

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBIN ZENTNER, Appellant,

vs.

Secretary, **WISCONSIN DEPARTMENT OF ADMINISTRATION**, Respondent.

Case 10
No. 71648
PA(sel)-89

Decision No. 33887-B

Appearances:

George B. Strother, Attorney, 2901 West Beltline Highway, Suite 301, Madison, Wisconsin, 53713, appearing on behalf of Appellant Robin Zentner.

Elisabeth Winterhack, Legal Counsel, 101 East Wilson Street, Madison, Wisconsin, 53703, appearing on behalf of the Department of Administration.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from a civil service hiring decision, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely filed. The final argument was filed on October 4, 2012.

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, except as noted below, 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. At all relevant times, Appellant Robin Zentner has been employed by Respondent Department of Administration (DOA). He was a candidate for the classified position of Director, Bureau of Portfolio and Operations Management in DOA's Division of State Facilities.

2. On May 14, 2012, Appellant received an e-mail announcing that another candidate, RJ Binau, had accepted appointment to the vacancy.

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3. Respondent also provided Appellant notice by letter dated May 16 that “an offer of employment has been accepted by another candidate.”

4. Appellant filed his appeal of the selection process on June 14, 2012.

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

CONCLUSION OF LAW

Appellant failed to file his appeal within the time limits set forth in Sec. 230.44(3), Stats.

ORDER¹

Respondent’s motion is granted and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of November, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

¹ 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.

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**MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS**

The question before the Commission is whether the Appellant filed a timely appeal from the hiring process for the position of Director of the Bureau of Portfolio and Operations Management within DOA's Division of State Facilities. The Commission reviews selection decisions pursuant to Sec. 230.44(1)(d), Stats. Appellant's underlying contention is that because he was already a Career Executive employee and completed an application for the vacant position, he had a right to be interviewed for the vacancy along with the other candidates. Appellant was not interviewed and not selected.

The time limit for appeals under this paragraph is established in Sec. 230.44(3), Stats.:

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 time limit relates to the Commission's competency to proceed. Stern v. WERC, 2006 WI APP 193, 296 Wis. 2d 306, 722 N.W.2d 594. Appellant has the burden of establishing that his appeal was timely filed. Jackson-Ward v. DOR, Dec. No. 32471 (WERC, 7/2008), citing Kline v. UW & OSER, Dec. No. 30818 (WERC, 3/2004); Allen v. DHSS & DMRS, Case No. 97-0148-PC (Pers. Comm. 8/10/1988).

We believe it is self-evident that when a single vacancy is at issue, notice that someone else has been hired to fill the vacancy also constitutes notice that the appellant has not been hired. Compare Cozzens-Ellis v. Personnel Commission, 155 Wis. 2d 271, 455 N.W.2d 246 (Ct. App. 1990) (the 30-day period began to run when the employee was notified that two other persons were selected, not when one began working); Elmer v. DATCP, Dec. No. 32087 (WERC, 5/2007) (notice not to select occurred when appellant learned another candidate had been selected).

DOA asserts that Zentner learned he had not been selected when he was informed, by e-mail dated May 14, 2012, that RJ Binau had accepted the job. In response, Appellant contends that "the record before the Commission is not sufficient to establish that Zentner in fact received that e-mail on May 14 . . . rather than on some subsequent date," and suggests that the time limit should be calculated from when Zentner received a letter dated May 16 informing him that he had not been selected and thanking him for his interest.

Despite his suggestion to the contrary, there can be no question that Zentner promptly received the e-mail sent at 11:00 a.m. on May 14 announcing that someone else had been appointed. He submitted an e-mail string showing that just two hours later, at 1:22 p.m. on

May 14, he forwarded the 11:00 a.m. announcement to another DOA employee and asked whether his own application materials for the position had been considered. The ineluctable conclusion is that by the afternoon of May 14, he knew RJ Binau had been selected to fill the vacancy. He also knew that he had *not* been selected. The record is sufficient to establish that Zentner in fact *reviewed* the May 14 e-mailed announcement on the same day it was sent.

Appellant did not dispute Respondent's assertion that he read the e-mail on the 14th, and we therefore treat it as true. See Yerges v. DMRS, Case No. 99-0042-PC (Pers. Comm. 8/11/1999) (appeal deemed untimely where appellant failed to indicate when he received written notice and failed to dispute respondent's statement that normal mail delivery was no more than four days).

Appellant's primary contention is that the only possible purpose of the May 16 letter to Appellant was to serve as *the* notice commencing the 30-day filing period. Consequently, Appellant argues, it should supplant the earlier e-mail for determining when the appeal time began to run. The letter (again) informed Appellant that another candidate had been selected but also thanked Appellant for his interest in the vacancy, which suggests the letter could serve multiple purposes. The existence of the May 16 letter does nothing to undermine the notice Appellant had already received on May 14. The letter merely confirmed what Appellant already knew. Kelling v. DHSS, Case No. 87-0047-PC (Pers. Comm. 3/12/1991) (the filing period ran from the date of verbal notice rather than subsequent written notice).

Appellant received notice of the selection decision for the vacant position on Monday, May 14, 2012. The 30th day thereafter, and the last day to file a timely appeal, was Wednesday, June 13, 2012. Zentner's June 14 appeal was untimely filed.

Dated at Madison, Wisconsin this 2nd day of November, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

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