STATE OF WISCONSIN PERSONNEL COMMISSION

MARY E. FERGUSON, Appellant, v. Attorney General, DEPARTMENT OF JUSTICE, and Administrator, DIVISION OF PERSONNEL, Respondents. Case No. 80-245-PC	ORDER

The Commission adopts the Proposed Decision and Order as its Final Decision except that it amends the Proposed Opinion by deletion of the last two full paragraphs on page 7 and substitutes in their place the following: In addition, estoppel against the state requires that the State action amounts to "a fraud or a manifest abuse of discretion." Surety Savings and Loan Association v. State, 54 Wis. 2d 438, 445 (1972).

The Commission does not agree that equitable estoppel is not, as a matter of law, available to prevent the State from arguing that an appeal was untimely filed in accordance with §230.44(3), Wis. Stats., where it is asserted that there are present all of the elements set forth above, including the element set forth in Surety Savings and Loan, which amounts essentially to agency misconduct. While there is a statement in Wisconsin Environmental Decade v. PSC, 84 Wis. 2d 504,515 (1978), that subject matter jurisdiction cannot be conferred by estoppel, that case did not involve agency misconduct of this nature.

There is no rule which generally prohibits the application of equitable estoppel principles to defenses based on the statute of limitations. Although the time limit in §230.44(3) is of the nature of a statute of lim-

Original

itations, it has been characterized as jurisdictional in nature because the subsection states that an appeal "may not be heard" if not filed within the time prescribed.

In Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 71 S. Ct. 760 (1959), the United States Supreme Court dealt with a somewhat similar question involving the Federal Employees Liability Act, 45 U.S.C. 51-60. This Act provides in part that "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." The plaintiff had not filed within the prescribed period but argued that the defendent was estopped from raising the defense because it had represented to him that he had seven years in which to sue. The defendant contended that "while estoppel often prevents defendents from relying on statutes of limitation, it can have no effect in FELA cases for there the time limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period." 359 U.S. at 232, 79 S. Ct. at 761. The court rejected this argument:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitation.
>
> * * * * *
>
> We have been shown nothing in the language or history of the Federal Employers' Liability Act to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute." 359 U.S. at 232-234, 79 S. Ct. at 762-763.

See also, Scarborough v. Atlantic Coast Line R. Co., 178 F. 2d 253, 259 (U.S. Ct. of Appeals, 4th Cir. 1949), also involving an action brought under FELA: "The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitation."

Thus Glus case is of particular interest in that it implicitly overrules Wisconsin case law refusing to allow the application of estoppel to prevent the defendant from pleading the statute of limitations under the FELA. See Gauthier v. Atchison, T. & S.F. R. Co., 176 Wis. 245 (1922).

The Wisconsin Supreme Court in Ryan v. Department of Revenue, 68 Wis. 2d 467, 228 N.W. 2d 357 (1975), addressed the issue of whether DOR should be estopped from arguing that petition for judicial review was untimely filed pursuant to §227.16(2), Wis. Stats. Despite the fact, as pointed out in the decision, that the Court had "...consistently demanded strict compliance with the requirements of §227.16, Stats., for judicial review...", 68 Wis. 2d at 472, the Court did consider the merits of the estoppel issue and held that "appellants have failed to make an adequate showing of facts sufficient to create an estoppel" because of failure to act with due diligence and because of a lack of a justifiable reliance on the representations made by the Tax Appeals Commission.

The Commission cannot conclude that the legislature intended by the language of §230.44(3), Stats., to abrogate the long-standing rule of law underlying or cited in the foregoing cases that noone may take advantage of his or her own wrong.

The Commission also notes that both it and its predecessor agency, the Personnel Board, have applied the principle of equitable estoppel in cases of claims of untimely filing under both §§230.44(3) and 16.05(2), Stats. (1975). See, e.g., Pulliam & Rose v. Wettengel, Wis. Pers. Bd. No. 75-51 (11/25/75); Olson v. DHSS, Wis. Pers. Commn. No. 78-11 (8/28/78); Wing v. UW, Wis. Pers. Commn. No. 78-159-PC (4/19/79).

While the Commission is of the opinion that in an appropriate case estoppel may prevent an agency from arguing that an appeal was untimely filed under §230.44(3), Wis. Stats., it also is of the opinion that the findings and record in this matter do not support a determination that the requisite elements of equitable estoppel are present.

Dated July 22, 1981

STATE PERSONNEL COMMISSION

Gordon H. Brehm
Chairperson

Donald R. Murphy
Commissioner

AJT:mew

Parties:

Ms. Mary E. Ferguson
c/o Steven M. Epstein
Levine & Epstein
312 E. Wisconsin Ave., Suite 512
Milwaukee, WI 53202

Bronson LaFollette
Attorney General
114 East State Capitol
Madison, WI 53702

Charles Grapentine
DP
149 E. Wilson St.
Madison, WI 53702

DISSENT

This dissent is based upon the conclusion that the respondent is estopped on an equitable basis from asserting that the appeal was not filed in a timely fashion.

The majority opinion correctly cites Surety Savings and Loan Association v. State, 54 Wis. 2d 438, 445, as setting forth the parameters within which equitable estoppel will be applied against a government or one of its agencies. Although generally the doctrine is applied sparingly, the Wisconsin Supreme Court in Park Bldg. Corp. v. Industrial Comm., 9 Wis. 2d 78, 87, 100 N.W. 2d 571, quoted with approval a statement from 2 Administrative Law Treatise by Kenneth Culp Davis, p. 541, sec. 17.09, that the trend was growing in both the federal and state courts to apply estoppel against governmental units.

The Circuit Court for Dane County applied the doctrine of equitable estoppel against the State in the case of Landaal v. Personnel Board, Case No. 738-392, November 26, 1973, before the Honorable George R. Currie, Reserve Circuit Judge. Referring to Park, supra, Justice Currie states that the position of the Wis. Supreme Court is clear:

> "'Quoting from 48 Harvard Law Review 1299, the court says: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'" Libby, McNeill & Libby, supra, p. 560.'"

The majority decision finds that Ms. Ferguson received some information from Mr. Brainerd which influenced her decision not to appeal the reallocation in September, 1979, adding that Mr. Brainerd was an individual whom

Ms. Ferguson had reason to trust in the area of salary, but that her own knowledgeability could have lead her to question Mr. Brainerd's information (emphasis provided). This rationale appears inconsistent with Finding of Fact number 20, to the effect that Ms. Ferguson's reliance on the information given her by Mr. Brainerd was unreasonable, especially when considered in conjunction with Finding number 19. Reference in the majority opinion to information available to her well before September, 1980, from her union representative is questionable in light of Findings 10 and 11. It was reasonable for Ms. Ferguson to rely on the information provided by Mr. Brainerd, Department Personnel Director; under all the circumstances, he was in as good or better a position to know the impact of the reallocation on her future salary as anyone else whom she might have contacted, in September, 1979.

There remains the question of whether the State action amounts to "a fraud or a manifest abuse of discretion." There is no evidence here that the actions of the respondent Department amounted to actual fraud. However, 28 Am. Jur. 2d, Estoppel Sec 43, "Fraud or bad faith, concealment," pp. 649-651, points out that "In many instances it is necessary to expand the terms 'fraud' or 'fraudulent' to situations which are more accurately described as 'unconscionable' or 'inequitable.' Neither actual fraud nor bad faith is generally considered an essential element. But there must be either actual fraud involving an intention to deceive or constructive fraud resulting from gross negligence or from admissions, declarations, or conduct intended or calculated, or such as might reasonably be expected

to influence the conduct of the other party (emphasis provided), and which have so misled him to his prejudice that it would work a fraud to allow the true state of facts to be proved." (See also: Markese v. Ellis, 11 Ohio App. 2d 160 229 N.E. 2d 70.)

In the instant case the facts are such that constructive fraud could be imputed to the respondent department, bringing the case within the parameters of Surety, supra; the respondent can be held responsible "for words or acts which he knows or ought to know (emphasis provided), will be acted upon by another," Markese, supra.

Dated July 22, 1981

STATE PERSONNEL COMMISSION

Charlotte M. Higbee

Charlotte M. Higbee
Commissioner

CMH:mew

STATE OF WISCONSIN PERSONNEL COMMISSION

MARY E. FERGUSON,

Appellant,

v.

Attorney General, DEPARTMENT OF JUSTICE,

Respondent.

Case No. 80-245-PC

PROPOSED DECISION AND ORDER

This is an appeal at the fourth step of a non-contractual grievance filed by appellant in which she sought reclassification of her position. Respondent objected to Commission subject-matter jurisdiction, on the ground that the appeal was untimely. Appellant argues that respondent is estopped from raising that defense. A hearing was held on March 9, 1981, limited to the jurisdictional issues. This decision goes only to jurisdiction.

FINDINGS OF FACT

1. Appellant, Mary E. Ferguson, has been and is, an employe in the classified civil service, employed by respondent in Milwaukee, Wisconsin.

2. On or about August 30, 1979, appellant received notice that her position of Administrative Secretary 2 (Pay Range 2-07), had been reallocated to Program Assistant 1 (Pay Range 2-06) as a result of a statewide survey of clerical positions.

3. The Notice of Reallocation, received by Ms. Ferguson (App. Ex. 1), clearly states on its face:

> "If the pay range maximum of the new classification is lower than that of your former classification, the 'Red 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 specified general economic adjustments until such time as the new range maximum becomes greater than your current salary."

4. The Notice of Reallocation also clearly set forth the appeal rights of the appellant as follows:

> "If you wish to appeal this reallocation, you must submit a written request to the State Personnel Commission . . . This appeal must be received by the State Personnel Commission within 30 days after the effective date of the reallocation or within 30 days after you are notified of the reallocation, whichever is later."

5. Appellant filed her appeal with the Commission on September 23, 1980.

6. Appellant knows and has had regular work-related contact over a period of years with Richard Brainerd, while he was serving as the Personnel Director of the Department of Justice (DOJ), and with Robert Hillner, Administrative Assistant to the Administrator of the Legal Division of the DOJ. Both these men were familiar at all times relevant to this appeal, with clerical employes' salary structure in the DOJ, and were the best sources of information available to the appellant with respect to the impact of a statewide clerical position survey and reallocation of her present and future salary.

7. Prior to the implementation of the clerical survey, Ms. Ferguson attended a group meeting of DOJ employes at which Mr. Brainerd presented information concerning the survey and its implementation.

8. Approximately one week after receiving notice of the reallocation, appellant telephoned Mr. Brainerd in Madison and asked him questions concerning the financial effect upon her of the change in the pay-range of her position. Mr. Brainerd explained to her that there was no immediate effect on Ms. Ferguson's salary, but pointed out to her that the maximum rate of pay in pay-range 2-06 would be lower than that in pay-range 2-07.

9. Approximately one week after the telephone conversation, Mr. Brainerd spoke to the appellant personally when he was in Milwaukee. He informed her that she still had room for salary growth to reach the maximum of pay-range 2-06.

10. When Mr. Brainerd met with Ms. Ferguson in September, 1979, he gave her an estimate of what she would be earning in 1980, based upon the 1979-80 pay schedule, which was then before the Legislature for approval. At this time, Mr. Brainerd knew what the proposed salary levels were, and believed that they would be approved by the Legislature.

11. Mr. Brainerd incorrectly calculated the amount of merit increase which Ms. Ferguson could receive in pay-range 2-06 before her salary would reach the range maximum under the 1979-80 rates.

12. Sometime in September, 1979, before the expiration of the 30-day appeal period, Mr. Brainerd informed Ms. Ferguson of her appeal rights, with respect to her position.

13. Mr. Brainerd did not advise Ms. Ferguson not to appeal the reallocation of her position.

14. Mr. Brainerd's general practice was to not only inform employes of their appeal rights, but to also, from time to time, particularly advise an employe to file an appeal of a personnel action.

15. Appellant knew within the 30-day period that her position would be in a pay-range with a lower absolute maximum pay rate than the pay range assigned to her position before August 26, 1979.

16. Ms. Ferguson was aware, when discussing her salary with Mr. Brainerd, of the pay increases called for in the collective bargaining agreement in effect on July 1, 1979, which contained the applicable pay schedule for her 1979 pay increases, which applied to her position at pay-range 2-07.

17. The information Mr. Brainerd gave Ms. Ferguson was given in good faith.

18. Ms. Ferguson had at all times relevant to this appeal, good relationships with Mr. Brainerd and Mr. Hillner. Each individual respected the reliablility and honesty of the others. Ms. Ferguson did not hesitate to question management and supervisory personnel concerning matters in which she was interested, either on her own behalf, or on the behalf of others.

19. On September 25, 1979, Mr. Hillner wrote Ms. Ferguson a letter in which he summarized his understanding that Ms. Ferguson, after discussions with Mr. Brainerd, as well as with the Deputy Attorney General Hanson and Attorney General LaFollette, understood the room for growth she had for salary in the classification of Program Assistant 1. This letter was based on Mr. Hillner's conversations with individuals other than Ms. Ferguson, and did not mention any salary figures for present or

future pay rates.

20. Under all the facts and circumstances of this case, Ms. Ferguson's reliance on the information given to her by Mr. Brainerd concerning her 1980 salary was not reasonable.

21. Ms. Ferguson discussed her salary situation with her union president in July, 1980, which is the time she argues that she first became aware that she had reached the maximum ceiling in pay-range 2-06 and would not, therefore, be receiving a full merit increase, as she had expected.

CONCLUSIONS OF LAW

1. The appellant has the burden to show that the appeal was timely filed.

2. The appellant has failed to carry the burden of proof on the issue of timely filing of her appeal.

3. The appeal was not timely filed, and the Commission lacks subject-matter jurisdiction over this case.

OPINION

The Findings of Fact in this case are based primarily upon the testimony of Mr. Brainerd and Ms. Ferguson. Mr. Brainerd's recollection of events was much less specific than Ms. Ferguson's. This disparity in memory is not suprising, since Ms. Ferguson's reallocation was undoubtedly of more immediate personal interest to her than Mr. Brainerd.

The credibility issue in this case is the determination of whose memory is more correct about specific past events.

The Commission finds, based upon Mr. Brainerd's uncontradicted testimony of his practice of not only telling employes of their appeal rights in certain situations, but also of his past practice of encouraging appeals in certain situations, and his direct testimony about his interchange with Ms. Ferguson, that he did not advise her not to appeal the reallocation of her position. The Commission finds, on the other hand, that Ms. Ferguson received some information from Mr. Brainerd which influenced her decision not to appeal the reallocation in September, 1979. Even though Mr. Brainerd was an individual whom Ms. Ferguson had reason to trust in the area of salary, her own knowledge of contractual salary levels and levels of increase in different salary levels could have led her to question Mr. Brainerd's information. Information from her union representative was available to her well before September, 1980, had she chosen to seek such information at some earlier time.

In this case, the appeal was untimely filed because it was received by the Commission more than 30 days from the effective date of the action appealled and more than 30 days after the appellant had notice of the action. See Section 230.44(3), Wisconsin Statutes. Appellant argues that she did not realize that she had relied on the respondent to her detriment, until sometime after July, 1980, approximately nine months after the appeal time had expired, when she asked her union president what her raise would be for the contract period.

Even though her contact with Mr. Brainerd was reasonable for the purpose of getting salary information in September, 1979, Ms. Ferguson still had the responsibility of making her own decision not to appeal the reallocation, and for not seeking any other opinion or information from any other sources.

The elements of estoppel are: 1) an action or non-action which 2) induces reasonable reliance on the part of one who 3) suffers a detriment on the basis of such reliance. State v. City of Green Bay, 96 Wis. 2d 195, 202 (1980), summarizing quotation from Kohlenberg v. American Plumbing Supply Company, 82 Wis. 2d 383, 396 (1978).

While estoppel may be raised as a defense, it cannot be used to confer jurisdiction on a tribunal which would not otherwise have jurisdiction of the subject matter of the case. Wisconsin Environmental Decade v. Public Service Commission, 84 Wis. 2d 504 (1978).

Ms. Ferguson cannot estop the respondent from raising the defense of lack of subject matter jurisdiction on the ground of untimely filing of this appeal. Even if she could successfully prevent respondent from raising the defense, the Commission would still lack subject-matter jurisdiction of this appeal.

ORDER

The respondent's Motion to Dismiss for lack of subject-matter jurisdiction is granted and this appeal is dismissed.

Dated: _____, 1981. STATE PERSONNEL COMMISSION

Gordon H. Brehm
Chairperson

Donald R. Murphy
Commissioner

AR:jmg:nwb