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BETTY J. MALZAHN,

Appellant,

v.

MANUEL CARBALLO, Secretary,  
Department of Health and Social  
Services, and VERNE KNOLL,  
Deputy Director, State Bureau  
of Personnel,

Respondents.

Case No. 75-39

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**OFFICIAL**

INTERIM  
OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE, STEININGER, WILSON and DEWITT, Board Members.

BACKGROUND

This is an appeal from a decision of the Director of the Bureau of Personnel upholding a decision of an appointing authority with regard to Appellant's rate of remuneration. Respondents have taken the position that the Board lacks subject matter jurisdiction.

FINDINGS OF FACT

These facts are based on uncontested matter in the record to date and are limited to this decision. The Appellant was advised by the Respondents by letter dated February 12, 1975, that she was promoted to Teacher 5 effective February 16, 1975, with salary of \$1,084 per month. A memo dated March 10, 1975, between two of Respondents' employes, indicated that the correct salary should be \$1,039 per month. She was advised of this on March 12, 1975. By letter dated March 27, 1975, to the Director of the Bureau of Personnel, received by him March 28, 1975, Appellant appealed the decision of the appointing authority on her salary. By letter dated April 7, 1975, to the Appellant, the Respondent Director indicated that "it is my determination that your present pay is appropriate and the agency was correct in its interpretation of the Director's Rules." Appellant appealed this decision in a letter to the Personnel Board dated April 21, 1975, and received April 22, 1975.

CONCLUSIONS OF LAW

Respondents contend that the appeal to the Director was untimely and that therefore there is no subject matter jurisdiction. The relevant statute on timeliness is S. 16.03 (4)(d):

The director shall not grant an appeal under this subsection unless he receives a written request therefor within 15 days after the effective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later ... .

In this case the parties concede that the appeal, or request for appeal, was received 16 days after the Appellant received notice of the change in her salary. The parties have not addressed explicitly the question of what was the "effective" date of this decision except to the extent that the Appellant argues that the salary decision should be treated as a "continuing violation" for purposes of analyzing the timeliness issue.

Laying to one side for the moment the continuing violation theory, the record does not indicate whether the effective date of the appealed decision preceded the 15 day limitation period for an appeal to the Director. The applicable statutory reference, S. 16.03 (4)(d), provides in part as follows: "within 15 days after the effective date of the decision, or within 15 days after the Appellant is notified of such decision, whichever is later ... ." (Emphasis supplied.) According to the Appellant, she received notice on March 12, 1975, of the decision regarding her salary. The "effective" date of the salary decision is the date the Appellant started earning at the different pay rate. "Effective" means "in force," "in effect," or "in actual operation." See Ballentine Law Dictionary, p. 423; Woods v. Reilly, 211 SW 2d 591, 598 (Texas 1948); Carlton v. Castranova, 11 Cal. Rptr. 258, 261 (Cal. 1961).

There is nothing in this record to indicate whether the appealed decision was made retroactive to February 16th, when Appellant assumed the Teacher 5 classification. It is conceivable that the Appellant actually received the initial salary that was offered and continued to receive it beyond the date she received notice of the decision on the revised salary. To pose a hypothetical, suppose the Appellant was in the midst of a pay period and receiving the original salary when the decision was made by the agency that that salary was

in error. Suppose further that the agency decided not to seek recoupment of the excess salary paid but to change the base salary beginning with the next pay period. Superimposing that hypothetical on this case, we might have a situation where the Appellant was actually receiving her original salary within the period of 15 days prior to the date she filed her appeal with the Director. In such circumstances, the effective date would not occur until the salary changes and the appeal would be timely.

The Appellant's argument that we should utilize a "continuing violation" theory to conclude that the appeal was timely also runs to the question of the effective date. Under this theory, there is a continuing violation, allegedly, of Appellant's rights as she continually is paid less than she should be. Thus the "effective date" is a continuing one, subject to the restriction that any recovery of back pay would be limited to, at the most, the period of 15 days before the filing of the appeal. In other words, in the context of a continuing violation theory the 15 day limitation serves to limit the retroactivity of the recovery, and not to totally extinguish the right to appeal.

This is a familiar doctrine in the area of limitations of actions for breach of employment contracts. See, for example, 54 C.J.S. Limitations of Actions S. 133, pp. 49-50:

Where a person is hired by the week, month, or year, his right to compensation accrues at the end of each week, month, or year, and the statute begins to run, and he can recover only what has accrued within the statutory period before the commencement of his action.

The idea that an alleged wrongful denial of salary is a recurring and continuing violation is also consistent with interpretations of a provision somewhat similar to S. 16.03 (4)(d), concerning the time for initiation of administrative proceedings charging Title VII violations, 42 USC S. 2000e-5(e).<sup>1</sup> This subsection provides that "A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred ... ." This provision has been interpreted by federal courts not to bar litigation where the alleged unlawful

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<sup>1</sup>This subsection formerly (d), was relettered in 1972 by Pub. L. 92-261, S. 4(a), which also extended the time for filing charges from 90 to 180 days after the occurrence of the alleged unlawful employment practice.

employment practice was deemed to have been continuing. For example, in Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763, 790 (D. Colo. 1973), charges by female stewardesses of discrimination in a number of particulars, including the payment of lower salaries than male pursers, were held to be continuing violations and not barred by the then 90 day limitation. See also Sciaraffa v. Oxford Paper Company, 310 F. Supp. 891 (D. Maine 1970); Cox v. United States Gypsum Co., 409 F. 2d 289 (7th Cir. 1969).

For these reasons we conclude that the effective date of the decision appealed to the Director, in the sense of the earliest possible effective date, has yet to be determined, and may or may not have been within the 15 day limitation set forth in S. 16.03 (4)(d). We further conclude that in any event the appeal was timely, based on the facts in the record to date, on a continuing violation theory.

We do not reach the other issues raised by the timeliness question, including whether the Director waived his objection to timeliness by answering the appeal on the merits, whether the question of timeliness here presented goes to the subject matter jurisdiction of the Personnel Board, and whether a conclusion of untimeliness should bar further proceedings even if not jurisdictional. We construe Respondents' position on timeliness as a motion to dismiss and conclude that it must be denied.

Appellant raises a collateral issue by her objection to determining the question of jurisdiction in a separate proceeding prior to a hearing on the merits. Appellant contends that we should hear the entire case before making any kind of ruling. She points out that if the Board rules unfavorably on jurisdiction and an appeal ensues, she is required to litigate that issue in Circuit Court, then, if she prevails, return to the Personnel Board for a hearing on the merits, and perhaps engage in another Circuit Court review proceeding following a hearing on the merits. On the other hand if the Board were to hold a plenary hearing and rule on all the issues, even if it were to decide that it had no jurisdiction, then a petition for review ostensibly would end the matter since if the court were to reverse the Board on jurisdiction there would be no need to hold a hearing on the merits.

These arguments do carry some weight. The countervailing consideration is that if there is no jurisdiction it would be a waste of everyone's time and resources to hold a hearing on the merits while reserving a ruling on jurisdiction. This consideration receives implicit recognition in the many rules of judicial procedure in various jurisdictions that provide for demurrers or motions to dismiss at early stages in the proceedings in order to resolve questions of subject matter jurisdiction.

We are reluctant to establish a firm rule or precedent on this subject as different cases may require different handling. For example, if the facts which determine subject matter jurisdiction are in dispute it may be expedient to hear the entire matter rather than to hold a bifurcated hearing, depending on the relationship between the jurisdictional facts and the substantive facts. There are other examples that come to mind. Suffice it to say that in most cases, including this one, we will attempt to make an initial determination on jurisdiction rather than to reserve the question until after a full hearing on the merits.

ORDER

Respondents' motion to dismiss is hereby denied.

Dated February 23, 1976.

STATE PERSONNEL BOARD

