

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHERYL A. MARR, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0194

Case Type: PA

DECISION NO. 36911

Appearances:

Sheryl A. Marr, 3216 Heartland Lane, Racine, Wisconsin, appearing on her own behalf.

Cara J. Larson, Department of Administration, 101 East Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER DENYING MOTION TO DISMISS

Sheryl A. Marr seeks to challenge her termination from her position at the Wisconsin Department of Corrections. Marr received the second step grievance denial on January 23, 2017. Her appeal to the Wisconsin Employment Relations Commission was received on February 7, 2017, the fifteenth day after the grievance denial. The Wisconsin Department of Corrections moves to dismiss based upon § 230.445(3)(c)1, Stats., which directs that appeals to the Commission be received within fourteen days of receipt of the administrator's decision. Both sides have submitted written argument.

DECISION

We have repeatedly held that time limitations on the receipt of appeals to the Commission are not jurisdictional. In *Stern v. WERC*, 2006 WI App 193 ¶ 23, 296 Wis.2d 306, 324, 722 N.W.2d 594, 603, the court of appeals concluded, "Wis. Stat. § 230.44(3) affects WERC's competency to proceed, not its subject matter jurisdiction," and, accordingly, "the time limit in Wis. Stat. § 230.44(3) may be waived." *Id.* While in this case we are dealing with the fourteen day limitation in § 230.445(3), Stats., the rationale is identical. Notwithstanding our prior holdings that the time limits on filing appeals are not jurisdictional (many of which involve DOC), the agency persists in asserting a lack of subject matter

jurisdiction as a basis for its motion to dismiss.¹ Here we have an appeal received by the Commission one day late and postmarked on February 6, 2017, the last day upon which it could have been filed.²

DOC argues that had the Legislature intended to utilize the postmark date rather than the date of actual receipt it would have so specified. The Wisconsin Human Resources Handbook, Chapter 430, applicable to all state agencies, provides that the grievance form must be filed “electronically, in person, or by U.S.P.S. mail. If the grievance is mailed via U.S.P.S. the postmark denotes the date of submittal.” Sec. 430.080. Obviously, an employee seeking to appeal to the Commission might assume that the “postmark” standard set forth in the Handbook was applicable to WERC appeals as well. The grievance forms themselves also reference Wis. Admin. Code § ER 46. If employees were to review that code section they would find that the appeal time limit for grievance appeals to the Commission was thirty days. Wis. Admin. Code § ER 46.07.

Finally, the statutory scheme itself is confusing. The time limit for Commission appeals under § 230.44, Stats., remains at thirty days and, on its face, includes appeals of disciplinary matters. It appears to conflict with the shorter appeal time limit in § 230.445(3)(c), Stats.

It is important to note also that many of the individuals appealing personnel transactions are pro se. Given all of the above, and in particular the cited Handbook language, we have concluded in this case that the equities favor the denial of the motion to dismiss.

ORDER

The motion to dismiss is denied.

Signed at the City of Madison, Wisconsin, this 6th day of March 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹ See, for example, *Pierzina v. DOC*, Dec. No. 35725 (WERC, 5/2015), which clearly holds that the 30-day limitation contained in § 230.44(3), Stats. is not jurisdictional and is subject to equitable modification.

² The transmittal envelope has been retained by the Commission and will become part of the record in this matter.