

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**JULIE M. BIGGAR**, Appellant,

vs.

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

Case 40  
No. 64706  
PA(adv)-64

**Decision No. 31388**

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**Appearances:**

**Julie Koenig (formerly Biggar)**, 24 Lakeview Lane, North Fond du Lac, WI 54937, appearing on her own behalf.

**Kathryn Anderson**, Assistant Legal Counsel, Department of Corrections, Office of Legal Counsel, 3099 E. Washington Ave., Madison, WI 53707-7925.

**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 on June 17, 2005. Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**

1. 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. Pursuant to 2003 Wis. Act 33, effective July 26, 2003, the PC was abolished and the authority to process these appeals was transferred to the Commission.

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2. At all times relevant to this appeal, the Appellant has been employed by Respondent's New Lisbon Correctional Institution (NLCI) at New Lisbon, Wisconsin. Prior to March 16, 2005, Appellant had permanent status in class as a Supervising Officer 2 (Captain).

3. Respondent demoted Ms. Biggar from her position effective March 16, 2005, for alleged misconduct. NLCI's deputy warden hand-delivered written notice of the demotion to Biggar on March 16<sup>th</sup>. The notice stated, in part: "Under s. 230.4(1)(c), Wis. Stats., you may file an appeal with the Wisconsin Employment Relations Commission if you believe that this action was not based on just cause."

4. The Commission's mailing address is P.O. Box 7870, Madison, WI 53707-7870.

5. The thirtieth day after March 16, 2005 is April 15, 2005.

6. On or before April 14, 2005, the Appellant accessed the website for the Office of Employment Relations (OSER), an organizational component of the State of Wisconsin's Department of Administration. The website indicated that OSER's mailing address is P.O. Box 7855, Madison, WI 53707-7855.

7. On April 14, 2005, Appellant placed a letter appealing the demotion into a United States Postal Service Express Mail envelope addressed to: "State of Wisconsin, Personnel Commission, PO Box 7855, Madison, WI 53707-7855."

8. The envelope was delivered to a "J. Clementi" on Friday, April 15, 2005, but it was not delivered to the Commission until Tuesday, April 19, 2005, as reflected on the document's date-stamp. Mail delivered to the Commission is date-stamped on the day it is received.

9. The Appellant's appeal was received by the WERC 34 days after she received the notice of discipline.

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 her appeal was timely filed.
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 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 11<sup>th</sup> day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Parties:

Julie Koenig  
24 Lakeview Lane  
North Fond du Lac, WI 54937

Matthew Frank, Secretary  
Department of Corrections  
P.O. Box 7925  
Madison, WI 53707-7925

**Department of Corrections (Biggar)**

**MEMORANDUM ACCOMPANYING ORDER**

Pursuant to Sec. 230.44(1)(c), Stats., State civil service employees with permanent status in class may appeal a demotion, layoff, suspension, discharge or reduction in base pay if the appeal alleges that the decision was not based on just cause. The time to file an appeal is limited to 30 days after the effective date of the action or 30 days after the appellant is notified of the action, whichever is later.<sup>1</sup> Sec. 230.44(3), Stats. As the term “to file” is used here, it “requires physical receipt by the Commission rather than merely placing the appeal in the mail.” *ELMER V. UNIVERSITY OF WISCONSIN SYSTEM*, DEC. NO. 30910 (WERC, 5/04), citing *RICHTER V. DP*, CASE NO. 78-261-PC (PERS. COMM. 1/30/79). The 30-day time limit is mandatory, rather than discretionary with the Commission. *STRONACH V. DOT & DER*, CASE NO. 95-0177-PC (PERS. COMM. 12/7/95). Even in circumstances where the US Postal Service takes an unusually long period of time to deliver the mail, the timeliness question is determined by the date the mail was actually received. *KRAHLING V. DER*, CASE NO. 90-0315-PC (PERS. COMM. 1/11/91); *REHEARING DENIED*, (PERS. COMM. 2/26/91) (the appeal received on August 7<sup>th</sup> was untimely filed when it was mailed on August 2<sup>nd</sup> and was due on August 6<sup>th</sup>).

As an administrative agency, the Commission is obligated to apply the restrictions that are imposed upon it by the Wisconsin Statutes. The Commission may not consider the merits of an appeal merely because the Commission believes the underlying issue is particularly important, or because the failure to timely file the appeal was unintentional or caused by confusion.

The Appellant received notice on March 16, 2005 that she was being demoted from her position as a Supervising Officer 2, effective March 16<sup>th</sup>. As a consequence, she had until Friday, April 15, 2005 to file an appeal of the personnel action with the Commission. She incorrectly addressed the envelope containing her appeal so that even though it was received by a State agency<sup>2</sup> on April 15<sup>th</sup>, it did not reach the Commission until the following Tuesday, April 19<sup>th</sup>.

It appears that Ms. Biggar was confused between three State agencies when she submitted her appeal. Even though Respondent had correctly notified her in the letter of discipline that she could appeal the transaction to the Wisconsin Employment Relations Commission, she directed her appeal to the Personnel Commission (abolished in 2003) and then compounded her error by using the mailing address for the Office of State Employment

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<sup>1</sup> Although the Respondent asserts that the 30 day time limit is a jurisdictional requirement, it actually relates to the Commission’s competency to proceed. *ASSOCIATION OF CAREER EXECUTIVES V. KLAUSER*, 195 WIS. 2D 602, 608-09, N. 7, 536 N.W.2D 478 (CT. APP. 1995); *AUSTIN-ERICKSON V. DHFS & DER*, CASE NO. 097-0113-PC (PERS. COMM. 2/25/98).

<sup>2</sup> J. Clementi received delivery of the appeal on April 15<sup>th</sup>. The State’s on-line telephone directory lists a John Clementi employed by the Department of Administration.

Relations. There is no indication that the employing agency misled her by providing her with inaccurate information about the procedure for filing her appeal.<sup>3</sup>

“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.” *ELMER V. UNIVERSITY OF WISCONSIN SYSTEM*, DEC. NO. 30910 (WERC, 5/04), citing *ANCEL V. DER*, CASE NO. 91-0117-PC (PERS. COMM. 10/17/91); and *GENSCH V. DER*, CASE NO. 87-0072-PC (PERS. COMM. 7/8/87). The circumstances surrounding Ms. Biggar’s appeal are indistinguishable.

The Commission does not dispute Appellant’s assertion that she made “an honest effort” to comply with the appeal requirements. However, a good faith effort does not equate to statutory compliance. *ELMER V. UNIVERSITY OF WISCONSIN SYSTEM*, DEC. NO. 30910 (WERC, 5/04)

We find the appeal untimely and grant the motion to dismiss.

Appellant also points out that DOC failed to provide her with a copy of the “EAP Information” identified as an attachment to the letter of discipline. She suggests that if dismissal of her appeal is an appropriate consequence of a technical error on her part, then the underlying demotion should be dismissed because of DOC’s failure to supply her with the EAP document. Appellant’s suggestion relates to the merits of the appeal, a topic that cannot be considered by the Commission unless and until the Commission denies the Respondent’s motion to dismiss. However, the Commission has concluded that the appeal was not timely filed so any comments relating to the underlying demotion would have no legal effect.

Dated at Madison, Wisconsin, this 11<sup>th</sup> day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>3</sup> Under certain circumstances, conduct by the employing agency that causes reasonable reliance by an appellant to her detriment may serve as the basis for preventing a respondent from claiming an appeal was untimely filed. *AUSTIN-ERICKSON V. DHFS & DER*, CASE NO. 097-0113-PC (PERS. COMM. 2/25/98).

