

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN W. ELMER, Appellant,

vs.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 5
No. 62813
PA(sel)-2

Decision No. 30910

Appearances:

John W. Elmer, 7309 Donna Drive, Middleton, WI 53562, appearing on his own behalf.

Nancy K. Lynch, University Legal Counsel, University of Wisconsin-Madison, 361 Bascom Hall, 500 Lincoln Drive, Madison, WI 53706-1380, appearing on behalf of the University of Wisconsin System.

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely filed. The parties have submitted written arguments, the last of which was received April 20, 2004. Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Appellant has been employed by the State of Wisconsin since June of 1981, most recently as a Facilities Repair Worker 2 at the Department of Military Affairs.

2. From May 28, 2003, to June 3, 2003, Respondent posted a vacant PE/Sports Equipment Area Coordinator at the University of Wisconsin-Madison's Nielsen Tennis Stadium for contractual transfer.

3. No eligible individuals chose to contractually transfer to the position and on June 4, 2003, Respondent began to accept requests for permissive transfer.

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4. Appellant and other persons contacted Respondent asking to permissively transfer into the position. Respondent opted to open the hiring opportunity to outside candidates so that those candidates could also be considered.

5. Respondent interviewed the various candidates, including Appellant, and selected David Borgrud for the position.

6. Prior to July 26, 2003, the Wisconsin Personnel Commission (PC) had the authority to hear appeals from certain personnel actions related to the State civil service. The PC also had the authority to process complaints of discrimination and retaliation filed against the State as an employer. The offices of the PC were at 5005 University Avenue in Madison. The U.S. Postal Service delivered mail addressed to the PC.

7. Effective July 26, 2003, and pursuant to 2003 Wisconsin Act 33, the PC was abolished. Its authority to hear State civil service appeals was transferred to the Commission.

8. The Commission's office is at 18 South Thornton Avenue in Madison.

9. Mail sent to the PC at 5005 University Avenue after the PC was abolished was forwarded by the U.S. Postal Service to the Commission pursuant to a mail forwarding order.

10. Mail delivered to the Commission is date-stamped on the day it is received.

11. Notice of the demise of the PC was posted on the PC's website no later than July 26, 2003. The notice appeared on the home page as well as several other pages and read:

Important Notice: Pursuant to the provisions of the State budget that was recently enacted into law, the Personnel Commission has been abolished and its authority has been distributed between two other state agencies: 1) the Wisconsin Employment Relations Commission (WERC) is now responsible for processing Appeals, and 2) the Equal Rights Division (ERD) of the Department of Workforce Development is responsible for processing Complaints. The terms "appeals" and "complaints" are described on the Introduction page of this website.

Correspondence and questions relating to Appeals should now be directed to: WERC, 18 South Thornton Avenue, PO Box 7870, Madison, WI 53707-7870. Phone (608)266-1381 <http://badger.state.wi.us/agencies/werc/index.htm> (Emphasis in original.)

12. In *ABGAR V. DEPARTMENT OF WORKFORCE DEVELOPMENT*, 03-CV-2956, DANE COUNTY CIRCUIT COURT (BENCH DECISION, 2/20/2004), the court addressed a timeliness question regarding another document that was forwarded from the PC's University Avenue address after July 26, 2004. The facts in that case were accurately described in the Defendant's Brief in Support of Motion for Judgment on the Pleadings as follows:

On [Wednesday] August 13, 2003, four days before the end of the 30-day period for filing an appeal from the Personnel Commission's initial determination, Abgar's attorney mailed an appeal and written request for hearing to the Personnel Commission at its former address on University Avenue in Madison, Wisconsin, addressed to the Personnel Commission "and/or" the [Equal Rights Division of the Department of Workforce Development]. The appeal was received by the Wisconsin Employment Relations Commission (WERC) on [Tuesday] August 19, 2003

13. By letter dated Thursday, July 31, 2003, the Respondent informed Appellant he had not been selected for the vacancy. Respondent's letter was mailed on July 31st, 2003, and was delivered to the Appellant's home no later than Saturday, August 2, 2003.

14. Sometime between August 2nd and August 28th, the Appellant consulted with a union representative about the hiring process. The union representative informed Appellant that there was a 30-day time limit for filing a civil service appeal. Appellant subsequently referenced the State of Wisconsin Telephone Directory to determine the address of the PC. The directory listed the PC at the University Avenue address.

15. In a letter dated Thursday, August 28, 2003, and mailed on that date to the PC at the University Avenue address, the Appellant sought to appeal the decision not to select him for the PE/Sports Equipment Area Coordinator position. The letter read, in part:

Dear Personnel Commission:

I would like to register a complaint to be looked into against the University of Wisconsin Recreational Sports Department due to the following circumstances. I was not allowed to permissively transfer into a position they recently had open after over twenty years of State civil service with an impeccable performance record. . . .

I heard about an opening equal to my pay scale, also being blue collar, via their transfer hotline in June of 2003. I called the contact person at the [Peterson] Building H.R. Department . . .

[Jeff Dvorak, supervisor for the position] informed me I was the first person to inquire since they became aware that nobody with the specific title had shown any interest. A short while later, a co-worker of mine told me a friend of his, who is a Facilities Repair Worker 1 (one pay scale less) who works for Rec. Sports and fills in for the position, primarily for call-in's and vacations, was offered the job but turned it down. Sometime thereafter I was informed by Mr. Dvorak that we could not meet and should wait for an interview. The following Sunday, I saw the position advertised in the newspaper. . . . During my interview, I informed Mr. Dvorak of my excellent work record and offered him eleven references. After being notified that I did not get the job, I began to wonder how could I not be allowed to transfer into a position that had not even been tested for? . . .

In summary, there is absolutely no logical reason I was not allowed to transfer into the P.E./Sports Equipment Area Coordinator job unless: 1) someone was in danger of layoff, 2) my age was a factor (I will be 50 this year), or 3) the budget deficit doesn't affect the U.W.

16. Appellant's letter was delivered to the Commission's offices at 18 South Thornton Avenue on Friday, September 5, 2003.

17. Monday, September 1, 2003 was Labor Day, a statewide legal holiday.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that his appeal was timely filed.
2. Because Monday, September 1st was a statewide legal holiday, the Appellant had until Tuesday, September 2nd to file a letter of appeal with the Commission.
3. The appeal that reached the Commission on September 5th was not timely filed.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's motion to dismiss this matter as untimely filed is granted, and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of May, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

University of Wisconsin (Elmer)

MEMORANDUM ACCOMPANYING ORDER

The issue in this matter is whether the Appellant complied with the time limit for filing an appeal of Respondent's personnel action. The jurisdictional basis for the appeal is Sec. 230.44(1)(d), Stats., which provides:

A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

Someone dissatisfied with a State civil service hiring decision has 30 days to file a civil service appeal pursuant to Sec. 230.44(1)(d), Stats. This time limit is found in Sec. 230.44(3), Stats., which reads, in relevant part:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later. . . .

Prior to the July 26, 2003, abolition of the PC, the authority to process appeals filed under Sec. 230.44(1)(d), Stats., rested with the PC. That authority transferred to this Commission on July 26, 2003.

Upon receiving Appellant's August 28th letter, the Commission interpreted it as at least arguably including an allegation falling within the scope of Sec. 230.44(1)(d), Stats., and processed the letter as a new appeal. The Commission also construed the letter to include an allegation of age discrimination and mailed a copy to the Equal Rights Division of the Department of Workforce Development so it could also be processed under the Wisconsin Fair Employment Act. By letter dated September 29, 2003, the Commission informed Appellant that a copy had been provided to the Equal Rights Division for that purpose. The present ruling does not address the timeliness of Appellant's discrimination allegation that is subject to a different time limit.

The particular question raised by the Respondent's motion is whether the Appellant's August 28th letter, construed as a civil service appeal, satisfied the 30-day time limit established in Sec. 230.44(3), Stats., for a claim under Sec. 230.44(1)(d), Stats. The Commission notes

that the “effective date” of the decision being appealed was no later than July 31, 2003, the date of Respondent’s letter. *COZZENS-ELLIS V. WIS. PERS. COMM.*, 155 WIS. 2D 271, 455 N.W.2D 246, (COURT OF APPEALS, 1990) (If a person is denied a promotion, the “action” appealed from is the denial and not the simultaneous or subsequent decision to promote someone else.) Therefore, the 30 days is calculated based upon when the Appellant was notified that he had not been selected. In this instance that date was no later than Saturday, August 2nd, when Appellant received Respondent’s July 31st letter.

Thirty days after August 2nd was Monday, September 1st. Pursuant to Sec. 990.001, Stats., when what would otherwise be the last day for filing an appeal falls on a Saturday, Sunday or a statewide legal holiday, the filing period is extended to the “next succeeding day that is not a Sunday or a legal holiday.” *STARCZYNSKI & MAYFIELD V. DOA*, 81-275, 276-PC, 12/3/81. Monday, September 1st was Labor Day, a statewide legal holiday. Therefore, in order for a claim under Sec. 230.44(1)(d), Stats., to be timely, the Appellant was required to file his appeal no later than Monday, September 2nd. This would also be Appellant’s deadline even if he received Respondent’s July 31st letter on Friday, August 1st.

The term “filed” in Sec. 230.44(1), Stats., requires physical receipt by the Commission rather than merely placing the appeal in the mail. *RICHTER V. DP*, 78-261-PC, 1/30/79. If an Appellant uses an incorrect address on the letter, the determination of whether the appeal was timely is still based on when it reaches the Commission rather than when it was received at the listed address. *ANCEL V. DER*, 91-0117-PC, 10/17/91; *GENSCH V. DER*, 87-0072-PC, 7/8/87.

It is undisputed that Appellant mailed his appeal to the PC on August 28, 2003. As noted above, all mail addressed to the PC after July 26, 2003, was automatically forwarded by the U.S. Postal Service and delivered to the Commission’s Thornton Avenue address. The Commission received Appellant’s letter on September 5, 2003, at least 34 days after the Appellant received notice of Respondent’s hiring decision.

There were seven days between the date Appellant mailed his letter to the PC and the date it was finally delivered to the Commission. We note that while this may be considered an unusually long delay, a lengthy delay in delivery was not unique to this case. In *ABGAR .V DEPARTMENT OF WORKFORCE DEVELOPMENT*, 03-CV-2956, DANE COUNTY CIRCUIT COURT (BENCH DECISION, 2/20/04), a letter mailed to the PC on August 13, 2003, did not reach the Commission until August 19th. (Finding of Fact 12)

It can hardly be a surprise that on August 28, 2003, a prospective appellant in a claim under Sec. 230.44(1)(d), Stats., would be unaware (1) that the PC had gone out of existence, (2) that the Commission had assumed jurisdiction over State civil service appeals, (3) that the PC’s mail was being forwarded to the Commission and (4) that the forwarding process could result in significant delays in the delivery of mail that had been sent to the PC’s University Avenue address. Most State employees were presumably unaware of this information on August 28, '2003.

However, the fact that the Appellant may have acted reasonably on August 28th based on what he actually knew at that time does not mean that his letter, received on September 5th, satisfied the statutory period for filing an appeal. There have been other cases finding civil service appeals to be untimely even though they were mailed in such a way that the appellant reasonably believed the appeal would be timely. In *VAN ROOY v. DMRS & DILHR*, 84-0062-PC, 7/19/84, the appellant received his civil service examination results on March 24th and mailed a certified letter to the PC at its correct address on April 19th. The postal service erroneously delivered the letter to the Department of Revenue on April 23rd and it was not received by the PC until the 32nd day, April 25th. The appeal was found to be untimely. We also note that a lack of familiarity with the law does not toll a filing period, *HALLMAN v. WCC & DOA*, 96-0146-PC, 2/12/97, so the fact the Appellant was unaware of the abolition of the PC has no bearing on the outcome of this case. In addition, there was no affirmative obligation for the Respondent in this case to inform the Appellant of the proper place to file a timely appeal of the selection decision. *AUSTIN-ERICKSON v. DHFS & DER*, 97-0113-PC, 2/25/98

The Appellant chose to rely on the Wisconsin Telephone Directory to determine the PC's address. Had he checked the PC's website, he would have learned that the PC had been abolished and its authority over this type of case transferred to the Commission. He also would have been informed of the Commission's correct address. The Appellant would have learned the same information had he attempted to either telephone the PC or to personally deliver his appeal to the PC's University Avenue address.

The result in this matter is an uncomfortable one, but it is the only result that is consistent with a predictable application of the 30-day filing period set forth in Sec. 230.44(3), Stats. We find the appeal untimely and have therefore granted the motion to dismiss.

Dated at Madison, Wisconsin, this 18th day of May, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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