Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-348

JANUARY TERM, 2002

In re Grievance of Pauline Liese	}	APPEALED FROM:
	}	
	}	Labor Relations Board
	}	
	}	
	}	DOCKET NO. 00-71

In the above-entitled cause, the Clerk will enter:

Grievant, a state employee, appeals the Labor Relations Board's determination that the increase in pay she obtained as the result of a classification review would not be made retroactive from the time she first submitted her initial request for review, which was never passed onto the Department of Personnel. We affirm.

On December 13, 1998, grievant submitted a request for review of the classification of her position to her superior, Bert Moffat, executive secretary of the Transportation Board. Three days later, Moffat gave the request to Arthur Rock, Chairperson of the Transportation Board, to complete the form and submit it as a management request to review the classification of grievant's position. In late December and early January, grievant asked about the status of the review, and Moffat told her that the request had been hand-delivered to the Agency of Transportation, Human Resources Division. When grievant again checked on the status of the review in May 1999, she was informed that the request for review could not be located either at the Agency of Transportation or the Department of Personnel.

On May 18, 1999, grievant resubmitted the request for review to the Agency and asked that the effective date of any classification change be made retroactive to January 1999. In May 2000, the Department of Personnel informed grievant that her position had been upgraded one paygrade effective August 1, 1999, the first day of the pay period following the date the completed May 18 classification request was received by the Department. In November 2000, the instant grievance was filed. Grievant contended that the Agency of Transportation failed to handle her initial request for review in a timely manner as specified under the collective bargaining agreement, and that, consequently, the effective date of the reclassification of her position should be January 31, 1999, the first day of the pay period following the date the Department of Personnel should have received her initial request for review from the Agency. The grievance was denied at three levels, and eventually grievant appealed to the Labor Relations Board.

On February 28, 2001, a majority of the three-member Board rejected the grievance, concluding that the remedy grievant sought was precluded by Article 16, Section 3(e) of the collective bargaining agreement. On March 28, 2001, grievant asked the Board to correct a finding and to modify its decision so as to grant the requested relief. The two majority members of the Board denied the motion on the grounds that it was untimely filed and had been waived. On appeal, grievant argues that Section 3(e) does not preclude the remedy she seeks, and that her motion to modify the Board's February 28 decision was not untimely and did not raise a new issue.

In relevant part, Section 3 of Article 16 provides as follows:

(b) . . . . The Request for Review shall state with particularity the change(s) in duties or other circumstances which prompt the Request for Review. The position's supervisor shall review the information provided on the form within ten (10) workdays, completing that portion which requests supervisory responses, and submit further written comments as

appropriate. The Request for Review shall then be submitted to the position's appointing authority, who shall review it for accuracy, comment as deemed appropriate, and forward the original to the Department of Personnel within five (5) workdays.

. . . .

(e) Notwithstanding the above, if corrective action results from either classification review or a classification grievance, any pay adjustment shall be retroactive to the date when a completed Request for Review was logged by the Department of Personnel . . . . An employee may initiate his or her review by concurrently filing a copy of the Request directly to the Department of Personnel at the same time the original is submitted to the supervisor. The effective date will then be computed 15 days from the date it was received by the Department of Personnel and logged in. This will permit the employee to ensure that the effective date of any corrective action is not delayed at the employee's department level due to management or supervisory review of the request.

The Board concluded that Section 3(e) plainly limits any retroactive pay increase resulting from a classification review to the date that the request for review was logged by the Department of Personnel. The Board also concluded that Section 3(e) provides employees with an option for protecting themselves against just the kind of circumstances that occurred here by allowing them to concurrently file a request for review with the Department of Personnel "to ensure that the effective date of any corrective action is not delayed at the employee's department level due to management or supervisory review of the request." According to the Board, because grievant failed to protect herself as provided under the contract, the effective date of her pay raise is the date her resubmitted grievance was logged by the Department of Personnel. We conclude that the Board's interpretation of Section 3(e) easily satisfies the standard of review on appeal to this Court. See In re Scott, 779 A.2d 655, 659 (2001) (Labor Relations Board's interpretation of collective bargaining agreement is within its expertise and thus entitled to deference by this Court).

Grievant argues, however, that the Board erred in relying upon the last sentence of Section 3(e) because her grievance challenges the failure of the "appointing authority" (the Agency of Transportation), not her supervisor at the "department level" (the Transportation Board), to meet the contractual processing deadlines. Further, grievant asserts that she timely raised this argument one month after the issuance of the Board's decision, see 3 V.S.A. 924(b) (until transcript is filed, Board may modify finding or order), and that the argument was not new because the Board was aware of all the facts necessary to determine that Section 3(e) did not preclude her grievance. We agree with the Board that grievant's argument was not timely raised in proceedings before the Board, and thus we conclude that the argument is waived on appeal. See In re Whitney, 168 Vt. 209, 214 (1998).

In any event, the argument is unavailing. The last sentence of Section 3(e) does not distinguish between the processing of those requests for review submitted by management and those submitted directly by an employee. Nor does the sentence suggest that delays in getting requests for review to the Department of Personnel are to be treated differently depending on whether the delay can be attributed to the employee's supervisor or the appointing authority. Such an interpretation of the agreement would lead to different treatment of state employees depending on where their positions were located within the structure of state government. We will not interpret the agreement to confer varying degrees of protection depending on the organization of the entity for whom the grieving employee works. Section 3(e) was plainly intended to provide a means for employees to avoid the consequences of any management delays occurring before submission of requests for review to the Department of Personnel - whether the delay is caused by the immediate supervisor or the appointing authority. See In re Gorruso, 150 Vt. 139, 143 (1988) ("In construing a contract, courts must endeavor to avoid what is unequal, unreasonable, and improbable, if this can be done consistently with the words of the contract.").

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice