

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW BOYEA, Appellant,

v.

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

Case 89
No. 68260
PA(adv)-151

Decision No. 32647

Appearances:

Matthew Boyea, appearing on his own behalf.

Terri A. Rees, Paralegal, P. O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

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 and for lack of subject matter jurisdiction. The final date for submitting written arguments was December 2, 2008.

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

FINDINGS OF FACT

1. Effective September 16, 2007, Appellant was promoted from Correctional Officer to Correctional Sergeant at Respondent's New Lisbon Correctional Institution. He was required to serve a six-month probationary period.

2. Appellant was absent from work for more than 174 hours during the course of his probation. Respondent contends that this automatically extended Appellant's probationary period, while Appellant contends he was not properly notified of any extension.

3. By letter dated March 28, 2008 that he received on March 29, Appellant was notified that effective March 28, his probationary employment as a Correctional Sergeant was being terminated "for failure to meet probationary standards," and that he was being restored to a Correctional Officer position. Respondent paid Appellant for working as a Sergeant for a portion of March 29. Thereafter, however, Appellant was paid as an Officer.

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4. Appellant filed a civil service appeal with the Commission on September 3, 2008 which stated, in part:

I am requesting a formal decision in confirmation of the exact date of my conclusion to my promotional probationary period as Correctional Sergeant. . . .

As to the timing of this request, I have only recently been informed by the union, who in turn were only recently informed, that I needed to write to you at the Wisconsin Employ[ment] Relations Commission in order that you may decide whether or not I was still on or off my promotional probation.

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 13th day of January, 2009.

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.

Department of Corrections (Boyea)

**MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS**

As already noted, the Respondent has moved to dismiss the appeal for lack of subject matter jurisdiction and as untimely filed. We address the timeliness objection first.

This matter was filed with the Commission as a State classified service personnel appeal. The time limit for a claim under Sec. 230.44(1), Stats.,² is found in subsection (3) 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.

Appellant acknowledges he learned on March 29 that his employer had decided to terminate his probationary employment as a Correctional Sergeant and to restore him to a Correctional Officer position. The transaction took effect midway through March 29 as indicated by the changeover in Appellant's rate of pay on that date. The appeal did not reach the Commission until September 3, more than five months later, and well outside the 30-day limit.

Appellant's only argument relating to the timeliness objection is that he acted promptly once he found out from his union "as to what my course of action should be." The date of notification referenced in Sec. 230.44(3), Stats., is the date the appellant is notified of the underlying personnel action, rather than the date the appellant concludes the action was improper³ or the date the appellant concludes that the action may be appealed to the Commission. A lack of familiarity with the law does not toll a filing period and the absence of information from the employer does not toll the period unless the employer has an affirmative obligation to provide such information. *HALLMAN V. WCC & DOA, CASE NO. 96-0146-PC (PERS. COMM., 2/12/1997)*. We are unaware of any obligation that would apply here, so the appeal is untimely and must be dismissed.

² The Commission's authority to review certain personnel actions relating to the State classified service is based on Sec. 230.45(1), Stats., which, among other provisions, incorporates Sec. 230.44, Stats., appeals. Nothing in the Appellant's submissions suggest he is attempting to pursue an appeal under some provision other than Sec. 230.44(1), Stats.

³ DATCP (ELMER) DEC No. 32087 (WERC, 5/2007).

Because the appeal was not timely filed, we do not reach the other basis for Respondent's motion to dismiss.

Dated at Madison, Wisconsin this 13th day of January, 2009.

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