

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER MUELLER, Appellant,

vs.

DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 77
No. 72137
PA(adv)-327

DECISION NO. 34648-A

Appearances:

Mike Stahl, Field Representative, Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin, appearing on behalf of Appellant Jennifer Mueller.

Wilhelmina Mickelson, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Respondent Department of Health Services.

**DECISION AND ORDER DENYING MOTION TO DISMISS
THE APPEAL OF A ONE-DAY SUSPENTION**

On June 17, 2013, Jennifer Mueller filed an appeal with the Wisconsin Employment Relations Commission (WERC), relating to her receipt of a written notification in lieu of a one-day suspension from her employer, the Department of Health Services (DHS). This matter had proceeded through the grievance procedure prior to submission to the WERC.

On September 3, 2013, the Office of State Employment Relations (OSER) filed a motion to dismiss. That motion asserted that the WERC lacked jurisdiction over the matter because Mueller failed to timely file an appeal of the Step 2 answer in the grievance procedure.

The motion was denied by Order dated October 24, 2013. The Order preserved to the State its right to create an evidentiary record and renew its jurisdictional objection.

Subsequent to the issuance of the Order Denying Motion to Dismiss, the parties agreed to consolidate the one-day suspension with both a three-day suspension and a five-day suspension

received by Mueller. The parties stipulated that the proceeding would be bifurcated. Jurisdictional matters would be heard and addressed initially. The merits of any claims that survived procedural objections would be heard and addressed at a subsequent date.

A hearing was conducted on April 30, 2014, in Madison, Wisconsin. As of that date, and continuing to date, the WERC has received no appeal of either the three-day or the five-day suspensions.

On January 10, 2013, Mueller was issued a letter of reprimand in lieu of a one-day suspension for reporting to work five minutes late. Mueller filed a Step 2 grievance on January 19, 2013. Her grievance was postmarked January 25, 2013, and was actually received on January 28, 2013. A grievance meeting was scheduled for January 31, 2013, and was postponed to February 15, 2013. That meeting was also postponed and rescheduled to March 18, 2013. By agreement of the parties, the grievance response was to be issued by Friday, April 5, 2013. It is unclear from the record whether the agreement to extend the grievance procedure dates was in writing or oral. On April 5, 2013, the grievance was denied. The denial was sent to the Mueller by letter.

It is unclear when Mueller received the April 5, 2013 letter. In the prehearing proceedings surrounding the motion to dismiss, Mueller indicated she received it no earlier than April 10, 2013. At hearing, Mueller testified that she could not recall when she received the letter but understood that she was under time pressure to appeal. Mueller testified that she sent her appeal by express mail on Friday, April 19, 2013 for delivery on Saturday, April 20, 2013. Mueller produced an express mail tracking form/receipt to confirm the date.

The express mail envelope had the wrong address. Mueller mailed the letter to the Madison address of the DHS, addressed to OSER.

OSER received the envelope and date-stamped it on April 24, 2013. There was no postmark on the envelope nor was there an express mail envelope.

This dispute involves certain provisions of the Wisconsin Human Resources Handbook (Chapter 430) which are set forth below:

Sec. 430.030 Grievance

Permanent and project employees ... may file a formal grievance through this grievance procedure contesting the following actions if the employee alleges the action was taken without just cause:

* * *

- suspension (including letters in lieu of suspension)

* * *

A representative may not file a grievance on behalf of an employee. A representative may not appeal a denied grievance to the next higher level step in the grievance procedure on behalf of an employee.

* * *

Employees shall use the OSER grievance form ... to file grievances. Grievances must be filed using the multi-ply OSER form and cannot be filed electronically.

* * *

Sec. 430.060 Grievance Steps

A grievance procedure for employees will have the following steps. The usual management designee responding to the step will be:

- Pre-filing (if this step exists at the discretion of the agency) – first line supervisor;
- First step – division administrator level or designee;
- Second step – appointing authority level or designee; and
- Third step – OSER

Grievances under this chapter which have not been resolved or settled under the foregoing procedure may be appealed to the Wisconsin Employment Relations Commission (WERC) under Wis. Stat. § 230.44(1)(c) if the appeal alleges the decision grieved was not based on just cause Grievances may not be appealed to the WERC without first completing the relevant preceding steps in the grievance procedure. Office of State Employment Relations, Bureau of Labor Relations staff will represent the agency before the WERC.

* * *

Sec. 430.080 Grievance Submittal and Response Time

A formal grievance must be filed with and received by the designated employer representative no later than 30 calendar days from the date the grievant first became aware, or should have become aware (with the exercise of reasonable diligence) of the

matter grieved. If mailed, the postmark denotes the date of submittal or response. Grievances not appealed within the designated time limits at any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievances which are not answered within the time limits may be grieved to the next step within ten (10) calendar days after the last day on which the grievance could have been timely answered.

* * *

3. If the grievant is dissatisfied with the answer in Step 1, the grievant must submit the grievance to Step 2 within ten (10) calendar days from receipt of the answer in Step 1 or within ten (10) calendar days of the date on which the response should have been answered if no response was issued at the first step of the process.

The Step 2 management designee must meet with the employee and supply a written response on the grievance form and deliver it to the grievant within thirty (30) calendar days of receipt of the grievance at Step 2. Grievance hearings may be conducted via teleconference or video conference at the discretion of the Employer.

4. If the grievant is dissatisfied with the answer in Step 2, the grievant must appeal to OSER within ten (10) calendar days from the date of the answer in Step 2 or within ten (10) calendar days of the date on which the response should have been answered. The appeal must:
 - a) Include the grievant's written appeal;
 - b) Include a copy of the grievance, including any and all copies of grievance responses;
 - c) Be postmarked or date stamped by OSER within the time frame specified above; and
 - d) Not be filed electronically.

OSER will review the grievance. If the grievance cannot be resolved, OSER shall send a written notice to the grievant within thirty (30) calendar days from receipt of the grievance at Step 3. The written notice will inform the grievant that grievances that have not been settled under the foregoing procedure may be appealed to the Wisconsin Employment Relations Commission under Wis. Stat. §

230.44(1)(c) if the appeal alleges the decision grieved was not based on just cause

5. Grievances which have not been settled under the foregoing procedure may be appealed to the Wisconsin Employment Relations Commission under Wis. Stat. § 230.44(1)(c), if appeal alleges the decision grieved was not based on just cause Such appeal must be made in writing and, notwithstanding Wis. Stat. § 230.44(3) or if applicable, PC 3.01, Wis. Adm. Code, filed (actual receipt at the Employment Relations Commission) within 30 calendar days after the date of OSER's notice issued at Step 3 or within thirty (30) calendar days from the date on which OSER's notice was due, whichever is sooner.

If an unresolved grievance is not appealed to the commission, it shall be considered terminated on the basis of the second step answer. ...

* * *

Sec. 430.100 Miscellaneous

1. A grievant may be assisted by a representative of his/her own choosing in person, by telephone, or by teleconference.
2. The grievant and the management designee can agree in writing to:
 - Waive a first step hearing
 - Extend a time frame for filing or responding
3. The second step hearing cannot be waived.

The State objects to this matter proceeding on the merits, contending that Mueller has failed to file her Step 2 appeal within the ten (10) day timeframe set forth in Section 430.080. This objection comes in the context of a grievance procedure whose declared timeliness seems at odds with operational reality. Mueller filed her initial Step 2 grievance on January 19, 2013. It was January 28, 2013 before it found its way into the hands of the appropriate individual.

At Step 2, management is required to do three things: 1) Meet with the grievant; 2) supply a written response on the grievance; and 3) deliver it to the grievant. These are to be accomplished within thirty (30) calendar days of receipt of the grievance. It took approximately eleven (11) weeks to author the response. The answer was placed in the mail on Friday, April 5, 2013. Under paragraph 4 of the grievance procedure, the grievant is required to respond within

ten (10) days of the date of the answer in Step 2. Paragraph 4 can only make sense if the date of the answer is the date the answer was delivered to the grievant. If it were to the contrary, an answer could be drafted, dated and held for ten (10) days before delivery. The obligation under Step 2 is for management to supply a written response and deliver it.

It is not clear when the Step 2 answer was received. It appears that it was placed in the mail on Friday, April 19, 2013, for a Saturday, April 20, 2013 delivery. The letter was stamped in on April 24, 2013. However, paragraph 4 allows for two methods of measuring timeliness; postmark or date stamp. The postmark date will always be the earlier of the dates. In this proceeding, it appears that the original envelope was discarded. The postmark was literally thrown away. Electronic appeal, which is both faster and would provide a time stamp, is not permitted.

On May 21, 2013, the Step 2 appeal was denied by a form letter issued by OSER. The letter simply indicates that the grievance has not been resolved. There is no reference to the matter having been submitted untimely.

The Commission has previously indicated an unwillingness to have a matter dismissed where it concluded there were “undue procedural bundles” arising out of the grievance procedure. Kepke v. Department of Veterans Affairs, Dec. No. 35040 (WERC, 2014). The Commission has also suggested that submission of the appeal to the wrong address “should at the very least toll the running of the time limitation.” Jacobson v. Department of Health Services, Dec. No. 35008 (WERC, 2014). In Jacobson, the Commission indicated that the State was likely estopped from raising the timeliness issue when it was not raised in the grievance procedure through the third step answer.

This grievance procedure has been unilaterally promulgated by the Employer. It is cumbersome to use with very short deadlines for the employee. It is appropriate to construe the timeliness ambiguities against the State, as the drafter of the process. Cf. Koon v. Department of Health Services, Dec. No. 35029 (WERC, 2014).

Mueller’s appeal of the one-day suspension is timely.

Neither the three-day suspension nor the five-day suspension was appealed to the WERC. In the absence of such an appeal, the WERC lacks jurisdiction over those matters.

ORDER

The Department of Health Services’ motion to dismiss the appeal of a one-day suspension is denied.

Dated in Madison, Wisconsin, on this 9th day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan, Examiner