

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KARRIE SCHMITTINGER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0363

Case Type: PA

DECISION NO. 38437

Appearances:

Maxwell Livingston, Attorney, Law Offices of Maxwell Charles Livingston, 16601 W. Greenfield Avenue, New Berlin, Wisconsin, appearing on behalf of Karrie Schmittinger.

Cara Larson, Attorney, 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 Corrections.

**DECISION AND ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO DISMISS**

On May 5, 2020, Karrie Schmittinger (Schmittinger) 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 Corrections (DOC). On May 13, 2020, DOC filed a motion to dismiss the appeal asserting that Schmittinger had not filed a timely grievance following her suspension. Schmittinger filed a response to the motion on May 21, 2020 whereupon the matter became ripe for consideration.

Having considered the matter, the Commission concludes the motion should be granted in part and denied in part.

NOW, THEREFORE, it is:

ORDERED

The motion to dismiss is granted in part and denied in part.

Issued at the City of Madison, Wisconsin, this 18th day of June, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER
GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Wisconsin Stat. § 230.445(3)(a)1. 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.

This provision establishes two requirements for a state employee to commence the grievance process for an adverse employment action. First, they have to file a timely appeal. Second, they have to file their timely appeal with their state agency. If they do not file a timely appeal, Wis. Stat. § 230.445(2) specifies what happens:

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.

On March 10, 2020, Schmittinger's supervisor hand-delivered a letter to Schmittinger which suspended her for one day. That letter stated that any grievance over the suspension:

[m]ust be received by DOC Employment Relations staff electronically to DOCBHRGrievances@wisconsin.gov, in person, via inter-departmental mail or U.S.P.S. mail no later than 14 calendar days after you became aware of, or should have become aware of, the decision that is the subject of the complaint.

The initial grievance that a state employee files is known as a Step 1 grievance. It is to be filed with the individual's employing agency (in this case, DOC). To be timely in this instance, a Step 1 grievance needed to be filed with DOC by March 24, 2020.

Schmittinger submitted a grievance challenging her suspension on March 23, 2020. That was the day before the 14-day timeline set forth in Wis. Stat. § 230.445 (3)(a)1., so it would initially appear that the grievance was timely filed.

However, the grievance which Schmittinger submitted that day was not sent to the DOC email mailbox referenced above. Instead, she sent it to the Department of Administration, Division of Personnel Management. That agency reviews grievances from state employees at Step 2 of the state grievance procedure, not Step 1. Thus, the grievance which Schmittinger submitted on March 23, 2020 was not submitted to the correct agency in accordance with the instructions outlined in the suspension letter.

The record shows that after Schmittinger sent her grievance to the DOA mailbox on March 23, 2020, a DOA employee responded to Schmittinger with an email on March 26, 2020. Therein, the DOA employee told Schmittinger she had mistakenly filed her grievance with DOA rather than with her employer (DOC). After Schmittinger received that response from DOA, she sent her grievance to DOC that same day (i.e. March 26, 2020).

The foregoing facts establish that Schmittinger's first grievance (i.e. the one she submitted on March 23, 2020) was timely filed, but it was submitted to the wrong state agency (i.e. DOA). It should have been submitted to DOC. Because of that error, this grievance was an invalid grievance. While Schmittinger's second grievance (i.e. the one she submitted on March 26, 2020) remedied her mistake and was submitted to the correct state agency (i.e. DOC), it was untimely filed.

Schmittinger asks us to overlook her late filing on March 26 and consider the grievance timely filed on March 23, 2020 for any of the following reasons. First, noting that she filed her original grievance with DOA, she avers that DOA is her "employing authority." She is incorrect; her employing authority is DOC. As such, she had to file her Step 1 grievance with that agency. Second, Schmittinger avers that DOC waived its right to assert untimeliness because it did not raise that issue (i.e. timeliness) as a basis for denying her grievance. We disagree. The record reflects that DOC put Schmittinger on notice at the pre-hearing conference call in this matter that it might raise a timeliness defense. Under these circumstances, DOC did not waive its right to raise a timeliness defense.¹ Lastly, Schmittinger claims that DOA intentionally waited to advise her that she had improperly filed until it was too late to correct the error. As to this claim, she is entitled to an opportunity to prove that this occurred. To that limited extent, the motion to dismiss is denied.

Issued at the City of Madison, Wisconsin, this 18th day of June, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹See *Barry J. Stern v. DWD and DMRS*, Dec. No. 30912-A (WERC, 6/07)