

STATE OF WISCONSIN

PERSONNEL COMMISSION

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MARGARET WETHERWAX,
 Appellant,

v.

President, UNIVERSITY OF WISCONSIN-
 SYSTEM, and Administrator, DIVISION
 OF PERSONNEL,
 Respondent.

Case No. 77-127

* * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to s.16.05(1)(f), Stats., (1975), of a decision of the then director, State Bureau of Personnel, extending the appellant's probation. The sole issue for decision is whether the respondents should be estopped from asserting that this appeal was not filed in a timely fashion. See Opinion and Order dated May 18, 1978.

FINDINGS OF FACT

The appellant, through counsel, filed an affidavit dated May 30, 1978, setting forth certain facts relating to her arguments relating to estoppel. While the respondents have not stipulated to the facts set forth in this affidavit, since the Commission concludes that all of the elements of an equitable estoppel against the respondent are not present even if all the facts set forth in said affidavit were assumed to be correct, no further evidentiary proceedings are required. For the sole purpose of deciding whether respondents are estopped from asserting that this appeal was not filed in a timely manner, the facts as set forth in said affidavit, a copy

of which is attached to this decision, are incorporated by reference as the Commission's finding of fact. Additionally, the Commission finds, based on the file and date stamp, that the appellant's appeal was filed with the State Personnel Board on June 21, 1977.

CONCLUSIONS OF LAW

1. This appeal must be decided under the law as it existed prior to February 16, 1978. See Chapter 196, Laws of 1977.
2. The appellant relied only in part on the agency's action in failing to file a timely appeal of the extension of her probation.
3. The action of the secretary of the botany department did not constitute fraud or a manifest abuse of discretion.

OPINION

The key allegation in appellant's affidavit is contained in paragraph 4:

4. Within a week after I was informed that my probationary period would be extended, I went to Mary Ellen Flatmen, the Secretary for the Botany Department who handles its personnel matters, and asked her what I could do to protest the extension. She informed me that there was nothing I could do. She suggested that I talk to the Union Steward for the clerical employees. I did so but did not learn from him about my right to grieve over the extension of my probationary period. I accepted Ms. Flatman's statement that I could do nothing as accurate and did not further pursue the matter.

Before there can be equitable estoppel against a state agency the following elements must be present:

- "(1) Agency action constituting fraud or a manifest abuse of discretion;
- (2) Good faith and honest reliance by the appellant on the agency action;
- (3) Irreparable injury to the appellant as a result of this reliance." Olson v. DHSS, Wis. Pers. Commn. 78-11(8/28/78); Pulliam and Rose v. Wettengel, Wis. Pers. Bd. No. 75-51(11/25/75).

In this case the secretary of the botany department expressed her opinion to the appellant that there was nothing that she could do to "protest" the extension of her probation, but suggested that the appellant speak to the union steward, who in turn did not inform her of her appeal rights. The Commission cannot conclude that this constituted "fraud or a manifest abuse of discretion." Furthermore, it must be concluded that the appellant's reliance was not solely on the departmental secretary's advise.

The appellant sets forth in her affidavit other instances of alleged misinformation regarding the right to appeal her termination. However, since this is an appeal of the extension of probation, these other matters are not material to the matter here in issue.

ORDER

This appeal is dismissed for lack of subject-matter jurisdiction inasmuch as it was not timely filed.

Dated Jan. 22, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Commissioner