

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**WARREN D. DOHMS**, Appellant,

v.

**WISCONSIN DEPARTMENT OF CORRECTIONS**, Respondent.

Case 114  
No. 69220  
PA(adv)-174

**Decision No. 32974**

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**Appearances:**

**Warren D. Dohms**, appearing on his own behalf.

**Terri A. Rees**, Paralegal, Department of Corrections, 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 relating to Respondent's motion was December 7, 2009.<sup>1</sup>

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

**FINDINGS OF FACT**

1. Warren D. Dohms, the Appellant, was employed by Respondent as a Captain at the Stanley Correctional Institution at the time of the events set forth in these findings.

2. Respondent prepared a written reprimand of Appellant in lieu of a one-day suspension, dated July 30, 2009.

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<sup>1</sup> Solely for the purpose of ruling on the motion and as reflected in the Findings of Fact, the Commission has liberally construed any information set forth in the Appellant's submissions. The format of the Commission's decision is prescribed, in part, by Sec. 227.47(1), Stats.

3. The letter of reprimand stated in part, “[i]f you believe this action was not taken for just cause you may appeal to the Wisconsin Employment Relations Commission.”

4. The letter of reprimand was hand-delivered to Appellant on August 12, 2009.<sup>2</sup>

5. After receiving the letter of reprimand, Appellant sought assistance from Nicole Hager in the Human Resources Department of Stanley Correctional Institution.

6. Ms. Hager provided Appellant with a form entitled, “Nonrepresented Employee Grievance Report”, but did not discuss with him any time limit for filing an appeal of the reprimand in lieu of a one-day suspension.

7. The “Nonrepresented Employee Grievance Report” given to Captain Dohms states in part:

State of Wisconsin  
Office of State Employment Relations  
OSER-DCLR-101 (10/01)  
s. 230.04(14)

. . .

The fourth step must be appealed to the Wisconsin Employment Relations Commission within 30 days. [See Ch. ER 46, Wis. Adm. Code, for specific rules regarding grievance.] [See WHRH Ch. 430 for grievance procedures.]

8. Appellant mailed his appeal of the reprimand in lieu of a one-day suspension to the Office of State Employment Relations (OSER).

9. OSER received Appellant’s letter on September 28, 2009, and forwarded it to the Commission.

10. The Commission received Captain Dohm’s letter of appeal on September 30, 2009.

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<sup>2</sup> Captain Dohm’s letter of appeal asserts, “the final disposition letter dated July 30<sup>th</sup> 2009 . . . was hand-delivered on August 14<sup>th</sup> 2009.” Respondent, however, maintains that Appellant was not working on August 14, 2009, and that the discipline letter was hand-delivered to Appellant on August 12, 2009. Appellant’s response to Respondent’s motion states, “I do not dispute the date of the disciplinary letter delivery. I correct myself by saying it was hand delivered on the 14<sup>th</sup> of August.” The Commission concludes that Appellant intended to state “the 12<sup>th</sup> of August” rather than “the 14<sup>th</sup> of August” as the date of hand-delivery, in light of his express admission of the date of delivery asserted by Respondent and self-correction in this regard.

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**<sup>3</sup>

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 12<sup>th</sup> day of February, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>3</sup> 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.

**Wisconsin Department of Corrections (Dohms)**

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS**

The issue before the Commission on Respondent's motion to dismiss is whether the Appellant complied with the time limit for filing a State classified service personnel appeal.<sup>4</sup> Appellant has the burden of establishing that his appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04).

The applicable 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.

Moreover, "the time limit set forth in 230.44(3), 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." OSER (ZNIDARSICH), DEC. NO. 31951-A (WERC, 1/07).

Captain Dohms' appeal was not timely filed. It is reasonable to assume that the reprimand in lieu of a one-day suspension was effective on August 12, 2009, the same date Appellant was "notified of the action". Sec. 230.44(3), Stats. In any event, the reprimand was effective no later than the date of notification. Under Sec. 230.44(3), Stats., Appellant had 30 days from August 12, 2009, or until September 11, 2009, to file his appeal. "The term 'filed' in this subsection requires physical receipt by the Commission." DOJ (MOORE), DEC. NO. 32351 (WERC, 2/08), *citing* UNIVERSITY OF WISCONSIN (ELMER), DEC. NO. 30910 (WERC, 5/04). Captain Dohms thus filed his appeal on September 30, 2009. Accordingly, his appeal must be dismissed as untimely filed.

Appellant presents various arguments to avoid this result, none of which are persuasive. He first argues that his employer could and should have advised him of the time limit for filing

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<sup>4</sup> A written reprimand *in lieu of a suspension* is an action directly appealable to the Commission. See WISCONSIN DEPARTMENT OF REVENUE (JACKSON-WARD), DEC. NO. 32471 (WERC, 7/08). Direct appeals to the Commission pursuant to Secs. 230.45(1)(a) and 230.44(1), Stats. are distinct from non-contractual grievances that are before the Commission pursuant to Sec. 230.45(1)(c), Stats., and Ch. ER 46, Wis. Adm. Code. At the fourth step of the non-contractual grievance procedure, decisions involving certain personnel transactions may be grieved to the Commission. However, as further discussed below, although Respondent provided Appellant with a form for initiating a non-contractual grievance (entitled, "Nonrepresented Employee Grievance Report"), the Commission treats this matter as a direct appeal rather than a non-contractual grievance for various reasons. First, Captain Dohms initiated his appeal with a letter rather than a "Nonrepresented Employee Grievance Report" and made no reference in his letter of appeal to the non-contractual grievance procedure. Second, there is no indication that Appellant ever pursued the first three steps of the non-contractual grievance procedure, as set forth in Ch. ER 46, Wis. Adm. Code. Third, even if Appellant had pursued the first three steps of the non-contractual grievance procedure, Ch. ER 46, Wis. Adm. Code expressly precludes the Commission from acting as the fourth-step grievance arbiter for the review of decisions regarding certain personnel transactions. Among those transactions expressly excepted from the Commission's review are "[a] written reprimand", Sec. ER 46.07(1)(a), Wis. Adm. Code, and actions directly appealable to the Commission under Sec. 230.44, Stats. (including a suspension). See Sec. ER 46.03(2), Wis. Adm. Code, and explanatory "Note".

an appeal but declined to do so. However, in DOC (BOYEA), DEC. No. 32647 (WERC, 1/09),

a decision interpreting Sec. 230.44(3), Stats. and involving the imposition of discipline, the Commission rejected this argument:

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.

Id.

Second, Appellant argues that he was not negligent in pursuing his appeal. The Commission need not assess the accuracy of this characterization, because Appellant's conduct cannot render an untimely appeal timely. "The fact that an appellant may have acted reasonably in terms of when or how s/he submitted an appeal does not satisfy the statutory filing period." *DOJ (MOORE)*, DEC. NO. 32351 (WERC, 2/08), *citing* *UNIVERSITY OF WISCONSIN (ELMER)*, DEC. NO. 30910 (WERC, 5/04).

Third, Appellant alleges that when she gave him the "Nonrepresented Employee Grievance Report", HR Director Nicole Hager stated, "I heard you were looking for this." Assuming for the sake of argument that Hager made this statement, the Commission does not interpret it or Appellant's argument to suggest that Hager misled Appellant to his detriment, or that Respondent should be equitably estopped from asserting its timeliness objection. Hager's alleged statement merely suggests that she was providing Appellant with a document that Appellant had requested. In addition, Appellant's response to Respondent's motion faults Hager for providing incomplete information, not misinformation: "I was not given any time lines then or any other direction either." As noted, Respondent did not have "an affirmative obligation to provide such information." *DOC (BOYEA)*, DEC. NO. 32647 (WERC, 1/09).

Even if Appellant were presenting an equitable estoppel argument – that he reasonably relied on Hager's conduct to his detriment – that argument must fail. "Equitable estoppel does not apply unless the reliance is reasonable and justifiable." *OSER (WINCENTSEN)*, DEC. NO. 31866 (WERC, 10/06) (citations omitted). Here, Appellant does not allege that he relied on Ms. Hager's remark or the grievance form she gave him (other than to determine where to mail his appeal). Nor does Appellant contend that reliance on Ms. Hager's remark and/or the grievance form delayed the filing of his appeal.

Appellant sent a letter of appeal, not the grievance form, to OSER, which forwarded his appeal to the Commission. Even if Appellant had relied on Hager's conduct and/or the form she gave him in deciding to file after the 30-day time limit had expired, such reliance would not have been reasonable. Appellant does not allege that Hager said anything about the time limit for appealing the reprimand in lieu of a one-day suspension. Moreover, the grievance report form contains language and statutory references indicating it is to be used for nonrepresented employee grievances. It does not even mention the procedure for filing a direct appeal to the Commission pursuant to Sec. 230.44, Stats. And the form, though inapplicable,

does state that “[t]he fourth step must be appealed to the Wisconsin Employment Relations Commission within 30 days.”<sup>5</sup>

Appellant’s fourth argument is that he mailed his appeal to the address on the grievance report form. Although OSER is mentioned on the form, its address is not, and the form identifies the Commission as the agency to which fourth-step grievances must be appealed. More importantly, the letter of reprimand states in part, “[i]f you believe this action was not taken for just cause you may appeal to the Wisconsin Employment Relations Commission.”

Appellant’s final argument that there was no just cause for his discipline goes to the merits, not timeliness, of his appeal. As such, it cannot be considered as a defense to Respondent’s timeliness objection:

As an administrative agency, the Commission is obligated to apply the restrictions that are imposed upon it by the Wisconsin Statutes. The Commission may not consider the merits of an appeal merely because the Commission believes the underlying issue is particularly important, or because the failure to timely file the appeal was unintentional or caused by confusion.

DOC (BIGGAR), DEC. No. 31388 (WERC, 7/05).

In sum, Appellant has failed to meet his burden of establishing that his appeal was timely filed under Sec. 230.44(3), Stats. Accordingly, his appeal must be dismissed.

Dated at Madison, Wisconsin this 12<sup>th</sup> day of February, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>5</sup> The 30-day time limit for filing fourth-step grievances to the Commission is set forth in Sec. ER 46.07(1)(a), Wis. Adm. Code. Moreover, even if Appellant interpreted his appeal to be a first-step, non-contractual grievance, Sec. ER 46.06(1), Wis. Adm. Code, provides, “[a]ll grievances shall be filed with the designated employer representative no later than 30 calendar days from the date the employee first became aware or should have become aware of the matter grieved.” Appellant became or should have become aware of the letter of reprimand in lieu of a suspension when it was hand-delivered to him on August 12, 2009. Under Sec. ER 46.06(1), Wis. Adm. Code, he would have had until September 11, 2009, to file a first-step grievance. As noted, however, OSER and the Commission received Appellant’s appeal letter on September 28, 2009, and September 30, 2009, respectively. Thus, OSER received Appellant’s appeal after both the applicable 30-day time limit set forth in Sec. 230.44(3), Stats., and other, inapplicable time limits on which Appellant might otherwise rely, had expired.

