

STATE OF WISCONSIN

PERSONNEL COMMISSION

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FRANK SCHLEICHER,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY,
LABOR & HUMAN RELATIONS,

[and Division of Personnel] Respondent.

Case No. 79-287-PC

* * * * *



DECISION
AND
ORDER

This appeal was dismissed by Commission order dated July 18, 1980, in which the Commission concluded that since the appeal was filed with the Commission more than 30 days after the appellant received notice of the results for the examination in question, it was untimely pursuant to §230.44(3), Wis. Stats. The appellant petitioned for rehearing by letter dated August 4, 1980, and filed August 6, 1980, and the respondents replied by letter filed August 25, 1980. The Commission has considered both of these documents.

The appellant argues that the notice of examination results was ambiguous. He admits that the notice contained the information that he had not been certified and that he was not eligible for further consideration. He contends that this notice was ambiguous because the form stated that he was not eligible for further consideration because ten other candidates received higher scores, yet his rank was given as ninth. He further contends that the notice did not contain adequate information for "rational decision-making" about his "vital interests, rights and guarantees."

The appellant further states in his letter:

"On 9/14/79, I wrote to DP requesting an explanation of the ambiguity of the exam grade. Eight calendar days later, I received a telephone call from DP during which, among other things, the possibility of appeal was discussed and a written confirmation of the conversation requested by me. In a letter dated 9/27/79, DP quoted §230.44 but did not specify to whom the appeal should be addressed.

On 10/2/79, I wrote to DP requesting a hearing on the "entire selection process -- including the possibility of discrimination" which is an entirely appropriate alternative under §227.06.

It took four separate and distinct transactions over a total elapsed time of 20 calendar (sic) days to obtain two bits of information from DP -- 1 clarification of the exam grade ambiguity and, 2. a complete statement of the appeal process to be followed. A letter dated 10/4/79 advising that the Personnel Commission and not DP would hear the appeal could not have been in my hands before 10/5/79, a day after my appeal rights to the Commission, according to their calculations (sic), expired. On 10/9/79, I wrote to the Personnel Commission requesting a hearing."

He argues that the time for appeal should have been tolled "for the 20 day period between my request for clarification of ambiguity and the DP letter referring me to the Commission."

Finally the appellant argues that a 300 day statutory appeal time applies because his appeal included a request for hearing "...on these matters including the possibility of discrimination." (emphasis supplied)

Assuming, for the purpose of deciding this petition for rehearing, all of the facts alleged by the appellant in this letter of August 4, 1980, the Commission concludes that the appellant has not made a sufficient showing for a rehearing pursuant to §227.12, Wis. Stats.

Section 230.44(3), Wis. Stats., provides as follows:

"TIME LIMITS. Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later, except that if the appeal alleges discrimination under subch. II of ch. 111, the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred." (emphasis supplied)

The notice of exam results informed the appellant that he was not certified and that he was not eligible for further consideration. While there may have been an ambiguity as to how the respondents reached that determination, there was adequate notice of the respondent's action. This situation is not comparable to the notice in Van Laanen v. State Personnel Board, Dane County Circuit Court, No. 145-395 (8/26/75). In that case the court pointed out that the purported notice "...did not say that a decision had been made in the matter, but only that Mr. Szymanski 'indicated' that his position was unchanged. It is consistent with the possibility that the matter was still pending, and that the final decision would come directly from Ms. Szymanski, as it had in response to petitioner's previous application for reclassification."

With respect to the behavior of the Division of Personnel following appellant's inquiry, the Commission cannot conclude that this amounted to an equitable estoppel which would have the effect of foreclosing the argument that the appeal was untimely. Equitable estoppel against a state agency requires inequitable conduct by the agency which amounts to a fraud or a manifest abuse of discretion, and irreparable injury to the other party acting honestly and in good faith reliance on the agency conduct.

See, e.g., Surety Savings and Loan Association v. State of Wisconsin, 54 Wis. 2d 438, 445 (1972).

As to the mention of "the possibility of discrimination" in the appeal, this is insufficient to bring into play the 300 day time limit. This only applies to allegations of discrimination under subchapter II of Chapter 111. Subchapter II of Chapter 111 only covers discrimination on the basis of: "age, race, color, handicap, sex, creed, national origin, ancestry, arrest record or conviction record...." Laying to one side the question of whether the appeal letter could be construed as "alleging" discrimination, the appellant at no time in this proceeding, including in his petition for rehearing identified any of the forbidden grounds of discrimination set forth above and in Subchapter II of Chapter 111.

ORDER

Appellant's petition for rehearing dated August 4, 1980, is denied.

Dated August 29, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Chairperson

Donald R. Murphy
Donald R. Murphy
Commissioner

Gordon H. Brehm
Gordon H. Brehm
Commissioner