

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

REBECCA RYF, Appellant,

v.

Director, OFFICE OF STATE EMPLOYMENT RELATIONS, Respondent.

Case 767
No. 66272
PA(der)-198

Decision No. 32025

Appearances:

Rebecca Ryf, appearing on her own behalf.

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

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the Respondent's decision to reallocate the Appellant's position to the classification of Office Associate, rather than Office Operations Associate, is before the Wisconsin Employment Relations Commission on Respondent's motion to dismiss the appeal as untimely filed. The final written argument relating to the motion to dismiss was filed on December 21, 2006.

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

FINDINGS OF FACT

1. Effective on a date prior to July 28, 2006,¹ Respondent reallocated Appellant's position, in the Department of Health and Family Services, to the Office Associate classification.

2. Appellant was notified of the reallocation decision, by written notice. Although the date adjacent to the Appellant's signature on the notice letter is August 20, 2006, Appellant received the letter on July 28, 2006.

¹ Although the record does not indicate the specific date upon which the Appellant's reallocation was effective, it has been understood – and there is no indication in the record to the contrary – that the effective date occurred prior to the date upon which the Appellant was notified of the reallocation decision. Thus, it is the date of notification, not the effective date, by which the timeliness of the Appellant's appeal should be measured, under Sec. 230.44(3), Wis. Stats.

3. Appellant submitted appeal materials to the Wisconsin Employment Relations Commission, where they were received on August 30, 2006.

Based on the above and foregoing Findings of Fact, the Wisconsin Employment Relations Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that her appeal was filed in accordance with the thirty-day time limit established in Sec. 230.44(3), Wis. 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:

ORDER²

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

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of February, 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

² 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.

Office of State Employment Relations (Ryf)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The issue before the Commission is whether the Appellant complied with the time limit for filing a State classified service personnel appeal. That time limit is set forth in Sec. 230.44(3), Wis. Stats., as follows:

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 term “filed” in this subsection requires physical receipt of the appeal by the Commission, rather than merely placing the appeal in the mail. RICHTER V. DP, CASE NO. 78-261-PC (PERS. COMM. 1/30/79).

The Appellant has the burden of establishing that the appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04). We have concluded that the Appellant in the present case did not meet that burden. Our conclusion is based on a finding that the Appellant was notified of the action from which she is appealing – that is, she received the letter denying her initial, internal appeal of the reallocation decision – on July 28, 2006. Pursuant to Sec. 230.44(3), Wis. Stats., this notification date resulted in an appeal filing deadline of August 28, 2006,³ which deadline the appeal did not satisfy. The process by which we arrived at this finding and conclusion merits a somewhat detailed explication.

The Respondent made a motion to dismiss the present appeal on October 6, 2006, during the course of a prehearing telephone conference conducted by the Examiner assigned by the Commission to handle the appeal. The Appellant appeared in person at the telephone conference, and the Respondent appeared through Attorney David Vergeront. In the course of making its motion, the Respondent asserted that the Appellant had received the denial letter from which she was appealing on July 28, 2006. The Appellant did not dispute this assertion during the course of the conference. Subsequently, on October 19, 2006, the Appellant filed with the Commission a written response to the motion to dismiss, wherein the Appellant stated that she had not placed her appeal papers in the mail until the thirtieth day after having received the denial letter,⁴ because she had been vacillating about whether she wanted to go through the appeal process at all, given her plans to retire in early 2007.

Subsequently, in the course of reviewing documents relevant to the pending motion to dismiss, the Examiner discovered a document, which had been filed by the Appellant with her original appeal papers, entitled “Employee Notification Form Receipt of Reclassification or

³ The thirtieth day after July 28, 2006, was August 27, 2006. Because August 27 was a Sunday, the Appellants filing deadline was extended to August 28, 2006, by action of Sec. 990.001(4), Wis. Stats.

⁴ The envelope in which the Appellant’s appeal papers arrived at the Commission is postmarked August 29, 2006, which actually was the thirty-first day after the Appellant received the denial letter.

Reallocation Decision". That document had been completed and signed by the Appellant, in pertinent part, as follows:

EMPLOYEE

I hereby acknowledge that I have received a copy of the attached (check appropriate box/es)

Reclassification

Reallocation

Denial letter

Effective date or date of letter 7-28, concerning my position.

I certify that I am aware I have a right to appeal this decision within 30 days of today's date and that I have read the instructions for filing an appeal, as noted on the bottom of this form.

Print Name: Rebecca Ryf

Employee's Signature Rebecca Ryf Date: 8-20-06

While the document contained reference to "7-28" – which, as stated, the Respondent had asserted and the Appellant had not disputed had been the date upon which the Appellant had received the denial letter – the document also, contradictorily suggested that the Appellant had signed the receipt form – and, therefore, received the denial letter – on August 20, 2006. Given the apparent ambiguity contained in the receipt form, the Commission's Examiner contacted the parties on December 1, 2006, stating, in pertinent part, the following:

I recently reviewed the submissions that have been made by the parties, in conjunction with the Motion to Dismiss, as well as other documents relevant to the question of whether Ms. Ryf's appeal was filed on a timely basis. Through my review, I have discovered that there appears to be an inconsistency that needs to be resolved before I can propose a decision to the Commission on the pending motion.

Specifically, in support of the Motion to Dismiss, Mr. Vergeront asserted, at the prehearing conference of October 6, 2006, that Ms. Ryf was notified, of the action from which she is appealing, on July 28, 2006. If that was the case, under the 30-day filing deadline, it appears that Ms. Ryf would have had until Monday, August 28, 2006, to file her appeal. Ms. Ryf has not disputed the assertion that she received notice of the decision on July 28, 2006. However, a form entitled "Employee Notification Form Receipts of Reclassification or Reallocation Decision", which was submitted to the Commission in conjunction with Ms. Ryf's appeal, indicates that Ms. Ryf certified that she received her decision on August 20, 2006. Such certification would suggest that Ms. Ryf's appeal was filed on a timely basis.

I am requesting input from the parties regarding this apparent discrepancy.

In response to the Examiner's request for additional input, the Appellant made a written submission to the Commission, stating that she did not know the exact date she received the denial letter, but also asserting that she believed she had "sent" her appeal within the thirty-day

timeframe. She also recounted that she had been “surprised” by the date on the denial letter. The implication of her surprised reaction provided some support to the theory that she may not have received the letter until the latter of the two dates reflected on the receipt form.

Our ultimate finding that the Appellant received the denial letter on July 28, 2006, rather than August 20, 2006, is based on several factors. First, if the Appellant had received the denial letter on August 20 and then sent her appeal to the Commission less than ten days later, we believe it is unlikely that she would have conceded, in her submission to the Commission of October 19, 2006, that her appeal had not been filed within the thirty-day filing deadline. We also take administrative notice of the fact that August 20, 2006, was a Sunday, not a work-day.⁵ Thus, it is unlikely that the denial letter and receipt form would have been presented to the Appellant on that day.

What seems more likely is that Appellant received the denial letter on July 28, noted as much on the receipt form, and then set the receipt form aside and did not finally finish reviewing and signing it until August 20, 2006. We find no other explanation for why the date of July 28 would have appeared on the receipt form. Further, we are not persuaded that Appellant’s reported surprise is an indication that she received the denial letter on August 20, 2006. The Appellant just as easily could have felt surprised upon receiving the letter on July 28, because of a two-week lapse in time between when the letter had been written⁶ and when it reached the Appellant.

Although the Appellant has requested that the Commission over-look the delay of one or two days in the filing of her appeal, it is not within our discretion to do so. The time limit set forth in Sec. 230.44(3), Wis. Stats., is mandatory, not discretionary, *RUNDE V. DMRS*, CASE NO. 97-0088-PC (PERS. COMM. 12/17/97), and the Commission cannot set it aside.

Dated at Madison, Wisconsin, this 22nd day of February, 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

⁵ The Respondent asserted and the Appellant did not dispute that, according to time sheets, the Appellant did not work on Sunday, August 20, 2006.

⁶ The Respondent asserted and the Appellant did not dispute that the denial letter was dated July 14, 2006.

