

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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AMANDA WATERMAN, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0149

Case Type: PA

DECISION NO. 36361

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**Appearances:**

Amanda Waterman, W10095 State Hwy 82, Elroy, Wisconsin, appearing on her own behalf.

Katharine Ariss, Department of Corrections, 3099 E. Washington Avenue, P.O. Box 7925, Madison, Wisconsin, appearing on behalf of State of Wisconsin, Department of Corrections.

**DECISION AND ORDER DENYING MOTION TO DISMISS**

Appellant Amanda Waterman is employed at the State of Wisconsin, Department of Corrections and works at its New Lisbon Correctional Institution. She was offered and accepted a position as an escort on January 28, 2016. Three days later, DOC withdrew the offer because the job “was on hold.” Waterman attempted to grieve that decision on February 16, 2016. On that same date, DOC answered the grievance and indicated the decision was “non-grievable.” On March 11, 2016, after learning that someone else was offered and accepted the position, Waterman filed another grievance challenging the fact that she did not receive the position which she was allegedly entitled to because of her seniority. DOC responded on March 15, 2016, stating that the grievance was denied because it was “non-grievable.” The official selection of Correctional Officer Crouse to fill the position in question was made on March 9, 2016. On April 18, 2016, Division of Personnel Management staff member Paegge Heckel advised Waterman that in DPM’s opinion the dispute was “non-grievable.”

## DECISION

While Waterman was challenging the hiring decision, she was also involved with grievances addressing two disciplinary suspensions. It is understandable that Waterman, a pro se appellant, might not realize that hiring decisions under § 230.44(1)(d), Stats. are directly appealable to the Wisconsin Employment Relations Commission without need to resort to the grievance procedure. After all she had progressed through the grievance procedure to address two other perceived wrongs. Had either the Employment Relations Specialist at DOC or the Labor Relations Chief at DPM taken a moment to advise Waterman of her right to directly appeal, we would now have heard the matter and possibly decided it.

Instead our highly skilled employment relations specialists chose to play “hide the peanut” and let Waterman stumble through the grievance procedure telling her only that her dispute was “non-grievable.”<sup>1</sup> They apparently felt no need to apprise Waterman of her right, under certain circumstances, to appeal directly to the Commission.

DOC now moves to dismiss the non-selection appeal on the grounds that it was untimely. Of course by the time Waterman finally did get to the Commission her appeal was untimely as it was not filed within the required 30-day time period. Crouse was officially notified of his appointment to the position on March 9, 2016. Waterman should have filed her appeal within 30 days of that notification. As we have held on numerous occasions, the 30-day appeal filing period is not jurisdictional but rather in the nature of a statute of limitation and subject to waiver and equitable tolling. In our judgment, the failure by either DOC or DPM to advise Waterman of her right to directly appeal, together with the decision to “process” her “grievance” for a period of time that was sufficient to delay a timely appeal to the Commission constitutes a waiver of the timeliness defense. We make no conclusion as to whether the actions were intentional or simply a bureaucratic oversight. The consequence is that Waterman was prevented from filing a timely appeal by the opposing party.<sup>2</sup>

## ORDER

The motion to dismiss is denied.

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<sup>1</sup> To our knowledge, “non-grievable” is not a word.

<sup>2</sup> We must note the utterly sloppy presentation made by counsel for DOC. She cites *Stern v. Wisconsin Employment Relations Commission*, 2006 WI App 193, 296 Wis.2d 306, as “Stearn” and does not include the official citation. Counsel then goes on to cite a 1994 Personnel Commission decision for the proposition that the timeliness of appeal defense cannot be waived when in fact that is exactly what the court in *Stern* concluded. *Id.* at ¶ 33. Misleading citations to questionable authority which has long been overruled is never a good practice and undermines one’s overall argument.

Signed at the City of Madison, Wisconsin, this 22nd day of June 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