

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL J. PERRY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case ID: 306.0002

Case Type: PA

DECISION NO. 36997

Appearances:

John M. Loomis, Attorney, 329 N. Second Street, P.O. Box 1802, Eagle River, Wisconsin, appearing on behalf of Daniel J. Perry.

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

The Appellant Daniel J. Perry was discharged from his position as a ranger assigned to the Northern Highland American Legion State Forest. His employing agency was the State of Wisconsin Department of Natural Resources. On May 31, 2017, Perry filed his initial grievance with the Department. The Department has moved to dismiss his appeal to the Commission based upon the assertion that Perry's initial grievance was untimely. Both sides have submitted written argument and evidentiary materials in the form of affidavits. The matter became ripe for Commission action on September 11, 2017.

DECISION AND ORDER GRANTING MOTION TO DISMISS

Following an investigation and meeting with supervisory staff, Perry was provided with a detailed letter specifying the bases for the decision to terminate his employment. Following the letter which was delivered and effective on May 1, 2017, Perry communicated with Employment Relations Specialist Shari Crandall seeking "a few copies of the OSER grievance form." He also requested copies of the previous five years' worth of performance reviews. On May 4, Crandall sent Perry a link to the Wisconsin Human Resources Handbook chapter entitled, "Employee

Grievance Procedure.” That document, which includes, as an attachment, grievance forms, summarizes (in expanded form) the provisions of § 230.445, Stats.

On May 31, Perry, using the correct form, submitted his grievance to Amber Passo, Director of Human Resources for DHR. On June 1, 2017, Passo advised Perry that his grievance was rejected as untimely pursuant to § 230.445(3)(a)1, Stats.

The Department acknowledged in its motion to dismiss that the statutory timelines for filing grievances and pursuing appeals are in the nature of statutes of limitation and are not jurisdictional. They do, however, impact our competency to proceed with an appeal. As a result, they are subject to equitable modification.

There is no dispute that on its face Perry’s grievance was untimely. It was due on May 15, 2017, and was not submitted until May 31. Perry submits that he was misled by his own doing. According to him, he did a “google” search on May 1 for the Wisconsin Human Resources Handbook, Chapter 430, which was referenced as the source for information on the grievance procedure in the termination letter.

The first research response that was returned was a link to the version of Chapter 430 that was in effect prior to July of 2016. That date is critical because prior to July 1, 2016 (when 2015 Wisconsin Act 150 became effective), the limitation period on filing grievances in discharge cases was 30 days. On May 4, Crandall in response to an email from Perry requesting copies of the “OSER Grievance Form (OSER-DCLR-222 (Rev. 12/2011))” sent him a link to the updated version of Chapter 430. Crandall also noted that “[t]here is an attachment at the end of that document which is the form you need to complete and email to a DOA email box to file your grievance.” Perry asserts that he opened the link but that the cover of the handbook chapter was very similar to the version he obtained through his google search and that he assumed it was the same.

One might argue (although Perry doesn’t) that Crandall should have known that Perry had the wrong form because he referenced OSER.¹ Perry recites that on May 16, a former coworker told him that he was mistaken in his belief that he had 30 days to file his grievance and that he only had 14 days. Perry checked the link from Crandall and realized that there was a different handbook. (Affidavit of Perry, ¶ 9). On May 25, Perry sent a request to the Division of Personnel Management requesting an extension of time to file his grievance which was ultimately never responded to. *Id.* at ¶¶ 10-11.

The Commission reviews the submissions by both parties to determine whether equity warrants relief for Perry for his late filings. Factual disputes, if any, are resolved in favor of the appellant on a motion to dismiss by respondent.

¹ The Office of State Employment Relations was abolished as part of Act 150. All agency employment relations employees should have been aware of that fact.

The Commission recognizes that it certainly is possible for Perry to have been misled by his own efforts at researching the appropriate procedure. As of the date of this decision a google search for the term “Wisconsin Human Resources Handbook Chapter 430” does result in the outdated version appearing as the first result. The second result is the current version of the document with the 14 day limit. Additionally, when Perry made his request on May 4 for copies of OSER grievance forms directed to Crandall, she should have been aware that Perry was operating under an outdated version. On the other hand, she did send Perry a link to the correct document which he assumed was the same as that returned via his earlier search.

The fact the Commission finds particularly significant is that upon being alerted to the correct date by a former coworker on May 16, Perry waited until May 25 to do anything about it. Perry worked in law enforcement and should have an understanding of the consequences of deadlines. He waited for ten days after learning of his potential misunderstanding before attempting to remedy the problem.

In the end, there was no effort intentional or otherwise to mislead Perry by the state. The late filing was attributable to his own mistakes and lack of diligence.

Due Process

The primary focus of Perry’s response is that the appeal procedure itself is deficient in that it does not provide applicants with the appropriate notice of time limitations. Perry points to the termination letter itself. He argues, without reference to any authority, that merely referring a discharged employee to the applicable regulations without noting the specific time limitations is a violation of his right to procedural due process. While Perry promptly checked the cited source, he was misled because a “google search” led him to an outdated version of the current statutory provisions.

There is no dispute that Perry, as a tenured employee, was entitled to procedural due process. The question is “whether sufficient state law protections exist, not whether sufficient protections were afforded.” *Michalowicz v. Village of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008) (emphasis supplied). Clearly, the § 230.44, Stats. procedure satisfies the requirements for a constitutionally sufficient post-termination hearing. *Schact v. Dept. of Corrections*. 175 F.3d 497, 503 (7th Cir. 1999).²

Given that the state provides an adequate remedy on its face, Perry must show that the procedure itself is inadequate. In order to meet that burden, the procedure must be “inadequate to the point that it is meaningless or nonexistent.” *Easter House v., Felder*, 910 F.2d 1387, 1406 (7th Cir. 1990)(en banc).

The Commission is satisfied that the legislative reduction in the time to file a preliminary grievance from 30 days to 14 days does not render the procedure “meaningless or nonexistent.”

² Admittedly, the § 230.44 procedure as it existed in 1999 did not include the 14-day limitation period but rather a 30-day appeal time.

This is particularly true in light of our prior holdings that equitable principles may justify a failure to meet the deadline.

Perry had the opportunity for a full blown hearing before the Commission complete with a full panoply of procedural rights. His failure to pursue that remedy in a timely fashion does not offend his due process rights.

Accordingly, the Commission enters the following:

ORDER

The appeal of Daniel J. Perry is dismissed.

Signed at the City of Madison, Wisconsin, this 29th day of September, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman