

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MONICA T. MARSICEK, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF SAFETY AND
PROFESSIONAL SERVICES, Respondent.

Case ID: 264.0002

Case Type: PA

DECISION NO. 36129

Appearances:

William Leanderts, Representative, 1410 Loftsgordon Avenue, Madison, Wisconsin, appearing on behalf of Appellant Monica T. Marsicek.

Elisabeth E. Winterhack, Legal Counsel, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of Respondent State of Wisconsin Department of Safety and Professional Services.

Appellant Monica T. Marsicek was terminated on May 21, 2015. She filed a grievance challenging that decision and the employee grievance report attached as Exhibit A reflects that the second step grievance was “returned” on July 7, 2015. On July 20, 2015, Marsicek filed a third step appeal. Respondent moves to dismiss based upon the alleged failure to file a timely third step appeal. Both sides have submitted written argument.

DECISION AND ORDER DENYING MOTION TO DISMISS

The purpose of the handbook grievance procedure is to give the state and the employees an opportunity to resolve disputes before they come to the Wisconsin Employment Relations Commission for formal hearing. As we have often noted, the grievance procedure is confusing with complicated alternative time limitations. *See Koon v. DHS*, Dec. No. 35029 (WERC, 07/2014); *Kepke v. DVA*, Dec. No. 35040 (WERC, 06/2014). We have described it as a “model of obfuscation.” *Pflum v. DOC*, Dec. No. 35067 (WERC, 07/2014) (noting that all employer time deadlines run from receipt and all employee deadlines from the date of the document).

Here the employer acknowledges that calculating the ten-day deadline from the date of the second step would be unfair. It argues however that it is up to the employee to “present evidence” that she did not receive the Department’s response until July 15, 2015. We are not sure how one could “present evidence” of a negative but, in our judgment, making the statement in the third step appeal ought to be sufficient to put the question at issue. On a motion to dismiss the facts as alleged by the non-movant are deemed true. Once the statement is uttered the burden shifts back to the state to provide conclusive proof that the employee in fact received the denial before July 15, 2015. The grievance response could have been sent by certified mail or personally served but that apparently did not happen. Accordingly, we accept the discharged employee’s statement that she did not receive the determination until July 15, 2015, and deny the motion.

As we have said in the past, once the just cause standard is in place, employees acquire a property interest in their continued employment. That property interest may not be lost without due process of law. That due process is satisfied by a hearing before the Wisconsin Employment Relations Commission. That right to a hearing cannot be lost by application of confusing time limitations.

ORDER

The motion to dismiss is denied.

Signed at the City of Madison, Wisconsin, this 3rd day of December 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner