

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDY JACOBSON, Appellant,

vs.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 87
No. 72769
PA(adv)-375

DECISION NO. 35008

Appearances:

Sandy Jacobson, 5845 Lochinvars Trail, Marshall, Wisconsin, 53559, appearing on behalf of himself.

Laura Amundson, Labor Relations Specialist, Wisconsin Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, 53707-7855, appearing on behalf of the Respondent Department of Health Services.

On November 26, 2013, Sandy Jacobsen filed an appeal with the Wisconsin Employment Relations Commission asserting Respondent Department of Health Services did not have just cause to suspend him for one day. This matter is before us on the February 10, 2014 motion of Respondent to dismiss the appeal because Jacobson was allegedly untimely when filing a step-three grievance. The parties have fully briefed the matter by April 7, 2014 and the facts as alleged by Appellant Jacobson are deemed admitted on a motion to dismiss. Accordingly, we issue the following:

OPINION AND ORDER DENYING MOTION TO DISMISS

We again remind the parties and their representatives that in a motion to dismiss the facts as alleged by the non-moving party are deemed admitted. It is also noteworthy that reply briefs should not be utilized to raise new arguments and never be utilized as a basis for introducing “new” factual contentions.

Here, the non-moving Appellant asserts that he received the step-two grievance response on October 2, 2013. Jacobson asserts he timely filed a step-three grievance but is apparently uncertain as to whom he filed it with. By letter dated October 16, 2014, from the Wisconsin Department of Health Services’ human resources director, he was advised his “packet” of

grievance materials had been forwarded to that office. He was further told that “(t)his is not the correct forms or procedures (sic) to follow.” Accordingly, Jacobson resubmitted his appeal using the correct form.

By letter dated October 29, 2013, signed by Laura Amundson of the Wisconsin Office of State Employment Relations, Jacobson was advised that his third-step grievance was denied and that he could seek review from the Wisconsin Employment Relations Commission. No mention was made of any timeliness issue or the use of defective forms.

At the very least, Jacobson’s original appeal had to have been timely filed as he alleges, as his employer obviously received it. Submitting the appeal to the wrong address or on the wrong form should at the very least toll the running of the time limitation. In that case, Jacobson’s “refiling” on the correct form and mailing the form to the correct agency was, in fact, timely. Furthermore, the Department’s acceptance, processing and response, without raising the issue of timeliness, likely estops it from raising the issue at this late date.

The Respondent argues that our decision in *Stern v. DWD and DMRS*, Dec. No. 30912-A (WERC, 2007), directs that we may not find that they waived their right to raise the “timeliness” issue. We find it ironic that experienced labor relations specialists led by attorneys assert that they should be free of any timeliness bounds while at the same time arguing that lay people should be held to a strict compliance with the labyrinth procedural process those same specialists created.

Given the foregoing, we conclude that Jacobson did in fact file his step-three grievance in a timely fashion and, accordingly, the motion to dismiss is denied.

ORDER

The Wisconsin Department of Health Services’ motion to dismiss is denied.

Dated at the City of Madison, Wisconsin, this 1st day of May 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner