

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**STEPHEN M. MARKWARDT**, Appellant,

v.

**Director, OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondent.

Case 739

No. 66186

PA(der)-171

**Decision No. 31902**

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**Appearances:**

**Stephen M. Markwardt**, appearing on his own behalf.

**David Vergeront**, Legal Counsel, P. O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Office of State Employment Relations.

**ORDER DENYING MOTION TO DISMISS**

This matter, which arises from the decision to reallocate the Appellant's position to Facilities Maintenance Specialist - Advanced, rather than Heating, Ventilating, Air Conditioning (HVAC) Specialist - Advanced, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal on timeliness grounds. The final written argument was filed on October 18, 2006.

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

**FINDINGS OF FACT**

1. Effective June 25, 2006, Respondent reallocated Mr. Markwardt's position to Facilities Maintenance Specialist - Advanced.
2. Appellant was notified of the reallocation decision by written notice and within 30 days thereafter, he submitted a letter of appeal, along with two attachments, to the Commission. He did not include payment for the \$50 filing fee.
3. The Commission received Appellant's initial submission on August 9, 2006.

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4. By letter dated August 16, 2006, the Commission informed Mr. Markwardt that:

The Commission must receive within 30 calendar days from the date of this letter either the filing fee of \$50.00 or an executed hardship affidavit. Failure to meet this requirement will result in dismissal of this appeal.

5. Appellant mailed a \$50 money order to the Commission on September 14, 2006. The envelope, which bears a postmark of September 14, reached the Commission on Friday, September 15.

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 filing fee was timely received by the Commission in accordance with the 30-day time limit established in Sec. PC 3.02, Wis. Adm. Code.

2. The Appellant has sustained that burden.

3. The fee was received timely.

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 denied and this parties will be contacted for the purpose of scheduling a prehearing conference.

Given under our hands and seal at the City of Madison, Wisconsin, this 9<sup>th</sup> day of November, 2006.

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

OSER (Markwardt)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The issue in this matter is whether Mr. Markwardt timely submitted the filing fee that is required for an appeal of a reallocation decision under Sec. 230.44(1)(b), Stats. According to Sec. 230.44(3), Stats., such an appeal must be 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.” There is no dispute that the Appellant’s initial submission that was received by the Commission on August 9, 2006 satisfied this requirement.

However, an appellant must also satisfy the separate time requirement for submitting the filing fee. The latter time limit is established by administrative rule<sup>1</sup> in Sec. PC 3.02, Wis. Adm. Code:

(1) Notwithstanding s. 230.44(3), Stats., . . . payment of a fee or filing of a hardship affidavit in lieu of fee payment is required for appeals subject to the fee payment of s. 230.45(3), Stats.

(2) . . . [T]he commission may take no action to resolve an appeal for which the payment of a fee is required until the commission receives the fee or hardship affidavit as required under this section. . . .

(5) TIME LIMITS FOR PAYING FEES. (a) *Requirements at time of filing.* Except as provide under par. (b), the fee or the hardship affidavit for filing an appeal shall be received by the commission at the time the appeal is filed.

(b) *Exceptions; time limits.* 1. If an appeal is filed without each appellant enclosing either the fee payment or hardship affidavit, the commission shall send each remiss appellant a letter advising of the requirement to either pay the fee or to submit a hardship affidavit.

2. A fee payment . . . received by the commission within 30 days of the date appearing on the commission’s letter mailed under subd. 1, will be considered a timely paid fee. . . .

(6) EFFECT OF FAILING TO TIMELY FILE FEE PAYMENT OR HARDSHIP AFFIDAVIT. The commission shall dismiss without prejudice the appeal of any appellant who has failed to submit the required fee payment or hardship affidavit within the time limits under sub. (5).

(7) REFILED APPEALS. The filing date for an appeal which is refilled after dismissal under sub. (6), shall be determined by the date upon which the commission receives the refilled action rather than the filing date of the initial appeal.

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<sup>1</sup> Subsection 230.45(3), Stats., which was created by Section 6293, 1995 Wisconsin Act 27, directs the Commission to “promulgate rules establishing a schedule of filing fees to be paid by any person who files an appeal” under 230.44(1)(b).

Mr. Markwardt filed his reallocation appeal with the Commission on August 9, 2006, but did not enclose a filing fee. Pursuant to PC 3.02(5)(b), the Commission mailed him a letter dated August 16, 2006 that provided him 30 days to supply the fee. He mailed the required \$50 fee to the Commission where it was received on September 15, 2006. Respondent contends that the payment was received one day late because the date of the letter to Appellant has to be counted when calculating the 30-day period:

In the event someone might argue that August 16 should not be counted, that clearly must be rejected. The Code provision does not provide that the date of the letter is to be excluded when computing timeliness. The language is very precise in that it **MUST** be received within “30 days of the date **appearing on the letter**” which means that said date is counted. Respondent is aware of s. 990.001(4)(a), Wis. Stats., which states that when computing due dates, the first day is excluded. However, that provision is not controlling herein for two reasons: (1) the specific verbiage of the Code expressly states that the computation of the 30 days begins with the date “appearing on the Commission’s letter”, which means that said date is included; and (2) s. 990.001, Wis. Stats., provides that statutes like s. 990.01(4)(a), Wis. Stats., do not govern if it would produce a result that is inconsistent with the manifest intent of the Legislature. [Respondent’s brief, emphasis in original.]

The 30-day timeline for the Commission’s receipt of a filing fee is mandatory, rather than directory. *RUNDE V. DMRS, CASE NO. 97-0088-PC (PERS. COMM. 12/17/97)*. However, the Commission finds no basis for the Respondent’s contention that the first day of the period for submitting the fee ends on the same day the letter to the Appellant was signed. According to Respondent’s argument, a requirement that a task be carried out “within one day of the date appearing on this letter” would mean that the task had to be performed during the 24 hours contained within the calendar day listed on the letter. Respondent’s interpretation is the precise result that the legislature sought to avoid by promulgating Sec. 990.001(4), Stats., which provides, in part: “The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last.”

The “manifest intent” behind the language used in PC 3.02(5)(b)2., is that the first day of the 30-day period is the calendar day *after* the date of the letter. This intention is reflected by the facts that are set forth in *BERNECKER V. DNR & DER, CASE NO. 00-0128-PC (PERS. COMM. 10/4/2000), REHEARING DENIED (11/21/2000)*. After Ms. Bernecker filed a letter of appeal without enclosing the filing fee, the Commission issued her a letter dated July 13, 2000 that set forth the 30-day period *and* specified the final date for satisfying the requirement:

The Commission must receive within 30 calendar days from the date of this letter (by 4:30 p.m. on August 14, 2000) either the filing fee of \$50, or an executed hardship affidavit.



Counting July 14 as the first day in the 30-day period, the 30<sup>th</sup> day was Saturday, August 12, 2000 and by action of Sec. 990.001(4)(c),<sup>2</sup> Ms. Bernecker had until the “next succeeding day that is not a Sunday or a legal holiday” for her filing fee to reach the Commission. The Commission did not receive Ms. Bernecker’s fee on Monday, August 14, 2000; it arrived on Tuesday, August 15, 2000, “which was one day late.” Had July 13 been the first day of the 30-day period granted to Ms. Bernecker, her fee would have been due on Friday, August 11, 2000. The facts relied on in Bernecker indicate that the first day in the 30-day period that is specified in PC 3.02(5)(b)2., is the day after the date appearing on the Commission’s letter.

In the present dispute, the Commission’s fee letter to Mr. Markwardt was dated August 16, 2006. The following day, August 17, was day one when calculating the 30-day period available to Mr. Markwardt for his filing fee to reach the Commission in a timely manner. He filed his fee on the 30<sup>th</sup> day, September 15, so it was received timely.

In light of Sec. 990.001(4)(a), Stats., the Respondent’s motion to dismiss must be denied.

Dated at Madison, Wisconsin, this 9<sup>th</sup> day of November, 2006.

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>2</sup> The paragraph provides:

When the last day within which a proceeding is to be had or taken or an act done, which consists of any payment to or the service upon or the filing with any . . . agency of the state . . . of any money . . . falls on a Saturday and the duly established official office hours of such . . . agency . . . do not include any office hours thereof on such Saturday, said proceeding may be had or taken or such act may be done on the next succeeding day that is not a Sunday or a legal holiday.