

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHANDRA BROST, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0078

Case Type: PA

DECISION NO. 38303

Appearances:

Anthony J. Gunderson, 830 Wilcox Street, Waupun, Wisconsin, appearing on behalf of Chandra Brost.

Cara J. Larson, Attorney, Department of Administration, 101 East 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 January 13, 2020, Chandra Brost filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for one day without just cause by the State of Wisconsin Department of Health Services (DHS). On January 15, 2018, DHS filed a motion to dismiss the appeal as untimely filed. Brost responded to the motion on January 20, 2020.

Having considered the matter, the Commission is satisfied that the motion to dismiss should be granted.

NOW, THEREFORE, it is:

ORDERED

The motion to dismiss is granted, and the appeal is dismissed.

Signed at the City of Madison, Wisconsin, this 6th day of February, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER
GRANTING MOTION TO DISMISS

Section 230.445, Stats., provides that state employees may appeal certain disciplinary actions to the Commission. § 230.445 (3)(a), Stats., outlines the time requirements dictating when an appeal must be filed.” Subsection (c) of that provision specifies a timeline for filing an appeal with the Commission. Specifically, it is “14 days after receiving the administrator’s decision.” Subsection (c) goes on to provide that “[i]f a procedural requirement is not met by the employee ... the commission shall dismiss the appeal.”

In this case, the State’s Step 2 grievance response was sent to Brost’s work email address by the Department of Personnel Management (DPM) on December 27, 2019. At the bottom of the “Employer Grievance Decision,” which was attached to the December 27 email, were instructions for filing an appeal with WERC. Those instructions said that “[a] timely appeal of a Step 2 Decision must be filed with the Wisconsin Employment Relations Commission no later than 14 days after receiving DPM’s decision.” DPM also attached instructions for filing an appeal with WERC to the email. The attached instructions – which were entitled “How to Appeal the DPM Step 2 Response to the Wisconsin Employment Relations Commission (WERC)” – again stated that the “appeal must be made in writing and filed with and received by the WERC within 14 calendar days from the receipt of the DPM’s Step 2 response.”

DHS contends that Brost’s January 13, 2020 appeal to the Commission was not filed within 14 days of her receipt of the December 27, 2019 Step 2 response. Brost asks the Commission to find her appeal timely because she was not working on December 27 and did not actually read the response until December 29, 2019.

In *Lindmeier v DOC*, Dec No. 38279 (WERC, 11/19), the Commission concluded that “receipt” of a Step 2 response occurs when the response arrives in the employee’s email. While there may be circumstances (such as the employee not having access to work email for the entirety of the 14 day period for filing an appeal with the Commission) where an equitable tolling of the deadline for filing is appropriate, such a circumstance is not present here. Brost still had 12 days to file a timely appeal and did not do so.

Since Brost’s appeal to the Commission was untimely, the appeal has been dismissed.

Signed at the City of Madison, Wisconsin, this 6th day of February, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman