STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BARRY J. STERN, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, and **Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,**
Respondents.

Case 3
No. 63312
PA(adv)-33

Decision No. 30912-A

Appearances:

Steven C. Zach, Boardman, Suhr, Curry & Field, P. O. Box 927, Madison, WI 53701-0927, appearing on behalf of Barry J. Stern.

Howard Bernstein, Legal Counsel, P. O. Box 7946, Madison, WI 53707-7946, appearing on behalf of the Department of Workforce Development and the Division of Merit Recruitment and Selection.

ORDER DISMISSING THE APPEAL

This matter is before the Wisconsin Employment Relations Commission (the Commission) on remand, pursuant to the order of the Court of Appeals, District IV, on the question of whether the Department of Workforce Development (DWD) has waived a timeliness objection in this matter. STERN V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 296 WIS.2D 306, 722 N.W.2D 594, 2006 WI APP 193. The final date for submitting written arguments was April 30, 2007.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. By letter dated May 22, 2002, Respondent DWD appointed Appellant Barry Stern to an Attorney position in its Unemployment Insurance (UI) Division. Appellant was required to serve a twelve-month probationary period.

2. By letter dated November 8, 2002, DWD appointed the Appellant to an Attorney position in its Worker's Compensation Division, effective December 2, 2002 and indicated that Appellant was required to serve a new twelve-month probationary period. Appellant resigned from his Unemployment Insurance position effective November 29.

3. By memo dated October 24, 2003, DWD notified Appellant that it was extending the Appellant's probationary period by 200 hours, i.e. until January 4, 2004.

4. By letter dated December 30, 2003 and effective the same date, DWD informed the Appellant that it was terminating his "probationary employment."

5. On January 30, 2004, the Commission received a document from Appellant that was designated as an "Appeal of Discharge (Filed under §230.44, Wis. Stats.)" The appeal included the following paragraphs:

> 4. The discharge was preceded by several acts of retaliation, harassment, religious discrimination and disability discrimination against the Appellant by the Appellant's immediate supervisor. The discharge was not due to unacceptable performance by the Appellant, but was motivated by the supervisor's personal reasons for having the Appellant discharged and by the supervisor's abuse of power. The Respondent improperly and unlawfully extended the Appellant's probationary period by absences for which appointing authority approval was not required; therefore, by the time of the discharge, the Appellant's probationary status had expired and he had already achieved permanent status. The Respondent's discharge of the Appellant was without just cause.
>
> 5. As a remedy for the Appellant's improper discharge by the Respondent, the Wisconsin Employment Relations Commission is requested to reinstate the Appellant to permanent employment status in a position equivalent to that which he held immediately prior to his discharge and to make the Appellant whole financially for the losses of pay and benefits he has experienced by reason of the discharge.

6. By letter that was dated February 5, 2004 and addressed to the Appellant, the Commission wrote, in relevant part:

> The Wisconsin Employment Relations Commission has received your recent letter of appeal and has assigned it the above case numbers. Copies of your letter are being provided to the respondent so they are given adequate opportunity to file any jurisdictional objections to the authority of the

> Commission to hear such an appeal. . . . If no objection is forthcoming from

> the respondent within 20 days of the date of this letter, you will be notified of the date for the next step in this matter, the prehearing conference, which will be explained further in a subsequent letter.
>
> To the extent your letter of appeal refers to acts of discrimination, any such claims under the Wisconsin Fair Employment Act are processed by the Equal Rights Division of DWD.

As indicated at the bottom of the letter, the Commission sent a copy to Attorney Howard Bernstein, Office of Legal Counsel, DWD. The Commission did not send a copy to the Administrator of the Division of Merit Recruitment and Selection or to an attorney representing the Administrator.

7. By letter dated February 16, 2004, DWD moved to dismiss the appeal "on the ground that the appellant was a probationary employee . . . . Because the appellant was a probationary employee, the Commission does not have jurisdiction over his appeal under sec. 230.44(1)(c), Stats." The motion specifically addressed the Appellant's argument that the extension of his probationary period was invalid, and concluded with the following:

> The exhibits show that the appellant's probationary period was properly extended in accordance with sec. ER-MRS 13.05(2), Wis. Adm. Code. Therefore he was a probationary employee on the date of the termination letter and this appeal should be dismissed.

There was no contention in the motion that the appeal was untimely filed.

8. Appellant filed a written response to DWD's motion. Appellant suggested that the issues before the Commission (and his position relative to those issues) were as follows:

> 1. Did the Employer abuse its discretion by establishing a new 12-month probationary period for the Employee as he began his WC ALJ position instead of continuing the probationary period that he had begun serving as a UI ALJ?
>
> Answer: Yes.
>
> 2. Did the Employer abuse its discretion by extending the Employee's probationary period from December 2, 2003 to January 4, 2004?
>
> Answer: Yes.

> 3. Does the Commission have jurisdiction to hear this appeal? Specifically, does the Commission have jurisdiction to determine whether the Employee was a probationary employee or a permanent employee of the Employer at the time of his discharge?
>
> Answer: Yes.
>
> 4. If the Commission has jurisdiction to hear this appeal and determines that the Employee was a permanent employee at the time of his discharge, does the Commission have jurisdiction to decide if the discharge was based on just cause or must the just cause issue be decided through the grievance arbitration process pursuant to the applicable collective bargaining agreement between the State of Wisconsin and the [Wisconsin State Attorneys Association (WSAA)].
>
> Answer: If the Commission determines that the Employee had attained permanent status in class prior to his discharge, the issue of whether the discharge was for just cause is subject to the grievance arbitration process under the WSAA collective bargaining agreement pursuant to §§111.93(3) and 230.34(1)(ar).

In his brief, Appellant proceeded to offer arguments relating to each of the identified issues. He made the following argument relating to issue 3:

> Section 230.34(1)(a), Wis. Stats., provides that a state employee with permanent status in class may be discharged only for just cause. Section 230.44(1)(c), Wis. Stats., provides that, if a state employee who has permanent status in class is discharged, the Commission has jurisdiction to hear the employee's appeal of the discharge if the appeal alleges that the discharge was not based on just cause. The Employee's appeal alleges that he had attained permanent status in class prior to the discharge and that the discharge was without just cause. Under §230.44(1)(c), with the exception of employees who are covered under [collective] bargaining agreements (discussed under issue #4, below), the Commission clearly has jurisdiction over the just cause issues for employees who have attained permanent status in class prior to discharge. Therefore, the Commission clearly has jurisdiction to make an initial determination of whether or not an employee who has filed an appeal with the Commission was a permanent employee at the time of discharge. For purposes of this appeal, the Employer should not be permitted to be the final arbiter of whether the Employee had attained permanent status, or of the correct

> interpretation of §ER-MRS 13.05, Wis. Admin. Code. The Commission's construction of §ER-MRS 13.05 and determination of whether the Employee

> had already attained permanent status in class by the time of his discharge are especially necessary in this case. The Employer has, to date, refused to participate in the collective bargaining grievance process, presumably because the Employer has unilaterally determined that the Employee was a probationary employee at the time of his discharge. If the Commission does not accept jurisdiction of this issue, the Employee will be left with no avenue of administrative review of an alleged error by the Employer in interpreting and administering state civil service laws, and the Employer's construction of §ER-MRS 13.05 will not be subject to review.

9. In its reply brief, DWD offered arguments relating to the first two issues listed in Appellant's brief and concluded with the following statement:

> Respondent DWD submits that the record in this matter shows that the appellant was terminated while he was a probationary employee and that the Commission therefore has no jurisdiction over this matter.

There was no contention in the reply brief that the appeal was untimely filed.

10. Appellant submitted "rebuttal comments" that addressed the arguments raised in DWD's reply brief and stated:

> Legitimate issues have been raised regarding whether DWD improperly and unlawfully extended my probationary period by absences for which appointing authority approval was not required and, consequently whether by the time of the discharge, my probationary status had expired and I had already achieved permanent status. The Commission should deny the employer's motion to dismiss and accept jurisdiction of this appeal. The Commission clearly has jurisdiction to hear an appeal of a discharge of a permanent employee; implicit in that jurisdiction is the jurisdiction to determine whether or not the appellant had permanent status at the time of discharge.

11. In an Order and accompanying Memorandum dated June 1, 2004, the Commission dismissed the appeal for lack of subject matter jurisdiction. The Commission's jurisdictional analysis was limited to the Commission's authority to hear appeals of certain disciplinary actions under Sec. 230.44(1)(c) and to the effect of Sec. 111.93(3) and 230.34(1)(ar). The Memorandum included the following:

> Given all of the foregoing, it is apparent that the Commission lacks subject matter jurisdiction to review Respondent's decision to terminate

Appellant's employment. If he had obtained permanent status in class, his appeal to the Commission would be barred by Secs. 111.93(3) and 230.34(1)(ar), Stats. If he had not, he would lack a prerequisite for invoking Sec. 230.44(1)(c), Stats.

As part of his written argument in this matter, the Appellant contends that Respondent acted improperly when it established a new twelve-month probationary period when he began his Worker's Compensation position and when it extended his probation by 200 hours. To the extent that the Appellant is seeking to obtain review of those decisions as separate personnel transactions, the Commission also lacks the authority to conduct that review. Appellant would not be able to satisfy the Sec. 230.44(3), Stats., 30-day filing period for civil service appeals even if his January 3, 2004, letter of appeal is construed as an appeal of Respondent's November 8, 2002 establishment of a new twelve-month probationary period or of Respondent's October 24, 2003 action to extend Appellant's probation. (Citation omitted.)

12. The Commission never convened a prehearing conference relating to the appeal.

13. Appellant filed a petition for judicial review of the Commission's June 1 ruling. It was in the circuit court proceeding that the Appellant initially made a specific contention that the Commission had jurisdiction over his appeal pursuant to Sec. 230.44(1)(a), Stats.

14. It was not until after the Court of Appeals remanded the matter to the Commission that the Commission identified the Division of Merit Recruitment and Selection (DMRS) as a party to the appeal and served a copy of the appeal materials on DMRS.

15. Respondent DWD has now asserted a timeliness objection to the appeal.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction over this appeal pursuant to Sec. 230.44(1)(a), Stats.

2. Respondent DWD did not waive its opportunity to raise a timeliness objection in this matter.

3. The appeal was not timely filed.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER[1]

This matter is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[1] Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

MEMORANDUM ACCOMPANYING ORDER DISMISSING THE APPEAL

This matter is now before the Commission on remand after the Court of Appeals, in STERN V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 296 WIS.2D 306, 722 N.W.2D 594, 2006 WI APP 193, made the following rulings:

> (1) Stern's appeal to WERC was an appeal under Wis. Stat. § 230.44(1)(a) of the decision to extend his probation and it was not filed within thirty days as required by § 230.44(3); (2) the time limit in § 230.44(3) may be waived; and (3) WERC, rather than the circuit court or this court, should decide if DWD waived the defense of the time limit. Therefore, on remand to WERC, if WERC determines that DWD did not waive the time limit, it shall dismiss Stern's appeal; if it determines there was a waiver, it shall decide whether Stern's probation was lawfully extended. 2006 WI App 193, ¶ 2. (Footnote omitted.)

The statutory provisions that are relevant to the ruling by the Court of Appeals include the following portions of Sec. 230.44, Stats:

> APPEAL PROCEDURES. (1) Appealable actions and steps. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):
> (a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator [of the division of merit recruitment and selection] or by an appointing authority under authority delegated by the administrator under s. 230.05(2). . . .
> (c) *Demotion, layoff, suspension or discharge*. If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause. . . .
> (3) Time limits. 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. . . .

Section 230.05(2)(a) also provides: "Any delegated action taken under this subsection by any appointing authority may be appealed to the commission under s. 230.44(1)(a). The administrator shall be a party in such appeal."

As noted above, the Court of Appeals has already ruled that the appeal of the decision to extend Appellant's probation was not timely, but that the 30-day filing period established in

Sec. 230.44(3) relates to the Commission's competency to proceed and is subject to waiver. DWD did not raise a timeliness objection with its February 16, 2004 motion to dismiss the appeal for lack of subject matter jurisdiction, but has done so now.[2] Appellant takes the position that the timeliness defense has been waived.[3] In its ruling, the Court of Appeals offered the following observations relating to the waiver question:

> We agree with the appellants that the procedural rules governing the proceeding before WERC are critical to a waiver analysis in this case. If no rule expressly requires that a defense based on the time limit in Wis. Stat. § 230.44(3) be raised at a particular time in the proceedings before WERC, as appears to be the case, then the question arises whether WERC has interpreted the rules to require that it be raised by a particular time. . . .
>
> It is certainly true that WERC has discretion in the manner of conducting proceedings before it when a rule or statute does not address a particular matter. . . . Thus it may be that, if the rules governing the proceeding before WERC do not address when the issue of timeliness under Wis. Stat. § 230.44(3) must be raised, WERC has discretion to decide at what point in the proceeding it is waived if not raised earlier. 2006 WI App 193 ¶¶36-37.

Appellant acknowledges that no administrative rule directly governs the question of when, in an appeal that has been filed with the Commission pursuant to Sec. 230.44, a party must raise a timeliness objection. Appellant argues that the Commission should "apply the

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[2] After the Court of Appeals remanded this matter, the Commission sent a letter to DWD, DMRS and the Appellant setting forth a schedule "for the parties' initial written submissions on the issue of waiver or on any other topic that might be appropriate for consideration at this time." Counsel for DWD timely filed a brief which, according to the cover letter, was submitted "on behalf of DWD and the Division of Merit Recruitment and Selection." The brief itself, denominated as "Respondent's Brief on the Issues of Timeliness and Waiver," made no mention of DMRS and only referred to Respondent DWD. The "Conclusion" paragraph in the brief reads:

> Under the circumstances of this case, Respondent DWD has not waived objection to the timeliness of an appeal of its decision to extend the probationary period, and the Respondent asserts the objection now, at the earliest reasonable time to do so in these proceedings. The appeal of the Respondent's decision to extend the Appellant's probationary period was filed more than 30 days after the Appellant received notice of the action. It is therefore untimely under sec. 230.44(3), Stats., and should be dismissed.

The Commission interprets the brief and accompanying letter to mean that while the brief was filed on behalf of both Respondents, only Respondent DWD was raising the timeliness objection.

[3] The Appellant agrees that he is not contending that Respondent should be equitably estopped from making a timeliness objection.

same rules regarding waiver of an affirmative defense as apply in civil actions." However,

"[i]n general . . . the rules of civil procedure apply to the courts of this state but are not applicable to administrative agency proceedings." VERHAAGH V. LIRC, 204 WIS. 2D 154, 161, 554 N.W.2D 678 (CT. APP. 1996).

In concluding that DWD has not waived its right to raise a timeliness objection in this matter, the Commission has considered a number of factors, including the relative informality of the procedure to be applied in this category of administrative cases. This informality is reflected in the applicable rules[4] and is due in part to the fact that appellants in these matters will frequently appear *pro se*. The requirements established in Sec. PC 3.03(1), Wis. Adm. Code, for the contents of the appeal document are quite limited:

> All appeals shall be in writing. Otherwise, there is no form that is to be used for filing an appeal. Appeals are not required to conform to any technical requirements except they shall identify the appellant. . . .

Similarly, and as provided in Sec. PC 3.05, a respondent is not required to file a formal answer[5] to an appeal:

> Respondents may file written answers within 20 days after service of the appeal. If no answer is filed, every material allegation of the appeal is in issue.

The operative administrative rules describe an expansive purpose for prehearing conferences:

> Prehearing conferences are intended to provide an opportunity to formulate a statement of the issue or issues presented by a case, to identify potential witnesses, to attempt to reconcile differences among the parties and promote the settlement of cases *and to perform any other functions in aid of the disposition of the case*. PC 4.01(1), Wis. Adm. Code. (Emphasis added.)

The administrative rule relating to hearings that are held by the Commission under Sec. 230.44 and .45 further notes that the Commission "is not bound by the strict rules of procedure and the customary practices of courts of law."

[4] Appellant refers to Sec. ERC 12.03(1), which provides that "affirmative defenses not raised by a timely answer are waived." However, as an appeal filed with the Commission pursuant to Sec. 230.44, this matter is subject to the administrative rules found in ch. PC 1, 3 and 5, rather than those in ch. ERC 12.

[5] No answer was filed in this matter.

Prior rulings issued in the same category of cases have indicated that the pleadings in these matters are to be treated liberally:

> In the Commission's view, parties to personnel appeals should be permitted a good deal of liberality in amending pleadings. It is a general rule of administrative law that pleadings are liberally construed and are not required to meet the standards applicable to pleadings in a court proceeding. OAKLEY V. COMM. OF SECURITIES, CASE NO. 78-66-PC (PERS. COMM. 10/10/78) (Citations omitted.)

OAKLEY and the related provisions in the administrative rules persuade us that it would be inappropriate to conclude that DWD waived a timeliness defense by not having expressly raised it in the February 16 motion to dismiss. To rule otherwise would ramp up the pleading requirements in these cases and generate an inconsistency with the very limited requirements for initiating an appeal by placing much more stringent requirements in terms of a responsive pleading.

In reaching our conclusion in this matter, we have also considered prior rulings that have been issued in similar proceedings. The Commission is unaware of administrative precedent addressing the identical procedural history that is present in this appeal. However, the ruling in MASEAR V. DILHR, CASE NO. 89-0065-PC (PERS. COMM. 11/1/89) is highly instructive. That matter arose as a non-contractual grievance and the timeliness objection was raised at a prehearing conference held 35 days after the appeal was filed. After noting that an objection based on the filing period applicable to a grievance could be waived, the Commission stated that 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."

A related ruling was issued in JENSEN V. DPI, CASE NO. 99-0070-PC (PERS. COMM. 2/11/2000). The agency in that case was found to have waived its objection to the competency of the Commission to hear the matter where the timeliness objection was raised on the second day of hearing on the merits of the appeal. That appeal was filed in July 1999, there was a prehearing conference in August and after an additional conference with the parties and one postponement, the hearing was held on November 1 and 2. The Personnel Commission noted that "Respondent chose not to explore the issue of timeliness until appellant had rested her case after calling 8 witnesses during two days of hearing." The facts in the JENSEN matter are clearly distinguishable from those currently before the Commission. Respondent DWD has now advanced a timeliness objection in the present case even though the matter has not even reached the point of a prehearing conference, much less a hearing.

Another factor in deciding that DWD has not waived its right to raise a timeliness objection in the present case is that in the cover letter first notifying DWD of the existence of the appeal, the WERC provided the agency 20 days "to file any *jurisdictional objections* to the

authority of the Commission to hear such an appeal." (Emphasis added.) There was no suggestion in the Commission's letter that DWD had to file all affirmative defenses or any objections relating to the Commission's competency to proceed within the same 20 day time period. Nothing in either the letter or in the applicable rules placed DWD on notice that the only opportunity to pursue a timeliness objection was to file a motion to dismiss within the 20 day period provided in the letter for raising a jurisdictional objection. In fact, the letter made it clear that if DWD did not file a jurisdictional objection within the 20 day period, the parties would "be notified of the next step in this matter, the prehearing conference. . . ." The MASEAR ruling is a strong indication that DWD would not be considered to have waived the timeliness objection by waiting until the prehearing conference to raise it.

The Commission has also considered that it was hardly obvious when DWD filed its February 16 jurisdictional objection that Mr. Stern's appeal was being advanced under Sec. 230.44(1)(a). There was little reason at that point for DWD to pursue a timeliness objection relative to a Sec. 230.44(1)(a) claim if the agency was convinced that there was no subject matter jurisdiction as a (1)(c) appeal.[6] The letter of appeal did not mention Sec. 230.44(1)(a) and even though Sec. 230.05(2)(a) requires DMRS to be a party to a Sec. 230.44(1)(a) appeal, the only named Respondent was DWD. Commission staff had not designated DMRS as a party upon receipt of the appeal. The Appellant did not reference Sec. 230.44(1)(a) in his response to the motion to dismiss or in his "rebuttal comments," even though he advanced the argument that DWD had improperly extended his probation. DMRS was not served by the Commission with a copy of the appeal materials until after the Commission issued its ruling on the jurisdictional objection and after the matter was remanded by the Court of Appeals.[7]

Under all these circumstances, we conclude that DWD has not waived its timeliness objection to Appellant's Sec. 230.44(1)(a) claim. No prehearing conference has been held in the current case and we believe that in most instances, a respondent in a case that is filed with

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[6] Appellant correctly points out that the time limit in Sec. 230.44(3) applies to appeals under both (1)(a) and (1)(c), so that even if DWD interpreted the appeal as a (1)(c) matter, a timeliness defense could have been asserted by DWD in its February 16 motion to dismiss relative to the decisions to establish a new 12-month period of probation and to later extend probation by another 200 hours. While we agree that DWD *could* have asserted a timeliness objection at that point, the question before the Commission is whether DWD forever waived the right to raise the objection by having failed to articulate it in the February 16 submission.

[7] DMRS was added as a necessary party due to Sec. 230.05(2)(a). There has been no contention that DWD did not remain an appropriate party eligible to assert a timeliness objection in terms of the Sec. 230.44(1)(a) claim. The Commission views DWD as having been delegated authority by DMRS relative to the duration of Appellant's probationary period.

the Commission under Sec. 230.44 or .45 will not be considered to have waived a timeliness objection if it is voiced at the time of the prehearing conference in the matter. Only unusual circumstances, not present here, might cause a different result.

DWD has now asserted a timeliness objection in this matter on remand and we have concluded that DWD has not waived the right to do so. The Court of Appeals has already concluded that the Appellant's appeal was untimely filed,[8] and the appeal must be dismissed.

Dated at Madison, Wisconsin, this 4th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[8] Stern filed his appeal on January 30, 2004, which was more than 30 days after he was informed, by memo dated October 24, 2003, that his probationary period had already been extended by 200 hours.