

RANDY M. YERGES,
Appellant,

v.

**Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondent.

**RULING
ON
MOTION TO
DISMISS**

Case No. 99-0042-PC

This matter is before the Commission on respondent's motion to dismiss the appeal as untimely filed. The following facts appear to be undisputed.

FINDINGS OF FACT

1. By letter dated March 23, 1999, appellant was informed by respondent, as follows:

At the request of Joann O'Connor, an appointing authority for the Department of Health & Family Services (DHFS), Winnebago Mental Health Institute (WMHI) and in accordance with subsections ER-MRS 11.04(1)(d), Wisconsin Administrative Code, Rules of the Administrator, we are removing your name from the certifications and employment register for the classification of Resident Care Technician for DHFS/WMHI.

Subsection ER-MRS 11.4(1)(d), Wisconsin Administrative Code, provides that "...the administrator may remove an applicant from a register who have [sic] been considered for appointment 3 times and not selected."

According to the appointing authority, you were not selected on 17 certifications based on responses during the interview and on reference checks.

As provided in s. 230.17(2), Wis. Stats., "the full and explicit statement of the exact cause" of your removal is stated above. You may appeal this removal decision to the Personnel Commission within 30 days after the effective date of the action, or within 30 days after being notified of

the action, whichever is later, under s. 230.17(2) and s. 230.44(1)(a) and (3), Wis. Stats.

The March 23rd letter was mailed from Madison to appellant's address in Fond du Lac.

2. Appellant filed an appeal with the Personnel Commission, dated April 25, 1999, on April 27, 1999.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this appeal pursuant to §§230.44(1)(b) and 230.45(1)(a), Stats.

2. Appellant has the burden of establishing his appeal was timely filed.

3. Appellant has failed to sustain that burden.

4. Inasmuch as this appeal was not filed in a timely manner in accordance with §230.44(3), Stats., the Commission lacks competency to hear the appeal and the appeal must be dismissed.

OPINION

The time limit for filing an appeal of a decision of the Administrator of DMRS under §230.44(1)(a), Stats., is established in §230.44(3), Stats.:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later

The burden of proof is on the appellant to establish that his appeal was timely filed. *Casper v. UW & DER*, 96-0013-PC, 6/28/96. The appeal was received by the Commission on Tuesday, April 27th. In order for the appeal to have been timely filed, appellant would have to have received notice of respondent's action¹ no earlier than Sunday, March 28th.

¹ The effective date of the respondent's decision to remove appellant's name was no later than the date appellant was notified of the decision. See *Cozzens-Ellis v. Personnel Commission*, 155 Wis. 2d 271, 455 N.W.2d 246 (Ct.App. 1990).

In its motion, respondent offered various arguments regarding the period of time it would normally take for a letter mailed in Madison to reach Fond du Lac, appellant's place of residence. Respondent contends that such mail normally takes no more than 4 days so "it is safe to rely on the fact that a letter dated 3/23/99 and mailed to Fond du Lac from Madison on that same date would have been received by appellant on 3/24/99 at the earliest date and 3/26/99 at the latest." Appellant did not respond to this contention, nor did he offer any sort of a statement as to when he received the March 23rd letter. The Commission must conclude that appellant received the March 23rd letter no later than March 26, 1999, more than 30 days before filing his appeal with the Commission.

An untimely filing usually deprives the Commission of "competency" to hear the appeal. *See Association of Career Executives v. Klauser*, 195 Wis. 2d 602, 608-09, n.7, 536 N.W.2d 478 (Ct. App. 1995).

The Commission notes that after this appeal was filed, a prehearing was convened on June 23, 1999, and respondent questioned whether appellant had timely filed his appeal. The Commission established a schedule for the parties to file arguments regarding the timeliness issue.

By letter dated June 28, 1999, an employe of respondent DMRS wrote appellant:

I am notifying you of a correction to the March 23, 1999, letter that Ms. Debra Bower of the Division of Merit Recruitment and Selection (DMRS) sent to you removing your name from the certifications and from the register for the classification of Resident Care Technician (RCT) for DHFS/WMHI.

As DMRS Policy Advisor, I am responsible for reviewing all matters appealed to the State's Personnel Commission in which DMRS is a named party. I became aware of Ms. Bower's decision as a result of your filing an appeal with the Personnel Commission (Case No. 99-0042-PC). After reviewing the case file and other related documents, I believe sufficient grounds exist to warrant removing your name from the RCT employment register for reasons in addition to that given by Ms. Bower.

According to records, the hiring agency made a reference check by contacting your current employer at or near the time of your employment interview. The written notes from the telephone conversation held with your employer indicate a number of deficiencies including "...short temper, can be lazy, late for deliveries, doesn't like to do more than he has to."

Officials from the hiring agency indicated that any one of these items would have been sufficient to request your name be removed from consideration, but they are especially concerned about the potential for a "short temper" to create problems. The residents at Winnebago are mentally disturbed and need the best possible role model to emulate in terms of personal behavior, including anger management. In addition, we know that residents at other institutions frequently have severe or profound mental and physical disabilities that require inordinate amounts of patience from the RCT who provides care. Many of the residents cannot verbalize their needs or when they have been neglected or mistreated. They are at the complete mercy of the care provider. The hiring agency does not believe that it can run the risk of hiring someone who may display a temper or anger in inappropriate ways. Furthermore, timeliness and initiative are absolutely essential to providing a proper role model and care for individuals who cannot care for themselves or who may not be able to verbalize or make known their needs in even the most rudimentary fashion.

Therefore, in addition to the reason for the removal action taken by Ms. Bower, your name was removed from the RCT register for the additional reason that, pursuant to §ER-MRS 6.10(8), Wis. Adm. Code:

. . . the [DMRS] Administrator may refuse to . . . certify an applicant, or remove an applicant from a certification:

(8) Whose . . . employment references are unsatisfactory.

As provided in §230.17(2), Wis. Stats., "the full and explicit statement of the exact cause" of your removal is stated above.

The key statutory language for understanding respondent's March 23rd and June 28th letters is §230.17(2), Stats., which provides:

If the administrator refuses to examine an applicant, or after an examination to certify an eligible, as provided in this section, the administrator, if requested by the applicant so rejected within 10 days of the date of

receipt of the notice of rejection, shall give the applicant a full and explicit statement of the exact cause of such refusal to examine or to certify. Applicants may appeal to the commission the decision of the administrator to refuse to examine or certify under s. 230.44(1)(a). . . . A notice of rejection shall notify an applicant or eligible of his or her rights under this subsection.

This language indicates the right of appeal runs from when the notice of rejection is received by the applicant, rather than when the applicant receives the reasons for the rejection. Respondent DMRS was not required to explain the reasons for the rejection in the initial (March 23rd) letter. Nevertheless, respondent chose to disclose the reason(s) in that letter. When respondent followed up with an additional reason in its June 28th "correction" letter, they modified their "statement of the exact cause of such refusal to examine or to certify" and did not withdraw the actual notice of the decision not to certify and to delete appellant's name from the register.

The Commission concludes that the March 23rd letter was received no later than March 26, 1999, thereby making the appeal, filed on April 27th, untimely.

ORDER

This appeal is dismissed as untimely filed. The hearing, previously scheduled for September 7, 1999, is cancelled.

Dated: August 11, 1999

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:990042Arul1


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Randy Yerges
115 S. Bell Street
Fond du Lac, WI 54935

Robert Lavigna
Administrator, DMRS
PO Box 7855
Madison, WI 53707-7855

NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such appli-

cation for rehearing Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95