

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-014-14

(MANAGEMENT SERVICE APPEAL)

JILL A. MILLER,)	
)	
Appellant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON RACING)	AND ORDER
COMMISSION,)	
)	
Respondent.)	
_____)	

On November 2, 2015, the Board heard oral argument on the parties’ objections to an October 2, 2015, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew. The ALJ bifurcated the matter and held a hearing in Portland, Oregon on August 26, 2014, and May 11 and 12, 2015. The record closed on June 12, 2015, with the receipt of the parties’ post-hearing briefs.

William J. Macke, William J. Macke & Associates, Portland, Oregon, represented Appellant.

Neil Taylor, Assistant Attorney General, Labor and Employment Section, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On August 1, 2014, Appellant filed this appeal alleging that the State of Oregon, Oregon Racing Commission (Commission) had violated ORS 240.570(3) and (5), ORS 240.555, and ORS 183.415(1) by dismissing her from state service. The ALJ bifurcated the hearing, holding the first phase on the issues of timeliness and jurisdiction, and the second phase on due process claims and the merits. After the first phase of hearing, the ALJ issued a recommended order, which was subsequently withdrawn at the request of the Board. The ALJ’s recommended order issued on October 2, 2015, contained his determinations on the issues in both phases of the hearing.

The issues are:

1. Is Appellant's appeal timely?
2. If the appeal is timely, does the Board have jurisdiction over the appeal?
3. If the appeal is timely and if the Board has jurisdiction, did the Commission: (a) provide Appellant with sufficient procedural due process; and (b) dismiss her from state service consistent with ORS 240.570(3), ORS 240.570(5) and ORS 240.555?

We conclude that Appellant's appeal was untimely. Therefore, we dismiss the appeal.¹

RULINGS

The relevant rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT²

The Parties

1. The Commission is a state agency that regulates all aspects of the pari-mutuel industry. The Commission also encourages and supports the industry in promoting live racing by attracting businesses to Oregon that are involved in races conducted at horse and greyhound tracks, off-track sites, and multi-jurisdictional simulcasting and interactive wagering totalizator hubs that conduct business online through a closed loop subscriber system. The Commission oversees approximately 3,700 active licensees.

2. The Commission's Account Wagering Hub unit regulates businesses (Hubs) that conduct pari-mutuel wagering on races that they simulcast and other races that they carry in their respective wagering venues through a subscriber service. The unit also administers and regulates account wagering, an integral part of the Hub system. Account wagering is a form of pari-mutuel wagering in which an individual deposits money into an account with a Hub licensee and uses the funds available in that account to pay for pari-mutuel wagering conducted by the Hub. Accounts can be established by Oregon residents and non-residents, subject to their compliance with account wagering rules. Oregon is one of only two states that provide regulation to this industry.

3. The supervisor of the Commission's Account Wagering Hub unit oversees nine "Advanced Deposit Wagering" companies (also called ADWs or Hubs). The ADW companies

¹Our conclusion negates any need to address the other issues raised in the appeal.

²Because we conclude that the appeal is not timely, we include only those findings of fact most pertinent to that conclusion.

provide opportunities for people in the United States and elsewhere to place more than \$2.4 billion in bets on horse and greyhound races. For historical reasons, Oregon is a key regulator of this industry and receives substantial revenue resulting from that regulation.

4. Appellant held the position of Supervisor/Manager of Mutuels and Account Wagering HUBS at the time of her termination on January 23, 2014.³ She reported directly to the Commission Executive Director Jack McGrail.

5. Because the Commission believed that Appellant was terminated from an executive service position, the Commission included no appeal rights regarding the termination in her dismissal letter. Further, someone from the Commission told Appellant that she had “no recourse” to appeal the termination decision.

6. Appellant filed her appeal with this Board on August 1, 2014, 190 days after the effective date of her termination. Appellant attributes the delay in filing the appeal to the Commission’s failure to apprise her of her alleged statutory appeal rights.

CONCLUSIONS OF LAW

1. Appellant’s appeal is not timely and will be dismissed.

Under ORS 240.560(1),

“[a] regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion. The appeal must be in writing. The appeal is timely if it is received by the board or postmarked, if mailed postpaid and properly addressed, not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion.”

Here, there is no dispute that Appellant’s appeal was filed more than 30 days after the effective date of her termination. Appellant argues, however, that because the Commission never informed her of appeal rights to this Board, either orally or via her termination letter, her late filing should be excused.

In *Lamb v. Cleveland*, 28 Or App 343, 346, 559 P2d 1325 (1977), the court rejected such an assertion, reasoning that, under the State Personnel Relations Law, there is “no statutory duty to inform a discharged employee of the proper appeal procedure.” The court added that neither the

³The parties dispute the proper classification of this position, with Appellant asserting that she was in a management service position, and the Commission asserting that Appellant’s position was in the executive service. Because we conclude that the appeal was not timely filed, we do not resolve this classification dispute.

failure to give advice nor the “giving of inadequate advice” warranted this Board “from requiring timely statutory notice in order to invoke its jurisdiction for appeal.” *Id.* (footnote omitted).⁴

Appellant does not dispute that *Lamb* is “on all fours” with this matter. She claims, however, that *Lamb* “predates the current [version of] ORS 183.415(1), which requires state agencies to notify employees of their rights.” We disagree with Appellant’s argument that the language in ORS 183.415(1) effectively overrules *Lamb* and creates a “good cause” exemption that excuses her late filing.

The current version of ORS 183.415(1) reads: “[t]he Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to the actions.” ORS 183.415(1). The statute then continues by setting forth notice requirements in “a contested case.” Appellant does not assert that the Commission’s decision to terminate her constitutes a “contested case.” Rather, in this context, the “contested case” provisions apply to the notice and procedures provided by this Board once we have received an appeal.

Nevertheless, Appellant asserts that ORS 183.415(1), a provision in the Oregon Administrative Procedures Act (APA), required the Commission to notify her of her right to appeal her dismissal to this Board. Because Appellant was not so notified, she states that she was unaware that she could file an appeal with this Board. Consequently, according to Appellant, the lack of appropriate notice means that she had “good cause” for filing her appeal beyond the 30-day requirement.

The flaw in Appellant’s argument is that it is premised on the assertion that the statute imposes a new statutory duty on the Commission—that is, the affirmative obligation to inform a discharged employee of appeal rights to this Board. But that is not so. Rather, the statute includes non-operational legislative findings, followed by a series of prescriptive requirements that, in the context of a contested case before this Board, we must follow. Those requirements do not include an affirmative obligation that disciplinary action by a state agency *must* include a notice of appeal rights to this Board.⁵ Those requirements also do not state a “good cause” exception to an untimely filing of an appeal under ORS 240.560(1).

We also disagree with the suggestion that the Commission’s letter terminating Appellant’s employment is an “[o]rder” within the meaning of the APA, such that the letter needed to comply with all of the APA’s provisions that apply to an agency “order.” ORS 183.310(6)(a) defines the term “order” as “any agency action expressed orally or in writing directed to a named person or

⁴We note that, as a practical matter, the issue of whether a state agency must give management service employees notice of their appeal rights has not arisen in recent years because, in this Board’s experience, discipline and termination letters to management service employees routinely include a description of the employees’ appeal rights.

⁵As we said in *Shepard-Lamb v. Adult and Family Services Division*, Case No. MA-29-94 at 4 (October 1994), the better practice is to include a notice of appeal. Even though the Commission believed that Appellant had no appeal rights, a notice stating that she may have appeal rights likely resolves any lack of notice issue.

named persons, *other than employees, officers or members of an agency.*” (Emphasis added.) The “action” of the Commission at issue here was a termination directed to its own employee (Appellant). Thus, the action is expressly excluded from the statutory definition of an “order,” within the meaning of the APA. Consequently, we do not find that Appellant had “good cause” for her late filing, under such a reading of the APA.

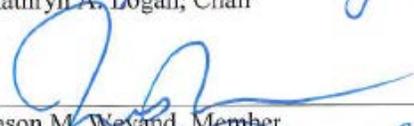
In sum, we conclude that the aforementioned provisions in the APA did not effectively overrule *Lamb* and its progeny to create a “good cause” exception that would excuse Appellant’s late filing. Because we are bound by the conclusion in *Lamb*, we disagree with Appellant’s assertion that her untimely filing may be disregarded. The appeal will be dismissed.

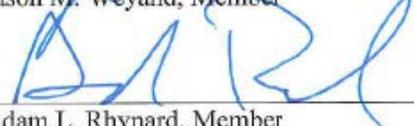
ORDER

The appeal is dismissed.

DATED this 16 day of December, 2015.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482