

1981 WL 157820 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 17, 1981

*1 The Honorable Jack S. Mullins
Director
State Personnel Division
State of South Carolina
Budget and Control Board
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Dr. Mullins:

Pursuant to Regulation 59-5, Vol. 24, Code of Laws of South Carolina (1976), you have requested that this office advise you as to whether the State Employee Grievance Committee (State Committee) has jurisdiction of an appeal made by a former employee of the Department of Mental Health (DMH). According to the information that we have been provided, the reported to work in a highly intoxicated manner on March 12, 1981 and entered a hospital as a patient on March 13, 1981. On March 20, 1981, DMH mailed a certified letter to the employee, addressed to his home, which notified him of his termination from employment, effective on that date. He was released from the hospital on April 12, 1981 and applied to the Retirement System on April 20, 1981 for retirement retroactive to March 21, 1981. The employee is now scheduled to receive his first check within a few weeks. On April 28, 1981, he filed a grievance petition with DMH. DMH held a 'Step 1' conference under its grievance procedure on May 1, 1981, after which the employee's supervisor upheld the decision to terminate. The employee was not allowed to proceed further in the grievance process because DMH determined that it had lacked the authority to waive what it believed was his failure to follow DMH grievance rules.

The DMH grievance policy requires that employees wishing to initiate the procedure file a grievance conference request within ten days of the effective date of an adverse action. The request of the employee in question here came well more than ten days after the effective date of his termination, over two weeks after his release from the hospital, and eight days after his application for retirement. DMH has stated that it does not have the authority to waive the ten day limit (see opinion of this office, November 6, 1979, by Barbara Hamilton, Assistant Attorney General) and, thus, it will not permit the employee to pursue its grievance procedure.¹

Employees covered by § 8-17-30 of the Code of Laws of South Carolina (1976), as amended, such as the one in question here, may appeal to the State Committee after they have exhausted all administrative remedies within their own agencies. An opinion of this office dated May 25, 1978 and written by Nathan Kaminski, Jr., Assistant Attorney General, concluded that an employee's Failure to pursue his agency's grievance procedure in a timely fashion would preclude his appeal because he would not have exhausted available remedies; however, the opinion concluded that, if the Personnel Director finds that the employee was prevented from timely pursuing the internal grievance procedure by the agency's own actions, he may permit an appeal to the State Committee on the basis that the agency has failed to act within the forty-five days required by § 8-17-20. An employee's negligent failure to pursue the grievance procedure constitutes failure to exhaust. See Kaminski opinion.

*2 Under §§ 8-17-20 and 8-17-40, you must evaluate the information presented to you to determine whether the employee in question failed to exhaust because of his own negligence or whether his apparent delay in initiating the grievance was due to the agency's sending him a letter of termination at a time when his health would not permit him to receive or act on such notice. See Kaminski opinion. The employee's affidavit states that he was ill and suffered from ' . . . remorse, anxiety, fear and

depression', but he has submitted no independent evidence to show whether the illness and its symptoms prevented him from complying with the DMH procedure both while he was in the hospital and, in particular, after he was released. According to the information that we have, he was able to apply for retirement eight days after his release from the hospital and eight days before filing his grievance. If you conclude that he was negligent or that he has presented insufficient evidence of his incapacity, you should deny his appeal. If you determine that he was unable to initiate the grievance because of his condition at the time of his termination, then his appeal should be allowed.

If we may be of further assistance, please let us know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

Footnotes

- 1 Regardless of whether the agency has such power, the supervisor who held the conference clearly had no authority to waive the rule. In stating that grievance conference requests '. . . must be filed (emphasis added) . . .' within ten days, DMH appears to have made compliance mandatory. Supervisors who must schedule the Step 1 conferences are given no express or implicit authority to waive the requirement. Thus, the supervisor's holding the conference for the employee in question here could not operate as a waiver of DMH's right to insist on compliance. Because the employee had been informed of these rules, he had no right to expect that the supervisor had the authority to waive the rule and bind the agency.

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