

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN KOON, Appellant,

vs.

DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 86
No. 72767
PA(adv)-373

DECISION NO. 35029

Appearances:

Susan Koon, 720 Brooke Ashley Court, Omro, Wisconsin, 54963, appearing on behalf of herself.

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

DECISION AND ORDER DENYING MOTION TO DISMISS

Appellant Susan Koon, a supervisory employee of the Department of Health Services (“DHS”) filed a grievance challenging the 3-day disciplinary layoff she received. Following the untimely receipt of the second step response from DHS, Koon filed a direct appeal with the Wisconsin Employment Relations Commission. DHS has moved to dismiss based upon Koon’s failure to follow the Wisconsin Human Resources Handbook (“Handbook”) which requires an appeal to the Office of the State Employment Relations (“OSER”) prior to initiating review by the Commission.

DECISION AND ORDER

On September 3, 2013, Koon filed a second step grievance with DHS’s Bureau of Human Resources. According to the Handbook, DHS’s obligation is as follows:

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. (Emphasis added.)

The deadline for response was October 3, 2013. DHS did not respond by the deadline and, therefore, the third step appeal to OSER would have been due on October 13, 2013. This is because according to the Handbook an appeal is due:

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 predicate to the “appeal” is that the grievant is “dissatisfied with the answer,” but how can one who has not received an answer be dissatisfied with it?¹ We are also puzzled by the fact that while the Handbook obligation on the employer is mandatory (“must meet”) there is no penalty for not doing so.

It is important to remember that the grievance procedure here is unilaterally adopted by the employer and that often the aggrieved employee is not represented by legal counsel or other experienced advocate. It is also obvious that time limits and deadlines for action serve an important function as well. DHS, here, cites *Elkouri and Elkouri* for the proposition that grievance time limits are generally strictly applied in the labor and arbitration context. That authority is inapposite because the Elkouri’s are referencing collectively bargained grievance procedures not an employer-imposed process. We think the better interpretive guideline is the general rule of contract construction that ambiguity is construed against the drafter.

Here, DHS responded twenty-five days after the grievance response was due and reduced the three-day suspension to one day. That untimely response then triggered Koon’s appeal to the WERC. That appeal should have gone to OSER by November 7, 2013, under the alternative date computation.

Given the fact that the second step appeal language is at best confusing and given the fact that DHS’s response was significantly untimely, we conclude that DHS is equitably estopped from asserting the time bar. However, the grievance process must be utilized; accordingly, we remand this matter to OSER for Step 3 processing.

ORDER

1. OSER will process the grievance of Susan Koon and provide her with a response within 30 days of this Order.

¹ The fact that this alternative time computation is confusing is obvious on its face and, in fact, the OSER representative in this case incorrectly computed the appeal due date as being October 3 rather than October 13, 2013.

2. If Koon is dissatisfied with the answer she may appeal to the Commission within 30 days of the response by OSER.²

Dated at Madison, Wisconsin, this 3rd day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

² That is assuming the discipline, if any, falls within our jurisdiction.