

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NIKHATH IRFANA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0072

Case Type: PA

DECISION NO. 37986-B

Appearances:

Mary C. Flanner, Attorney, Cross Law Firm, S.C. 845 North 11th Street, Milwaukee, Wisconsin, appearing on behalf of Nikhath Irfana.

Anfin Jaw, Attorney, Wisconsin 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 Health Services.

DECISION AND ORDER DISMISSING APPEAL

On July 5, 2019, Nikhath Irfana filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Health Services (DHS). On July 10, 2019, prior to a prehearing conference, DHS filed a motion to dismiss the appeal asserting that Irfana had not timely filed a grievance following her discharge. Irfana filed argument in opposition to the motion on July 18, 2019.

On August 28, 2019, the Commission issued a Decision and Order Granting Motion to Dismiss concluding she did not timely file a grievance with DHS. On September 16, 2019, Irfana filed a Petition for Rehearing pursuant to § 227.49, Stats. On September 26, 2019, the Commission issued an Order Granting Petition for Rehearing for the purpose of determining whether the August 28, 2019 decision contained any material errors of fact and/or law.

A hearing was held in Milwaukee, Wisconsin, on October 11, 2019, by Commission Examiner Peter G. Davis. Irfana filed written argument on October 22, 2019.

Having considered the matter, the Commission is satisfied that its August 28, 2019 decision dismissing the appeal did not contain any material errors of fact and/or law.

NOW, THEREFORE, it is:

ORDERED

The appeal is dismissed.

Signed at the City of Madison, Wisconsin, this 31st day of October, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER DISMISSING APPEAL

Section 230.445(3)(a)1, Stats., provides:

To commence the grievance process for an adverse employment action, an 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.

Section 230.445(2), Stats., specifies in pertinent part:

... If an employee does not file a complaint or an appeal by an applicable deadline under sub. (3), the employee waives his or her right to appeal the adverse employment decision under this subchapter.

Irfana was employed as a psychiatrist by the State of Wisconsin Department of Human Services (DHS) and was advised of her April 15, 2019 discharge when she received and was read the written discharge notice that same day. The discharge notice advised Irfana that any grievance over the discharge "must be submitted to the DHS email mailbox at DHSEmployeeRelations@wisconsin.gov, no later than 14 calendar days after the employee becomes aware of, or should have become aware of, the decision that is the subject of the complaint."

The initial grievance filed with the individual's employing agency (in this instance DHS) is known as a Step 1 grievance. To be timely in this instance, a Step 1 grievance would have needed to be filed with DHS before midnight on Monday, April 29, 2019.

On Friday, April 26, 2019, at 3:34 p.m., Irfana sent a Step 2 grievance regarding the discharge to the email address of the State of Wisconsin Department of Administration, Division of Personnel Management (DOA) at DOADPMGrievance@wisconsin.gov. She copied her attorney Mary Flanner on that email. On Monday, April 29, 2019, at 1:01 p.m., DOA representative Jim Underhill forwarded the April 26 email on to DOA representative Linda Brennan. That same day, Brennan began searching electronically for a Step 1 grievance that normally would have preceded a Step 2 filing. Finding nothing electronically, she then contacted a DHS representative asking for the Step 1 grievance and related materials. Brennan had no knowledge as to any deadlines that might have been applicable to the filing of a Step 1 grievance. On April 30, 2019, Brennan learned that no Step 1 grievance had been filed and sent the following email to Irfana:

Hi Irfana. DOA received your Step 2 grievance. I believe you submitted this in error because you didn't follow the proper steps to submit a Step 1 grievance commencement. You must follow the

instructions detailed in your discharge letter and file the Step 1 grievance with DHS.

Later that day, Irfana filed a Step 1 grievance with DHS.

On rehearing, Irfana reiterates all arguments previously made and rejected by the Commission. But, in addition, she now points to evidentiary facts she believes support her contention that DOA was obligated to but did not advise her of the errors she made with her April 26 Step 2 filing within a timeframe that would have allowed for a timely Step 1 filing on April 29. The Commission concludes otherwise.

The evidence recited earlier herein establishes DOA acted quite expeditiously when sorting out the errors Irfana made by first identifying her grievance as a Step 2 filing instead of a Step 1 and then erroneously filing with DOA instead of DHS.¹ Further, Irfana's claim that DOA should have immediately forwarded the Step 2 filing on to DHS is inherently flawed by the reality that Step 2 filings are properly sent to DOA and thus DOA initially had no reason to forward the matter on to DHS because DOA had no reason to believe it had received Irfana's Step 2 filing in error.

Irfana again cites several Commission decisions where unrepresented employees were allowed to proceed to hearing despite having made procedural errors. All the affected employees in those matters were unrepresented, and the Commission generally made a point of noting the complexity of the then existent grievance procedure. That grievance procedure has been replaced by a streamlined statutorily-based grievance process and disciplinary letters such as the one received by Irfana specifically advise employees how to file a Step 1 grievance with their employer. Because Irfana was represented by counsel and did receive clear written directions as to how to begin to use the new statutory grievance process, none of those decisions provide a persuasive basis for denying the motion to dismiss.

Irfana also cites *Roen v. DOC*, Dec. No. 37431 (WERC, 3/18), in which an unrepresented employee sent a timely Step 1 grievance to the wrong email address under the new statutorily-based grievance procedure. The Commission held:

Where, as here, a grievance was timely sent but to the wrong State employer-side email address, there are factual circumstances where the Commission would conclude a grievance was timely. As a general matter, when an employee is unrepresented, the best practice would be for DOA to forward a grievance on to DOC. At a minimum, DOA should advise the employee that the grievance had been sent to the wrong address. From the record as it stands, neither of these things happened, but there may have been factual

¹ There is no evidence of any bad faith or intentional delay that might form the basis for equitable tolling of the applicable time deadline for filing with DHS.

circumstances that justify these failures. The matter will proceed to hearing to allow for the presentation of any such evidence.

First, it is important to note the *Roen* decision acknowledges there may be factual circumstances that justify failure to advise an unrepresented employee a Step 1 grievance had been sent to the wrong address or for DOA to forward a Step 1 grievance to the employing agency. More importantly, not only was Irfana represented by counsel, she was expeditiously advised by DOA she needed to file a Step 1 grievance with DHS. Further, thru no fault of DOA, by the time Irfana's errors had been sorted out, the deadline for timely filing with DHS had expired. Thus, *Roen* does not support Irfana's position in this matter.²

Turning to Irfana's assertion the State has waived the timeliness defense, in *Stern v. DWD*, Dec. No. 30912-A (WERC, 6/2007), the Commission generally concluded there is no waiver if the timeliness defense is raised at or before a prehearing conference is held. Here, the timeliness defense was raised by DHS at Step 2 of the grievance procedure well before any prehearing conference. DHS' request for more time to investigate the matter after the Step 1 grievance was filed does not waive DHS' right to subsequently raise a timeliness defense. Further, there are no unusual circumstances that might make raising this defense untimely.

Lastly, Irfana makes a general due process claim premised on the allegedly complex and misleading grievance procedure, citing *Franck v. DOC*, Dec. No. 35437 (WERC, 11/14), and *Peandro v. DPI*, Dec. No. 36328 (WERC, 4/16). Those employees were unrepresented by counsel and proceeding under the then existent more complex grievance procedure. Given Irfana's represented status and the new applicable statutory grievance process, the Commission concludes those prior decisions are not a persuasive basis for denying the motion to dismiss.

Given the foregoing, the Commission concludes it did not make any material errors of fact and/or law in its August 28, 2019 decision and the appeal has been dismissed.

Signed at the City of Madison, Wisconsin, this 31st day of October, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

² To the extent Irfana argues she filed a Step 2 grievance because she thought Step 1 had already occurred, the Commission rejects any such confusion as basis for concluding her April 30 Step 1 filing should be found to be timely. The discharge letter she received on April 15 provided clear guidance as to how to proceed. In addition, we again note Irfana was represented by counsel.