturned in circuit court on review.

C. Summary

The Grievance Procedure which you are being asked to adopt meets the BRB's legal requirements and is fair and equitable to the County as well as its employees. The BRB provides counties with unparalleled discretion to make decisions and manage the County in a way which is in the best interests of the County and its stakeholders. The Grievance Procedure importantly also provides a mechanism for county employees to grieve decisions relating to discipline, termination and workplace safety which allows the impartial hearing officer to correct any mistakes that the County may make. The Grievance Procedure strikes the balance between competing interests which will provide a fair and equitable environment for the County and its employees.

