

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRIAN A. STEWART, Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondent

Case 792
No. 67652
PA(dmrs)-18

Decision No. 32462

Appearances:

Brian A. Stewart, appearing on his own behalf.

David Vergeront, Legal Counsel, P. O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Division of Merit Recruitment and Selection.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the decision to remove Mr. Stewart's name from certifications and the register of eligible candidates for the classification of Transportation Customer Representative Field Examiner, is before the Wisconsin Employment Relations Commission on Respondent's motion to dismiss the appeal for failure to timely submit a filing fee. The final written argument was received on April 22, 2008.

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

FINDINGS OF FACT

1. Sometime prior to January 3, 2008, the Division of Merit Recruitment and Selection (DMRS) removed Brian Stewart's name from certifications and the register of eligible candidates for the classification of Transportation Customer Representative Field Examiner.
2. Appellant was notified of the action.
3. On January 3, 2008, the Commission received a written appeal from Mr. Stewart. There was no filing fee included with the appeal.

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4. By letter dated January 16, 2008, the Commission informed Mr. Stewart that:

The Commission must receive within 30 calendar days from the date of this letter either the filing fee of \$50.00 or an executed hardship affidavit. Failure to meet this requirement will result in dismissal of this appeal.

5. Appellant mailed a \$50 money order to the Commission and it was received on Monday, February 18.

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 his filing fee was timely received by the Commission in accordance with the 30-day time limit established in Sec. PC 3.02, Wis. Adm. Code.

2. The Appellant has not sustained that burden.

3. The fee was not received timely.

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 without prejudice.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of June, 2008.

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 content of that letter are hereby incorporated by reference as a part of this Order.

DMRS (Stewart)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The issue in this matter is whether Brian Stewart timely submitted the filing fee that is required for an appeal under Sec. 230.44(1)(a), Stats.² His appeal relates to the action of DMRS to remove his name from an employment register and one or more related certifications. According to Sec. 230.44(3), Stats., such appeals must be 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.” There is no dispute that the Appellant’s initial submission, received by the Commission on January 3, 2008, satisfied this requirement.

However, an appellant must also satisfy the separate time requirement for submitting the filing fee. The latter time limit is established by administrative rule³ in Sec. PC 3.02, Wis. Adm. Code:

(1) Notwithstanding s. 230.44(3), Stats., . . . 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.

(2) . . . [T]he commission may take no action to resolve an appeal for which the payment of a fee is required until the commission receives the fee or hardship affidavit as required under this section. . . .

(5) TIME LIMITS FOR PAYING FEES. (a) *Requirements at time of filing.* Except as provided under par. (b), the fee or the hardship affidavit for filing an appeal shall be received by the commission at the time the appeal is filed.

(b) *Exceptions; time limits.* 1. If an appeal is filed without each appellant enclosing either the fee payment or hardship affidavit, the commission shall send each remiss appellant a letter advising of the requirement to either pay the fee or to submit a hardship affidavit.

2. A fee payment . . . received by the commission within 30 days of the date appearing on the commission’s letter mailed under subd. 1, will be considered a timely paid fee. . . .

(6) EFFECT OF FAILING TO TIMELY FILE FEE PAYMENT OR HARDSHIP AFFIDAVIT. The commission shall dismiss without prejudice the appeal of any appellant who has failed to submit the required fee payment or hardship affidavit within the time limits under sub. (5).

(7) REFILED APPEALS. The filing date for an appeal which is refiled after dismissal under sub. (6), shall be determined by the date upon which the commission receives the refiled action rather than the filing date of the initial appeal.

² The paragraph provides:

[T]HE 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. . . .

³ Subsection 230.45(3), Stats., which was created by Section 6293, 1995 Wisconsin Act 27, directs the Commission to “promulgate rules establishing a schedule of filing fees to be paid by any person who files an appeal” under Sec. 230.44(1)(a), Stats.

Mr. Stewart filed his appeal with the Commission on January 3, but without the filing fee. Pursuant to Sec. PC 3.02(5)(b), Wis. Adm. Code, the Commission mailed him a letter dated January 16 that provided him 30 days to supply the fee. He mailed a \$50 money order to the Commission where it was received on Monday, February 18, 2008. Respondent moved to dismiss, contending that the payment was due on February 15 and that it was received one work-day late.

The 30-day timeline for the Commission's receipt of a filing fee is mandatory, rather than directory. OSER (MARKWARDT), DEC. NO. 31902 (WERC, 11/2006), citing RUNDE V. DMRS, CASE NO. 97-0088-PC (PERS. COMM. 12/17/97). As provided in Sec. 990.001(4), Stats.,⁴ day one in calculating the 30-day period was January 17, which means that the 30th day was Friday, February 15. Because the payment did not reach the Commission by February 15, the fee was late.

Appellant argues that he had difficulty raising the \$50 filing fee and that he filed "as soon [as he] was able." As already noted, the period for the Commission to receive the fee is mandatory rather than directory, so the Appellant's arguments are ineffective.⁵

Respondent's motion to dismiss must be granted.

Dated at Madison, Wisconsin, this 25th day of June, 2008.

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

⁴ "The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last."

⁵ While Mr. Stewart has not expressly made a request of the Commission to return the filing fee, we note that such payments are not refundable once deposited. OSER (WINCENTSEN), DEC. NO. 31866-A, (WERC, 11/2006): "[T]he Commission had no authority to even consider the question of the timeliness of the appeal until such time as Ms. Wincentsen 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." (Footnote omitted.)

