
 CAROLYN BISH, et al.,
 Appellants,
 v.
 SUPERINTENDENT, Department of Public
 Instruction and DEPUTY DIRECTOR,
 Bureau of Personnel,
 Respondents.
 Case No. 76-257

OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members

NATURE OF THE CASE

This is an appeal from the decision to reallocate appellants' positions from Watchman 1 (PR 3-03) to Child Care Counselor 1 (PR 6-05) effective April 25, 1976, instead of the date upon which they began working in those positions.¹

FINDINGS OF FACTS²

1. Appellants' positions at the time of hire were classified as Watchman 1.

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1. The original appeal was filed on behalf of Jane Strzelecki, Carolyn Bish and George Capriotti. By memorandum dated December 13, 1977, Mr. Capriotti advised the Board that he no longer wished to pursue the appeal and withdrew therefrom.
 2. These findings are based upon the written record to date which was reviewed by the Board and are made solely for the purpose of deciding the motion to dismiss on the ground that the appeal was not timely filed.

2. Effective April 25, 1976, appellants' positions were reallocated to Child Care Counselors 1. Reallocation Notices were dated May 3, 1976, and were sent by cover memorandum dated May 5, 1976, to appellants' supervisor, Robert Wescott, Dormitory Coordinator, Wisconsin School for the Deaf. The reason for reallocation as stated on the notice was: "Correction of error in previous placement of position." (Respondent's Exhibits #1-3. A representative notice is attached to this Opinion and Order as Appendix A.)

3. Ms. Bish was apparently on an approved leave of absence and received her notice sometime in August.

4. Appellants individually or as a group asked Mr. Wescott about the possibility of having the effective date of the reallocations made the date they began working in the positions. They made this inquiry very shortly after they received the notices. Mr. Wescott evidently advised the appellants that he would look into the reason for setting the effective date as it was. (See Appellant's Exhibit #3.)

5. By memorandum dated November 18, 1976, Mr. Wescott advised Ms. Bish that retroactive pay could not be given. (See Appellant's Exhibit #5.)

6. On or about December 9, 1976, Ms. Strzelecki and Ms. Bish filed grievances requesting retroactive pay. (See Appellants' Exhibit #4.) These grievances were returned to them with an answer advising them that they should appeal the reallocation action to the Personnel Board.

7. By letter dated December 15, 1977, appellants filed an appeal letter with the Personnel Board. The appeal letter was received by the Board the same day.

CONCLUSIONS OF LAW

1. The Personnel Board has jurisdiction to hear appeals from reallocation actions of the Director under s. 16.05(1)(f), Wis. Stats., 1975.

2. This Board cannot hear an appeal under s. 16.05(1),(f), unless it is timely filed. Section 16.05(2), Wis. Stats., 1975. Scott v. Estkowski, Case No. 379 (1/29/71); Odau v. Personnel Board, 250 Wis. 600 (1947).

3. To establish that respondents should be equitably estopped from raising an objection to the Board's jurisdiction on the grounds of failure to file in a timely manner, appellants must show that respondents acted in such a manner as to constitute fraud or a manifest abuse of discretion, that they relied on this action, that the reliance was honest and in good faith, and that they suffered irreparable injury because of this reliance. Pulliam & Rose v. Wettengel, Case No. 75-5 (11/25/75).

4. Appellants failed to establish that equitable estoppel applies in the instant case.

5. Appellants did not file their appeal in a timely manner. Therefore, the Board does not have jurisdiction to hear this appeal.

OPINION

Appellants had a right to appeal the effective date of the reallocation decision directly to the Personnel Board. Such a decision involves a determination of the appropriate effective date as well as the proper classification title for the position.

It is clear from the facts that appellants received notices of reallocation more than 15 calendar days before the date they perfected their appeal. The question then arises whether there exists some interim factor which mitigates

the failure to file in a timely manner (Van Laanen v. Personnel Board, Dane Co. Cir. Ct. 145-395 (1975); Pulliam & Rose v. Wettengel, Case No. 75-51 (11/25/75)).

In Van Laanen, the court determined that the appeal was timely filed and the Board had jurisdiction to hear the appeal despite the fact the appellant had not filed a timely appeal from the date she had first had notice that her request for reclassification was denied. The court held that the initial notice was reasonably interpreted by the appellant as not having been a final decision.

In the instant case, appellants received the reallocation notices which clearly set forth the action to be taken including the new classification title, pay rate and effective date. There can be no question that the notice represented a final decision.

Appellants argue, that the reallocation notices did not advise them what steps should be taken to appeal some aspect of the action except the determination of the appropriate classification. The notices do state:

"If you believe the new classification does not adequately reflect the duties and responsibilities of your position, you may file a written notice of appeal within 15 calendar days after receipt of this notice. If you have any questions on the procedural aspects of filing an appeal, please contact your Agency Personnel Officer.
(Appendix A)

While the above language is not complete and certainly should be revised, it does advise an employee to contact the agency personnel officer for appeal procedures. From the record appellants apparently did not contact a personnel officer in their agency or at the Bureau of Personnel about what steps should be taken to change the effective date of the reallocation decision.

However, appellants did immediately contact their supervisor, Mr. Wescott, about retroactive pay. He advised them he would contact Dirk Graye, DPI's Personnel Manager.

Even assuming *arguendo* that the reallocation notices were not final, we conclude that Mr. Wescott's memorandum of November 18, 1976, was a final determination. Unlike the memorandum in Van Laanen Mr. Wescott quoted directly Mr. Gray's written response to his inquiry about retroactive pay. The quoted language was unequivocal in denying the possibility of retroactive pay.

In Pulliam & Rose v. Wettengel, Case No. 75-51 (11/25/75) the Board found that the respondent was equitably estopped from raising an objection to jurisdiction on timeliness grounds. The appellants had immediately evidenced their intent to appeal. The appellants were incorrectly advised by various employes from the agency that the proper route of appeal was through the grievance procedure. When they finally did file their appeal, it was untimely. The Board held:

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).

* * *

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. (Case No. 75-51 at 2.)

In the instant case appellants did not ask by what means they could appeal the decision regarding the effective date. They did immediately contact their supervisor about the possibility of retroactive pay. Wescott eventually did

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advise them based upon information received from Dirk Graye that retroactive pay was not possible. It was from this memorandum (Appellant's Exhibit #5) that grievances and then ultimately an appeal were filed.

We cannot conclude that equitable estoppel applies in this case. Based upon the record respondents' action does not amount to fraud or a manifest abuse of discretion, an essential element in the estoppel theory. Appellants were not given incorrect information about the proper route of appeal or the time limits involved in an appeal.

It is apparent from the record that appellants experienced considerable confusion in determining what steps should be taken in order to get the retroactive pay to which they felt they were entitled. While we recognize that such confusion can and does easily arise, we cannot conclude that the actions of respondent were insufficient though to cause the theory of equitable estoppel to apply.

While the brief filed by appellant Bish was late and we stated we would disregard it, we would like to comment on one of the arguments raised. Appellant urges that the appeal was timely under Sclaut, Olson & Winkelmann v. Schmidt & Wettengel, Case No. 74-67 and 130 (11/24/75). In that case, the appellants' positions were reallocated from Cosmetology Inspectors to Cosmetology Inspector 2 based upon the survey of the Bureau of Personnel. Appellant filed grievances requesting that their pay rate be the same as Barber Inspectors. One of the bases of the grievances was that the Cosmetology Inspectors who were women were not being paid the same as the Barber Inspectors who were men. We concluded in part that the grievances were timely filed since the nature of the action grieved was an ongoing condition. In the instant case, this is not the situation.

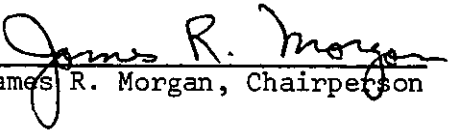
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ORDER

IT IS HEREBY ORDERED that this appeal was not timely filed and is dismissed.

Dated: May 18, 1978

STATE PERSONNEL BOARD


James R. Morgan, Chairperson

Agency Complete Payroll update and distribute as indicated below on each copy.

1-Employee Name - Last Jr./Sr., First Middle Initial 008 <u>Bish, Carolyn J</u>	2-Agency/Employing Unit Public Instruction - Wisconsin School for the Deaf	3-Notice Date 040576
4-Present Class Code 912 89801	5-Present Class Title Watchman 1	6-Present Pay Range 03-03
7-New Class Code 037 58501	8-New Class Title Child Care Counselor 1	9-New Pay Range 06-05
10-Effective Date 045 042576	11-Reason for Reallocation Correction of error in previous placement of position	

The Director of the State Bureau of Personnel continually reviews positions in state service to ensure that they are properly classified and compensated. After a review of your position, your classification and/or salary range is being changed as shown above. This action does not require you to serve a new probationary period, nor does it require an examination.

If you are currently on probation, the time you have already served will be counted toward completion of your probationary period. Your pay will be adjusted to the minimum pay of the new range for the balance of your probationary period, provided your present pay is not in excess of the new minimum.

If you are not on probation, and the Permanent Status in Class Minimum (PSCM) of the new range is greater than your present salary, your salary will be adjusted to the new PSCM rate.

If the pay range maximum of the new classification is lower than that of your former classification, the "Pay Circle Rule" applies when your current pay is greater than the new range maximum. This means you will not be able to receive any salary increase except cost-of-living adjustments, as provided in S. 16.106, Wisconsin Statutes, until such time as the new range maximum becomes greater than your current salary.

If you believe the new classification does not adequately reflect the duties and responsibilities of your position, you may file a written notice of appeal within 15 calendar days after receipt of this notice. If you have any questions on the procedural aspects of filing an appeal, please contact your Agency Personnel Officer.

not appealing! just want retroactive pay due me along with "correction of error"

Director, State Bureau of Personnel

12-Social Security No. & Check Digit 001 557-54-0367	13-Agency Code 002 255	14-Tie Breaker 003 A	15-Transaction 044 52 Reallocation
16-New Base Pay 069 3,915	17-Base Rate 070 6	18-Old Base Pay 3,709	19-Signature of Appointing Authority <i>[Signature]</i> Date 1/21/76

EMPLOYEE