

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KEVIN FRANCK, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0013

Case Type: PA

DECISION NO. 35437

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**Appearances:**

Kevin Franck, E1379 Dayton Road, Waupaca, Wisconsin, appearing on behalf of himself.

Karl R. Hanson, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of the Respondent Department of Corrections.

Appellant Kevin Franck worked at the Wisconsin Department of Corrections' facility at Redgranite, Wisconsin, until his termination on April 26, 2014. On June 29, 2014, he emailed Karla Souzek, the facility human resources manager, and asked if the State was "willing to waive the first step grievance in my termination." Souzek responded the next day by indicating "Yes, we will waive it." Two days later, on July 3, 2014, Souzek emailed Franck and stated "You haven't submitted a grievance to me yet, right?" Franck submitted a written grievance on the official form on July 7, 2014. On August 30, 2014, the second step grievance answer was provided asserting just cause as well as timeliness "at Step 2." The third step appeal was rejected based upon timeliness on September 16, 2014, and appealed to the Wisconsin Employment Relations Commission on October 1, 2014. DOC has moved to dismiss the appeal based upon untimeliness.

**DECISION AND ORDER DENYING MOTION TO DISMISS**

There is no question that Franck was untimely when he submitted his grievance to his employer. When he initially communicated with DOC seeking a waiver of the "first step" in the procedure, DOC's human resources representative responded affirmatively. No issue regarding timeliness was raised even though the grievance at that point would have been over a month late. When Franck eventually filed the written grievance on July 7, 2014, the response should have

been immediate but it was not. DOC itself missed the employer response “deadline” by almost a month and apparently did not hold the required meeting with Franck.

The obvious first question is why would the State waive the first step when the grievance was untimely? The human resources person was copied on the termination letter and presumably would have knowledge of the action. Her explanation for waiving the first step was that it was DOC practice “so that the termination decision could be grieved immediately to the second step.” Affidavit of Karla Souzek in Support of Motion to Dismiss (hereinafter “Souzek Aff.”) at ¶2. That response makes little sense if the grievance is clearly untimely. Furthermore, why after accepting an untimely grievance, would you sit on it for almost two months?

As we have explained in the past, this grievance procedure which is unilaterally imposed by the employer is confusing and unduly complicated. In our judgment any ambiguity or uncertainty will be resolved against the employer, particularly when the employee is unrepresented. DOC’s decision to waive compliance with the first step procedure together with the violation of its own time deadlines constitutes a waiver of the timeliness defense.

Franck, as a tenured employee of the State, has a procedural due process right to a post-termination hearing as required by the Fifth and Fourteenth Amendments to the United States Constitution. Courts have consistently held that collective bargaining grievance and arbitration procedures satisfy that constitutional requirement. *Chaney v. Suburban Bus Div.*, 52 F.3d 623, 628 (7th Cir. 1995) (listing holdings to that effect from a variety of different circuit courts of appeal). Unilaterally adopted grievance procedures that culminate with an impartial hearing may also satisfy constitutional requirements. *Riggins v. Board of Regents*, 790 F.2d 707 (8th Cir. 1986). The goal is to provide the terminated employee with a fair and impartial hearing during which the employee has an appropriate opportunity to challenge the decision. If the process to get to that hearing is so complicated or confusing that it effectively bars some from obtaining the hearing they are constitutionally entitled to, it is not serving its purpose.

With that understanding in mind, we view all procedural bars to proceeding with skepticism, particularly in discharge cases. Here, the former employee filed his “grievance” late but the DOC accepted it and treated it as though it were timely. It then proceeded to violate its own self-imposed time deadlines. The consequence is that the DOC is equitably estopped from asserting the procedural violation. *Pflum v. DOC*, Dec. No. 35067 (WERC 2014); *Koon v. DOC*, Dec. No. 35037 (WERC 2014),

Accordingly, we enter the following

**ORDER**

The motion to dismiss is denied.

Dated at the City of Madison, Wisconsin, this 4th day of November 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner