

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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CALVIN OBERLIN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0035

Case Type: PA

DECISION NO. 36921

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**Appearances:**

Calvin Oberlin, 3215 - 21st Street, Racine, Wisconsin, appearing on behalf of himself.

Anfin Jaw, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Health Services.

**DECISION AND ORDER**

The Wisconsin Department of Health Services has moved to dismiss based upon a lack of subject matter jurisdiction. The basis for the motion is the purported failure on the part of Oberlin to file a timely appeal to the Wisconsin Employment Relations Commission. The question of timeliness does not go to our subject matter jurisdiction but rather is a condition precedent to maintaining an appeal.

This case does, however, present a jurisdictional matter which was not raised by DHS. Oberlin is appealing a written reprimand in lieu of a three-day disciplinary layoff. In *Schallock v. DOC*, Dec. No. 36326 (WERC, 2016), we noted that since 2004 the Fair Labor Standards Act (FLSA) administrative regulations have permitted the use of disciplinary suspensions for exempt employees without risk of forfeiture of their exempt status. 29 C.F.R. § 541.602(5). In *Schallock*, we indicated we would no longer exercise jurisdiction over “written reprimands in lieu of suspensions” and that for purposes of progressive discipline we

would not consider them as a step in the process.<sup>1</sup> As we stated in *Schallock*, “in lieu of suspension will be treated as a written reprimand.” Therefore, we will dismiss the appeal of Oberlin, however, he will not advance in the progressive discipline continuum.

**ORDER**

The appeal of Calvin Oberlin is dismissed based upon a lack of subject matter jurisdiction.

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

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<sup>1</sup> The one exception was that in unusual circumstances which may warrant use of an “in lieu of” penalty such as an employee with special skills who cannot be away from work without hardship to the employer.