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 CHARLES W. THREINEN,
 Appellant,
 v.
 ANTHONY EARL, Secretary,
 Department of Natural Resources,
 VERNE KNOLL, Deputy Director,
 State Bureau of Personnel,
 Respondent,
 Case No. 76-245
 * * * * *

OPINION
 AND
 ORDER

OFFICIAL

Before:

NATURE OF CASE

This appeal originally involved a selection process and a denial of back pay. Following the commencement of the appeal the appellant indicated through counsel the only claim he intended to pursue was that for back pay for the periods he served in acting positions. An objection to subject matter jurisdiction has been raised by the respondent. The board has read the entire record in this matter.

FINDINGS OF FACT

At a prehearing conference held June 7, 1977, the parties stipulated to certain facts. A copy of the prehearing conference report dated June 9, 1977 is attached to this opinion and order, incorporated by reference and adopted as findings in fact as if fully set forth here.

The stipulation is not complete as to the facts that related to the timeliness of the appeal. However, in an appeal letter dated November 10, 1976, the appellant indicated that:

"For the three years and nine months prior to October 11, 1976, I served as Acting Director (or Section Chief) for the Fish Management Bureau of the Wisconsin Department of Natural Resources. I formally requested back pay for the difference between the pay I received and that which the permanent positions should have been receiving (Threinen to Besadny, memo 10/18/76 Subject: Back pay for past work performed). My request was rejected by the Department of Natural Resources (Besadny to Threinen, memo 11/1/76 Subject: Back pay for work performed)."

CONCLUSIONS OF LAW

Section 16.05(2), stats., provides in part:

"The board shall not grant an appeal under subject (1)(e) or (f) unless a written request therefore is received by the board 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."

It is reasonable to infer from this record, and it is concluded, that the appellant had actual or is chargeable with constructive knowledge that he was not being paid at the rate appropriate for the permanent position on a continuing basis as he received his biweekly paychecks.

The appellant argues that the appeal should be deemed timely under Section 16.05(2) on the theory that the problem was a continuing one which did not ripen until his request for back pay was made and denied. (Prehearing conference report dated June 9, 1977). While the problem indeed may be characterized as continuing, the rest of this position cannot be sustained. To conclude that an employee can reach back to appeal a personnel transaction which began over 3 years ago by requesting a lump sum retroactive payment for salary differential 3 years later and then perfect an appeal of the entire amount in controversy by filing an appeal with the board within 15 days of the denial of that request would render meaningless the appeal limitations found in Section 16.05(2). See Malzahn v. Carballo, Wisconsin Personnel Board 75-39 (2/13/76):

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.

While it is possible depending on the facts that might be proven at a hearing that the appeal might be deemed timely under Section 16.05(2), at least to the extent of a relatively few days salary, there is a more basic jurisdictional defect here in that there is no action that is directly appealable to the board. The denial of the back pay was made by the appointing authority and there is no action of the director to appeal pursuant to Section 16.05(1)(f), stats., nor is there present here an appealable disciplinary matter pursuant to Section 16.05(1)(e), stats., nor any other matter that is perceived to be directly appealable to this board.

The appellant further has requested that the board assume jurisdiction over this matter pursuant to the discretionary investigatory authority conferred by Section 16.05(4), stats. In Schwartz v. Schmidt, Wisconsin Personnel Board 74-18 (1/17/75), the board held:

"The purpose of the Section 16.05(4) seems to be directed to broad policy matters related to the enforcement and effect of the civil service law.

In the instant case, the appellant would appear to have had a right to appeal to the director, provided that such had been filed within 15 days of the effective date of the discharge. Assuming for the moment that a right of appeal to the director exists, board exercise of its jurisdiction would be to grant an appeal to an employe who did not file a timely appeal to an employe who did not file a timely appeal with the director. Such exercise of jurisdiction would emasculate the statutory requirement that appeals must be filed promptly, and that if they are not they are barred totally, even when meritorious."

Compare, State ex rel. Hart v. Personnel Board, Dane County Circuit Court (151-038, 6/10/76).

ORDER

This appeal is dismissed and the request for investigation is denied.

Dated July 22, 1977.

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson