

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEPHEN C. ELMER, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE
AND CONSUMER PROTECTION**, Respondent.

Case 55
No. 66749
PA(sel)-38

Decision No. 32087

Appearances:

Stephen C. Elmer, appearing on his own behalf.

Dennis Fay, Assistant Legal Counsel, P. O. Box 8911, Madison, WI 53708-8911, appearing on behalf of the Department of Agriculture, Trade and Consumer Protection.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from a civil service hiring process, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely filed. The final written argument was received on April 12, 2007.

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

FINDINGS OF FACT

1. Appellant Stephen Elmer applied for a vacant Environmental Enforcement Specialist position at the Department of Agriculture, Trade and Consumer Protection (DATCP) and was interviewed on August 8, 2006.

2. Linda Nowaczyk, DATCP Human Resources Specialist, later mailed Elmer a letter informing him that due to the small number of applicants and to more options in terms of the location of the headquarters for the position, the position would be re-announced.

3. Elmer received the letter on October 5 and submitted an open records request to DATCP on October 11 for documents related to the vacancy. He received materials on November 2, one of the documents indicated that a candidate had been offered the position on August 18 but had turned it down. Appellant considered that candidate to have been well-qualified to fill the vacancy.

4. On December 19, Elmer received written notice that someone else had been hired into the position.

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5. Elmer filed another open records request on December 29 and he received responsive documents on January 24, 2007. Based on these documents, Elmer concluded that he was better qualified than the candidate who ended up in the position.

6. Elmer prepared a letter of appeal dated February 20, 2007. It was received by the Commission on February 22, 2007.

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

ORDER¹

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 8th day of May, 2007.

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

¹ Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

DATCP (Elmer)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

This matter is before the Commission as an appeal of a civil service selection action, pursuant to the Commission's authority 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 issue raised by Respondent's motion to dismiss is whether Mr. Elmer 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.

Elmer argues that his appeal should be considered timely because it was filed within 30 days of when he learned that the selection decision was improper:

The "action" in this case is not "the failure to select Mr. Elmer for the Environmental Enforcement position which effectively occurred when another candidate was offered and accepted the position," as the respondent alleges. The question is when did Elmer learn that the selection of the candidate was an action "alleged to be illegal or an abuse of discretion" pursuant to s. 230.44(1)(d) stats. Elmer first learned that another candidate was selected for [the] position in a letter from DATCCP dated December 18, 2006, and received on December 19, 2006. The letter from DATCP was generic and provided no indication of a possible abuse of discretion in the hiring process. Merely learning that another candidate was selected for the position does not constitute a basis to appeal pursuant to s. 230.44(1)(d) and (3), stats. . . .

Elmer received the [response to his open records request] on January 24, 2007.
. . .

From review of the Hiring Justification Worksheet on January 24, 2007, Elmer first learned the following:

1. The candidate hired for the position was less qualified than Elmer.
2. The candidate hired was interviewed in November 2006 as a result of the second job re-announcement.

3. It was evident that DATCP acted contrary to established hiring practices by arbitrarily and capriciously re-announcing the position vacancy for a second time rather than offering the position to Elmer, a well qualified candidate who interviewed on August 8, 2006.

Therefore, it was on January 24, 2007, that Elmer received first notification of an action that was “alleged to be illegal or an abuse of discretion” had occurred.

While the Appellant’s arguments have some superficial appeal, they are inconsistent with longstanding and well-founded precedent.

The subject of Elmer’s appeal is the decision not to select Appellant to fill the vacant position rather than the decision, that may have been made later in the process, to select another candidate. *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 day filing period begins no later than the date the Appellant was notified that he had not been selected. *UW (ELMER)*, 2 Dec. No. 30910 (WERC, 5/2004). (The “effective date” of the decision not to select the appellant, who had sought to be permissively transferred into the vacant position, was no later than July 31, 2003, the date of the agency’s letter notifying appellant of the non-selection.)

Receipt of information causing an applicant to believe that the selection decision was improper has no effect on the period for commencing an appeal under Sec. 230.44(1)(d), Stats. In *GRIMES V. WIS. LOTTERY, CASE NO. 91-0158-PC (PERS. COMM. 10/31/91)*, the appeal was untimely filed when it was received nearly 3 years after the selection decision. The appellant in that matter filed the appeal after having read a newspaper article regarding various personnel disputes within the hiring agency. The Commission held that once the appellant learned he had not been selected to fill certain vacancies, he had an obligation to determine whether the decisions were proper and to promptly file an appeal with the Commission if he wanted to obtain review of the decisions.

More recently, in *DOC (RASMUSSEN), DEC. NO. 31121 (WERC, 10/2004)*, the Commission specifically rejected the contention that the 30-day filing period did not commence until the appellant received his response to an open records request relating to the disciplinary action that was the subject of his appeal.

[Mr. Rasmussen] 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:

² Stephen Elmer was not the appellant in the cited case.

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. . . .

The ruling most directly relevant to this appeal is BACHMAN V. UW, CASE No. 85-0111-PC (PERS. COMM. 11/7/85). Bachman had been notified on April 8 that he not been selected to fill a vacant position as a Library Assistant. Within 30 days, he wrote at least two letters to the librarian who made the selection decision, seeking a detailed explanation. He was dissatisfied with the response and after making a phone call to human resources department he wrote a third letter to the librarian on June 8 contending that “the entire [hiring] process was designed to secure a sinecure” for the librarian’s former assistant. The same day, he wrote a letter of appeal that did not reach the Personnel Commission until June 18. The appeal was deemed untimely.

In the present matter, Elmer learned on December 19 that another candidate had been hired to fill the vacancy. He could have filed an appeal at that time, without cost and by simply sending a letter to the Commission. Instead, he chose to wait 10 days to file an open records request and he subsequently waited four more weeks before he received DATCP’s response on January 24, 2007. He filed his appeal on February 22, more than two months after he learned that he had not been selected to fill the position.

The Commission must conclude that Elmer’s letter of appeal, received by the Commission on February 22, 2007, was not a timely appeal of the decision not to select Elmer for the Environmental Enforcement Specialist position, notice of which was received by Elmer on December 19, 2006. The appeal must be dismissed as untimely filed.

Dated at Madison, Wisconsin, this 8th day of May, 2007.

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

