



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

March 30, 2021

To:

Hon. Timothy M. Witkowiak
Circuit Court Judge
Safety Building Courtroom, #113
821 W. State St.
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Clayton Patrick Kawski
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kevin M. Kelsay
5435 W. Forest Home Ave. - #3
Milwaukee, WI 53220

Decision # 39729CA1

You are hereby notified that the Court has entered the following opinion and order:

2020AP191

Kevin M. Kelsay v. Wisconsin Employment Relations Commission
(L.C. # 2019CV4103)

Before Dugan, Graham and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kevin M. Kelsay, *pro se*, appeals an order of the circuit court affirming a Wisconsin Employment Relations Commission (WERC) decision, which upheld Kelsay's one-day suspension from the Wisconsin State Public Defender's Office (SPD). Kelsay contends that WERC lost jurisdiction over his case by failing to issue a timely decision and that his rights to self-representation and freedom of expression were violated. Upon our review of the briefs and

record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

The following facts are taken from the record. Kelsay is employed by the SPD and works in its Milwaukee office as a legal secretary. In June 2018, Kelsay was a defendant in an out-of-state lawsuit. The Milwaukee County Sheriff's Department unsuccessfully tried multiple times to serve papers related to the lawsuit on Kelsay. In August 2018, Sergeant William Brown attempted to serve Kelsay at the SPD office. Kelsay refused to accept the papers. Brown then spoke with Paige Styler, the Deputy Regional Attorney Manager in the Milwaukee office. Styler told Kelsay to speak with the service processor so that he would stop coming to the SPD office, but Kelsay continued to refuse service. Brown then completed an affidavit of service and left copies of the completed affidavit and papers with the receptionist. The receptionist gave the papers to Styler, who placed the papers on Kelsay's desk.

On October 8, 2018, Kelsay sent a "cease and desist" letter to the SPD affirmative action officer, six SPD supervisors, and an attorney at the Wisconsin Department of Administration. The letter demanded that SPD cease and desist from refusing to accommodate his disability and from retaliating against him because he filed a disability-discrimination complaint against SPD with a federal agency. As relevant to this appeal, the letter claimed that Styler specifically retaliated against him by engaging "in a conspiracy" with Brown and others "by attempting to effect service of process of some paperwork related to an Arkansas lawsuit." The letter also alleged that Styler herself decided to serve Kelsay outside the presence of Brown. Specifically,

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the letter alleged that Styler and Brown “conspired to file a false Affidavit of Service with the Arkansas court in which they claim that the deputy served [Kelsay], a fact they knew to be false[.]” The letter further stated that “Styler’s behavior in participating in a perpetration of a fraud upon the courts will be something she can resolve with the lawyer regulatory agency[.]”

SPD’s human resources department investigated the allegations in Kelsay’s letter, and following the investigation, SPD suspended Kelsay for one day. The letter of suspension stated that Kelsay violated SPD policy by making false, inaccurate, or malicious statements about Styler.

On Sunday, December 23, 2018, Kelsay emailed an appeal challenging his suspension to WERC on the grounds that the SPD’s action was retaliatory. He also mailed the appeal to WERC on Monday, December 24, 2018.

In a decision and order dated April 24, 2019, WERC affirmed Kelsay’s suspension based on Kelsay’s “inaccurate statements about an SPD supervisor.” As relevant to this appeal, WERC noted that employees may generally be within their rights to submit cease and desist letters to their employers, but Kelsay’s letter contained false and inaccurate statements about Styler. WERC also rejected Kelsay’s claim that he was disciplined for proceeding *pro se*.

On May 28, 2019, Kelsay sought judicial review of WERC’s decision by filing a petition in the circuit court. Kelsay argued that WERC’s decision, issued on April 24, 2019, and physically mailed on April 25, 2019, was issued beyond the 120-day deadline established by WIS. STAT. § 230.445(c)(1), rendering WERC without jurisdiction over Kelsay’s case when it issued its decision. Kelsay also argued that there was a lack of substantial evidence to support WERC’s decision.

The circuit court upheld WERC's decision. In a thoughtful, well-reasoned decision, the circuit court found that WERC issued its decision on April 24, 2019. WERC's decision was within the 120-day statutory deadline if Kelsay's complaint was filed after December 25, 2018, but untimely if his complaint was filed on or before December 24, 2018. The circuit court determined that Kelsay's appeal, though emailed on December 23 and mailed on December 24, was not actually filed with WERC until December 26. The circuit court also found that substantial evidence supported WERC's decision to uphold Kelsay's suspension. This appeal follows.

In an appeal of a circuit court order reviewing an agency decision, we review the decision of the agency, not that of the circuit court. *See Wisconsin Pro. Police Ass'n v. WERC*, 2013 WI App 145, ¶10, 352 Wis. 2d 218, 841 N.W.2d 839. We will accord "due weight" to the experience, technical competence, and specialized knowledge of WERC in considering its arguments regarding conclusions of law. *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3, 382 Wis. 2d 496, 914 N.W.2d 21.

On appeal, Kelsay again contends that WERC failed to issue a decision within the 120-day statutory time period, thus rendering WERC without jurisdiction when it issued its decision. Kelsay also contends that his rights to self-representation and free speech were violated.

A state employee with permanent status in class² may appeal a suspension decision to WERC under WIS. STAT. § 230.445(3)(c)1. WERC "shall issue a decision on the appeal no later than 120 days after the date the appeal is filed with the commission." *Id.* WERC may not

² *See* WIS. ADMIN. CODE § ER-MRS 1.02(23) (through Feb. 2021).

extend the 120-day limit for issuing its decision. *See* § 230.445(3)(c)2.d. However, WERC is authorized to adopt rules to carry out its powers and duties pursuant to WIS. STAT. § 230.45(1)(i). The circuit court, in its decision, summarized the rules WERC adopted for the filing and receiving of appeals:

[WERC] has adopted administrative rules for the filing of civil service appeals. An appeal is “filed” when it is physically received at the WERC’s office. *See* WIS. ADMIN. CODE §§ ERC 91.02(10) and 92.01. However, WERC’s website states that an appeal is filed when it is received at the WERC office by email by 4:30 p.m. on the last day it can timely be filed, and lists WERC’s hours of operation as 7:45 a.m. to 4:30 p.m. An appeal received by email after 4:30 p.m. on a business day, or at any time on a non-business day, is treated as filed on the next business day.

Here, Kelsay emailed WERC his appeal on Sunday, December 23, 2018, and the WERC office was closed at that time. Kelsay mailed his appeal the following day, December 24, 2018, a legal holiday during which the WERC office was closed. *See* WIS. STAT. § 990.001(4)(a)-(c); *see also* WIS. STAT. § 230.35(4)(a)7.-8. December 25, 2018, was also a legal holiday; thus, the WERC office was still closed. *See id.* Per WERC’s adopted rules, Kelsay’s appeal was, therefore, considered filed on the next business day when it was actually received by WERC—that is, December 26, 2018.

Because Kelsay’s appeal was filed on December 26, 2018, WERC’s decision fell within the 120-day statutory time period. WERC’s decision is dated April 24, 2019, and postmarked April 25, 2019. Either way, the decision fell within the 120-day time period. Accordingly, we conclude that WERC issued a timely decision and did not lose jurisdiction over Kelsay’s case.

As to the substance of WERC’s decision, Kelsay contends that WERC’s decision “effectively gags and bounds the *pro se* litigant from engaging in zealous advocacy.” In other

words, Kelsay contends that WERC punished him for representing himself when he submitted a cease and desist letter. Kelsay also argues that WERC's decision violates his freedom of expression.³ However, Kelsay provides no legal authority for his arguments, nor does he point to anything in the record to counter WERC's findings or legal conclusions. Accordingly, we will not address Kelsay's remaining arguments. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (declining to consider unsupported or underdeveloped arguments, including those inadequately supported by citation to legal authority).

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

³ It does not appear as though Kelsay is challenging the evidence WERC relied upon in its decision; accordingly, we do not address the "substantial evidence" issue raised in the circuit court. See *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶16, 293 Wis. 2d 1, 717 N.W.2d 166 (when reviewing findings of fact made by the agency, we apply the "substantial evidence" standard); see also *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (stating an issue raised in the circuit court, but not raised on appeal, is deemed abandoned).