

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ARLENE MASEAR,

Appellant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

Respondent.

Case No. 89-0065-PC

* * * * *

DECISION
AND
ORDER

This appeal was filed at the fourth step in the noncontractual grievance process pursuant to §230.45(1)(c), Stats. Respondent has filed a Motion to Dismiss for lack of subject matter jurisdiction. The final brief was filed in regard to the motion on September 6, 1989. The following Findings of Fact appear to be undisputed and are made solely for the purpose of deciding this motion:

1. On June 27, 1986, appellant was laid off from her classified position as a Job Counselor 3 with respondent's Janesville Job Service Office. Appellant had recall rights for a period of five years from the date of the layoff pursuant to the applicable collective bargaining agreement.

2. From June 30, 1986, through March 6, 1989, appellant was employed by respondent in a project position classified as a Job Service Specialist 3 in the Beloit Job Service Office.

3. On March 3, 1989, appellant received a written reprimand from her first-line supervisor, Marian E. Knapp, alleging that appellant had exhibited intimidating, harassing and discourteous behavior.

4. By letter of March 4, 1989, appellant resigned from her project position to protest the reprimand.

5. Appellant has taken no action to relinquish the recall rights she gained as a result of her 1986 layoff.

6. On March 30, 1989, appellant filed a written grievance with Ms. Knapp pursuant to the noncontractual grievance process challenging the written reprimand.

7. By letter dated April 4, 1989, Ms. Knapp responded to the written grievance by stating that appellant was no longer an employee within the meaning of the Wisconsin Administrative Code and therefore not eligible to file a grievance.

8. By letter dated April 12, 1989, to Merry Fran Tryon, District Job Service Director, appellant filed her grievance of the reprimand at the second step and challenged respondent's decision at the first step by stating that:

"Ms. Masear's resignation does not affect her ability to grieve the written reprimand because 1) the resignation was under protest of the reprimands received, and, thus, a constructive termination, and 2) though she has resigned her project position, Ms. Masear still has reinstatement rights as a state employee for five years from June 27, 1986, when her position as Job Service Counselor 3 was eliminated and she was laid off. Since Ms. Masear retains her recall rights and since the reprimand of Ms. Masear may follow her and affect her future state employment, it is grievable despite her resignation of the project position. See, Section 230.35, Wis. Stats."

9. By letter dated April 18, 1989, Ms. Tryon responded to appellant's grievance at the second step by stating that appellant was not eligible to file a grievance pursuant to the noncontractual grievance process because she was not an "employee" within the meaning of the Wisconsin Administrative Code.

10. By letter dated April 27, 1989, to John Coughlin, Secretary of DILHR, appellant filed her grievance of the reprimand at the third step.

11. By letter dated May 1, 1989, and received by appellant's attorney on May 2, 1989, Lee Isaacson, Employment Relations Specialist and respondent's designated third step grievance representative, responded to appellant's grievance as follows:

"Because Ms. Masear voluntarily resigned her project position, she is no longer an employee under s. ER 46.02, Wis. Adm. code and she is therefore not eligible to file a grievance under the grievance procedure described in Chapter ER 46, Wis. Adm. Code. While Ms. Masear may have some rights from a prior layoff from a permanent position, those rights are contractually based and do not provide her access to the non-represented grievance procedure for matters pertaining to a subsequent appointment to a non-represented position."

12. On June 8, 1989, appellant filed with the Commission an appeal of respondent's denial of her noncontractual grievance at the third step. The letter of appeal was dated June 1, 1989, and appears to be postmarked June 1, 1989.

13. At a prehearing conference convened by the Commission on July 18, 1989, respondent filed a motion to dismiss the appeal on the following bases:

- a. Respondent alleges that pursuant to §ER 46.07(1)(a), Wis. Adm. Code, a written reprimand, such as the one which forms the basis of this appeal, may not be grieved.
- b. Respondent alleges that appellant did not file her appeal with the Personnel Commission on a timely basis.
- c. Respondent alleges that the noncontractual grievance procedure is available only to current, not former, employees and, therefore, not available to appellant as a result of her resignation.

Appellant acknowledges that a written reprimand may not be appealed to the Commission pursuant to the noncontractual grievance process as a result of the limitations imposed by §ER 46.07(1)(a), Wis. Adm. Code. However, appellant alleges that she is not appealing the reprimand itself but the procedure followed by respondent in processing her grievance, i.e., the fact

that respondent abused its discretion and acted in violation of the noncontractual grievance procedure laid out in Chapter ER 46, Wis. Adm. Code, by refusing to address the substance of appellant's grievance and by refusing to meet with her to discuss her grievance. Section ER 46.07, Wis. Adm. Code, provides in pertinent part:

(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 secretary promulgated under ch. 230, Stats. . . .

Ch. ER 46, Wis. Adm. Code, is clearly a rule of the Secretary of DER promulgated under Chapter 230 Stats., specifically, §230.04(14), Stats., and the grievant in this case is clearly alleging that respondent DILHR abused its discretion in applying this rule. As a result, the instant appeal, as it relates to the procedure followed by respondent in processing the subject grievance, falls within the jurisdiction of the Commission to serve as final step arbiter in the state employee grievance procedure pursuant to §230.45(1)(c), Stats. The Commission reached the same conclusion in cases presenting parallel fact situations in Wing v. UW, Case No. 81-328-PC (6/25/82) and Williamson v. DOR, Case No. 80-303-PC (12/17/80).

Respondent next alleges that the instant appeal was not filed on a timely basis. The time limit for filing an appeal pursuant to §230.45(1)(c), Stats., is governed by §ER 46.07(2), Wis. Adm. Code, which states as follows:

(2) Grievances to the commission must be filed within 30 calendar days after service of a decision issued at the third step of the grievance procedure under s. ER 46.06 (2)(c)2., or within 30 calendar days after the last day on which the employer could have served a timely decision, whichever is sooner.

The 30-day time limit for filing appeals with the Commission pursuant to §230.44, Stats., has been found to be jurisdictional due to the language in

§230.44(3), Stats., which provides that such appeals "may not be heard" unless the 30-day time limit is satisfied, and, as a result, is not subject to waiver or equitable tolling. However, such language is not present in §ER 46.07(2), Wis. Adm. Code, and the Commission concludes that such time limit is akin to a statute of limitations and, as a result, subject to waiver by the respondent or to equitable tolling.

Under §PC 1.02(10), Wis. Adm. Code, "filing" means the physical receipt of a document at the Commission's offices. It is clear that the instant appeal was not "filed" with the Commission within 30 days of May 2, 1989, the date that the decision issued at the third step of the grievance procedure was received in appellant's attorney's office. Appellant argues that she properly relied upon §ER 46.06(4), Wis. Adm. Code, which states as follows:

(4) A grievance or a decision is timely if received by the employer during normal business hours or postmarked by 12:00 midnight on the due date.

However, this provision and the other provisions of §ER46.06, Wis. Adm. Code, clearly apply only to the procedure to be followed by the grievant and the employer during the first 3 steps in the noncontractual grievance process and do not apply to the procedure to be followed in appealing to the Commission, which is set forth in a separate section, §ER 46.07, Wis. Adm. Code.

Since appellant did not satisfy the 30-day filing requirement, the next question is whether there was a waiver or equitable tolling of the time limit. The record does not indicate nor does the appellant allege that respondent took any action which could be interpreted as an express or implied waiver of the time limit. In order for the time limit to be tolled, appellant must demonstrate that the equities involved so require such a tolling. In this case, neither respondent nor any other entity took any action to impede appellant's filing of her appeal. The only reason offered by appellant to support the tolling is that

her attorney misinterpreted the law in relying on §ER 46.06(4), Wis. Adm. Code. It is clear from the record that appellant's attorney did not draft the appeal or mail it until the 30th day and did not anticipate that the appeal would arrive at the Commission until after the 30th day had passed. The Commission finds nothing in the record upon which to base a decision that the 30-day time limit should be tolled and concludes that the instant appeal was untimely filed.

In light of the conclusion that this appeal was not timely filed, the Commission will not reach the question of whether appellant was an "employee" as defined by §ER 46.02(2), Wis. Adm. Code.

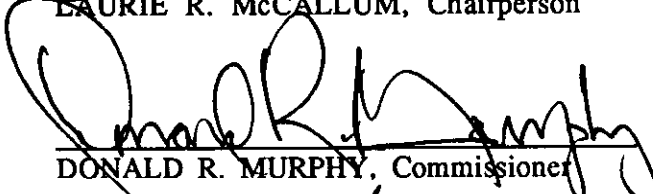
Order

Respondent's Motion to Dismiss is granted and this appeal is dismissed.

Dated: November 1, 1989

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

LRM:lrn

Parties:

Arlene Masear
865 Cranston Road
Beloit, WI 53511

Gerald Whitburn
Secretary, DILHR
P.O. Box 7946
Madison, WI 53707