

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANNESSA CLARK-DYETT, Appellant

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent

Case 23
No. 70548
PA(mch)-1

Decision No. 33234-A

MIRTA KASPER, Appellant

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent

Case 24
No. 70549
PA(mch)-2

Decision No. 33235-A

Appearances:

Annessa Clark-Dyett, appearing on her own behalf.

Mirta Kasper, appearing on her own behalf.

Lara M. Herman, Attorney, Wisconsin Department of Health Services, Office of Legal Counsel, P.O. Box 7850, 1 West Wilson Street, Madison, WI 53707-7850, appearing on behalf of Respondent.

ORDER GRANTING MOTIONS TO DISMISS

These matters are before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motions to dismiss these two appeals as untimely.¹ The final written arguments were filed on April 11, 2011.

¹ Because the relevant facts related to timeliness are substantially similar, the Commission has consolidated these appeals solely for the purpose of deciding Respondent's motions to dismiss.

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Solely for the purpose of ruling on the motions and as reflected in the Findings of Fact, the Commission has liberally construed any information set forth in the Appellants' 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. Appellants applied for open Health Care Supervisor positions with Respondent in Fall 2010.

2. Appellant Clark-Dyett was "told informally" on or around November 18, 2010 that she was not selected as a successful candidate. On November 29, 2010, she sent a letter to four unidentified departments of the State of Wisconsin communicating concerns related to her non-selection.

3. Appellant Kasper was informed by November 30, 2010 that she was not selected as a successful candidate. On November 30, 2010, she sent an e-mail requesting information regarding her non-selection. She was subsequently informed of her appeal rights by letter on December 16, 2010.²

4. Both Appellants received a letter from Respondent on December 2, 2010 notifying them that they were not selected.

5. On January 4, 2011, Appellants filed their letters of appeal seeking Commission review of Respondent's decision not to select them for the positions. Appellant Kasper filed in an envelope postmarked December 30, 2010 by regular U.S. Postal Service. Appellant Clark-Dyett also filed by U.S. Postal Service in an envelope with an illegible postmark, but containing a money order dated December 29, 2010.

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

CONCLUSIONS OF LAW

1. Appellants have the burden of establishing that their appeals were timely filed in accordance with the 30-day time limit established in Sec. 230.44(3), Stats.

2. Appellants have failed to sustain that burden.

² This letter, from the Wisconsin Office of State Employment Relations, is not in the record.

3. The appeals are untimely.

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

ORDER³

Respondent's motions are granted and these two appeals are dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 9th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

³ 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 Health Services (Clark-Dyett and Kasper)

MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEALS

Respondent has filed motions to dismiss the appeals as untimely, contending they were filed more than 30 days after Appellants were notified they had not been selected for Health Care Supervisor positions. Appellants contend their appeals are timely because they were not informed of their appeal rights, the delivery of their appeal documents were delayed due to holiday and furlough schedules, and they waited to file their appeals pending attempts to informally resolve their concerns related to the selection process. For the following reasons, we grant Respondent's motions and dismiss the appeals as untimely.

The issue raised by both of Respondent's motions to dismiss is whether Appellants complied with the statutory 30-day period for filing appeals.⁴ Section 230.44(3), Stats., provides as follows:

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.

In appeals of non-selection decisions, such as those at issue here, the effective date that begins the 30-day filing period occurs no later than the date on which the appellant receives notification she was not selected for the position. UW (ELMER), DEC. No. 30910 (WERC, 5/2004).

Appellants have the burden of establishing that their appeals were timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/2004). Filing is complete upon physical receipt of the appeal documents by the Commission at its Madison office. DHFS & DMRS (SAVELAND), DEC. NO. 31815 (WERC, 9/2006).

Appellant Clark-Dyett acknowledges she was informed of her non-selection "on or around" November 18, 2010. Appellant Kasper acknowledges she was informed of her non-selection for the positions "on or around" November 28, 2010 and sent an e-mail to Respondent seeking information regarding the selection process on November 30, 2010.⁵

⁴ If the 30th day of the filing period is a Saturday, Sunday or legal holiday, the period is extended until "the next succeeding day that is not a Sunday or legal holiday." Sec. 990.001(4)(c), Stats. UW(KARRE), DEC. NO. 32655 (WERC, 1/2009).

⁵ November 28, 2010 was a Sunday. For the purpose of this decision, we will give Kasper the benefit of the doubt and use November 30, 2010 as the date which she was notified of her non-selection.

Therefore, to be timely, Clark-Dyett would have to file her appeal on Monday, December 20, 2010 and Kasper would have to file her appeal by December 30, 2010. Instead, both Appellants filed their appeals on January 4, 2011, well outside the filing period. As such, their appeals must be dismissed as untimely.⁶

Despite being late, Appellants contend that their appeals should be considered timely because 1) they did not receive notification of their statutory appeal rights at the time they were informed that they had not been selected, 2) the U.S. Postal Service is unreliable and holiday schedules delayed the delivery of their appeal documents, and 3) they attempted to resolve their concerns regarding the selection process through correspondence and meetings with Respondent prior to filing a formal appeal and these efforts should toll the time period to file an appeal. Appellant Kasper also argues that her status as a non-attorney should be considered. For the following reasons, we reject each of these contentions.

First, Respondent had no duty to inform Appellants of their appeal rights when notifying them that they had not been selected as successful candidates for Health Care Supervisor. Although the civil service code does require employers to provide appeal rights information when notifying affected individuals of certain actions, such as refusals to examine or certify eligible candidates under Sec. 230.17(2), Stats., no such requirement is mandated when notifying unsuccessful candidates of their non-selection. *COENEN V. UW-MADISON*, CASE NO. 99-0039-PC (Pers. Comm. 7/14/99). Therefore, the fact that Respondent did not inform Appellants of their appeal rights did not toll the filing period.

We also reject Appellants' argument that we should find their appeals timely due to the unreliability of the U.S. Postal Service for the simple reason that both appeals were not placed in the mail until after the filing period had ended. Further, it is appellants' burden to ensure appeal documents are timely filed. If there are concerns as to the reliability of the regular mail system, appellants can select another method of filing, such as personal delivery to the Commission's office, courier, confirmed package delivery service such as UPS or FedEx, or facsimile.⁷ The method of delivery that appellants select to file their appeal documents is not relevant to determining whether the appeal documents were timely filed.

⁶ Both Appellants and Respondent refer to the date Appellants received written notification of the non-selection decision - December 2, 2010 - as the date from which to compute whether the appeals were timely. Neither Sec. 230.44(3), Stats., nor any relevant administrative rule or case law requires that the notification of non-selection be in writing. *VARNEY V. DOA*, CASE NO. 94-9283-PC (PERS. COMM. 12/22/1994). However, even accepting Appellants' reliance on written notice, the timely appeals would have to have been filed with the Commission no later than 4:30 PM on Monday, January 3, 2011. Instead, their appeals were filed one day later on Tuesday, January 4, 2011 and would still be untimely.

The fact that Appellants attempted to discuss and resolve their concerns regarding their non-selection with Respondent prior to filing their appeals also did not toll the filing period. Following the notification of their non-selection as successful candidates, both Appellants made several contacts with DHS and Office of State Employment Relations employees in an attempt to gain information regarding the selection process.⁸ The information gained from these attempts persuaded Appellants to file their appeals with the Commission. However, as we stated in DOC (BOYEA), DEC. NO. 32647 (WERC, 1/2009):

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 improper or the date the appellant concludes that the action may be appealed to the Commission.

We addressed a similar argument in DHS (ELMER), DEC. NO. 33179-A (WERC, 3/2011), as follows:

Someone who is concerned about a personnel action yet unfamiliar with the reason for the action is still susceptible to a motion to dismiss, as long as s/he does not file within 30 days of having learned of an already effectuated personnel action. In short, an individual who is informed that they have not been selected to fill a vacancy and wants the Commission to review the decision must file an appeal with the Commission within 30 days of being notified of the decision. This is true even if the individual lacks information leading them to believe that the decision was improper within the 30 day filing period.

Also unpersuasive is Appellant Kasper's contention that her status as a non-attorney should extend the filing period. There is simply no authority allowing the Commission to extend the statutorily mandated filing period simply because an appellant is not an attorney. In fact, the Commission has previously granted motions to dismiss pro se appellants' appeals based on timeliness on numerous occasions, including at least one where the appeal documents were filed one day late. SEE OSER (WINCENTSEN), DEC. NO. 31866 (WERC, 10/2006).

⁷ The Commission and its predecessor, the Personnel Commission, have interpreted its rules to permit filing of initial appeal documents by facsimile. DOC (FASSBENDER II), DEC. NO. 31677 (WERC, 5/2006), citing BARE V. DOT, CASE NO. 99-0119-PC-ER (PERS. COMM. 1/25/2000).

⁸ Appellant Clark-Dyett suggests that some of these communications, specifically letters to "four different departments in the State of Wisconsin" sent November 29, 2010, could be construed as a formal appeal. Although she does not identify the four departments, there is nothing in the record to indicate that the Commission was an intended recipient of any of the letters. As discussed above, it is the date that the Commission receives an appeal that serves as the filing date.

For the foregoing reasons, the Commission must conclude that Appellants' letters of appeal, received by the Commission on January 4, 2011, were not timely appeals of the decisions not to select them for vacant Health Care Supervisor positions, notice of which Appellant Clark-Dyett received on November 14, 2010 and Appellant Kasper received by November 30, 2010. Accordingly, both appeals must be dismissed as untimely filed.

Dated at Madison, Wisconsin this 9th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner