

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAYNE STARBIRD, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0215

Case Type: PA

DECISION NO. 36978

Appearances:

Sean P. Daley, Field Representative, AFSCME Wisconsin Council 32, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Wayne Starbird.

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

Appellant Wayne Starbird filed an appeal to the Wisconsin Employment Relations Commission following the second step denial of his grievance. He sought review of a one-day disciplinary layoff he received from his employer, the Wisconsin Department of Corrections. Starbird's appeal was received on July 7, 2017. DOC has moved to dismiss his appeal based upon a claim that the appeal was not filed within the statutory time limit. Both sides have submitted written argument.

DECISION AND ORDER GRANTING MOTION TO DISMISS

After at least three years of repeated Commission decisions holding that failure to meet procedural deadlines does not deprive us of jurisdiction to hear matters under Chapter 230, the message has finally been received. The Department has acknowledged per *Stern v. WERC*, 2006 WI App 193 ¶ 23, 296 Wis.2d 306, 324, 722 N.W.2d 594, as well as our numerous prior decisions, that a failure to file a timely appeal impacts our competency to proceed not our subject matter jurisdiction.

In this matter, the Department filed a motion to dismiss for “lack of competence.”¹ While some may view our decision making as reflecting on our “competence,” the better approach is a motion to dismiss based upon a failure to satisfy a condition precedent. A failure to satisfy a precedent requirement is subject to equitable modification. *See gen. Stern, supra.* at ¶ 30-33. That of course is the significance of treating the time restriction as something other than an element of our subject matter jurisdiction.

Starbird does not dispute the fact that his appeal to us arrived on July 7, 2017, and that the last day for a timely response was July 5. His argument is that under § 230.445(3)(c)(1), Stats., we “shall determine whether all procedural requirements were completed properly and in a timely manner” within ten days of receiving the appeal. As his argument goes, because we did not resolve the issue of the timeliness of his appeal within the ten days any motion by the state challenging timeliness is barred.

There are several problems with Starbird’s contention. First of all, the “ten day” requirement falls upon the Commission not the employer and it would be unjust to penalize the employer for the Commission’s failure to act. More importantly, the direction that we shall make the determination within ten days is directory not mandatory. As the court in *State ex rel. St. Michaels Ev. Lutheran Ch. v. DOA*, 137 Wis.2d 326, 336, 404 N.W.2d 114 (Ct. App. 1987), noted:

... statutes specifying a time period in which an agency is to act are directory unless the statute denies the exercise of the power after such time or the nature of the action or the statutory language shows the time was meant to be a limitation.

The ten-day restriction does not deny further action nor is it clearly intended to bar further action. As a practical matter, delaying the decision on procedural motions gives the appellant an opportunity to respond and dispute the factual and/or legal bases supporting the motion. By our own procedures, the motion does not delay the processing of the appeal nor does it prevent the Commission from meeting the overall 120 day statutory time limit.

The consequences of adopting the appellant’s rationale are severe. We would be forced to either make hasty decisions without according appellants the opportunity to dispute assertions or allow persons who have no basis for an appeal to nonetheless have access to the appeal process.

We believe we are correct in interpreting the language as directory and, accordingly, we conclude that Starbird’s appeal was not filed within the 14-day limitation period and therefore:

¹ It is our “competence to proceed” with the hearing itself which is at issue. *Stern* at ¶ 25. The question of whether we can proceed is dependent upon the employee satisfying various time limits compliance with which is a condition precedent to our ability to proceed.

ORDER

That the appeal of Wayne Starbird is dismissed.

Signed at the City of Madison, Wisconsin, this 10th day of August, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

James J. Daley, Commissioner