

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EILEEN H. KARRE, Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 16
No. 67997
PA(adv)-138

Decision No. 32826

Appearances:

Eileen H. Karre, appearing on her own behalf.

John C. Dowling, Senior University Legal Counsel, Office of Administrative Legal Services, 361 Bascom Hall, 500 Lincoln Drive, Madison, Wisconsin 53706-1380, appearing on behalf of the University of Wisconsin System.

ORDER DENYING MOTION TO DISMISS

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss certain claims for lack of subject matter jurisdiction and certain claims as untimely filed. The final date for submitting written arguments was July 10, 2009.

Having reviewed the materials submitted by the parties and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. At all times relevant to this appeal, Appellant Eileen Karre worked as a Food Service Supervisor at the Babcock Dairy Store on the University of Wisconsin-Madison campus.
2. On January 11, 2008, the Respondent issued a one-day suspension to Karre.
3. On January 28, 2008, Respondent issued her a three-day suspension.

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4. On or about February 14, Appellant grieved the suspensions referenced above.

5. On April 1, 2008, she received a decision from her employer relating to the grievance. The decision stated in part:

Relief sought will be partially granted. Employee will receive payment for one and three day suspensions without loss of benefits. Disciplinary letters will not be removed from personnel file.

The decision was not dated or signed and was not on official University stationery.

6. On April 8, 2008, Respondent issued a revised letter of discipline to Karre in lieu of the January 11 one-day suspension. The letter formally reduced Karre's discipline to a "written reprimand in lieu of a one-day suspension" and offered the following rationale: "Although we believe your conduct would merit a one-day suspension, this second letter of reprimand is being issued instead of a one-day suspension in order to maintain the FLSA exempt status of your position."

7. Also on April 8, Respondent issued a revised disciplinary letter in lieu of the January 28 three-day suspension and expressed the same rationale as for the other revised letter.

8. The two revised letters of discipline were not delivered to the Appellant on April 8 because she only worked a half-day on that date. She first received the two letters of reprimand in lieu of a suspension on April 9.¹

9. Respondent issued Appellant a third disciplinary letter on April 8 that suspended her for five days commencing April 14.

¹In correspondence dated June 30, 2009, Appellant wrote that she "must have first seen the letters April 9th. . . ." In an e-mail sent later on June 30 that established the date for Respondent to reply to the Appellant's submission, a representative of the Commission noted:

In the reply, Respondent should indicate whether the University is satisfied that Ms. Karre received (i.e. reached the hands of Ms. Karre) the "reprimand in lieu of a one-day suspension" (which bore a date of April 8) and the "reprimand in lieu of a three-day suspension" (which also bore a date of April 8) no earlier than April 9. In the absence of that agreement by Respondent, I believe it will be necessary to conduct an evidentiary hearing to determine the date of receipt.

Respondent's reply included the following:

As stated in my letter dated June 19, 2009, the university does not have any specific information to confirm the date on which Ms. Karre received the reprimands dated April 8, 2008. We cannot confirm that she received them prior to April 9. I do not, therefore, believe that an evidentiary hearing will be necessary on this issue.

10. Appellant filed an appeal with the Commission on May 9, seeking review of all three disciplinary letters.

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 the Commission has subject matter jurisdiction over her claims and that the appeal was timely filed.
2. The Appellant has satisfied her burdens.
3. The Commission has subject matter jurisdiction under Sec. 230.44(1)(c), Stats., to review the written reprimand in lieu of a one-day suspension, the written reprimand in lieu of a three-day suspension, as well as the five-day suspension.
4. The Appellant's letter of appeal was timely filed.

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.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of August, 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

University of Wisconsin (Karre)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The Appellant is seeking review of three disciplinary actions imposed by her employer, the University of Wisconsin: 1) a reprimand in lieu of a one-day suspension, replacing a one-day suspension imposed on January 11, 2008; 2) a reprimand in lieu of a three-day suspension, replacing a three-day suspension imposed on January 28, 2008; and 3) a five-day suspension commencing April 14. All three letters were dated April 8, 2008 and the Commission received the letter of appeal on May 9, 2008.

Jurisdictional objection

Respondent contends that Sec. ER 46.07(1)(a), Wis. Adm. Code, bars the Appellant from appealing a written reprimand to the Commission. The administrative rule in question is part of the chapter of the Wisconsin Administrative Code establishing the parameters of the grievance procedure available to State civil service employees who are not covered by the terms of a collective bargaining agreement. Section ER 46.07(1)(a) provides that a written reprimand may not be grieved to the Commission sitting as the fourth step of that procedure. The Commission's authority to serve as the fourth and final step of the non-contractual grievance procedure is established by Sec. 230.45(1)(c), Stats.

The appeal materials filed by the Appellant with the Commission on May 9, 2008 referred to filing a "grievance." While the paragraph in the Administrative Code that Respondent cites limits the scope of the grievance procedure, the appeal materials must also be analyzed in the context of the Commission's jurisdiction pursuant to Sec. 230.44(1)(c), Stats., to review "a demotion, layoff, suspension, discharge or reduction in base pay." Previous decisions of the Commission have interpreted a "written reprimand in lieu of a suspension" as a suspension for purposes of obtaining review under Sec. 230.44(1)(c). DOR (JACKSON-WARD), DEC. NO. 32471 (WERC, 7/2008). The Commission has subject matter jurisdiction to review all three disciplinary actions imposed by the Respondent that are the subject of Ms. Karre's letter of appeal. The motion to dismiss for lack of subject matter jurisdiction must be denied.

Timeliness

The time limit for an appeal of a disciplinary action under Sec. 230.44(1)(c) is established by Sec. 230.44(3):

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of this action, or within 30 days after the appellant is notified of the action, whichever is later.

The letter of appeal reached the Commission on May 9, 2008. Working backwards, either the effective date or the date of notification for each disciplinary action being appealed must be April 9, 2008 or later in order for the appeal of that disciplinary action to be considered timely. The five-day suspension did not become effective until the first day of the suspension which was April 14, 2008. HANSEN V. DATCP, CASE NO. 87-0092-PC (PERS. COMM. 10/7/1987). As a consequence, the appeal of the five-day suspension must be considered timely filed.

Determining the timeliness of the other claims is somewhat more complicated.

Had the Appellant been seeking to obtain direct review of the one-day suspension issued on January 11 or the three-day suspension issued on January 28, her May 9 appeal of those actions would clearly be untimely as appeals filed pursuant to Sec. 230.44(1)(c). As a consequence of the Appellant's grievance relating to the two suspensions, Respondent chose to withdraw the one-day and three-day suspensions and re-issue them as a reprimand in lieu of a one-day suspension and a reprimand in lieu of a three-day suspension. The re-issued discipline was reflected in two letters that were dated April 8, 2008. Respondent acknowledges that Appellant was only at work for a half-day on April 8 and that the person who prepared the letters had asked that they be hand-delivered to Appellant at her workplace in Babcock Hall on that date. Respondent also acknowledged "we do not have any specific confirmation of the date of receipt" of the two letters.

In contrast, the Appellant presented a letter dated July 1, 2009 stating that she had checked her records and confirmed that she had only worked in the morning on April 8, 2008 and that she "must have first seen the letters April 9th before my meeting with Linda [the human resources manager]": "I know I had stopped at Babcock Hall before my meeting with Linda [on the 9th] to have Glenda drive me to Ag Hall. I also know I had off on April 9th all day and I came in to work on my time off to meet with Linda. I most likely read my mail before Glenda drove me up the hill." Several weeks before Appellant's written statement, a member of the Commission's staff had convened a telephone conference with the parties in an effort to determine when the letters of discipline had actually reached Appellant's hands. The conference report includes the following:

On at least two occasions during the conference, Ms. Karre indicated she believed she had received these two documents on April 8, but she then qualified those statements by saying the "might have" received them on April 8 or she was "not positive". She later said she did not remember when they reached her hand and it was clear to me that at least at some points during the conference, Ms. Karre was equating these two reprimands with the undated and unsigned memo she received on April 1.

The Appellant's July 1 written statement reflects her recollection after she had an opportunity to review her personal records which confirmed the reason she worked only a half-day on April 8. For that reason, we accept her written statement rather than any comments she made during the earlier telephone conference as the more accurate description of the events of 13 months earlier.

Given this conclusion and the Commission's authority to review suspensions as well as reprimands in lieu of suspensions, we deny the Respondent's motion to dismiss. A member of the Commission's staff will be in contact with the parties regarding further processing of these matters.

Dated at Madison, Wisconsin, this 6th day of August, 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