

1978 WL 207609 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 25, 1978

*1 Dr. Jack S. Mullins
Director
State Personnel Division
Budget & Control Board
1205 Pendleton Street
Columbia, S.C. 29201

Dear Dr. Mullins:

You have asked this Office to render an opinion as to whether a grievant who failed to comply with the time period requirements set forth in an agency's Grievance Procedure forfeits the right to continue the appeal within the internal grievance procedure. You have also asked, if there is a forfeiture of the right to pursue the internal grievance procedure, whether this precludes the State Employee Grievance Committee from exercising its jurisdiction to consider a grievance appeal.

S.C. Code Ann. § 8-17-20 (1976), as amended, states in part:

Each agency and department of state government shall establish an employee grievance procedure within such agency or department which shall be reduced to writing and be approved by the State Personnel Director. A copy of the approved grievance procedure plan shall be furnished and explained to each employee of the agency or department concerned.

Pursuant to this statutory directive, the Personnel Division has reduced to writing an "employee grievance procedure", which specifically includes provisions for a first step (conference with section director) and second step (appeal to committee of peers or to State Director), and a final decision disposing of the appeal by the State Director of Personnel. In the case in point, the employee, after termination, began the first step of the grievance procedure with a conference with his section director. Thereafter, the section director provided a written statement stating his decision as to the first step, refusing to reconsider the employee's dismissal.

The Employee Grievance Procedure for the Personnel Division provides for the "second step" as follows:

If the written statement of the administrative superior does not represent in the opinion of the appealing employee satisfactory disposition of the grievance, then within five working days after receiving this statement the appealing employee shall make written request to the State Director of Personnel that his appeal be taken to the second step of this appeal procedure.

The employee in this case did not file a written request for an appeal to the second step "within five working days", but waited approximately seventeen working days before filing a written request to pursue the second step of the appeal. The State Personnel Director, upon receipt of this written request, notified the employee that he could not continue the appeal since the employee had not met the time limitations set forth in the Agency's grievance procedure. The employee thereafter responded that it was his intention to "fully pursue the grievance process" and that he had not met the time requirements because of some "confusion" and "miscommunication" with administrative personnel within the Personnel Division concerning this grievance regarding termination and a previous grievance commenced by this same employee concerning a suspension prior to termination.

*2 The time limits and requirements set forth within each agency's grievance procedures are important in light of the overall purpose of the State Employee Grievance Procedure Act. Under this Act, in S.C. Code Ann. § 8-17-20, the agency must act on a grievance within 45 days. Further time limits governing when decisions must be made by the State Employee Grievance Committee and by the Budget & Control Board are specifically set forth in § 8-17-30. Clearly, the overall purpose of the Grievance Procedure Act is to provide for an expeditious resolution of employees' grievances. The time requirements found within the internal grievance procedure of the individual agency are of the essence in ensuring a speedy resolution of any dispute, and provide protection both to the employer and the employee.

It has been stated:

Rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature. Procedural rules are binding upon the agency which enacts them as well as upon the public of the agency, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule so long as such rule remains in force.

[2 Am.Jur.2d, Administrative Law, § 350, p. 152 \(1962\).](#)

This same authority also states:

The time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay beyond the statutory time being fatal.

[2 Am.Jur.2d, Administrative Law, § 544, p. 354 \(1962\).](#)

Scrupulous observance of procedural safe guards, such as time limits, provided in the internal grievance procedures of an agency is of particular importance, particularly since these rules were principally intended to confer benefits upon the individual employee in the face of otherwise unfettered discretion on the part of the agency. See Vitarelli vs. Seaton 359 U.S. 535 (1959). It is the opinion of this Office that where an employee through negligent or indifferent conduct fails to observe the time requirements contained within the agency's grievance proceedings, and the employee knew or should have known of the time period stated in the procedure, the agency is under no obligation to continue the grievance procedure upon an untimely request by the employee, and the agency may properly declare that the employee has forfeited his rights to proceed under the procedure, and dismiss the grievance or complaint.

The employee in this case maintains that he did not comply with the time limits because of “miscommunication” with administrative personnel handling the grievance procedure within the agency. In such a case, the agency head, or his designated representative, should make a determination whether, in fact, the employee was misled, and for this reason did not make a timely appeal. If in fact the employee was prevented from filing an appeal within the agency's grievance procedure in a timely fashion because of the ignorance or negligent acts of an administrative official, it is within the discretion of the administrative agency to relax or modify its procedural rules and allow an appeal if it is prosecuted within a reasonable time. See Turner vs. Unemployment Compensation Board of Review, 163 P.A. Super. 168, 60 A.2d 583 (1948). The agency director in this case should make the determination whether the employee was misled, or whether he filed an untimely appeal because of negligent conduct on his own part. In the former case, the appeal should be allowed to continue. In the latter case, the grievance appeal should be dismissed.

*3 You have further inquired whether the State Employee Grievance Committee has jurisdiction to hear an appeal if the employee's grievance was dismissed by the agency for failure of the employee to timely pursue his grievance within the agency. S.C. Code Ann. § 8-17-30 (1976), as amended, states that eligible employees under the grievance procedure shall have the right to appeal to the State Employee Grievance Committee “after all administrative remedies to secure

acceptable adjudication within their own agency or department have been exhausted". The doctrine of "exhaustion of administrative remedies" is relatively well defined by court decisions in the context of an appeal from an administrative body to a court of law. Definition of this particular phase, then, should be obtained by reference to that substantial body of law concerning "exhaustion of administrative remedies".

The generally accepted meaning of words used in statutes or ordinances are to be accepted unless such words have a well recognized meaning in law; if so, they are presumed to have been used in that sense.

[Purdy vs. Moise](#), 223 S.C. 298, 75 S.E.2d 605, 608 (1953).

It is generally stated that the doctrine of exhaustion of administrative remedies "requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act". See [2 Am.Jur.2d, Administrative Law](#), § 595, p. 426 (1962).

It is generally recognized that the failure to pursue an appeal process within the administrative agency itself constitutes a failure to exhaust administrative remedies.

The classic example of failure to exhaust an administrative remedy is the failure to appeal from an administrative decision to a higher tribunal within the administrative system.

[2 Am.Jur.2d, Administrative Law](#), § 608, p. 447 (1962).

It is the opinion of this Office that if an employee fails to pursue in a timely fashion the internal agency's grievance procedures available to him, and his grievance or complaint is dismissed by the agency, the employee is precluded from appeal to the State Employee Grievance Committee by the plain language of § 8-17-30, since the employee has not exhausted all administrative remedies to secure an acceptable adjudication within the employee's agency or department.

However, the employee may allege that he was prevented from fully pursuing his appeal within the agency because of agency actions, and not because of his own negligent conduct. Under [S.C. Code Ann. § 8-17-40 \(1976\)](#) as amended, the State Personnel Director must "assemble all records, reports and documentation of the earlier hearings on the grievance and review the case to ascertain that there has been full compliance with the established grievance policies, procedures and regulations within the agency or department involved and determine whether the action is grievable to the State Committee." The State Personnel Director, then, must make an independent determination based on the facts of each individual case to determine whether the employee has, or has not, exhausted all administrative remedies to secure an acceptable adjudication within his own agency. If the Personnel Director finds that the employee was prevented from timely pursuing the internal grievance procedure by the agency's own actions, the Personnel Director may permit an appeal to the State Employee Grievance Procedure on the basis that the agency has failed to act within 45 days pursuant to § 8-17-20. If the employee has failed to pursue fully the grievance procedure within the agency because of his own negligent conduct, the State Personnel Director should notify the employee that his appeal cannot be heard because the employee has failed to exhaust his administrative remedies.

*4 If I can provide any further information, please let me know.

With kind regards, I remain
Very truly yours,

Nathan Kaminski, Jr.
Assistant Attorney General

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