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DISTRICT I

November 16, 2021

To:

Hon. Timothy M. Witkowiak
Circuit Court Judge
Electronic Notice

Ronald Clayton
8229 W. Concordia Ave.
Milwaukee, WI 53222

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Brian Keenan
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Madison, WI 53707-7857

Steven C. Kilpatrick
Electronic Notice

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

2019AP1981

Ronald Clayton v. Wisconsin Employment Relations
Commission (L.C. # 2019CV1217)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Ronald Clayton, *pro se*, appeals from an order of the circuit court that affirmed a decision of the Wisconsin Employment Relations Commission (“the Commission”). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ The order is summarily affirmed.

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

Clayton worked for the Department of Corrections (“Corrections”), as a teacher at the Milwaukee Secure Detention Facility. On September 17, 2018, Clayton was advised that he was discharged, effective immediately, for violations of workplace rules. While being so informed, Clayton asked if he could tender his resignation; he was told yes. Clayton thus submitted a resignation letter on September 18, 2018, which was accepted on September 19, 2018.

On September 24, 2018, an attorney submitted a grievance on Clayton’s behalf, *see* WIS. STAT. § 230.445, to the Division of Personnel Management, which is under the Department of Administration (“Administration”). On September 27, 2018, a director from Administration emailed Clayton and his attorney to inform them that the grievance had been filed incorrectly—it was designated as a “Step 2” grievance even though there had not yet been a “Step 1” grievance. Further, the grievance had not been submitted to Corrections as required, so the director provided the correct email address for submitting the grievance.² Finally, the director informed Clayton that, while a grievant may be assisted by a representative, the representative cannot file a grievance on the employee’s behalf. The director sent a second email the next day, reminding Clayton and his attorney that Clayton was required to file a Step 1 grievance himself and again providing the proper email address for Corrections.

On September 28, 2018, Clayton physically mailed his grievance form to the Division of Personnel Management, which marked it received on October 1, 2018. On October 2, 2018, the director from Administration sent Clayton an email that acknowledged receipt of the grievance;

² Counsel submitted the grievance via email to DOADPMGrievance@wisconsin.gov. The director’s email advised that the necessary email address was DOCBHRGrievances@wisconsin.gov.

however, the email once again told Clayton that the grievance had to be filed with Corrections. Clayton later filed his Step 1 grievance with Corrections on October 8, 2018.

Corrections denied the grievance on October 28, 2018, for two reasons. First, it said that Clayton was attempting to challenge a discharge, but he had actually resigned, and resignations could not be the subject of a grievance. Second, it found that the grievance was untimely. Clayton filed a Step 2 grievance to challenge Corrections' decision, but that was also denied.

Clayton then filed an appeal with the Commission on November 12, 2018. *See* WIS. STAT. §§ 230.44(1)(c), 230.445(3)(c)1. Corrections filed a motion to dismiss. The Commission granted the motion, concluding it was required by law to dismiss the appeal because the grievance had been untimely filed with Corrections. The Commission also denied Clayton's subsequent petition for a rehearing. Clayton then sought judicial review from the circuit court. *See* WIS. STAT. §§ 230.44(4)(bm), 227.57. The circuit court upheld the Commission's decision, and Clayton appeals.

“In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court.” *Mineral Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701; WIS. STAT. § 227.57(11). We are not bound by an agency's determinations on questions of law. *See Wehr Steel Co. v. DILHR*, 106 Wis. 2d 111, 117, 315 N.W.2d 357 (1982). The burden of proof is generally on the party seeking to overturn the agency's action. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995), *abrogated on other grounds by Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

There is no dispute that WIS. STAT. ch. 230 controls here, or that Clayton needed to utilize the grievance process therein. To begin the grievance process, “an employee shall file a complaint with the employee’s appointing authority ... *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.” See WIS. STAT. § 230.445(3)(a)1. (emphasis added). Clayton’s appointing authority was Corrections, not Administration or the Division of Personnel Management. See WIS. STAT. § 230.03(4) (“‘[A]ppointing authority’ means the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency[.]”). “If an employee does not file a complaint or an appeal by an applicable deadline ... the employee waives his or her right to appeal the adverse employment decision[.]” Sec. 230.445(2). Further, “[i]f a procedural requirement was not met by the employee ... the [C]ommission *shall* dismiss the appeal.” Sec. 230.445(3)(c)1. (emphasis added).

Clayton was made aware of his discharge on September 17, 2018, meaning the latest he could have filed his grievance with Corrections was October 1, 2018.³ On appeal, Clayton argues that while Corrections and the Commission “are stating that the papers were not received until October 8th ... [this] is not true.” He contends that his grievance paperwork was delivered on October 1. However, although the tracking information Clayton provided indicates that the mail he sent was delivered to its destination on October 1, 2018, the record reflects that the destination was the Division of Personnel Management, not Corrections. Thus, Clayton has not

³ Because the Commission deemed the grievance untimely, it made no determination of whether Clayton actually had a valid grievance to make. We note that even if Clayton could challenge his resignation, he submitted his resignation on September 18, 2018, and it took effect on September 19, 2018; thus, the deadline for filing a grievance from his resignation was, at the latest, October 3, 2018, and his October 8, 2018 filing was untimely in any event.

established that he timely filed his grievance with the agency constituting his appointing authority. *See* WIS. STAT. § 230.445(3)(a)1.

Clayton makes three additional arguments on appeal. First, he notes that “the paperwork was never sent back to me indicating anything wrong.” This argument is not developed, nor is it supported by any legal authority. We need not consider such arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In any event, though nothing was physically returned to Clayton, he was notified at least three times of deficiencies in his filing by the agency to which he incorrectly submitted the documents, and he was supplied with the proper email address for filing his grievance with Corrections.

Second, Clayton also argues that the attorney he retained “was working with the DOC beyond October 1st.” This argument is also undeveloped. *See id.* Clayton does not indicate what “working with the DOC entailed” nor how it cures his untimely filing.

Finally, Clayton makes note of a “new development” that happened at the detention facility; a deputy warden and captain involved in investigating the circumstances leading to Clayton’s discharge have recently come under investigation. He asserts that “the fact that both seem to be under scrutiny seems very ironic, and suspicious.” This is both irrelevant and, like his other assertions, wholly undeveloped. *See id.*

In short, Clayton has not shown that the Commission made any error of law when it dismissed his appeal for noncompliance with procedural requirements. *See* WIS. STAT. § 230.445(3)(c)1.

Upon the foregoing, therefore,

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