

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PLUA M. HER, Appellant,

vs.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION, Respondent.

Case 1

No. 63741

PA(sel)-13

Decision No. 31170

Appearances:

Plua M. Her, 933 South 5th Avenue, Wausau, Wisconsin 54401, appearing on her own behalf.

Sheri Garvoille, Staff Attorney, P.O. Box 7841, Madison, Wisconsin 53707-7841, appearing on behalf of the Department of Public Instruction.

ORDER DENYING
RESPONDENT'S MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (Commission) on Respondent's motion to dismiss the appeal of Plua M. Her as untimely filed. A hearing on the Motion to Dismiss was held on August 11, 2004 in Wausau, Wisconsin. The parties have submitted written arguments, the last of which was received September 13, 2004. The hearing examiner issued a proposed decision on December 8, 2004. No objections were filed by the requisite due date of January 7, 2005. Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Ms. Plua M. Her, hereafter Appellant, has applied for a vacant position in the State of Wisconsin classified service, *i.e.*, half-time Education Specialist-Upward Bound Program in the Department of Public Instruction's Division of Reading and Student Achievement, Wisconsin Educational Opportunities Program (WEOP) in Wausau, Wisconsin.

No. 31170

2. On April 29, 2004, Virginia (Ginny) Maly, Human Resources Assistant-Advanced, Human Resources Services, Department of Public Instruction, hereafter DPI, placed a letter in the DPI's outgoing mail bin that was addressed to the Appellant at her address of 933 South 5th Avenue, Wausau, Wisconsin 54401. This letter advised the Appellant that the position of half-time Education Specialist-Upward Bound Program for which the Appellant had applied had been offered to and accepted by another candidate. On that same date, Ms. Maly placed similar letters in the bin to the five other applicants who had not been selected for the position of half-time Education Specialist-Upward Bound Program, including applicant Yang Dao Moua.

3. Prior to April 29, 2004, the Appellant received letters that had been addressed to her at 933 South 5th Avenue, Wausau, Wisconsin 54401 and mailed by employees of DPI. Neither the Appellant, nor Mr. Moua, received the non-selection letter dated April 29, 2004.

4. On May 6, 2004, the Appellant telephoned Robert Boetzer, DPI Human Resources Specialist, to inquire about the status of her application for the position of half-time Education Specialist-Upward Bound Program. During the ensuing telephone conversation, Mr. Boetzer stated that the position was still open and applicants were being interviewed. The Appellant telephoned Boetzer because, during her interview, she had been told that the Madison office would notify her of the hiring decision.

5. Mr. Boetzer's name and telephone number were listed on the Job Announcement for the position of half-time Education Specialist-Upward Bound Program. Prior to applying for this position, the Appellant had telephoned Boetzer because she wanted to apply for the position, but the announced deadline for submitting applications had passed. During this telephone conversation, Boetzer told the Appellant that the position would remain open until a suitable applicant was found and that the Appellant could apply for the position. Boetzer, who has worked in various State Human Resources positions for many years, was the DPI employee responsible for the majority of the recruitment activity for the position of half-time Education Specialist-Upward Bound Program. Boetzer's responsibilities included announcing the position; accepting applications; approving the exam process; certifying candidates; composing the letter of acceptance to the successful candidate; and approving the letters of non-selection that were sent to the unsuccessful candidates. Boetzer routinely receives telephone calls regarding the status of applications; handles approximately forty to sixty recruitments per year; and, at the time of hearing, was handling twenty recruitments.

6. In late May of 2004, the Appellant telephoned DPI and spoke with "Linda." During the ensuing conversation, "Linda" advised the Appellant that a person had been selected for the position of half-time Education Specialist-Upward Bound Program and stated that she did not understand why the Appellant had not received a rejection letter.

7. On June 7, 2004, the Appellant filed with the Commission a letter dated June 4, 2004, which letter appealed DPI's decision to not select her for the position of half-time Education Specialist-Upward Bound Program.

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

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to decide the merits of Appellant Plua M. Her's appeal of DPI's decision to not select her for the State classified service position of half-time Education Specialist-Upward Bound Program in the Department of Public Instruction's Division of Reading and Student Achievement, Wisconsin Educational Opportunities Program (WEOP) in Wausau, Wisconsin, pursuant to Sec. 230.44(1)(d), Stats., if her appeal is timely filed in accordance with Sec. 230.44(3), Stats.

2. Appellant Plua M. Her has the burden of establishing that her appeal was timely filed in accordance with Sec. 230.44(3), Stats.

3. Appellant Plua M. Her has sustained her burden.

4. The appeal is timely.

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

ORDER

1. Respondent's Motion to Dismiss this matter as untimely filed is denied.

2. The Commission will contact the parties regarding the next step in this proceeding, which presumably will be the scheduling of a pre-hearing conference in anticipation of a hearing on the merits.

Given under our hands and seal at the City of Madison, Wisconsin, this 28th day of January, 2005.

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:

Plua M. Her
933 S. 5th Ave.
Wausau, WI 54401

Elizabeth Burmaster
Superintendent, DPI
PO Box 7841
Madison, WI 53707-7841

Department of Public Instruction (Her)

MEMORANDUM ACCOMPANYING ORDER
DENYING RESPONDENT'S MOTION TO DISMISS

Upon receiving Plua M. Her's letter of June 4, 2004, on June 7, 2004, the Wisconsin Employment Relations Commission (Commission) interpreted it as an appeal of a Department of Public Instruction (DPI) decision to not select Ms. Her for a classified service position of part-time Education Specialist in the Upward Bound Program in the Department of Public Instruction's Division of Reading and Student Achievement, Wisconsin Educational Opportunities Program (WEOP) in Wausau, Wisconsin. Such a decision may be appealed to the Commission under 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.

The Commission has jurisdiction to decide the merits of such an appeal if the appeal is filed within the time limit 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. . . .

The particular question raised by the Respondent's motion to dismiss is whether the Appellant was notified of the Respondent's decision not to select her for the position of Education Specialist-Upward Bound Program so as to satisfy the thirty-day filing requirement in Sec. 230.44(3), Stats. Respondent, contrary to the Appellant, argues that the appeal was not filed within 30 days after the appellant was notified of the relevant action.

As Respondent argues, Sec. 230.44, Stats., does not define the term "is notified." As the Respondent further argues, other statutes, such as Sec. 227.53(1)(a)2 and Sec. 32.05(4), specify time limits for filing other types of actions and compute these time limits from the date that notice is mailed. Asserting that these other statutes provide guidance in defining the term "is notified," Respondent argues that the Appellant was notified of the relevant action by the April 29, 2004 mailing of the non-selection letter.

Presumably, if the statutory intent of Sec. 230.44(3), Stats., were that notice is accomplished by the act of mailing a notice, then that statute would reference the act of mailing. Given the absence of such a reference, the most reasonable construction of Sec. 230.44(3), Stats., is that the act of mailing a notice, *per se*, does not satisfy the notice requirement of Sec. 230.44(3), Stats.

Such a construction is consistent with previous Commission decisions. For example, the Commission has computed the thirty-day time limit set forth in Sec. 230.44(3), Stats., from the time that the appellant received the letter notifying the appellant of the relevant action. DOC (RASMUSSEN), DEC. NO. 31121 (WERC, 10/04). In UW (ELMER), DEC. NO. 30910 (WERC, 5/04), the Commission computed the thirty-day time limit set forth in Sec. 230.44(3), Stats., from the time that the appellant received the letter notifying the appellant of a non-selection decision. In UW (SABEZ), DEC. NO. 30890 (WERC, 4/04), the Commission recognized that the thirty-day time limit set forth in Sec. 230.44(3), Stats., commenced no later than the date on which the Appellant learned that he was not on the list certifying candidates.

DPI employee Virginia Maly credibly testified that she mailed the April 29, 2004 non-selection letter to the Appellant at the Appellant's correct address; that this letter had a return address; that, in the past, letters mailed by Maly were returned to Maly when they were undeliverable; and that Appellant's letter was not returned to Maly. Respondent argues that Maly's testimony is sufficient to establish that the Appellant received this letter shortly after it was mailed and, thus, Appellant was notified of her non-selection more than 30 days prior to the date on which she filed her appeal. Respondent asserts that, for the Commission to conclude otherwise, would be to shift the burden of proof from the Appellant to the Respondent.

As the Respondent argues, the Appellant has the burden of proof to establish that her appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04) Ms. Maly's testimony gives rise to a presumption that the Appellant received the non-selection letter dated April 29, 2004. Although Maly's testimony establishes that, when applicants receive this type of letter, they often do not understand that the letter is notifying them of non-selection, the Grievant credibly testified that she would have understood the import of this letter if she had received it, but that she did not receive this letter.

Fellow applicant Yang Dao Moua also testified that he did not receive the letter notifying him that he had not been selected for the position. Ms. Maly did not state that Mr. Moua's letter was returned as undeliverable.

There may be circumstances in which it would be reasonable for the Commission to conclude that, if an appellant had not received a non-selection letter that had been properly mailed by DPI, then it would have been returned to DPI. In the present case, the testimony of the Appellant and Mr. Moua is sufficient to persuade the Commission that there was a disruption in the mail delivery system such that the Appellant and Moua did not receive the non-selection letter that was mailed by Maly on April 29, 2004.

As the Respondent argues, the Appellant and Mr. Moua each reside with other family members. Respondent's suggestion that the disruption to the mail delivery system was due to interference by family members is not only speculation, but also is countered by the evidence that the Appellant and Moua had previously received correspondence from the DPI without the interference of any family member.

The hiring decision had been made by May 6, 2004, the date on which the Appellant states that she had a telephone conversation with Robert Boetzer. Given this fact, Boetzer's involvement in the recruitment for this position; and Boetzer's experience in State Human Resources positions, it is puzzling that Boetzer would have told the Appellant that the position was still open and that persons were being interviewed. However, given Boetzer's inability to recall that he had spoken with the Appellant on May 6, 2004, and the Appellant's clear recollection of this telephone conversation, Boetzer's claim that, if such a call had been made, then he would not have said that the position was not filled, is not sufficient to rebut the Appellant's testimony with respect to this conversation.

To be sure, the Appellant acknowledges that, prior to applying for the disputed position, she telephoned Mr. Boetzer because the deadline for applications had passed and, at that time, Boetzer stated that she would be allowed to submit her application because the position would remain open until a suitable applicant was found. Given the Appellant's clear recollection of the conversation of May 6, 2004, the Respondent's suggestion that the Appellant is confusing the pre-application conversation with the conversation of May 6, 2004 must be rejected.

The Appellant recalls that she contacted DPI in late May of 2004 and spoke with "Linda." According to the Appellant, during this conversation "Linda" confirmed that a person had been selected for the position in dispute and that "Linda" was surprised that the Appellant had not received a rejection letter. It is true that, initially, the Appellant recalled that the conversation with "Linda" occurred in April. Subsequently, however, the Appellant clarified that this testimony was a mistake and that the conversation with Linda occurred after the May 6, 2004 conversation with Boetzer. The record provides no reasonable basis to discredit the Appellant's claim that she spoke with "Linda" in late May of 2004.

Summary

As stated above, the Appellant has the burden to prove that her appeal is timely filed under Sec. 230.44(3), Stats. The Appellant has established that she did not receive the non-selection letter of April 29, 2004 and that she was not notified of the relevant action until late May of 2004. Inasmuch as her appeal was filed with the Commission on June 7, 2004, her appeal was “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. . . . “

We conclude that Appellant’s appeal dated June 4, 2004 and filed with the Commission on June 7, 2004 is timely under Sec. 230.44(3), Stats. We have, therefore, denied Respondent’s Motion to Dismiss on the basis that the appeal was not timely filed.

Dated at Madison, Wisconsin, this 28th day of January, 2005.

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