

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GARY GEORGE, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0118

Case Type: PA

DECISION NO. 36327

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**Appearances:**

William Brauner, Representative, N9507 Hwy 12, Merrilan, Wisconsin, appearing on behalf of Gary George.

Amesia N. Xiong, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin, Department of Corrections.

**DECISION AND ORDER DENYING MOTION TO DISMISS**

Appellant Gary George appeals a one-day disciplinary suspension he received from his employer the State of Wisconsin, Department of Corrections for purportedly violating work rules. DOC moves to dismiss asserting that George's appeal was untimely filed with the Wisconsin Employment Relations Commission.

As we have frequently noted, the failure to file a timely appeal is not jurisdictional but rather is in the nature of a statute of limitations subject to equitable tolling. George filed a timely third step appeal on January 5, 2016. By letter dated January 26, 2016, and received by George on February 2, 2016, he was advised that the grievance "has not been resolved." The letter itself makes no reference to dates on which appeals are due but does include an information sheet entitled "How to Appeal the DPM Step 3 Response to the Wisconsin Employment Relations Commission (WERC)." That document recites that the appeal must be received "within 30 calendar days after the date of DPM's Step 3 response." It also includes

an invitation to visit the Commission's website to learn more about the process.<sup>1</sup> If the employee visits our site, they will learn that the "typical time limit" for filing an appeal as contained in § 230.44(3), Stats., is "30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later." They might also click on the link to the Division of Personnel Management's administrative rules, which includes a grievance procedure set forth at Chapter 46. Seeking out the rule on timely appeals, they would find Wis. Admin. Code § ER 46.07(2) which indicates the appeal is due 30 days after service of the decision or 30 days after it could have served a timely decision.

Reference is also made to the Wisconsin Human Resources Handbook. There the employee would find that a timely appeal must be received by the Commission within 30 calendar days after the date the Office of State Employment Relations' notice is issued at Step 3 or within 30 days from the date on which OSER's notice was due, whichever is sooner. Of course, those in the inner circles of state government are aware OSER no longer exists and has been "replaced" by DPM.

It is difficult to imagine that the average lawyer let alone the average state employee could discern precisely how to calculate when an appeal is due. The state has a statute, an administrative rule and a handbook posing as a rule, all of which provide differing means by which the time limit is calculated.

In the interest of clarity for all concerned from this point forward, we will apply the statutory time limit set forth in § 230.44(3), Stats., to all appeals to the Commission under § 230.44, Stats. It is our understanding that DPM is serving Step 3 responses by certified mail which should made the calculation of due dates relatively easy. We will modify our website to reflect this position and suggest that DPM to so as well.

Finally, we note that language in our decision in *Stuczynski v. DVA*, Dec. No. 36173 (WERC, 2016), suggests a different result. In that case, the employee's appeal was untimely regardless of the method of calculation. Here, George's appeal would have been timely under the statutory standard and under Wis. Admin. Code § ER 46.07. To the extent any language in *Stuczynski* contradicts this opinion it is overruled.

### **ORDER**

The motion to dismiss is denied.

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<sup>1</sup> The link contained in the standard instruction sheet does not work but presumably an employee could find the Commission website.

Signed at the City of Madison, Wisconsin, this 11th day of April 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner