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BY THE COURT:

DATE SIGNED: August 14, 2019

Electronically signed by Timothy M Witkowiak
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**
BRANCH 22

RONALD CLAYTON,

Petitioner,

v.

Case No. 19 CV 1217

RE: [WERC Dec. No. 37792-A]

WISCONSIN EMPLOYMENT RELATIONS COMMISSION And WISCONSIN DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION AND ORDER

Ronald Clayton ("Clayton") seeks judicial review under Wis. Stat. §§ 227.52-227.57 of a declaratory ruling by the Wisconsin Employment Relations Commission ("WERC") under the Wisconsin Civil Service Law, Wis. Stat. ch. 230, subch. II. On December 12, 2018, WERC issued a Decision and Order Granting a Motion to Dismiss. On January 17, 2019 WERC issued an Order denying Petition for Rehearing. WERC concluded that Clayton waived his right to appeal his discharge by the Wisconsin Department of Corrections ("DOC"), under Wis. Stat. §§ 230.44(1)(c) and 230.45(1)(c), because Clayton failed to file a complaint with the DOC

challenging his discharge within 14 days after he became aware of his discharge. *See* Wis. Stat. § 230.445(2) and (3)(a)1. For the reasons stated herein, the Court affirms the Wisconsin Employment Relation Commission's decision.

STATEMENT OF FACTS

Clayton was employed as a Teacher by the State Department of Corrections, Division of Adult Institutions, Milwaukee Secure Detention Facility ("DOC"). Clayton had permanent status in class. On September 5, 2018, the DOC placed Clayton on administrative leave with pay from his employment as a Teacher. On September 17, 2018, the DOC contacted Clayton by telephone and read him his letter of termination. Human Resources Director Yvette Muhammad contacted Clayton to read the letter. The discharge letter, dated September 17, 2018, stated that Clayton was being discharged for violations of work rules. In particular, Clayton violated two Department of Corrections Work Rules that apply to all employees: "WR 1 – Falsification of records, knowingly giving false information or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required" and "WR 2 – Failure to comply with written agency policies or procedures: Serious misconduct – Fraternization with offenders, inmates, or juvenile offenders including, but not limited to: sharing personal information, providing or receiving goods or services, displaying favoritism, engaging in a personal relationship, failing to report solicitation by an offender, inmate or juvenile offender."

The letter specifically stated that Clayton continued to engage in a relationship with a female offender after May 7, 2018, when Clayton discovered she was on extended supervision with the Division of Community Corrections. According to the letter, Clayton told his supervisor that he had ended the relationship. However, he admitted to continuing to have regular contact

and maintain the relationship with the female offender; this included giving her money and allowing her into Clayton's home through August 6, 2018.

According to Executive Directive 16 – Fraternization Policy, employees are required to report relationships involving adult offenders. Additionally, having personal contacts with an adult offender is prohibited by policy unless there is an exemption request on file. There were several signed copies of acknowledgment of Executive Directive 16 – Fraternization Policy in Clayton's personnel file. The last acknowledgment was signed on February 24, 2016.

The letter indicated that Clayton did not have a discipline record. However, "The Department may impose a more severe level of discipline, up to an including discharge, for serious acts of misconduct. Employees who are found to have engaged in serious misconduct may be terminated as an initial level of discipline depending on the seriousness of the behavior." The Warden, Ronald Malone ("Warden"), stated in the letter that Clayton's actions rose "to the level of serious misconduct" because he "demonstrated a lack of good judgment and demonstrated a blatant disregard for the rules and polices [Clayton is] required to follow as an employee of the DOC."

The letter also detailed the process to appeal the termination decision through the grievance procedure set forth in Wis. Stat. § 230.445, the Wisconsin Human Resources Handbook Chapter 430 Employee Grievance Procedure, and the DOC Grievance Policy 200.30.303. The letter also provided Clayton with the proper form to file, where to access it, the address to send it both electronically and in person, and how many calendar days Clayton had to file the grievance after he became aware of his termination.

During the telephone call Clayton asked if he could resign. The Deputy Warden said "yes." The next day, on September 18, 2018, Clayton submitted a two-page resignation letter

serving as formal notice of termination of Clayton's employment as a Teacher at the Milwaukee Secure Detention Facility. The letter noted that Clayton had "resigned from [his] position voluntarily following a completed investigation." HR Director Muhammad mailed Clayton a "resignation acknowledgement letter" dated September 19, 2018 to Clayton, but did not attest to mailing the September 17 termination letter.

On September 24, 2018, Clayton's attorney, Kathy Charlton, submitted a grievance via email to DOADPMGrievance@wisconsin.gov with an address of "Division of Personnel Management, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, WI 53707-7955." On September 27, 2018, Director Jim Underhill, Bureau of Employee Management, Department of Administration ("DOA"), sent an email to Clayton and his attorney, Charlton, describing that the grievance that was filed inaccurately indicating a "2nd step" grievance. The email from Director Underhill also provided the proper link for commencing Clayton's appeal. The email further cited the language from the Wisconsin Human Resources Handbook ("WHRH") Chapter 430.100, which states that "a grievant may be assisted by a representative of his or her choosing at any step of the grievance process," but that "[a] representative cannot file or advance a grievance on the employee's behalf." On September 28, 2018, Director Underhill sent another email to Clayton and his attorney, reiterating that Clayton must file a Step 1 grievance by himself, and inviting them to email or call if they had any further questions.

On September 28, 2018, Clayton mailed the grievance to the same physical address that his attorney had sent the grievance on September 24. Clayton sent the grievance by Priority Express Mail. The grievance was marked "Received October 1, 2018" by the DOA Division of Personnel Management. The DOA/DPM Director Underhill acknowledged receipt of the grievance on October 2, 2018. On the say day, the Director Underhill sent an email to Clayton

stating that "[i]n order to file timely and properly you must send your 1st step appeal to the DOC at their mailbox, which is DOCBHRGrievances@wisconsin.gov."

Clayton forwarded his Step 1 grievance by email to the DOC at its grievance website on October 8, 2018. On October 28, 2018, the DOC denied Clayton's grievance. The grievance was denied because it raised a non-grievable issue and was untimely. The grievance was not considered grievable because Clayton was attempting to challenge a "discharge" when he ultimately resigned, which was accepted in writing. Additionally, his grievance was denied because it was untimely submitted outside of the 14-day deadline. Clayton's Step 2 grievance was returned to him on November 8, 2018. The grievance was denied for the same reasons stated in Clayton's Step 1 denial.

Clayton filed a State civil service personal appeal with WERC on November 12, 2018. Clayton argued that he was coerced into resigning in lieu of being fired by his supervisor. Clayton also claimed that he hired counsel and did his due diligence in attempting to file his grievance. In the appeal, Clayton requested a hearing where the DOC would prove the statutory just cause for Clayton's termination and whether he was constructively discharged.

The Wisconsin Department of Corrections filed a Motion to Dismiss on November 21, 2018. The Motion detailed the two main reasons to dismiss the appeal: (1) WERC lacks competence to hear the appeal because the Appellant, Clayton, did not meet a condition precedent, as his first step grievance was not timely; and (2) WERC lacks subject matter jurisdiction because Clayton voluntarily resigned in lieu of being terminated. WERC decided that Wis. Stat. § 230.445(3)(c)1 required it to dismiss Clayton's appeal because he did not file his complaint/grievance with DOC within 14 days of the end of his employment. *See* Wis. Stat. § 230.445(3)(a)1. WERC rejected Clayton's argument that the 14-day filing period should be

equitably tolled because the procedure for filing was confusing. Rather, WERC found that the State provided him with clear and timely advice as to how and where to file his grievance.

Clayton filed a petition for rehearing on December 28, 2018. In the petition Clayton claimed that his supervisor had told him he should consider submitting a letter of resignation before receiving a termination letter in order to not lose all of his benefits. On January 17, 2019 WERC denied the petition for rehearing.

STANDARD OF REVIEW

Petitioner seeks review from this Court under Chapter 227 of the Wisconsin Statutes. An agency's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983). Credible evidence is "that evidence which excludes speculation or conjecture." *Milwaukee Bd. of School Directors v. Wisconsin Employment Relations Com'n*, 2008 WI App 125, ¶ 7, 313 Wis. 2d 525. The test for substantial evidence is whether "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5.

A reviewing court is not bound, however, by an agency's conclusions of law. *Richland School Dist. v. DIHLR*, 174 Wis.2d 878, 890 (1993). Wis. Stat. § 227.57(5) provides: "The court shall set aside or modify the agency action if the court finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. *Tetra Tech*, ended the practice of deferring to an administrative agency's conclusions of law. Justice Kelly's decision in *Tetra Tech* noted that the deference doctrine "does not respect the separation of powers, gives insufficient consideration to the parties' due process interest in a

neutral and independent judiciary, and 'risks perpetuating erroneous declarations of the law.'" *Tetra Tech,* 2018 WI 75, ¶ 83 (citing *Operton v. LIRC*, 2017 WI 46, ¶ 73, 375 Wis. 2d 1, 894 N.W.2d 426 (R. Grassl Bradley, J., concurring)). Consequently, the *Tetra Tech* Court determined that courts must "review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo." *Id.*, ¶ 84. Further, while not explicitly addressed in *Tetra Tech*, the Wisconsin Supreme Court later clarified that "[b]y 'conclusions of law' we mean both the interpretation of the law and the application of that law to the facts of a case." *John McAdams v. Marquette University*, 2018 WI 88, ¶ 51 n.17, 383 Wis.2d 358, 397, 914 N.W.2d 708.

Though administrative agencies are no longer afforded deference in interpretations of law, courts may give persuasive "due weight" to an administrative agency's experience, technical competence, and specialized knowledge. *Tetra Tech*, 2018 WI 75, ¶ 84; *see also Wisconsin Dep't of Workforce Dev. v. LIRC, et al.*, 2018 WI 77, ¶ 4 n.4, 382 Wis. 2d 611, 914 N.W.2d 625. When considering the persuasive value under a "due weight" standard, a court may analyze factors such as (1) whether the agency is responsible for administering a statute, (2) the duration of the interpretation, (3) the extent to which the agency used its expertise, and (4) whether the interpretation enhances the consistency of law. *Tetra Tech*, 2018 WI 75, ¶ 79. The agency must explain "how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why the background should make the agency's view of the law more persuasive than others." *Id.*

DISCUSSION

A Wisconsin state employee with permanent status in class may be discharged only for just cause. *See* Wis. Stat. § 230.34(1)(a). An employee may appeal a discharge to WERC as the

final step in the state employee grievance procedure, if the appeal alleges that the discharge was not based on just cause. *See* Wis. Stat. §§ 230.44(1)(c) and 230.45(1)(c). To commence the grievance process for an "adverse employment decision" like a discharge, the employee "shall file a complaint with the employee's appointing authority challenging the adverse employment decision against the employee no later than 14 days after the employee becomes aware of, or should have become aware of, the decision that is the subject of the complaint." *See* Wis. Stat. § 230.445(3)(a)1. If an employee does not file a complaint by the 14-day deadline, the employee "waives his or her right to appeal the adverse decision." *See* Wis. Stat. § 230.445(2). Further, if a procedural requirement is not met by the employee, WERC must dismiss the appeal. *See* Wis. Stat. § 230.445(3)(c)1.

A statutory time limit like the 14-day time limit contained in Wis. Stat. § 230.445(3)(a)1 affects WERC's competency to proceed, not its statutory jurisdiction, and a state employing agency may waive the issue of timeliness. *See Stern v. WERC*, 2003 WI App 193, ¶¶ 23, 33, 296 Wis. 2d 306, 722 N.W.2d 594. The time limit may be overcome by estoppel where the employee justifiably relies to his detriment upon the representation of a state agency; however, estoppel generally may not be asserted against the government and especially against one governmental agency based upon the acts of a different governmental agency. S*ee Ryan v. Wis. Dep't of Revenue*, 68 Wis. 2d 467, 469-71, 228 N.W.2d 357 (1975); *Surety Savings & Loan Assn. v. State*, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972) (to establish estoppel, the acts of a state agency "must amount to a fraud or a manifest abuse of discretion"). Estoppel does not arise unless the party asserting it has acted with due diligence. *Ryan*, 68 Wis. 2d at 471.

Clayton did not file a grievance within 14 days of the end of his employment, as required under Wis. Stat. § 230.445(3)(c)1. Based on this fact, WERC dismissed Clayton's appeal.

However, Clayton contends that the period for filing an appeal should be equitably tolled because the procedure for filing a grievance is confusing. Clayton argues that the Motion to Dismiss should not have been granted by WERC because it was not Clayton's failure to avail himself to the proper procedure that led to the untimely filing of his grievance. Rather, Clayton argues that the Department of Correction's ("DOC") action of not including Clayton's attorney, Kathy Charlton, on an email led to Clayton's untimely filing. This argument is without merit.

On September 17, 2018, Clayton became aware of his discharge from the DOC when his discharge letter was read to him over the phone by Director Muhammad. The letter that was read to Clayton expressly informed him that he could appeal by filing a timely grievance with DOC either electronically or by mail. The letter provided Clayton with the Wisconsin Statute for the grievance procedure, the correct form to fill out, the internet address to locate the proper form, and the exact email address to send the form to. According to Wisconsin Statue § 230.445(3)(a)1, from the time Clayton was read his discharge letter, he had 14 days, or until October 1, 2018, to file his grievance with DOC. Clayton did not file his grievance with DOC until October 8, 2018. Clayton attempted to file his grievance with the Wisconsin Department of Administration ("DOA"), Division of Personnel Management ("DPM") by emailing a grievance form, indicating a "Step 2 Grievance" on September 24, 2018. On September 27, 2018, a DOA/DPM bureau director sent a email to Clayton and his attorney, stating that Clayton must file a "Step 1 Grievance," the grievance must be filed by Clayton himself instead of an attorney, and that Clayton should send his grievance to DOCBHRGrievances@wisconsin.gov. The DOA/DPM bureau director sent another email to Clayton and his attorney on September 28, 2018, reiterating that Clayton must file a "Step 1 Grievance" by himself. The email also stated that Clayton or his attorney should email or call the DOA/DPM bureau director if there were any questions.

Clayton sent a grievance form to DOA and Division of Human Resources ("DHR") on September 28, 2018, by priority mail. However, this was the wrong location to send the "Step 1 Grievance." Clayton was told to send the form to the DOC, not the DOA/DPM or DHR. On October 2, 2018, the DOA/DPM bureau director acknowledged receipt of the grievance that was sent by U.S. mail by Clayton. On the same date, the DOA/DPM bureau director sent an email to Clayton, but not his attorney, that stated "[i]n order to file timely and properly you must send your 1st step appeal to the DOC at their mailbox, which is DOCBHRGrievances@wisconsin.gov." On October 8, 2018, Clayton forwarded his grievance by email to the DOC at its grievance website.

Clayton's grievance was denied by the DOC on October 28, 2018. The DOC gave two reasons for the denying the grievance. First, the DOC stated that Clayton failed to file his complaint/grievance within 14 days after he became aware of his discharge. Second, the DOC stated the grievance was not subject to the grievance procedure because Clayton had resigned, and his resignation was accepted in writing by the DOC.

Wis. Stat. § 230.445(3)(a)1 explicitly requires that a grievance is filed with the appointing authority, who made the adverse decision. This permits the appointing authority to correct any mistakes without the need to involve either DOA/DPM or WERC. It is only when the appointing authority denies a grievance that the employee can appeal to DOA/DPM and, if necessary, WERC. The DOA/DPM bureau director correctly and properly informed Clayton and his counsel multiple times that Clayton had to file a "Step 1 grievance" with DOC.

Clayton argues that the time limits should be tolled. Clayton cites, *Jacobson v. Wis. Dep't of Health Services,* 87-72769-PA (5/1/14), and argues that submitting the appeal to the wrong address or on the wrong form should toll the running of the time limitation. Clayton also argues

that the State should be equitably estopped from "benefitting from its malfeasance" because Wis. Stat. § 227.57(4) requires a court to remand the case to the agency for further action if it finds that either "the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure."

However, while Clayton cites several past WERC decisions, as well as predecessor agency, the Wisconsin Personnel Commission ("WPC"), these decisions are distinguishable. In *Jacobson v. DHS*, Decision No. 35008 (WERC), the employee filed his grievance with the correct appointing authority but on the wrong form in the wrong office. He later filed the correct form in the correct office after the filing period ended. WERC decided that filing with the agency, even if on the wrong form and in the wrong office, tolled the time limitation. Further, the agency was estopped from raising the timeliness issue because it accepted, processed, and responded to the grievance without mentioning the timeliness issue. The present case is distinguishable from *Jacobson*, however, because Clayton did not file his grievance with the DOC within the 14-day limit. Further, the DOC did not accept, process, and respond to it without raising the timeliness issue. Although Clayton did file his grievance with another state agency, DOA/DPM, that filing does not toll the time limit or estop DOC from raising the timeliness issue. Wis. Stat. § 230.445(3)(a)1 expressly requires that the complaint/grievance be filed with the appointing authority.

Clayton also cites *Gensch v. Secretary, Dep't of Employment Relations,* Case No. 87-0072-PC (WPC, July 8, 1987), in passing. However, this case is also distinguishable. In *Gensch*, the employee attempted to appeal to the WPC, but sent her appeal on the last day to appeal the decision to the Department of Employment Relations ("DER") instead. The appeal was specifically addressed to the DER employee who issued the decision. However, the DER

employee was on vacation. The appeal was hand-delivered to the WPC when she returned. The WPC ruled that the appeal was untimely and that DER was not estopped from raising the untimeliness of the appeal. WPC stated that the DER decision explicitly informed the employee the appeal had to be filed with the WPC. In the present case, Clayton was also explicitly told multiple times, in his termination letter and in emails by the DOA/DPM bureau director that Clayton's "Step 1 grievance" had to be filed with the DOC.

Clayton also argues that because his attorney wasn't included on the October 2, 2018 email, this amounted to a "material error in procedure." This argument is also without merit. In *Goeltzer v. Secretary, Department of Veterans Affairs,* Case No. 82-11-PC (WPC, May 12, 1982), the WPC ruled that the appointing authority in the case, the Department of Veterans Affairs ("DVA") could not be estopped from challenging the timeliness of an appeal where another state agency gave the employee misinformation about the WPC's address. In Clayton's case, even if the DOA/DPM bureau director could somehow be at fault for failing to include Clayton's attorney on the October 2, 2018 email, the action of the DOA/DPM bureau director cannot estop the DOC from raising the timeliness of the grievance filed by Clayton. Furthermore, not only did the DOA/DPM bureau director give Clayton the proper instructions and email address to send his grievance to, Clayton's attorney was included on these previous communications that addressed Clayton's filing deficiencies in the grievance procedure. The October 2, 2019 email once again reiterated from previous communications that Clayton must send his 1st step appeal to the DOC via email.

Clayton alternatively argues that he should be allowed a rehearing because the the Motion to Dismiss was granted without a hearing where Clayton was intending to provide evidence of constructive discharge. WERC's Order of December 12 that found that there was "no support for

an equitable tolling of the 14-day filing period," also addressed the fact that Clayton submitted a resignation letter. The Commission stated in a footnote of their December 12 Order that "[r]eview of the text of Clayton's resignation letter makes it highly unlikely it could ever be concluded that he was coerced into resigning." Clayton argues that it is impossible to prove a constructive discharge without any evidence in the record as to why he submitted his resignation. Constructive discharge is within the purview of the WERC. Typically, to succeed on a constructive discharge claim, a plaintiff must prove both that the defendant engaged in "harassing behavior sufficiently severe or pervasive to alter the conditions of [his or her] employment" and that "the abusive working environment became so intolerable that [his or her] resignation qualified as a fitting response." *Mercer v. City of Fond du Lac*, 2010 WI App 15, ¶ 13, 323 Wis. 2d 67, 76, 780 N.W.2d 188, 193 (citations omitted).

The evidence in the record does not support Clayton's contention that he was constructively discharged. Clayton does not offer a compelling reason for the Court to interpret his written resignation at anything other than face value. It is clear from Clayton's letter to the Court that he submitted his resignation because he did not want to be terminated and risk losing his benefits. While Director Muhammad was reading Clayton his resignation letter, he interrupted and asked if he submitted his resignation letter at that point if it would be considered to be effective. Director Muhammad responded "yes". The DOC did, in fact, accept Clayton's resignation and on September 19, 2018 the DOC sent Clayton a letter acknowledging and accepting Clayton's resignation. While Clayton argues that there is evidence of constructive discharge, there is evidence in the record of Clayton resigning to keep his benefits. "[A] resignation resulting from a choice between resigning or facing proceedings for dismissal is not tantamount to discharge by coercion...." *Dusanek v. Hannon,* 677 F.2d 538, 543 (7th

Cir.1982); *see also Spreen v. Brey,* 961 F.2d 109, 112 (7th Cir.1992); *Mercer v. City of Fond du Lac*, 2010 WI App 15, ¶ 16, 323 Wis. 2d 67, 77, 780 N.W.2d 188, 193. The choice to resign and keep benefits instead of being terminated also does not amount to "harassing behavior sufficiently sever or pervasive to alter the conditions of his employment" required for constructive discharge. Furthermore, Clayton's resignation letter did not state or show that there was an "abusive working environment" that became "so intolerable that his resignation qualified as a fitting response."

Regardless of Clayton's argument that he did not get a chance to present evidence to WERC of constructive discharge, Clayton did not properly follow the grievance process, and cannot now argue constructive discharge because the WERC was required to dismiss his grievance action due to noncompliance.

CONCLUSION

THEREFORE, based upon a thorough review of the record and the arguments of the parties as set forth in the parties' briefs, it is hereby ORDERED that the decision of the Wisconsin Employment Relations Commission is hereby **AFFIRMED**.

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL