

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIELLE WINCENTSEN, Appellant,

v.

Director, OFFICE OF STATE EMPLOYMENT RELATIONS, Respondent.

Case 763
No. 66262
PA(der)-194

Decision No. 31866-A

Appearances:

Danielle Wincentsen, appearing on her own behalf.

David Vergeront, Legal Counsel, P. O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Office of State Employment Relations.

ORDER DENYING APPELLANT'S PETITION FOR REHEARING

The underlying appeal, which was filed on August 24, 2006, arose from a decision to reallocate the Appellant's position to Office Operations Associate rather than some other classification. Respondent filed a timeliness objection, arguing that the appeal was not filed within the 30-day period specified in Sec. 230.44(3), Stats. By order dated October 13, 2006,¹ the Commission granted the Respondent's motion to dismiss but did not mention whether the Appellant was entitled to the return of the \$50 filing fee she submitted with her original appeal materials. In a letter to the Commission that was received on October 23, 2006, the Appellant specifically asked for the return of the \$50 filing fee that she submitted in August with her appeal:

I am writing this letter to request that the filing fee of \$50.00 I paid, (via money order) be returned. The money order dated August 23, 2006, as was my appeal, should also be found to be "*untimely filed*" and therefore also dismissed by this [commission]. . . . If you deny this request, please include any and all appeal processes as I will not yield on this issue. (Emphasis in the original.)

By letter dated October 25, 2006, the Commission informed Ms. Wincentsen that her October 23 letter was being construed as a petition for rehearing. The last date for submitting written arguments relating to the petition was November 6, 2006.

¹ Decision Number 31866.

The Commission is required by Sec. 230.45 (3), Stats., to establish a schedule of filing fees for certain types of appeals:

The commission shall promulgate rules establishing a schedule of filing fees to be paid by any person who files an appeal under sub. (1)(c) or (e) or s. 230.44(1)(a) or (b) with the commission on or after the effective date of the rules promulgated under this subsection. Fees paid under this subsection *shall be deposited* in the general fund as general purpose revenue—earned. (Emphasis added.)

The administrative rule (Sec. PC 3.02, Wis. Adm. Code) that applies the statute has been in effect since 1996.

There is no dispute that Ms. Wincentzen’s appeal sought to invoke the Commission’s jurisdiction under 230.44(1)(b) to review the decision by the Director of the Office of State Employment Relations to reallocate her position to the newly established classification of Office Operations Associate. Therefore, a \$50 filing fee was required for processing the new appeal. The administrative rules make it clear that *the fee is required whether or not the appeal satisfies the 30-day filing period established in 230.44(3)*:

Notwithstanding s. 230.44(3), Stats., and s. PC 3.01, payment of a fee or filing of a hardship affidavit in lieu of fee payment is required for appeals subject to the fee payment of s. 230.45(3), Stats. PC 3.02(1)

While 230.45(3) requires the Commission to *deposit* the filing fee, there is no corresponding language in either the statute or the related administrative rules to indicate that the fee is refundable. Instead, the administrative rule specifies that “. . . the commission may take no action to resolve an appeal for which the payment of a fee is required until the commission receives the fee. . . .”² In other words, the Commission had no authority to even consider the question of the timeliness³ of the appeal until such time as Ms. Wincentzen had paid the fee which, in turn, the Commission is required to deposit. Once deposited, the filing fee may not be returned to an appellant.

² PC 3.02(2), Wis. Adm. Code.

³ The 30-day period for filing an appeal is in the nature of a statute of limitations and relates to the Commission’s competency to proceed. *AUSTIN-ERICKSON v. DHFS & DER, CASE NO. 97-0113-PC (PERS. COMM. 2/25/98)*. A respondent agency may, under certain circumstances, waive the right to raise a timeliness objection if it had waited a lengthy period do so. Had that occurred here, the Commission would have retained the authority to address the merits of Ms. Wincentzen’s appeal. However, OSER articulated its timeliness objection on September 7, 2006, within two weeks of the date the appeal was filed. As a result, the question of waiver does not arise.

We confirm that our October 13, 2006 dismissal order in this matter was without repayment of the \$50 filing fee to Ms. Wincentsen and we conclude that there has been no showing that the Commission's Order was premised on an error of law or of fact or that the Appellant has discovered new evidence of the nature described in §227.49(3), Stats.

Therefore, this petition is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of November, 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

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