

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHARI FASSBENDER, Appellant,

v.

Secretary, **WISCONSIN DEPARTMENT OF CORRECTIONS**, Respondent.

Case 49
No. 65409
PA(adv)-91

Decision No. 31677

Appearances:

Shari Fassbender, appearing on her own behalf.

Gloria Thomas, Assistant Legal Counsel, P.O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely filed. The final date for submitting written arguments was February 23, 2006.

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

FINDINGS OF FACT

1. At the time of the events giving rise to the instant appeal, Shari Fassbender was appearing *pro se* in the matter of FASSBENDER v. DOC, CASE 34, No. 64196 PA(ADV)-55. (For ease of differentiating the two matters, the Commission will refer to Ms. Fassbender's first appeal as FASSBENDER I.) That case arose from Respondent's actions to suspend the Appellant from her position of employment in November 2004.

2. The Commission designated Attorney Daniel Nielsen, a member of the Commission's staff, as hearing examiner in FASSBENDER I. He conducted an administrative hearing on May 19, 2005, the final post-hearing submission was received on August 6, 2005, and he issued a Proposed Decision on November 30, 2005. Examiner Nielsen is not stationed at the Commission's office in Madison. He lists his mailing address as Post Office Box 1375, Racine, WI 53401-1375.

3. Respondent notified Ms. Fassbender on November 10, 2005 that she was demoted from her position as a Unit Supervisor at the Oshkosh State Correctional Institution to a position of Correctional Sergeant, effective November 13, 2005. The letter of discipline

included the following information about obtaining review of the action: "If you do not believe this action was taken for just cause, you may file an appeal with the Wisconsin Employment Relations Commission."

4. Ms. Fassbender prepared an electronic version of a letter dated December 10, 2005, to the Commission:

Wisconsin [Employment] Relations Commission
P. O. Box 7870
Madison, WI 53707-7870

WERC:

I would like to file an appeal regarding my demotion from Corrections Unit Supervisor at Oshkosh Correctional Institution to a Sergeant at Green Bay Correctional Institution. I received notice of my demotion on November 10, 2005. Since that time, I have repeatedly attempted to retrieve the investigation reports in order to file [an] appropriate appeal. I finally received this information on December 10, 2005 via the U.S. mail.

I feel this demotion is excessive in nature. I have supporting documents, but in order to file in a timely fashion I am sending this email as notification as my interest in the appeal process.

5. Ms. Fassbender electronically attached the above letter to an e-mail she sent to Examiner Nielsen on Sunday, December 11, 2005 at 10:30 p.m. The e-mail read:

I am attaching a copy of an appeal regarding a disciplinary action taken against me by Oshkosh Correctional on November 10, 2005. I was unable to secure necessary information from OSCI until December 10, 2005 regarding my disciplinary action; therefore, I [am] emailing this to the commission in order to abide by the timeliness. I do have necessary paperwork I can mail, if my appeal is accepted.

6. At 6:00 p.m. on Tuesday, December 13, Examiner Nielsen faxed a copy of Ms. Fassbender's December 10 and December 11 correspondence, along with a cover message, to the Commission's facsimile machine located in its office in Madison. The cover message read:

I received the following appeal from Sheri Fassbender via e-mail on Sunday night. Due to a problem with my computer, I could not open it and I needed to have her resend it today.

When I opened it, I realized it was not just a copy of an appeal of the original suspension case, but rather a new appeal of a demotion imposed on November 10th.

The fax was received after the Commission's office hours for December 13.

7. Commission staff in Madison date-stamped the faxed material on December 14, 2005 and assigned it Case 49 No. 65409 PA(adv)-91 (FASSBENDER II).

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

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that her appeal was timely filed in accordance with the 30-day time limit established in Sec. 230.44(3), Stats.
2. The Appellant has failed to sustain that burden.
3. The appeal is untimely.

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

ORDER¹

Respondent's motion is granted and this matter is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of May, 2006.

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 the 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.

Department of Corrections (Fassbender II)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The issue in this matter is whether Ms. Fassbender complied with the time limit for filing a State classified service personnel appeal. That time limit is found in Sec. 230.44(3), Stats., which reads, in part:

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.

On November 10, Appellant received notice of the demotion that is the subject of this appeal. The demotion became effective November 13, 2005. The 30th day thereafter and the deadline for Appellant to appeal the demotion to the Commission was Tuesday, December 13. On Sunday, December 11, Ms. Fassbender sought to appeal the demotion by sending an e-mail message, with an appended letter, to a WERC staff attorney headquartered in Racine who was serving as the designated hearing examiner in another matter that Appellant had pending with the Commission at the time. Due to a problem with his computer, the examiner was unable to read at least a portion of the electronic transmission so he contacted Ms. Fassbender and directed her to resend it. The examiner received the re-sent message on Tuesday, December 13 and realized that Ms. Fassbender intended to file a new appeal rather than to file a document relating to her case that was already pending. The examiner faxed the documents to the Commission's office in Madison at 6:00 p.m. on the same day. The fax transmission copy was date-stamped in Madison on December 14.

Ms. Fassbender has the burden of establishing that her appeal was timely filed. UW & OSER(KLINE), DEC. NO. 30818 (WERC, 3/04). Her sole argument is that her appeal reached the correct address in Madison within the 30-day time limit.

A. Facsimile transmission

The administrative rules that are relevant to this appeal have been interpreted to allow someone who is seeking to obtain review of a State civil service personnel action to initiate a case by facsimile transmission as well as delivery by mail and by hand.² BARE V. DOT, CASE NO. 99-0119-PC-ER (PERS. COMM. 1/25/00), citing PRATSCH V. PRATSCH, 201 WIS. 2D 491, 548 N.W.2D 852 (CT. APP. 1996).³

² The Commission has previously declined to interpret Sec. 111.07(5), Stats., to permit filing a petition for review of an examiner's order in a prohibited practice case by facsimile because the applicable administrative rule required any document filed with the Commission to be "submitted with 3 copies in addition to the original" and required the "original of each document filed" to be signed. There are no comparable requirements that relate to filing an appeal with the Commission pursuant to Sec. 230.44, Stats.

³ The BARE V. DOT ruling is consistent with a later ruling of the Supreme Court in STATE V. SORENSON, 2000 WI 43, 234 WIS.2D 648.

Appellant suggests that the fact a fax is transmitted to Madison after the close of business on the day it is due has no effect on the timeliness of an appeal. The Commission disagrees. Paragraph 230.35(4)(f), Stats., provides:

Monday to Friday the offices of the agencies of state government shall open at 7:45 a.m. and close at 4:30 p.m., with intermissions from 11:45 a.m. to 12:30 p.m. Agencies may, with the permission of the governor, adjust opening and closing hours and intermission periods to relieve traffic congestion or as the needs of the service otherwise require.

The facsimile that included the two messages Appellant wrote in order to initiate an appeal did not reach Madison until an hour and one-half after the Commission's office had closed on the final day for a timely appeal. If, instead of transmitting the messages electronically, the Appellant had decided to hand-deliver the appeal and if she was able to slide the documents under the Commission's locked door at 6:00 p.m. on December 13 so that they were discovered the next day, the filing would not satisfy the 30-day requirement in Sec. 230.44(3), Stats. For the same reason, her appeal documents that did not reach the Commission's fax machine until 6:00 p.m. on December 13 cannot be considered timely.

B. Information e-mailed to Examiner Nielsen

Although she did not do so, the Appellant might also argue that her e-mail messages to Examiner Nielsen on December 11 and December 13 served to satisfy the 30-day filing deadline.⁴ However, even if an e-mailed message of appeal is viewed as the equivalent of a faxed appeal,⁵ the relevant administrative rules do not equate delivery of an appeal to Examiner Nielsen with delivery to the Commission.

The administrative rules indicate that all appeals arising from the Commission's jurisdiction under Sec. 230.45 "shall be filed at the *office of the commission*," and the corresponding note supplies the reader with the Commission's mailing address and street

⁴ Examiner Nielsen's faxed message indicates his computer was unable to open at least a portion of the Appellant's initial message. While the Appellant has not established what information had actually reached Examiner Nielsen by 4:30 on December 13, the Commission assumes for the purpose of the following discussion that he had received decipherable versions of both the December 11th e-mail and the attachment by that time.

⁵ Timely transmission of exhibits and a list of witnesses by facsimile was found to satisfy the requirement in Sec. PC 4.02, Wis. Adm. Code to file and serve these materials three days prior to hearing, but e-mail transmission of the same materials was not. RAISANEN V. DOC, CASE NO. 98-0052-PC-ER (PERS. COMM. 1/25/00).

address.⁶ The rules also specify that for all such appeals, “filing” is defined as “the physical receipt of a document *at the commission’s office.*” Sec. PC 1.02(10)

Matters submitted to the Commission pursuant to statutory authority other than Sec. 230.45 are subject to a different set of administrative rules that specify the limited circumstances under which case-related materials are to be filed directly with the individual who is assigned to a specific matter. Pursuant to Sec. ERC 10.09(2):

All documents and papers filed prior to hearing shall be filed with the commission at its Madison office. During the course of the hearing, all matters shall be filed with the commission agent conducting the hearing. After the close of the hearing, all matters shall be filed with the commission at its Madison office.

The existence of this contrasting rule highlights the reason for interpreting both PC 1.02(10) and PC 3.01 to require filing a State civil service personnel appeal at the office of the Commission in Madison, rather than with a Commission agent who may periodically carry out Commission business in any municipality throughout the State.

This matter must be dismissed as untimely filed because Ms. Fassbender failed to establish that she complied with the 30-day time limit set forth in Sec. 230.44(3), Stats.

Dated at Madison, Wisconsin, this 3rd day of May, 2006.

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

⁶ The rule and note read:

PC 3.01 Time limits and address for filing appeals. All appeals shall be filed according to the appropriate time limits established by statute or rule and shall be filed at the office of the commission. The time limit for filing any appeals with the commission pursuant to s. 230.45(1)(d) or (e), Stats., shall be 30 days after the effective date of the action, or 30 days after the appellant is notified of the action, whichever is later.

Note: The mailing address of the commission is:
Wisconsin Employment Relations Commission
18 South Thornton Avenue
PO Box 7870
Madison, WI 53707-7870