STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILLIAM F. McCREEDY, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 109
No. 68974
PA(adv)-166

Decision No. 32887

Appearances:

William F. McCreedy, appearing on his own behalf.

Kathryn R. Anderson, Chief Legal Counsel, Department of Corrections, P.O. Box 7925, Madison, Wisconsin 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 August 19, 2009.

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

FINDINGS OF FACT

1. William F. McCreedy, the Appellant, was employed by Respondent in the Division of Adult Institutions, Kettle Moraine Correctional Institution, at the time of the events set forth in these findings.

2. Respondent prepared a letter of suspension dated April 17, 2009, apprising Appellant that he was to be suspended without pay on April 27, 28, 29, 30, and May 1, 2009.

3. The letter of suspension also stated:

> If you do not agree with this action or feel it is unjust, you may file a written appeal of this decision within 30 days, by mail or in person, with the Wisconsin Employment Relations Commission, 1457 East Washington Avenue, PO Box 7870, Madison, WI 53707-7870.

4. Kettle Moraine Correctional Institution (KMCI) Warden Michael Dittmann hand-delivered the letter of suspension to Appellant on April 20, 2009.

5. Appellant served the five-day suspension without pay on April 27, 28, 29, 30, and May 1, 2009.

6. Mr. McCreedy completed a letter appealing the five-day suspension without pay.

7. The Commission received the letter of appeal on Wednesday, June 3, 2009, via facsimile.

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 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

ORDER[1]

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 14th Day of October, 2009.

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.

Department of Corrections (McCreedy)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The issue in this matter is whether Appellant complied with the time limit for filing a State classified service personnel appeal, as set forth in Sec. 230.44(3), Stats. Respondent contends that the failure to do so is jurisdictional. To the contrary, in STERN v. WERC, 2006 WI APP 193, ¶ 23, 296 WIS.2D 306, 324, 722 N.W.2D 594, 603, the court of appeals concluded, "Wis. Stat. § 230.44(3) affects WERC's competency to proceed, not its subject matter jurisdiction", and, accordingly, "the time limit in Wis. Stat. § 230.44(3) may be waived." ID., 2006 WI APP 193, ¶ 33, 296 WIS.2D AT 331, 722 N.W.2D AT 606.

However, Respondent has moved to dismiss Mr. McCreedy's appeal as untimely. Accordingly, Appellant has the burden of establishing that his appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04).

The time limit is set forth in Sec. 230.44(3), Stats., which states 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.

Appellant was "notified of the action" (his five-day suspension) on April 20, 2009, when Kettle Moraine Correctional Institution (KMCI) Warden Michael Dittmann hand-delivered a letter of suspension to him. He served his suspension on April 27, 28, 29, 30, and May 1, 2009. Thus, the 30-day period for appeal began to run from the effective date of the action rather than the preceding date of notification. The "effective date" of a suspension period is its first day. HANSEN v. DATCP, CASE NO. 87-0092-PC (PERS. COMM. 10/7/87).[2] Accordingly, the 30-day period began to run on April 27, 2009, and Appellant had until May 27, 2009 to timely file his appeal.[3]

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[2] HANSEN is correct on this point, notwithtanding that in light of STERN, HANSEN incorrectly concluded the 30-day time limit in Sec. 230.44(3), Stats., "is jurisdictional in nature." *SEE ALSO* KARRE v. UNIVERSITY OF WISCONSIN, DECISION NO. 32826 (WERC, 8/09) (noting that a "five-day suspension did not become effective until the first day of the suspension.".

[3] Appellant alleges that on April 24, 2009, KMCI Warden Dittmann authorized Appellant to attend a managers' meeting on April 29, 2009, and to arrange for a different day to serve the April 29, 2009 suspension. Appellant further alleges that on April 28, 2009, while serving his suspension, he received a call informing him that Warden Dittmann was instructing him not to attend the meeting the following day and instead to serve his suspension as originally planned. Even if true, these events do not alter the fact that Appellant initially was suspended from April 27 through May 1, 2009, and actually served his suspension on those days. Nor do such events disturb the conclusion that under HANSEN v. DATCP, CASE NO. 87-0092-PC (PERS. COMM. 10/7/87), the effective date of Appellant's suspension period was its first day, April 27, 2009. However, as shown below, even if the first day of Appellant's suspension period were interpreted to be April 28, 2009, his appeal still would be untimely.

The term "filed" in this subsection requires physical receipt by the Commission rather than merely placing the appeal in the mail. UNIVERSITY OF WISCONSIN (ELMER), DEC. NO. 30910 (WERC, 5/04). Moreover,

> [t]he 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. 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).

DOC (FASSBENDER), DEC. NO. 31677 (WERC, 5/06). The Commission received Mr. McCreedy's appeal via facsimile on June 3, 2009. Thus, Mr. McCreedy's appeal to the Commission was filed on June 3, 2009, seven days after his May 27, 2009 deadline. Mr. McCreedy has not met his burden and his appeal must be dismissed as untimely.

In an effort to avoid this conclusion, Appellant first argues that "days" within the meaning of Sec. 30.44(3), Stats. means business days, not calendar days. Alternatively, he argues that even if "days" were interpreted to mean calendar days and his appeal were filed after the 30-day time limit expired, his untimely filing should not bar his appeal, because his employer failed to satisfy its burden to clarify the definition of "day". The Commission finds neither argument persuasive.

Meaning of "days" as used in Sec. 230.44(3), Stats.

Appellant suggests that he had 30 business days, not calendar days, to appeal his suspension, and that his appeal is therefore timely. This reading of Sec. 230.44(3), Stats. must be rejected under established rules of statutory interpretation:

> "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. We look first at the plain language of the statute, taking into consideration the context in which the provision under consideration is used. *Id.,* ¶¶ 45-46, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning." *Id.,* ¶ 45, 681 N.W.2d 110.

BURBANK GREASE SERVICES, LLC V. SOKOLOWSKI, 2006 WI 103, ¶ 14, 294 Wis.2d 274, 286-287, 717 N.W.2d 781, 788. *See also* Sec. 990.01(1), Stats. ("All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.")

The word "days" as used in Sec. 230.44(3), Stats., is not a technical word and thus "shall be construed according to common and approved usage." Sec. 990.01(1), Stats. "When a word of common usage is not defined in a statute, we may turn to a dictionary to ascertain its

meaning." BURBANK, 2006 WI 103, ¶ 14, 294 Wis.2d at 287, 717 N.W.2d at 788, *CITING GARCIA V. MAZDA MOTOR OF AM., INC.,* 2004 WI 93, ¶ 14, 273 WIS.2D 612, 682 N.W.2D 365. Webster's online dictionary defines "day" in relevant part as "the mean solar day of 24 hours beginning at mean midnight",[4] *i.e.*, a calendar day.

Moreover, when looking at the plain meaning of "days", we may "tak[e] into consideration the context in which the provision under consideration is used." BURBANK, 2006 WI 103, ¶ 14, 294 WIS.2D AT 286, 717 N.W.2D AT 788. While Sec. 230.44(3), Stats. contains no express or implied reference to business or working days, other statutory provisions expressly define those terms. *See e.g.* Sec. 227.01(14), Stats. (defining "working day") and Sec. 421.301(6), Stats. (defining "business day"). Had the Wisconsin Legislature wished to depart from the common understanding of "days" as calendar days in Sec. 230.44(3), Stats., it would have expressly done so, just as it has in other statutes.

In addition, the use of the word "days" in the statute detailing the computation of time assumes that "days" means calendar days:

> Although no statutory section specifically states that the word ["days"] means calendar days, section 990.001(4) which outlines the rules for construction of the computation of time would make little sense if days meant anything but calendar days. For example, the section details how time is computed when the last day falls on a Sunday or legal holiday. Obviously, if only work days were being referred to, the last day could not fall on a Sunday or legal holiday.

MORGAN V. KNOLL, CASE NO. 75-204 (PERS. BD. 5/25/76). Moreover, "we must, if it is possible to do so, . . . avoid a [statutory] construction which creates an inconsistency if a reasonable interpretation can be adopted . . ." IN RE PATERNITY OF T.J.D.C., 2008 WI APP 60, ¶ 12, 310 WIS.2D 786, 793-794, 750 N.W.2D 957, 961, *QUOTING* BRUNETTE V. BIERKE, 271 WIS. 190, 196, 72 N.W.2D 702 (1955). Adopting Appellant's reading of Sec. 230.44(3), Stats. would create just such an inconsistency and must be avoided.

In sum, Appellant's proposed interpretation of "days" to mean "business days" is clearly at odds with the intent of the Legislature, when rules of statutory construction are applied. The Commission therefore declines to adopt Appellant's proposed reading.

Burden of Notification

Appellant acknowledges having received notice from his employer that he could "file a written appeal of this decision within 30 days, by mail or in person, with the Wisconsin Employment Relations Commission. . . ." He also acknowledges having merely assumed that

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[4] *Merriam-Webster Online Dictionary* (visited October 1, 2009) <http://www.merriam-webster.com/dictionary/day>.

"30 days" meant business days, not calendar days, and attempts to justify that assumption by arguing, "[i]n a world that uses 'calendar', 'business' and 'working' days frequently, there is a responsibility on the employer to provide clear definition of a 'day' in these matters." Appellant cites no authority supporting a burden on Respondent to clarify what is meant by "days", let alone to notify him of the 30-day filing period. To the contrary, the Commission recently observed:

> A lack of familiarity with the law does not toll a filing period and the absence of information from the employer does not toll the period unless the employer has an affirmative obligation to provide such information. HALLMAN V. WCC & DOA, CASE NO. 96-0146-PC (PERS. COMM. 2/12/1997). We are unaware of any obligation that would apply here, so the appeal is untimely and must be dismissed.

DOC (BOYEA), DEC. NO. 32647 (WERC, 1/09). It was Appellant's, not Respondent's, burden to seek any needed clarification of the limitations period set forth in Sec. 230.44(3), Stats.[5] And it was ultimately Appellant's burden to comply with the 30-day limitations period. Because he did not do so, Mr. McCreedy's appeal must be dismissed as untimely filed.

Dated at Madison, Wisconsin, this 14th day of October, 2009.

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] Appellant also suggests that his conversation with a Commission employee on May 20, 2009 supports his assumption that "30 days" referred to business days. Appellant contacted the Commission to learn whether he could file an appeal via facsimile. He states that the Commission employee asked him whether he was still within the 30-day time limit. The question was merely *not inconsistent* with Appellant's wholly unexpressed misunderstanding. The employee's question cannot be accurately described as having "supported" the Appellant's misunderstanding and is not a basis for finding the June 4 appeal to be timely filed.

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