STATE OF WISCONSIN PERSONNEL BOARD

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LUCY VAN LAANEN,

Appellant,

v.

C. K. WETTENGEL, Director, State Bureau of Personnel, and WILBUR J. SCHMIDT, Secretary, Department of Health and Social Services,

Respondent.

Case No. 74-17

* *

OPINION AND

ORDER ON

MOTION TO RE-OPEN

Before AHRENS, Chairman, SERPE, JULIAN, STEININGER and WILSON.

OPINION

The Board rendered its decision in the above-captioned case on January 2, 1975. The Board determined that the appeal was untimely and that the Board was without jurisdiction to decide the merits of Appellant's claim and accordingly, dismissed said appeal.

On January 14, 1975, Appellant, by her counsel moved the Board to reopen the matter so that Appellant could introduce evidence in support of her contention that the Board's finding that her appeal was untimely was erroneous. We believe that we have jurisdiction to consider and decide the motion. Sec. 227.16(1), Wis. Stats.; Claflin v. Department of Natural Resources, 58 Wis. 2d 182; Beauchaine v. Schmidt (II), Wis. Pers. Bd. Case No. 73-38 (July 22, 1974). But see Baken v. Vanderwall, 245 Wis. 147. In the motion paper itself, several arguments are advanced in support of the motion, and we will consider each of these in turn.

Appellant intimates that because the timeliness issue was not litigated before the Board and, indeed, was considered sua sponte, the Board should grant a rehearing

to take the evidence Appellant could offer on the issue. It is true that the Board overlooked the issue at the time of the hearing, but so did the Appellant. Though overlooked, it was always present in the exhibits, especially Appellant's appeal letter, which forms a part of Board's Exhibit 1. Appellant was present at the prehearing conference held in her case on June 11, 1974. One of the exhibits marked at that time was Board's Exhibit 1, the appeal letter, attached to which were all of the documents on which the Board later relied in reaching its determination in the case. Clearly impressed on the appeal letter at the time it was marked was the time stamp which, at the least, indicated that timeliness was a potentially troublesome issue in Appellant's case which, if left unanswered, could cause her considerable difficulty when the time for decision arrived. The fact that Appellant failed to see this -- and apparently failed to request that copies of the exhibits marked at the prehearing conference be sent to her, or her counsel when she retained one -- does not cure what remains a fatal jurisdictional defect. It is elementary that the burden of demonstrating that jurisdiction is present in this Board is on the party invoking the Board's jurisdiction, here the Appellant. Everything that Appellant wishes now to testify to she could have testified to at the hearing in this matter. It is not the responsibility of this Board to insure that an Appellant has spoken to all of the issues which inhere in a particular case. It most emphatically is the responsibility of this Board -- which is, after all, a creature of statute -- to adhere faithfully to its jurisdictional limits. The time limit for appeals set forth in Sec. 16.05(2), Stats., is just such a limit, a point we labored to make plain in our opinion in this case. It is, moreover, a limit which, since it goes to the Board's subject matter jurisdiction, can never be waived. But see Hamilton v. ILHR Department, 56 Wis. 2d 673, 686-687.

Appellant maintains in her motion that even under the Board's finding that her appeal was received on March 19, 1974, her appeal is timely because the decision

of Mr. Gilbert Szymanski was not, in fact, made until March 7, 1974. Appellant insists that the Board's reliance on a memo by Mr. Dennis Dokken of February 28, 1974, in which Mr. Dokken stated that Mr. Szymanski had "indicated" to him that he (Szymanski) had refused the Appellant's request was misplaced. Appellant argues that an "indication" of a decision does not itself constitute the decision in the matter and, that, moreover, no evidence was introduced to demonstrate that Mr. Dokken had authority to communicate the decision of Mr. Szymanski and to show that this was not the obligation of Mr. Szymanski himself. In our view neither proof was necessary, for, as Appellant herself admits in her motion, she was not even entitled to a written notice of a denial of a reclassification request. The notion that evidence had to be adduced on the hearing, or must now be adduced on a rehearing, to demonstrate that the proper authority communicated the decision to the Appellant is unpersuasive. As there is no requirement that Appellant receive a written notice of the denial of her request, it can hardly be admitted that the person who gave her written notice of Mr. Szymanski's denial is not properly authorized to do so. We do not see that Appellant can successfully challenge a procedure which wasn't required in the first place. But even if she could challenge the manner in which she was notified and the authority of the person who notified her, the fact is that she failed to do so at the hearing. She offered no evidence on these contentions though they were present then as now. The Board must of course deal with the record as it finds it; it cannot assume responsibility for the Appellant's failure to make that record more complete on an issue on which it was her special responsibility to offer sufficient proof to see it resolved in her favor.

Moreover, Appellant's reclassification request was not her first such request. This was not a new battle for Appellant. Her same request had been denied by the same individual a year and a half before. When Mr. Dokken stated in writing to Appellant that "Mr. Szymanski ... has indicated to me that his position of October,

1972, /sic/ remains unchanged...," there was no mistaking the meaning. Appellant was not operating in a vacuum or without a background of experience on this precise issue and with precisely the same individual -- Gilbert Szymanski.

The fact that Appellant recognized the Dokken memo as notification of a denial of her request is manifest from her own appeal letter. In that letter she states that "On February 28, 1974, I received notification from Dennis Dokken, Personnel Manager, that my request /for reclassification/ was denied by Gil Szymanski." (Emphasis supplied.) This, of course, constitutes an admission by Appellant of exactly that date when she received notice of the action denying her request. Appellant insists that it is merely a characterization of an event and that this Board cannot be ousted from its jurisdiction by a party's mere characterization of an event. To a certain degree, all admissions are characterizations of events, for, as here, they often describe what the party believed to have occurred. But in the instant case, Appellant's statement in her appeal letter is also corroborative of the Dokken memo. The one shapes the character of the other. The two when considered together clearly establish the time Appellant was notified of the denial of her request, and it is the establishing of that fact -- and not merely a "subjective characterization" -- which led this Board to deny jurisdiction.

Contrary to what Appellant seems to contend, we do not believe the March 7, 1974, letter of Mr. Szymanski can be deemed her "formal notice" of denial. There is no requirement that an Appellant receive a "formal notice" of denial of his reclassification request, but even if there were, the March 7, 1974, letter does not seem to us to be such notice. We adhere to what we said in our original opinion in this case concerning the March 7 Szymanski letter. By its own terms it is a response to an inquiry by Appellant explaining the rationale for a decision already taken and is not itself the decision; nor is it the first notice Appellant had of the decision.

Appellant requests that she be permitted to submit her letter of March 5, 1974, to Mr. Szymanski in support of the instant motion. This request will be

denied. Appellant's March 5 letter, like other evidence she wishes now to present, was available to her at the time of the hearing and could have been utilized by her then in support of a contention of timeliness. The fact that she did not offer the letter at that time is reason enough to deny her request. The fact that Appellant's letter of March 5, 1974, is unlikely to change the result we have reached is all the more reason to deny it.

Appellant contends that in finding as we do we are imposing stricter procedural requirements on employees than we are on those in authority who make decisions which affect employees' rights. The short answer to this contention is that this Board did not create the timeliness requirement contained in Sec. 16.05(2), Stats.; the Legislature did. Nor did this Board write the language of that sub-section stating that an appeal letter must be received within the time limit therein established; the Legislature did. The result may seem unfair, but as the Board is a creation of statute, it is not a question of what is fair; rather, it is a question of what is prescribed. The statute is written in such a way that the right of appeal is often lost for reasons beyond the control of individual Appellants. The slowness of mail delivery, whether U.S. Postal or intrastate, is one of those unfortunate incidents of life over which this Board has even less control. It is the wording of the statute and not capricious action by this Board which defeats the Appellant in this case.

Appellant also argues that on a reopening of testimony, she would testify that she placed her appeal letter in intrastate mail on March 11, 1974, and would argue that since it was at all times thereafter in control of the State of Wisconsin the letter should be deemed received on that same date. Sec. 16.05(2), Stats., makes plain, however, that a written request for an appeal must be received by the Board within the time limit therein set forth. Merely placing a letter in State mail cannot be said to be receipt by this Board of the letter in question.

Alternatively, Appellant maintains that the Board should allow testimony to rebut the presumption -- which Appellant maintains is rebuttable -- that the time stamp which appears on the face of the appeal letter accurately reflects the actual time the letter was received by the Board. It is difficult to see what evidence Appellant could offer in rebuttal. It has been, and remains, the practice of the Board that all mail received by it is time stamped immediately upon being opened. By this practice, Appellant's letter was at least four days late. Appellant claims that the Board is amending the statute in her case by transforming the requirement that an appeal letter be "received by the Board" into a requirement that an appeal letter be "time-stamped by the Board" within the 15 day limit. Since this Board must deal with the record of the case as it stands, it is not altogether clear what else the Board had to go on. For us to say that an appeal will be deemed timely if dated -- or deposited in intrastate mail -- within the 15 day time limit would be amending the statute in question. It seems to us, given our past practice in this regard, that the time stamp is a far more reliable indicator of just when a particular appeal letter is received by the Board. To act otherwise would be to allow a party, merely by backdating an appeal letter, to confer subject-matter jurisdiction on the Board. That power, needless to say, lies only with the Legislature; the parties by their conduct may not confer it. See Minor v. Nusbaum, Wis. Pers. Bd. Case No. 73-173 (decided January 3, 1975).

Finally, we reiterate what has been said above: any evidence which Appellant wishes now to offer on the issue of timeliness -- whether it be the date on which she mailed her appeal letter to this Board, or through what channel the letter travelled, or to rebut the prima facie validity of the Board's time stamp -- was all proof she could have marshalled at the hearing in this matter. Appellant failed to do so. In this respect it cannot be said that Appellant was diligent in bringing before the Board all relevant proof bearing on all of the material

issues present in the case, whether apparent or not. Lest this be thought an unduly severe result, it should be remembered that one of the tests for the granting of a new trial in the courts of this state, when it is alleged the outcome of a trial would be substantially affected by newly discovered evidence, is that the party so asserting must have been diligent and not negligent in discovering the evidence. See, e.g., Combs v. Peters, 23 Wis. 2d 629. This rule has been consistently applied to criminal as well as civil matters. Sheehan v. State, 65 Wis. 2d 757; State v. Herfel, 49 Wis. 2d 513. Though this Board is an administrative body and not a court, neither is the proffered evidence "newly discovered."

We are of the opinion that the Appellant's case was correctly decided in the first instance and that the instant motion to reopen is without merit. The motion to reopen will accordingly be denied.

ORDER

IT IS ORDERED that the Appellant's Motion to Reopen her case is hereby denied.

Dated Feb 21, 1975

STATE PERSONNEL BOARD

By

William Ahrens

William Ahrens, Chairman