

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RAYMOND ERICKSON, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0057

Case Type: PA

DECISION NO. 35750

Appearances:

Troy Bauch, Field Representative, AFSCME Council 24, 1190 Ruffedt Road, Cornell, Wisconsin, appearing on behalf of Appellant Raymond Erickson.

David A. Hart, Office of State Employment Relations, 101 E. Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Respondent Department of Corrections.

DECISION AND ORDER DENYING MOTION TO DISMISS

The employee, Raymond Erickson, seeks Wisconsin Employment Relations Commission review of a one-day suspension imposed by Respondent Department of Corrections. On May 8, 2015, Erickson received a second step answer denying his grievance. Pursuant to the grievance procedure, Erickson had ten days from the date of the answer to pursue an appeal to the Office of State Employment Relations, the third step in the process. On May 19, 2015, we received an appeal to the Commission from Erickson's representative. Attached to it was an unsigned letter to Jim Underhill of OSER seeking a third-step review. The letter from Erickson's representative indicates that a "Step 3 appeal to the Office of State Employment Relations was also filed." The representative goes on to assert that the matter is "now properly before the Wisconsin Employment Relations Commission." That statement of course was incorrect at the time it was made. An appeal of disciplinary matters pursuant to § 230.44(1)(c), Stats., may seek review with the Commission "as the final step in the state employee grievance procedure established under s. 230.04(14), if the appeal alleges that the decision was not based on just cause." At the time we received the appeal, the grievance procedure had not been exhausted. The DOC has moved to dismiss the matter based upon the failure to exhaust the grievance procedure.

On June 23, 2015, the Commission contacted both parties to determine if OSER had received the appeal after May 27, 2015, the date upon which the affidavit of Jim Underhill was executed.¹ Subsequently, counsel for the State advised that no appeal had been received as of June 24, 2015. On June 25, 2015, the Commission was provided with a copy of a June 16, 2015 email from David Hart, counsel for the DOC, to Troy Bauch, representing Erickson that provided as follows: "It appears the grievance in this case was received by OSER on May 14. It is now being processed." On June 26, 2015, Mr. Hart by way of email reaffirmed that the affidavit he submitted and his representations in that regard were accurate notwithstanding his June 16 email to Bauch.

At the very least, the June 25, 2015 email creates an issue of fact as to whether the grievance was received by OSER. A motion to dismiss will only be granted if there are no factual disputes and it is clear that we lack jurisdiction over a matter. Clearly, that is not the case here. After receiving the June 16 memorandum it is understandable why Erickson's representative made no further submission. The DOC should have withdrawn the motion to dismiss on June 16, 2015. We will resolve the matter by denying the motion.

ORDER

The motion to dismiss is denied and the matter will be assigned for hearing.

Signed at the City of Madison, Wisconsin, this 1st day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹ Underhill, an employee of OSER and the addressee of the appeal, provided an affidavit that no third step appeal had been received as of that date.