STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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T.N., Appellant,

vs.

UNIVERSITY OF WISCONSIN SYSTEM BOARD OF REGENTS, Respondent.

Case ID:  3.0032
Case Type:  PA

DECISION NO.  37982-B

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**Appearances:**

Colin B. Good, Attorney, Hawks Quindel, S.C., 409 East Main Street, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of T.N.

C. Wade Harrison, Attorney, University of Wisconsin System, Office of General Counsel, 1852 Van Hise Hall, 1220 Linden Drive, Madison Wisconsin, appearing on behalf of the University of Wisconsin System.


### ORDER DENYING REQUEST TO SET ASIDE ORDER OF DISMISSAL

On August 15, 2019, Wisconsin Employment Relations Commission Examiner Raleigh Jones issued a Proposed Decision and Order in the above-captioned matter concluding the University of Wisconsin System (UW) had just cause to discharge T.N. On September 3, 2019, prior to the issuance of a final decision by the Commission, T.N. filed a request to withdraw her appeal. T.N. did not copy UW's counsel on the request and the Commission did not independently provide notice of the request to UW's counsel.

On September 11, 2019, the Commission issued an Order of Dismissal based on the withdrawal request. On September 17, 2019, UW counsel asked that the Order of Dismissal be set aside and a final Commission decision be issued. The parties thereafter filed written argument and the matter became ripe for Commission consideration on October 4, 2019.

Having considered the matter, the Commission issues the following:


### ORDER

The request to set aside the Order of Dismissal is denied.

Signed at the City of Madison, Wisconsin, this 11th day of October, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**


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James J. Daley, Chairman

## MEMORANDUM ACCOMPANYING ORDER DENYING
## REQUEST TO SET ASIDE ORDER OF DISMISSAL

Wisconsin Admin. Code § ERC 91.11 states in pertinent part:

> Subject to the approval of the commission, a petitioner may withdraw a case at any time prior to a final decision by the commission. …

Wisconsin Admin. Code § ERC 91.05(1) provides in pertinent part:

> ... all papers filed by a party with the commission shall also be served by that party on all other parties to the case.

When exercising the right to seek withdrawal under Wis. Admin. Code § ERC 91.11, T.N. failed to comply with Wis. Admin. Code § ERC 91.05(1). Compounding that error was the Commission's failure to notice the non-compliance and to then independently provide UW counsel with a copy of the request and an opportunity to comment. The matter is further complicated by the statutory directive that the Commission make a final disposition of a disciplinary appeal no later than 120-days from the date the appeal was filed. In this instance, the 120-day period ended on September 12, 2019.

There is room for doubt as to whether the doctrine of "equitable tolling" allows the Commission to issue a final decision on the merits of an appeal after the 120-day period has expired. However, the circumstances presented herein warrant the assumption that such equitable tolling is available if the Commission determines the withdrawal request should be denied.

As to the merits of the withdrawal request, T.N. contends she should not be coerced into continuing a claim against her will, and the Commission should not have to expend additional resources adjudicating an unwanted claim. UW asserts that issuance of a final decision (which it baselessly assumes would inevitably reach the same result as the Proposed Decision and Order) would be of assistance in its defense of a worker's compensation claim. Particularly where, as here, the evidence presented at hearing is available for UW's potential use in other litigation and any final decision issued by the Commission would not in any event be dispositive of the worker's compensation claim, the Commission concludes the interests asserted by T.N. are more persuasive. Therefore, the September 11, 2019 Order of Dismissal stands.

Signed at the City of Madison, Wisconsin, this 11th day of October, 2019.


**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**


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James J. Daley, Chairman