

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NIKHATH IRFANA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0072

Case Type: PA

DECISION NO. 37986

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**Appearances:**

Mary C. Flanner, Attorney, Cross Law Firm, S.C. 845 North 11th Street, Milwaukee, Wisconsin, appearing on behalf of Nikhath Irfana.

Anfin Jaw, Legal Counsel, Wisconsin Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Health Services.

**DECISION AND ORDER GRANTING MOTION TO DISMISS**

On July 5, 2019, Nikhath Irfana filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Health Services (DHS). On July 10, 2019, prior to any prehearing conference, DHS filed a motion to dismiss the appeal asserting that Irfana had not timely filed a grievance following her discharge. Irfana filed argument in opposition to the motion on July 18, 2019.

Having considered the matter, the Commission is satisfied that the appeal should be dismissed.

NOW, THEREFORE, it is:

**ORDERED**

The appeal is dismissed.

Signed at the City of Madison, Wisconsin, this 28th day of August, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND  
ORDER GRANTING MOTION TO DISMISS**

Section 230.445(3)(a)1, Stats. provides:

To commence the grievance process for an adverse employment action, an employee shall file a complaint with the employee's appointing authority challenging the adverse employment decision against the employee no later than 14 days after the employee becomes aware of, or should have become aware of, the decision that is the subject of the complaint.

Section 230.445(2), Stats., specifies in pertinent part:

... If an employee does not file a complaint or appeal by an applicable deadline under sub. (3), the employee waives his or her right to appeal the adverse employment decision under this subchapter.

Nikhath Irfana became aware of the discharge when she received and was read the written discharge notice on April 15, 2019. The discharge notice advised Irfana that any grievance over the discharge

... must be submitted to the DHS email mailbox at [DHSEmployeeRealtions@wisconsin.gov](mailto:DHSEmployeeRealtions@wisconsin.gov), no later than 14 calendar days after the employee becomes aware of, or should have become aware of, the decision that is the subject of the complaint.

A Step 1 grievance was received from Irfana at the DHS email mailbox on April 30, 2019. DHS asserts that, because the grievance was filed one day late, the appeal must be dismissed. Irfana contends that the motion to dismiss should be denied because: (1) she timely filed a grievance (albeit at the wrong email address) and thereby tolled the 14-day time limit; (2) DHS waived the affirmative defense of untimeliness; and (3) the grievance procedure is confusing and dismissal would deny her due process.

On Friday, April 26, 2019, at 3:34 p.m., Irfana sent a Step 2 grievance regarding the discharge to the email address of [DOADPMGrievance@wisconsin.gov](mailto:DOADPMGrievance@wisconsin.gov). She copied Attorney Flanner on that email. On Monday April 29, 2019, at 1:01 p.m., DOA representative Jim Underhill forwarded the April 26 email to DOA representative Linda Brennan. On April 30, 2019, Brennan wrote Irfana as follows:

Hi Irfana. DPM received your Step 2 grievance. I believe you submitted this in error because you didn't follow the proper steps to submit a Step 1 grievance commencement. You must follow the

instructions detailed in your discharge letter and file the step 1 grievance with DHS.

Later that day, Irfana filed a Step 1 grievance with DHS.

Irfana cites *Jacobson v. DHS*, Dec. No. 35008 (WERC, 5/14), and *Taylor v. DOC*, Dec. No. 36363 (WERC, 6/16), where unrepresented employees were allowed to proceed to hearing despite having made procedural errors. All the affected employees in those matters were unrepresented, and the Commission generally made a point of noting the complexity of the then existent grievance procedure. That grievance procedure has been replaced by a streamlined, statutorily-based grievance process, and disciplinary letters advise employees how to file a Step 1 grievance with their employer. Because Irfana was represented by counsel and did receive clear written directions as to how to begin to use the new statutory grievance process, none of those decisions provide a persuasive basis for denying the motion to dismiss.

Irfana also cites *Roen v. DOC*, Dec. No. 37431 (WERC, 3/18), in which an unrepresented employee sent a timely Step 1 grievance to the wrong email address under the new statutorily-based grievance procedure. The Commission held:

Where, as here, a grievance was timely sent but to the wrong State employer-side email address, there are factual circumstances where the Commission would conclude a grievance was timely. As a general matter, when an employee is unrepresented, the best practice would be for DPM to forward a grievance on to DOC. At a minimum, DPM should advise the employee that the grievance had been sent to the wrong address. From the record as it stands, neither of these things happened, but there may have been factual circumstances that justify these failures. The matter will proceed to hearing to allow for the presentation of any such evidence.

Because Irfana was represented by counsel, the holding in *Roen* is not applicable here. It also is noted that DPM did promptly advise Irfana the grievance had been sent to the wrong address.

Turning to Irfana's assertion that the State has waived the timeliness defense, in *Stern v. DWD*, Dec. No. 30912-A (WERC, 6/2007), the Commission generally concluded that there is no waiver if the timeliness defense is raised at or before a prehearing conference. Here, the motion raising the timeliness defense was filed prior to any prehearing conference and there are no unusual circumstances that might make raising this defense untimely.

Lastly, Irfana makes a general due process claim premised on the allegedly complex and misleading grievance procedure, citing *Franck v. DOC*, Dec. No. 35437 (WERC, 11/14), and *Peandro v. DPI*, Dec. No. 36328 (WERC, 4/16). Those employees were unrepresented by counsel and were proceeding under the then existent more complex grievance procedure. Given Irfana's represented status and the new applicable statutorily-based grievance process, the

Commission concludes those prior decisions are not a persuasive basis for denying the motion to dismiss.

Given the foregoing, the appeal has been dismissed.

Signed at the City of Madison, Wisconsin, this 28th day of August, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman