

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEPHEN C. ELMER, Appellant,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 22
No. 70328
PA(sel)-76

Decision No. 33179-A

Appearances:

Stephen C. Elmer, appearing on his own behalf.

Lara M. Herman, Attorney, Wisconsin Department of Health Services, Office of Legal Counsel, P.O. Box 7850, 1 West Wilson Street, Madison, Wisconsin 53707-7850, appearing on behalf of the Respondent.

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely. The final written arguments were filed on February 3, 2011.

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.

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

FINDINGS OF FACT

1. Appellant applied for the position of Public Health Sanitarian – Senior with Respondent and was subsequently interviewed on January 22, 2009 and April 1, 2009.

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2. On October 5, 2009, Appellant received a letter from Respondent informing him that he was not selected for the position.

3. On October 16, 2010, Appellant received information from Respondent leading him to believe that Respondent's decision not to hire him was illegal or an abuse of discretion.

4. On November 12, 2010, Appellant filed his letter of appeal in this matter.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. 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

ORDER¹

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 22nd day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

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 Health Services (Elmer)

MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL

Respondent has filed a motion to dismiss the appeal as untimely because it was received more than 30 days after Elmer was notified that he had not been selected for the Public Health Sanitarian – Senior position. Elmer contends that he became aware of key facts indicating that the decision was illegal or an abuse of discretion more than one year after receiving notice of the decision and that his appeal is timely because he filed it within 30 days of receiving that information. For the following reasons, we dismiss the appeal as untimely.

Appellant has the burden of establishing that his appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/2004). The analysis for determining whether an appeal is timely filed was outlined in our decision related to another appeal filed by Elmer. In that case, DATCP (ELMER), DEC. NO. 32087 (WERC, 5/2007), we stated:

This matter is before the Commission as an appeal of a civil service selection action, pursuant to the Commission's authority under Sec. 230.44(1)(d), Stats., which provides:

A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The issue raised by Respondent's motion to dismiss is whether Mr. Elmer complied with the time limit for filing a State classified service personnel appeal. That time limit is found in Sec. 230.44(3), Stats., which reads, 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.

Elmer argues that his appeal should be considered timely because it was filed within 30 days of when he learned that the selection decision was improper[.]

In this matter, Elmer advances a similar rationale for why his appeal should be considered timely. In his written arguments, he contends:

It was in the DHS letter to DWD-ERD dated October 15, 2010, when Elmer was **"notified"** that DHS failed to take into proper consideration the facts and law relating to the hiring process in classified service contrary to Wis. Stats., §§230.20(1)(2) when they failed to hire Elmer based on merit. It was at this

time, October 16, 2010, when Elmer was “**notified**” that his failure to be hired was based on slanderous and retaliatory statements by Tom Sieger.² Therefore, pursuant to Wis. Stat. §230.44(3) Elmer was “**notified of the action**” that can be construed as an “**abuse of discretion**” on October 16, 2010, in the letter from DHS to DWD-ERD. (emphasis in original)

Elmer does not dispute he received notification on October 5, 2009 that he had not been selected as the successful candidate to fill the Public Health Sanitarian – Senior position. Instead, he argues that the date which began the 30-day filing period was October 16, 2010 when he became aware the Respondent based its decision not to hire him on the conversation between Respondent’s hiring manager and one of Elmer’s previous supervisors. Elmer concludes that this conversation was the “action” that constitutes the abuse of discretion. Thus, in his view, the letter of appeal filed on November 12, 2010 was timely.

Elmer’s conclusion is erroneous for two reasons. First, the appealable action is not the conversation between the hiring manager and the former supervisor. Instead, it is Respondent’s underlying decision not to hire Elmer. As we stated in DOC (BOYEA), DEC. No. 32647 (WERC, 1/2009):

The date of notification referenced in Sec. 230.44(3), Stats., is the date the appellant is notified of the underlying personnel action, rather than the date the appellant concludes the action was improper or the date the appellant concludes that the action may be appealed to the Commission.

Someone who is concerned about a personnel action yet unfamiliar with the reason for the action is still susceptible to a motion to dismiss, as long as s/he does not file within 30 days of having learned of an already effectuated personnel action. In short, an individual who is informed that they have not been selected to fill a vacancy and wants the Commission to review the decision must file an appeal with the Commission within 30 days of being notified of the decision. This is true even if the individual lacks information leading them to believe that the decision was improper within the 30 day filing period.

Second, Respondent had no affirmative obligation to inform Appellant of the specific reason he had not been hired. If there is such an obligation to inform and the obligation has not been fulfilled, the filing period may be tolled. For example, Sec. ER-MRS 17.03, Wis. Adm. Code, requires the employer to “notify an employee who is being demoted of the action and the reasons for the action at least 5 working days prior to the effective date of the action [and such] notification . . . shall advise the employee of his or her right to appeal the action under s. 230.44(1)(c), Stats.” A demotion notice that failed to include information about the

² According to the Appellant, he learned that after the person making the hiring decision received positive recommendations from Appellant’s references, she spoke with Mr. Sieger, Appellant’s former supervisor, who said he would not rehire the Appellant.

right to appeal could toll the 30-day filing period until the employee learns of the right to appeal. There is no comparable provision to notify candidates of the particular reasons they might not have been selected to fill a vacant civil service position. See *HALLMAN v. WCC & DOA*, CASE No. 96-0146-PC (PERS. COMM., 2/12/1997).

For the foregoing reasons, the Commission must conclude that Elmer's letter of appeal, received by the Commission on November 12, 2010, was not a timely appeal of the decision not to select him for the Public Health Sanitarian-Senior position, notice of which he received on October 5, 2009. Accordingly, the appeal must be dismissed as untimely filed.

Dated at Madison, Wisconsin, this 22nd day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

