

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**KEITH HARRSCH**, Appellant,

v.

**WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT and OFFICE OF  
STATE EMPLOYMENT RELATIONS**, Respondents.

Case 13  
No. 69340  
PA(der) - 261

**Decision No. 33023**

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**Appearances:**

**Phillip S. Klein and John Verberkmoes**, appearing on behalf of Appellant Keith Harrsch.

**Howard Bernstein**, Office of Chief Legal Counsel, DWD, 201 East Washington Avenue, P.O. Box 7946, Madison, Wisconsin, 53707-7946, appearing on behalf of Respondent Department of Workforce Development.

**David Vergeront**, Chief Legal Counsel, OSER, 101 East Wilson Street, 4<sup>th</sup> Floor, P.O. Box 7855, Madison, Wisconsin, 53707-7855, appearing on behalf of Respondent Office of State Employment Relations.

**ORDER DISMISSING APPEAL AS UNTIMELY FILED**

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondents' motion to dismiss the appeal as untimely filed. The final date for submitting written arguments was January 21, 2010. The briefing schedule encompassed the timeliness objection and the Respondents' companion motion for an award of fees and costs under Sec. 227.483, Stats. However, on April 23, 2010, Respondents notified the Commission and the Appellant that they were no longer pursuing fees and costs.

Solely for the purpose of ruling on the motion and as reflected in the Findings of Fact, the Commission has liberally construed any information set forth in the Appellant's submissions. The format of the Commission's decision is prescribed, in part, by Sec. 227.47(1), Stats.

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 2005, Appellant was employed by the Department of Workforce Development (DWD). Pursuant to a joint agreement dated February 17, 2005, Appellant agreed to resign his position effective July 27, 2005 in exchange for, among other things, an agreement that DWD would only provide neutral employment references.

2. On May 5, 2008, facts were revealed in the course of a hearing in a factually-related WERC matter<sup>1</sup> involving the Appellant that demonstrated a potential violation in April 2007 of the neutral reference provision of the February 17, 2005 agreement.

3. Appellant filed a grievance related to the potential violation on May 22, 2008. The grievance was denied at the third step of the grievance procedure on September 22, 2008.

4. On October 22, 2009, Appellant submitted an unfair labor practice (ULP) complaint to the Commission under the State Employment Labor Relations Act. The complaint relied on the facts revealed in the 2008 hearing. The Commission processed it as provided in Ch. 111, Stats., titling it DOA – Office of State Employment Relations (Workforce Development), Case 819, No. 69263, PP(S)-400.

5. The October 22<sup>nd</sup> complaint also referred to “s. 230.13 and specifically s. 230.13(2).” By letter dated October 26, 2009, a member of the Commission’s staff wrote the Appellant:

The Commission’s authority to hear certain State civil service appeals pursuant to Sec. 230.45(1)(a), Stats., includes the authority under Sec. 230.44(1)(b), Stats., to review “a personnel decision under . . . 230.13(1) made by the director or by an appointing authority under authority delegated by the director. . . .” Any appeal under Sec. 230.44(1)(b), Stats., is subject to the filing fee requirements set forth in Sec. PC 3.02, Wis. Adm. Code. (Emphasis in original.)

6. On November 13, 2009, Appellant submitted a hand-written letter directed to the Commission’s hearing examiner presiding over the ULP complaint: “This is to inform you of our intent to continue with the alleged violation of 230.13.” The Commission created a new case file, and assigned it Case 13, No. 69340, PA(der)-261. This is the case that is currently before the Commission.

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<sup>1</sup> OFFICE OF STATE PUBLIC DEFENDER (HARRSCH), Case 3, No. 67756, PA(sel)-44.

7. On December 7, 2009, Appellant submitted the requisite filing fee.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

**CONCLUSIONS OF LAW**

1. Appellant has the burden of establishing that his appeal was timely filed.
2. Based on the uncontested facts drawn from a liberal reading of Appellant's written submissions, 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**<sup>2</sup>

Respondent's motion to dismiss is granted and this appeal is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 28<sup>th</sup> day of April, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.

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<sup>2</sup> 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.

**Wisconsin Department of Workforce Development and Office of State Employment Relations (Harrsch)**

**MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL**

Respondents have moved the Commission to dismiss the appeal as untimely. The Appellant has the burden of establishing that he timely filed his appeal. OFFICE OF STATE EMPLOYMENT RELATIONS (ZNIDARSICH), DEC. NO. 31951 (WERC 12/06). To meet that burden, Appellant must show that his appeal was filed within the timeframe established by statute. In this case, that time limit is specified in Sec. 230.44(3), Stats., which provides in relevant part that:

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....

The 30-day period for filing an appeal acts as a statute of limitations and restricts the Commission's ability to proceed to consider the merits of an appeal. AUSTIN-ERICKSON V. DHFS & DER, CASE NO. 97-0113-PC (PERS. COMM. 2/25/98).

In this case, Appellant alleges that the violation of Sec. 230.13, Stats., occurred in April 2007 when DWD provided Appellant's employment file to another agency where Appellant was a job applicant. According to the grievance filed with DWD on May 22, 2008, Appellant's representative became aware of this alleged violation on May 5, 2008. However, Appellant did not file his appeal with the Commission until October 22, 2009<sup>3</sup> – an interval of 535 days. Interpreting this timeline in a light most favorable to Appellant, it is clear that he did not file his appeal until he was well outside the 30-day time period set forth in Sec. 230.44(3), Stats. Appellant attempts to point the blame at DWD because it did not issue a final determination on the grievance until September 22, 2008<sup>4</sup> – four months after it was filed.

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<sup>3</sup> For purposes of discussion, we assume that the November 13, 2009 filing related back to the October 22 filing of the ULP complaint. LIPFORD V. DER & UW, CASE NO. 91-0118-PC (PERS. COMM. 7/22/1992) (appellant was permitted to amend a Fair Employment Act complaint to state a civil service appeal that ran against a party not named in the original complaint and to have the amendment relate back to the date of filing of the original complaint where there was no specific showing of prejudice to a respondent and were no circumstances from which prejudice could be inferred).

<sup>4</sup> There is a discrepancy in the record regarding the date the grievance was ultimately denied. The grievance form itself states that it was "returned" on October 22, 2008. However, in his December 7, 2009 "complaint" submission to the WERC, Appellant states that the final response denying the grievance was made on September 22, 2008. Although it is immaterial to ruling on Respondents' motion to dismiss, the Commission has accepted the Appellant's date.

A delay in denying the grievance, if there was a delay, is irrelevant to the determination here. Even if the Commission accepts May 5, 2008 as the effective date and the date of notification of the matter being appealed, this appeal was not filed until October 22, 2009, at the earliest. In light of the 30-day filing period established by statute, the Appellant has not even offered a theory on which this appeal could have been timely filed. Therefore, the motion to dismiss will be granted as the appeal was untimely filed.

Dated at Madison, Wisconsin this 28<sup>th</sup> day of April, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.