

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JEREMY SMET, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 258  
No. 73146  
PA(adv)-403

DECISION NO. 35066

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**Appearances:**

Sean Daley, Field Representative, AFSCME Council 24, AFL-CIO, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Appellant Jeremy Smet.

Michael R. Soehner, Labor Relations Specialist, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Respondent Department of Corrections.

In January of 2012, Appellant Jeremy Smet was offered and accepted a promotion to the position of Correctional Sergeant at the Kettle Moraine Correctional Institution. Prior to beginning the job assignment, the offer was withdrawn and Smet remained in his position of Correctional Officer at the Taycheedah Correctional Institution. In December of 2013, Smet grieved the decision to withdraw the offer of promotion. The grievance was processed through the three steps and appealed to the Wisconsin Employment Relations Commission on April 10, 2014. The Department of Corrections has moved to dismiss based upon its contention that the grievance was untimely and that the Commission lacks subject matter jurisdiction over the underlying dispute. The motion was filed on April 30, 2014, and Smet's response was received on May 13, 2014.

**DECISION AND ORDER GRANTING MOTION TO DISMISS**

The DOC argues that the withdrawal of an offer of promotion is not a demotion under § 230.44(1)(c), Stats., and that we have no jurisdiction. The DOC also asserts that the filing of a grievance some twenty-three months after the event being challenged renders this claim untimely as well.

An obvious flaw in Smet's claim that the withdrawal is a "demotion" is that newly promoted employees serve a six-month probation period during which they can be removed at the employer's will. *Perkins v. DOC*, Dec. No. 31901 (WERC, 2006)(removal from promotional position during probation period not reviewable). Had the DOC decided to instate Smet for one day in the sergeant position, it could have removed him without recourse and the decision would not be characterized as a demotion. It would, therefore, be difficult to call the withdrawal of an offer of promotion as a demotion particularly because Smet never held the position. It is apparent we have no jurisdiction over this claim under § 230.44(1)(c), Stats.

This is, in fact, the denial of a promotion which may be reviewable under § 230.44(1)(d), Stats., if it were timely filed with the Commission.<sup>1</sup> The statutory appeal must be taken within thirty days of the effective date of the action. § 230.44(3), Stats. Smet argues that his late filing was due to his lack of knowledge about the reasons for the withdrawal and that the limitation period should be tolled until he acquired knowledge of his rights. That is an insufficient basis for tolling the limitations period which he missed by twenty-three months. The time to file an appeal from the denial of a promotion begins to run when the promotion is denied. *Cozzens-Ellis v. Personnel Commission*, 155 Wis.2d 271, 274, 455 N.W.2d 246 (Ct. App. 1990).

Smet's appeal is untimely and, accordingly, we issue the following

**ORDER**

That the appeal of Jeremy Smet is dismissed.

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<sup>1</sup> Unlike Commission review of disciplinary action under § 230.44(1)(c), Stats., where exhaustion of the grievance procedure is a requirement, a denial of promotion is subject to direct appeal under § 230.44(1)(d), Stats.

Dated at Madison, Wisconsin, this 22nd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner