

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BERLYE S. MIDDLETON**, Appellant,

v.

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

Case 124  
No. 70151  
PA(adv)-192

**Decision No. 33159**

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**Appearances:**

**Stephen L. Weld**, Attorney, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Appellant.

**Jonathan Nitti**, Attorney, Wisconsin Department of Corrections, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

**ORDER GRANTING 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 the appeal as untimely. The final date for submitting written arguments was October 4, 2010.<sup>1</sup> 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. Section 227.47(1), Stats., prescribes in part the format of the Commission's decision.

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<sup>1</sup> This was the Appellant's due date for responding to the motion to dismiss. Respondent's due date for filing a reply was October 14, 2010; however, the Appellant declined to respond to the motion, and thus Respondent did not file a reply.

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

### **FINDINGS OF FACT**

1. Berlye S. Middleton, the Appellant, was employed by Respondent as a Corrections Program Supervisor at the Chippewa Valley Correctional Treatment Facility (Chippewa Valley) at the time of the events set forth in these findings.

2. Respondent prepared a letter of reprimand in lieu of a suspension without pay addressed to Mr. Middleton and signed by Warden Pamela J. Wallace, dated June 14, 2010, relating to alleged incidents on March 1, March 2, and March 5, 2010.

3. The June 14 letter of reprimand stated in part:

If you believe this action was not taken for just cause, you may appeal to the Wisconsin Employment Relations Commission within thirty (30) days of the effective date of this action, or within thirty (30) days of notification of this action, whichever is later.

4. The letter of reprimand was personally served on Appellant on June 14, 2010.

5. Appellant's counsel sent a letter of appeal on behalf of Appellant, which was dated August 17, 2010, and was received by the Commission on August 20, 2010. The letter of appeal stated in part:

Pursuant to § 230.44, Wisconsin Statutes, we are, on behalf of Berlye Middleton, appealing the attached "written reprimand in lieu of suspension" issued to Mr. Middleton by Warden Wallace at the Chippewa Valley Correctional Treatment Facility. That reprimand/suspension was issued without just cause. We believe the Facility failed to follow progressive disciplinary procedures and is retaliating against its only black employee for his prior criticism of management. Warden Wallace found the reprimand not grievable at Step 1 of the grievance procedure. Neither Division Administrator Grosshans (Step 2) or Department Secretary Raemisch (Step 3) have responded to the grievance.

Whether grievable or not, the "written reprimand in lieu of a suspension" is appealable. See Jackson-Ward, WERC Dec. No. 32471. Please process this appeal. Be advised that the matter is a companion to PA-184 (a written reprimand) currently pending before the Commission.

Attached to the letter of appeal was a copy of Warden Wallace's June 14 letter of reprimand.

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 not sustained that burden.
3. The appeal is untimely and therefore must be dismissed.

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 is granted and this matter is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2<sup>nd</sup> day of November, 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

Terrance L. Craney /s/

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Terrance L. Craney, Commissioner

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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.

**Department of Corrections (Middleton)**

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS**

Appellant has the burden of establishing that his appeal was timely filed. UW & OSER (KLINE), Dec. No. 30818 (WERC, 3/04). The appeal cites Sec. 230.44, Stats., and paragraph (1)(c) in that section grants the Commission the authority to review disciplinary suspensions.<sup>3</sup> The applicable time limit is set forth in Sec. 230.44(3), Stats., which states 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.

Moreover, “the time limit set forth in 230.44(3), Stats., is mandatory, not discretionary, RUNDE v. DMRS, CASE NO. 97-0088-PC (PERS. COMM. 12/17/97), and the Commission cannot set it aside.” OSER (ZNIDARSICH), DEC. NO. 31951-A (WERC, 1/07).

The appeal in this case was not timely filed. The reprimand in lieu of a suspension was effective no later than the date of notification, June 14. Under Sec. 230.44(3), Stats., Appellant had 30 days from June 14, 2010, or until July 14, 2010, to file his appeal. “The term ‘filed’ in this subsection requires physical receipt by the Commission.” DOJ (MOORE), DEC. NO. 32351 (WERC, 2/08), *citing* UNIVERSITY OF WISCONSIN (ELMER), DEC. NO. 30910 (WERC, 5/04). The Appellant filed his appeal on August 20, 2010, more than two months after the July 14<sup>th</sup> filing deadline.

Accordingly, Mr. Middleton’s appeal must be dismissed as untimely filed.

Dated at Madison, Wisconsin this 2<sup>nd</sup> day of November, 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

Terrance L. Craney /s/

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Terrance L. Craney, Commissioner

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<sup>3</sup> The Commission lacks subject matter jurisdiction to hear a claim under the Wisconsin Fair Employment Act of race discrimination. *See* DOA (MEIER-O’BRIEN), DEC. NO. 32955 (WERC 1/10), *QUOTING* DOC (ALT), DEC. NO. 31795 (WERC, 9/06) (“[T]he Commission lacks the authority to receive and process complaints of discrimination that seek to invoke Wisconsin’s Fair Employment Act, subch. II, ch. 111, Stats.”).