STATE OF WISCONSIN STATE PERSONNEL BOARD

JOANNE D. PULLIAM and
MAREN E. ROSE,

Appellants,

v.

C. K. WETTENGEL, Director,
State Bureau of Personnel,

Respondent.

Case No. 75-51

INTERIM
OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of a denial of the third step of a grievance. Appellants were on an employment register for Disability Claims Adjudicator IV which was cancelled by the Bureau of Personnel. At the prehearing conference the Director alleged that the appeal to the Personnel Board was untimely and that the Board therefore lacks subject matter jurisdiction. He also objected to the Appellants' position that they were entitled to a hearing prior to the cancellation of the register. The parties have filed briefs on these points prior to a hearing on the merits.

TIMELINESS

On this record it is undisputed that Appellants' appeal was filed with the Personnel Board on May 6, 1975. The action complained of occurred March 11, 1975. The Appellants must have had notice of this no later than March 17, 1975, when they filed a first step grievance. The grievance was denied at this step, and at the next two steps, on the grounds that the employer did not have the authority to grant the relief requested. The third step of the grievance was submitted March 21, 1975, and returned April 25, 1975.

Respondent takes the position that the decision in this case is that of the Director and is not grievable, and as an appeal of a decision of the Director it is clearly untimely. Appellants respond that they were

advised by various agency employes that they were correct in pursuing this matter as a grievance.

Assuming, at this stage of the process, that the Appellants were misled by agency employes, does this in some manner excuse a failure to file a timely appeal from the decision of the Director? These facts suggest an equitable estoppel, which is a common law doctrine which would prevent or "estop" the Respondent from relying on the untimeliness of the filing of the appeal. The elements of such an estoppel are inequitable conduct by the estopped party and irreparable injury to the other parties honestly and in good faith acting in reliance thereon. Jefferson v. Eiffler, 16 Wis. 2d 123, 132-133 (1962). In order to establish estoppel, the acts of the agency must amount to "a fraud or a manifest abuse of discretion." Surety Savings and Loan Assn. v. State, 54 Wis. 2d 438, 445 (1972).

The Supreme Court found an equitable estoppel in a case similar to the one before us in Harte v. Eagle River, 45 Wis. 2d 513 (1970). There written notice of injury was not filed within the 120 days required by S. 81.15, Wis. Stats. Defendant's demurrer (objection to the complaint) was overruled because the complaint alleged that two days after the injury one of the plaintiffs reported the injury to the Eagle River Police Chief who stated that he would file an accident report, and that the city subsequently directed the plaintiffs to communicate directly with its insurance carrier.

In the case before us there is irreparable injury caused by good faith reliance by the Appellants on the advice rendered by various agency personnel. They face the prospect of being denied their appeal as a result of having pursued the grievance route. We are not persuaded that the fact that the erroneous advice came from an agency other than Respondent's should change the result. So long as the conduct is attributable to state employes acting on behalf of management and in their official capacities, estoppel should run to the Respondent as another representative of the state. As a general rule, an estoppel operates on, or is effective as to, "the parties to the transaction out of which it arises and their privies," 28 AM JUR 2d, Estoppel and Waiver, S. 114. On this record, the relationship between the agencies and among the parties is such that the agencies should be considered privies for the purpose of applying the doctrine of equitable estoppel.

RIGHT TO A PRIOR HEARING

Respondent argues that the Appellants are not entitled, as a matter of constitutional requirement, to any hearing, no less a prior hearing, as to the cancellation of the register. Inasmuch as we conclude that the Appellants have a right to a hearing pursuant to state law, we do not reach the question of their entitlement to a hearing under the due process clause of the Fourteenth Amendment.

Section 16.05(1)(f), Wis. Stats., provides that the Personnel Board shall ". . . hear appeals of interested parties . . . from actions and decisions of the director." Section 26.02, Wisconsin Administrative Code, provides that "Personnel actions which are appealable include . . . (8) Actions alleged to be illegal or an abuse of discretion." This is a very broad and expansive grant of review which by no means depends on the establishment of a right to a hearing under the Fourteenth Amendment.

With respect to the necessity for a prior hearing, we conclude there is none required by statute. The number of separate opinions in Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633 (1974), makes it somewhat difficult to abstract a cogent consensus of the court. However, not even Justice White, who would utilize an analysis of the affected interests of the parties to determine the necessity for a prior hearing, would require one in this case. The Appellants in this case are not deprived of their livelihood nor of their sole source of support pending a hearing as would be a person discharged from employment or whose welfare benefits had been terminated. Rather they are deprived of an opportunity for a salary increase. This is also consistent with Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975), where the court found substantial interests in educational benefits and liberty when analyzing ten day suspensions of high school students. We conclude, therefore, that Respondent must prevail on this aspect of Appellants' claim.

ORDER

IT IS HEREBY ORDERED that Respondent's motion to dismiss on the grounds that the appeal was untimely is denied subject to Appellants' ability to prove that they were misled into following the wrong appeal

route by advice given by their agency, and that so much of Appellants' appeal as relates to a claim of entitlement to a prior hearing on the cancellation of the register for Disability Claims Adjudicator IV is stricken.

Dated November 25, 1975. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson