

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JUNIOR GEBERT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0195

Case Type: PA

DECISION NO. 36920

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**Appearances:**

Junior Gebert, P.O. Box 661, Mailbox #408, Waupun, Wisconsin, appearing on his own behalf.

Anfin Jaw, 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**

Employee Junior Gebert seeks Wisconsin Employment Relations Commission review of a one-day disciplinary suspension he received for prohibited use of the internet while at work. The State of Wisconsin Department of Corrections has moved to dismiss the appeal based upon the alleged filing of an untimely appeal. The motion is characterized as being based upon a purported lack of subject matter jurisdiction.

**DECISION**

Gebert allegedly received by electronic mail the denial of his second step grievance on February 6, 2017. His appeal was received by the Commission on February 23, 2017. DOC argues that fourteen days after the 6th is the 20th of February and that Gebert's appeal is untimely.

First of all, we clearly have subject matter jurisdiction over this matter as it is a disciplinary appeal under § 230.44(1)(c), Stats., and the employee has permanent status in

class. The timeliness of appeals to the Commission does not impact our jurisdiction over the substance of the claim. As we have noted repeatedly, the correct manner within which to address the issue is a motion to dismiss based upon a failure to satisfy a condition precedent. We will treat the motion filed by DOC in this matter as a motion to dismiss for failure to satisfy a condition precedent.

In support of its motion, DOC submitted a copy of an email reflecting that the grievance decision was sent on February 6, 2017, and that it “was read on Monday, February 6, 2017 at 2:26 p.m.” We have nothing in the record that reflects that Gebert in fact read the message on February 6. We are unaware of whether Gebert had exclusive access to the computer in question or that he was working on the day in question.

The submissions made on behalf of DOC are simply insufficient to support a decision extinguishing the rights of an employee to challenge discipline. An uncorroborated hearsay document is simply inadequate. While Gebert states in his response that he failed to “take into account that President’s Day was Monday February 20, 2017,” and that because he sent it by mail “it did not get to WERC on time,” we do not view that as a concession that DOC’s calculation is accurate. This is particularly true with a pro se appellant.

### **ORDER**

The motion to dismiss is denied.

Signed at the City of Madison, Wisconsin, this 21st day of March 2017.

### **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