STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JULIE HANSEN, Appellant,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 115
No. 69313
PA(haz)-8

Decision No. 33192

Appearances:

Julie Hansen, appearing on her own behalf.

Jonathan Nitti, Attorney, Department of Corrections, P.O. Box 7925, Madison, WI, 53707-7925, appearing on behalf of the Department of Corrections.

ORDER DENYING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal. Respondent's motion is based on the Appellant's allegedly untimely application for hazardous duty injury pay, pursuant to Sec. 230.36, Stats., and Sec. ER 28.04(1), Wis. Adm. Code. The date for submitting written arguments relating to Respondent's motion was March 15, 2010. However, on November 3, 2010, the Commission asked the parties to offer their comments on several issues relating to the motion. The Respondent submitted its response on November 19, 2010. The Appellant did not respond.

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. Section 227.47(1), Stats., prescribes in part the format of the Commission's decision.

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

FINDINGS OF FACT

1. Julie Hansen, the Appellant, was employed by Respondent as a Supervising Youth Counselor at Ethan Allen School at the time of the events set forth in these findings.

2. Ms. Hansen was present during one or more confrontations with Ethan Allen School residents during the afternoon of Wednesday, May 13, 2009. She now contends she suffered an injury at that time. She completed at least one Incident Report and filed it later that day.

3. Ms. Hansen called in sick on Monday, May 18, 2009, as well as May 19 and 20, because of back pain.

4. On August 17, 2009, Ms. Hansen completed two more forms relating to the events on May 13. The first was an "Employee Workplace Injury or Illness Report." The second was entitled, "Request for Leave of Absence with Pay Due to Injury." The latter document is the form for applying for hazardous duty pay. Both are Office of State Employment Relations (OSER) forms. Appellant indicated on the forms that she had been injured on May 13, 2009, and described the circumstances resulting in her alleged injury.

5. On October 14, 2009, Respondent denied the Appellant's August 17 leave-with-pay request. The denial was reflected both in a letter from Ethan Allen Superintendent Kyle Davidson, ("This letter is to advise you that your request has been denied. Medical documentation does not support that the alleged injury was caused by the act of a juvenile offender.") and an entry by Paege Heckel, on behalf of the appointing authority, on the request form itself: "230.36 benefits denied. The medical evidence and [incident reports] by other staff received to date do not support that the injury was caused by an act of a youth." Ms. Heckel is an Employment Relations Specialist employed by the Respondent.

6. The Commission received a letter from Ms. Hansen on November 6, 2009, appealing Respondent's October 14 denial of her application for hazardous duty injury pay.

7. On December 1, 2009, Respondent filed a motion to dismiss the matter, asserting that Ms. Hansen's original application for benefits was not filed within 14 days of the alleged injury.

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

CONCLUSIONS OF LAW

1. Section ER 28.04(1), Wis. Adm. Code, provides that, with specified exceptions, the time limit for filing an application for benefits under Sec. 230.36, Stats., is 14 days from the day of injury.

2. Because the Respondent's reliance on the 14-day filing period is in the nature of an affirmative defense, the Respondent has the burden to establish the facts sufficient to grant the motion to dismiss.

3. On the limited record before the Commission, the Respondent has failed to establish those facts.

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

ORDER

Respondent's motion is denied without prejudice.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of December, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/
Terrance L. Craney, Commissioner

Department of Corrections (Hansen)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

This matter is before the Commission because the Appellant has sought hazardous duty benefits as provided in Sec. 230.36, Stats. Pursuant to that provision, State employees in certain occupations who are injured during the course of performing their work duties are, if unable to work because of those injuries, entitled to their full pay and benefits. The Appellant contends she was injured on May 13, 2009 during a confrontation with youths at Ethan Allen School and that she should receive pay and benefits for a lengthy absence that began on Monday, May 18, 2009.

The Director of the Office of State Employment Relations (OSER) has promulgated administrative rules relating to hazardous duty benefits. Section ER 28.04, Wis. Adm. Code, establishes a procedure to apply for the benefit and for the employing agency to respond to the application:

> (1) *Application for benefits* under s. 230.36, Stats., *shall be made* by the employee or the employee's representative *to the appointing authority within 14 calendar days from the day of injury*, on forms prescribed by the director [of OSER]. In extenuating circumstances, at the discretion of the director, the time limit for application for benefits may be waived. When medical verification is required for final approval of the claim, failure by a physician to provide verification within the 14 days shall not be the basis for denial. The application shall contain sufficient and factual information to indicate the nature and extent of the injury or illness, the circumstances surrounding its occurrence and the qualifying duties on which the application is based.
> (2) Within 14 days after receipt of the claim the appointing authority shall notify the employee of the decision to authorize or deny the claim and file a copy of the notice of action with the director. . . . (Emphasis added.)

In addition, Sec. ER 28.06, Wis. Adm. Code, establishes a procedure for the employee to appeal a denial of benefits by the appointing authority:

> If an employee's claim for leave with pay due to hazardous duty injury is denied by the appointing authority, the employee may appeal the action to the commission by filing a written request within 30 calendar days after being notified of such decision or within 30 calendar days from the effective date of the decision, whichever is later. Failure to file the appeal within the specified time limit shall bar the employee from any future claims to s. 230.36, Stats., benefits related to the particular injury incurred.

Appellant asserts that her injury occurred on May 13, 2009. There is no dispute that she first applied for hazardous duty benefits on August 17, 2009. The Respondent argues that the Commission, in the role described in Sec. 28.06, Wis. Adm. Code, should dismiss the

Appellant's case because she did not file her application for benefits with the appointing authority within 14 days of the day of her alleged injury.

It is undisputed that Respondent's October 14, 2009 action to deny benefits was not premised on the 14-day filing period referenced in the administrative rule. The application was denied because Respondent concluded that "[m]edical documentation does not support that the alleged injury was caused by the act of a juvenile offender." Nonetheless, Respondent claims that the 14-day time limit in Sec. ER 28.04(1), Wis. Adm. Code, is in the nature of a statute of limitations, citing ROSE V. DOC, CASE NO. 93-0180-PC (PERS. COMM. 11/30/1993), and is mandatory, rather than directory.

In cases filed with the Commission pursuant to Sec. 230.45(1), Stats., most motions to dismiss for lack of timeliness require the Commission to address the question of whether an appeal *to the Commission* is timely pursuant to the 30-day filing period specified in Sec. 28.06, Wis. Adm. Code, as well as in Sec. 230.44(3), Stats. The latter provision relates to the Commission's competency to proceed. STERN V. WERC, 296 WIS. 2D 306, 722 N.W.2D 594 (CT. APP. 2006). In contrast, the Respondent's argument in the present matter is not premised upon any alleged untimeliness in the Appellant's filing of her appeal at the Commission. Rather, the Appellant's contention is in the nature of an affirmative defense arising from the particulars of the Respondent's benefit application procedure. It is the Respondent's construction of the OSER regulation, not the Commission's construction of a Commission rule, that is at issue here; the Respondent's construction in turn is likely revealed at least in part by prior agency practice. See HOLTZ & KRAUSE, INC. V. DNR, 85 Wis. 2d 198, 210, 270 N.W. 2d 409, 416 (1978) (factual issue of agency's alleged past practice in not enforcing agency rule is to be developed on record made before the agency and then reviewed by circuit court).

Here, the Respondent's argument relies on some basic facts that are not in dispute, such as the date of the alleged injury and the date the Appellant submitted her application for benefits. However, the Commission's ability to resolve the motion, including the ability to determine whether the 14-day time period is indeed mandatory in implementation, or whether instead the Respondent itself implements the time period (intentionally or otherwise) in a more relaxed fashion, is undermined by the lack of information relating to the agency's standard practices. If evidence showed that the Respondent regularly or occasionally ignored the 14-day filing period when considering such applications, that evidence could bear on the proper resolution of the Respondent's motion. More specifically, it would relate to the question of whether it is appropriate to construe ER 28.04 strictly in applying the 14-day filing period to the Appellant.

The Commission has previously asked the parties to respond to several questions relating to the application review process. The parties were informed that the file did not contain any information relating to that process and Respondent was specifically asked: "[W]hat evidence does the Respondent have that would demonstrate that it has consistently maintained a practice of obtaining . . . express determination [from the Director] before

granting any [otherwise] untimely applications?" The responsive affidavit from Ms. Heckel merely indicated that she "was simply unaware that the law may make unnecessary reaching the merits of an application for benefits under Wisconsin Statutes §230.36 should the application be untimely."

The limited material in the case file provides no basis on which the Commission can reach conclusions to certain questions, including but not necessarily limited to the following questions, all of which we believe to be relevant to the resolution of the Respondent's motion:

Is there a written procedure that applies within DOC or extends beyond it, for processing hazardous duty benefit applications?

a) If so, does that procedure address applications that appear to be filed more than 14 days after the day of the alleged injury?
b) If not, how do employees who process these applications learn of relevant unwritten procedures?

Whether written or not, is DOC's procedure applicable to both non-represented employees and employees within a collective bargaining unit?

What is the normal practice of Ms. Heckel or other agents of the Respondent when she/they receive an application that appears to be filed more than 14 days after the day of the alleged injury?

Does the Respondent have a practice of advising an employee in the Appellant's situation of the "extenuating circumstances" exception to the 14-day filing period?

Did Ms. Heckel process the Appellant's application according to her and/or the Respondent's normal practice?

Is there normally some type of internal or external review conducted of a decision such as the one made by Ms. Heckel in the present matter, or of a decision to grant benefits? If so, did that review occur here?

If DOC perceives an application to have merit, are there any circumstances (other than the failure of a physician to provide verification) under which DOC has ignored the 14-day limit without having express authorization from the Director?

We believe that it is appropriate to assign the burden of establishing the various elements of the Respondent's affirmative defense on the party raising the defense,[1] which is also the party that is in the best position to provide evidence of Respondent's practice.[2] That party is clearly the Respondent.

Based upon the limited information before us, we must deny the Respondent's motion to dismiss without prejudice. In other words, the Respondent may reassert the motion later in this process should it wish to do so. Resolution of the issue at that point would presumably require holding an evidentiary hearing.

A member of the Commission's staff will contact the parties for the purpose of scheduling another conference.

Dated at Madison, Wisconsin, this 20th day of December, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/
Terrance L. Craney, Commissioner

[1] In an action for malicious prosecution, reliance on the advice of counsel is an affirmative defense and the burden of proof is on the defendant. LECHNER V. EBENREITER, 235 WIS. 244, 292 N.W. 913 (1940). The burden of proof to establish all elements of a laches affirmative defense rests with the party asserting the defense. STATE EX REL. COLEMAN V. MCCAUGHTRY, 290 WIS. 2D 352, 714 N.W.2D 900 (2006). In an action for damages resulting from the collision of defendant's boat with plaintiff's pier, the burden of proof for the affirmative defense that the pier interfered with navigation and was constructed without a permit was on defendant. BOND V. WOJAHN, 269 WIS. 235, 69 N.W.2D 258 (1955).

[2] When facts lie peculiarly in the knowledge of a party, that party should ordinarily bear the burden of proof on that issue. ACUITY MUT. INS. CO. V. OLIVAS, 298 WIS. 2D 640, 726 N.W.2D 258 (2007).