

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL K. LANGWORTHY, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 119
No. 69812
PA(adv)-185

Decision No. 33211-A

Appearances:

Michael K. Langworthy, appearing on his own behalf.

H. Elizabeth Kennebeck, Assistant Legal Counsel, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

ORDER REOPENING APPEAL

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on the Appellant's request to reopen the matter after the Commission issued a dismissal order on January 7, 2011. Appellant contends that the dismissal order was issued under a misapprehension of his intentions. The final date for submitting written arguments was January 21, 2011.

Solely for the purpose of ruling on the motion in a manner that conforms with the requirements of Sec. 227.47(1), Stats., the Commission has rendered the following Findings of Fact that are based upon what appear to be uncontested matters as well as a liberal construction of the information set forth in the Appellant's submissions.

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

FINDINGS OF FACT

1. During the relevant time period, the Appellant has been employed by the Department of Corrections as a captain at Taycheedah Correctional Institution.

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2. By letter dated April 6, 2010, he was notified of a 10-day suspension.
3. Appellant filed an appeal of the suspension with the Commission on April 26, 2010.
4. A member of the Commission's staff convened a pre-hearing conference with the parties, via telephone, on June 28, 2010, scheduled a hearing for September 9, and supplied the parties with Prehearing Conference Memorandum via email. Appellant participated without an attorney.
5. On August 29 and 30, the parties requested, via email, postponement of the hearing for separate reasons. The Appellant cited discovery difficulties and referenced "my counsel" in his written request.
6. By email dated August 30, 2010, the Commission staff attorney who was to conduct the hearing wrote the parties that the proceeding had been cancelled, and informed them:

I suggest that once the documents Mr. Langworthy requested are provided, we hold another conference call to reschedule. Also[,] Mr. Langworthy, please advise Ms. Kennebeck and myself of the identity and contact information of anyone representing you in this matter.

7. By email dated December 7, 2010, the staff attorney wrote the Appellant:

In reviewing this file I see that there has not been any activity on this case for over three months. According to the preceding correspondence, [you] were to notify me when you had received the information you were seeking and were also to provide Ms. Kennebeck and myself with the identity of your representative, if any. At that point we would reconvene the scheduling conference and set a new date for hearing. Please advise as to the status of this matter at your earliest convenience. If I do not hear from you by December 17, I will assume you no longer intend to pursue this matter and will close my file.
8. Once Appellant filed his appeal, all of the correspondence described above was exchanged using Appellant's Department of Corrections email address.
9. By order dated January 7, 2011, the Commission dismissed the appeal upon the following premise:

Michael K. Langworthy having filed a State civil service personnel appeal with the Wisconsin Employment Relations Commission and the Appellant having, on December 17, 2010, requested that the appeal filed herein be withdrawn; and the Commission being satisfied that the appeal should be dismissed

By cover letter dated January 7, 2011, the Commission supplied the parties with a copy of the dismissal order. The materials were mailed to the Appellant's home address.

10. Appellant had been off work since mid-November 2010. He did not notify the Commission of that fact until January 10, 2011. He was on administrative leave at that time.

11. Appellant did not receive the December 7, 2010 email prior to January 10, 2011.

12. By January 10, 2011 email from his home address, Appellant formally requested that the Commission reopen his appeal.

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

CONCLUSIONS OF LAW

1. Pursuant to Sec. 227.49(1), Stats., the Appellant filed a timely "petition for rehearing" within 20 days after service of the Commission's January 7, 2011 final order of dismissal.

2. The Commission's January 7, 2011 dismissal was issued based upon a misunderstanding of the Appellant's intent, which is a material error of fact.

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

ORDER

Appellant's motion to reopen is granted and the matter is reopened.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of January, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Department of Corrections (Langworthy)

MEMORANDUM ACCOMPANYING ORDER REOPENING APPEAL

The Appellant asks the Commission to reopen the appeal after it was dismissed by order that stated the Appellant had “requested that the appeal . . . be withdrawn.” Approximately one month prior to the dismissal order, the Commission staff attorney assigned to the case had sent an email to the Appellant’s work address. The December 7 email included language indicating the staff attorney would “assume you no longer intend to pursue this matter and will close my file” unless Appellant responded by December 17. The Appellant was not working on December 7, did not receive the email, and had not returned to work at the time the Commission issued its dismissal order one month later.

The Commission obviously issued the January 7 dismissal order under a misapprehension of the Appellant’s intention. The Appellant did not wish to withdraw his appeal. He simply had not received the staff attorney’s email because it had been sent to his work address and he was on administrative leave. In addition, and contrary to the language of the dismissal order, Appellant had not “on December 17, 2010, requested that the appeal filed herein be withdrawn.” He had merely not responded to the underlying email, because he had not received it.

These circumstances are comparable to those in WIPPURFURTH v. DER, CASE NO. 0135-PC (PERS. COMM. 11/13/1992). Although the appellant in that matter had earlier indicated she had wished to withdraw her appeal, a letter from the Commission to the appellant to confirm her intent was improperly addressed, appellant changed her mind before she received the Commission’s dismissal order and, at that time, wrote that she wished to continue her appeal. Her appeal was reopened.

The Respondent’s sole argument opposing the Appellant’s motion to reopen is that he failed to notify the Commission of his “change of address.” Pursuant to Sec. PC 1.03(1), Wis. Adm. Code: “Parties shall promptly notify the commission, in writing, of any change of address during the pendency of the case.” While it is true that the Appellant did not inform the staff attorney to switch to Appellant’s home email address, and even assuming the language of the administrative rule is broad enough to encompass an email address, there is no indication the Appellant ever knew how long he would be on administrative leave and how long he would not access his email account at work. Appellant’s actions, though imperfect, do not justify barring him from pursuing his appeal.

A member of the Commission's staff will be contacting the parties to reschedule the hearing or to convene a telephone conference.

Dated at Madison, Wisconsin, this 26th day of January, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner