

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD A. RASMUSSEN, Appellant,

vs.

Secretary, **DEPARTMENT OF CORRECTIONS**, Respondent.

Case 25
No. 63702
PA(adv)-39

Decision No. 31121

Appearances:

Richard A. Rasmussen, 502 Hoard Road, Waupun, Wisconsin 53963, appearing on his own behalf.

Deborah Rychlowski, Assistant Legal Counsel, Department of Corrections, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely filed. The final date for submitting written arguments was September 22, 2004.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Commission's mailing address is P.O. Box 7870, Madison, WI 53707-7870. The Commission's street address is 18 South Thornton Avenue in Madison. Thornton Avenue is assigned to zip code 53703.

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2. At all relevant times, Richard Rasmussen, the Appellant, has been employed by Respondent as a Supervising Officer 1 at Dodge Correctional Institution (DCI).

3. Respondent prepared a letter of reprimand (issued in lieu of a 3-day suspension without pay) that was addressed to Mr. Rasmussen's home address and dated April 5, 2004. The letter was not signed by the DCI Warden until either April 12 or 13.

4. It was mailed to Mr. Rasmussen via first class mail on either April 13 or 14, 2004.

5. Mr. Rasmussen received the letter of reprimand no later than Wednesday, April 21, 2004.

6. Mr. Rasmussen completed a letter of appeal to the Commission, dated May 17, 2004. The envelope bears a postmark of Tuesday, May 18. It was sent to the Commission's street address but listed the zip code as 53707.

7. The appeal was not received by the Commission until Monday, May 24, 2004. The letter reads, in part:

I am writing this letter in an attempt to appeal a letter of reprimand in lieu of a three day suspension that I received in April of this year. I have been attempting to get information as it relates to this matter through the Open records request and thought that I had thirty days from the time of the fulfilled records request to file this appeal.

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 in accordance with the 30-day time limit established in Sec. 230.44(3), Stats.

2. The Appellant has failed to sustain that burden.

3. The appeal is untimely.

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

ORDER

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

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of October, 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

Parties:

Richard A. Rasmussen
502 Hoard Road
Waupun, WI 53963

Matthew Frank
Secretary, DOC
PO Box 7925
Madison, WI 53707-7925

Rasmussen vs. DOC

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The issue in this matter is whether Mr. Rasmussen complied with the time limit for filing a State classified service personnel appeal. That time limit is found in Sec. 230.44(3), Stats., which reads, in 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.

The term “filed” in this subsection requires physical receipt by the Commission rather than merely placing the appeal in the mail. If the Appellant uses an incorrect address on the letter, the timeliness determination is still based on when it reaches the Commission. UNIVERSITY OF WISCONSIN (ELMER), DEC. NO. 30910 (WERC, 5/04). The disciplinary action that is the subject of this appeal was effective no later than April 12 or 13, the day the Warden signed the letter. The 30-day filing period commenced on the subsequent date on which Mr. Rasmussen received the letter.

In his written submission, Mr. Rasmussen indicates he is unable to provide the Commission with the date he received the letter:

I cannot provide the date that I received the discipline letter because when I read the letter I became so upset that I destroyed both the letter and envelope.

Respondent has submitted an affidavit from the DCI Human Resources Director that reads, in part:

On a Friday in May, Capt. Waltz stopped by my office. Capt. Waltz was representing Mr. Rasmussen in this action. Capt. Waltz asked me how many days Mr. Rasmussen had to appeal his disciplinary action. I advised Capt. Waltz that Mr. Rasmussen had 30 days from the date he received the letter to file an appeal with WERC. Capt. Waltz advised me the date that Mr. Rasmussen received the letter, which I recall was sometime between April 13th and April 19th. Together we counted 30 days on the calendar. We determined that that day, the Friday, was either the 29th or 30th day for filing an appeal, depending on whether or not the date received counted as one of the days. Capt. Waltz told me that Mr. Rasmussen had not yet prepared his appeal, and that he would advise Mr. Rasmussen that his appeal needed to be filed that day.

If Mr. Rasmussen received the letter on a date between April 13 and 19, 2004, so that the 29th day thereafter was a Friday in May, he would have received the letter on Thursday, April 15. Friday, May 14 is the 29th day after April 15. The day on which a cause of action accrues is not included when calculating the filing period. *PUFAHL V. WILLIAMS*, 179 WIS. 2D 104, 506 N.W.2D 747 (1993). If Mr. Rasmussen had received the letter of discipline on April 15 and assuming the DCI Human Resources Director and Capt. Waltz were unfamiliar with the applicable case law, then a calculation that counted the day Mr. Rasmussen had received the letter as the first day of the filing period would place Friday, May 14 as the 30th day.

It is undisputed that the Commission received the appeal on Monday, May 24, 2004. However, the 30 day filing period must be calculated as if the actual day of receipt by the Commission was Saturday, May 22nd. As provided in 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.” *UW (ELMER)*, DEC. NO. 30910, (WERC, 5/04). If Mr. Rasmussen had received the letter of discipline on April 22nd, the 30th day thereafter would be Saturday, May 22nd, and an appeal that was delivered to the Commission on the following work day, Monday the 24th, would be a timely appeal. But if Mr. Rasmussen received the disciplinary letter on April 21st or any previous day, the appeal delivered on May 24th is untimely.

Mr. Rasmussen has the burden of establishing that his appeal was timely filed. *UW & OSER (KLINE)*, DEC. NO. 30818 (WERC, 3/04). He has not contended nor has he supplied any indication that he received the letter of discipline after April 21st. The only information of record suggests that he received the letter on April 15th, well outside of the 30 day filing limit. He has not satisfied his burden.

Mr. Rasmussen argues that the filing period did not commence until he received his response to an open records request relating to the disciplinary action. He states that he “was waiting to obtain information from my employer to allow me to formulate an appeal.” This argument is inconsistent with the clear language of Sec. 230.44(3), Stats., as well as the extremely limited requirements established in Sec. PC 3.03(1), Stats., for the appeal document:

All appeals shall be in writing. Otherwise, there is no form that is to be used for filing an appeal. Appeals are not required to conform to any technical requirements except they shall identify the appellant. . . .

Given the absence of any information to the contrary, the Commission must conclude that Mr. Rasmussen received the letter of discipline no later than April 21, 2004, and that his letter of appeal, mailed on May 18 and received by the Commission on May 24, 2004, was not timely. The appeal must be dismissed as untimely filed.

Dated at Madison, Wisconsin, this 22nd day of October, 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