STATE OF WISCONSIN PERSONNEL COMMISSION

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ROBERT C. JUNCEAU,

Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES, and Administrator, DIVISION OF PERSONNEL, [Revenue + DP]

Respondents.

Case No. 82-112-PC

* * * * * * * * * * * * * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This appeal relates to the computation of the appellant's salary upon regrade pursuant to the attorney's pay plan. The respondent Administrator has raised jurisdictional objections and the parties have filed briefs therein. Because the facts material to jurisdiction do not appear to be in dispute and because no party has requested an evidentiary hearing therein, this decision is rendered on the following findings and without evidentiary hearing.

FINDINGS OF FACT

1. At all material times the appellant has been employed by DOR in the classified civil service as an Attorney 13.

2. By a letter dated July 11, 1979, from the Bureau of Personnel and Employment Relations in DOR, the appellant was informed as follows:

> This is to advise, in conformity with attorney pay plan provisions, that you have been assigned to a new regrade point in the current compensation schedule.

> Upon the recommendation of your division your position has been assigned to regrade point B. Such action entitles you to either an increase to the new regrade point or one step greater than your current pay, whichever is greater. As a result, effective July 1, 1979, your pay was increased to $10.664 per hour ($1856 per month).

3. By a letter dated July 2, 1980, from the Bureau of Personnel and Employment Relations in DOR, the appellant was informed as follows:

> This is to advise, in conformity with attorney pay plan provisions, that you have been assigned to a new regrade point in the current compensation schedule.
>
> Upon the recommendation of your division, your position has been assigned to regrade point C. Such action entitles you to either an increase to the new regrade point or one step greater than your current pay, whichever is greater. As a result, effective June 29, 1980, your pay was increased to $12.427 per hour ($2162 per month).

4. By a letter dated July 1, 1981, from the Bureau of Personnel and Employment Relations in DOR, the appellant was informed as follows:

> This is to advise, in conformity with attorney pay plan provisions, that you have been assigned to a new regrade point in the current compensation schedule.
>
> Upon the recommendation of your division, your position has been assigned to regrade point D. Such action entitles you to either an increase to the new regrade point or one step greater than your current pay, whichever is greater. As a result, effective June 28, 1981, your pay was increased to $14.335 per hour ($2494 per month).

5. On January 28, 1982, the Dane County Circuit Court decided in the case of Stellick v. Personnel Commission, No. 81CV4398, that this Commission erred in affirming the computation of Mr. Stellick's salary on regrade, which was computed on essentially the same basis as Mr. Junceau's for the years 1979, 1980, and 1981, as set forth above.

6. By letter dated March 31, 1982, to the Administrator, Mr. Junceau stated, in part, as follows:

> It is apparent to me as a result of such decision [Stellick v. Personnel Commission] that I have erroneously, continuously

> and illegally been underpaid since July 1, 1979... I must, therefore, request that you reconsider your position on this matter and correct your past error which has deprived me of a duly entitled salary attendant to the regrade points I long ago reached and passed.... (a copy of this letter is attached hereto as Exhibit 1.)

7. By letter dated April 19, 1982, to Mr. Junceau, the Administrator stated, in part, as follows:

> I have considered the matter raised in your letter to me dated March 31, 1982. As you know, the 30-day period during which you were provided the right to appeal a 1979 action of the Administrator has long since expired (§230.44(3), Stats.)...
>
> I believe that my duty to promote the public interest in laying to rest forever state controversies supersedes whatever public interest may be served by meeting your demands. Therefore, I must deny your request. (A copy of this letter is attached hereto as Exhibit 2.)

8. The appellant also pursued a non-contracted grievance concerning his regrade salary transactions. This grievance was denied as untimely filed with the third step decision dated and returned to the appellant on April 12, 1982.

9. The instant appeal was filed with this Commission on May 7, 1982.

CONCLUSIONS OF LAW

1. This appeal was not timely filed pursuant to §230.44(3), Stats.

2. This Commission lacks subject matter jurisdiction over this appeal.

OPINION

Section 230.44(3), Stats., provides, in part:

> 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...

The respondents argue that the appeal is untimely because the regrades occurred in 1979-81, substantially more than 30 days before the filing of this appeal. The appellant makes a number of arguments.

He argues that pursuant to §230.44(1)(a), Stats., he is appealing a decision of the administrator which was made on April 19, 1982, in the letter cited above. However, it is clear from the contents of the correspondence between the appellant and the Administrator that in point of fact the Administrator was being asked to "... reconsider your position on this matter and correct your past error...," (emphasis added), and that the Administrator refused to do so because the time had run for appeal of his earlier decision. Under such circumstances, it is clear that consideration of the April 19, 1982, letter as a "decision" of the Administrator on the regrade issue which occurred in 1979-81 would be a "bootstrap" attempt to circumvent the 30 day period for appeal set forth in §230.44(3), Stats. Compare, Chapman v. DILHR, Wis. Pers. Comm. No. 79-247-PC (8/19/80); affirmed, Chapman v. Pers. Comm., Dane County Circuit Court No. 80CV5422 (9/8/81). The same observation applies to the non-contractual grievance which, as the appellant notes in his brief, is subject to the Administrative Practices Manual issued pursuant to §Pers 25.01, Wis. Adm. Code. This APM is effective pursuant to sec. 129(4q), Chapter 196, Laws of 1977, and provides a period of limitations of 10 working days.

The appellant also argues that equitable estoppel obtains against the respondents:

> Here, the state's conduct consisted of a misrepresentation in each regrade letter that the regrade was in accordance with the current attorney pay plan provisions, when the regrade was to a wage in the expired pay plan (to which was added an economic wage increase negotiated by WSAA and the State). The non-action by appellant in response thereto was failure to appeal the regrades on the assumption that they were properly and legally computed.

The appellant cites Department of Revenue v. Family Hospital, 105 Wis. 2d 250, 308 N.W. 2d 419 (1982), but it is questionable whether this case has much precedential value as to the instant matter. In the Family Hospital case, the court held as follows:

> In Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 279 N.W. 2d 13 (1979), this court recognized that in a proper case equitable principles may estop the Department from assessing a sales tax.
>
> 'We conclude that where a party seeks to estop the Department of Revenue and the elements of estoppel are clearly present, the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position. Libby, McNeill & Libby v. Department of Taxation, supra, 260 Wis. at 558, 559. In each case the court must determine whether justice requires the application of the doctrine of estoppel, the determination of whether the state is estopped must be made on a case-by-case basis.'

This is not a case where the state allegedly changed its position on the interpretation of the law. More applicable to the type of case before the Commission is another case cited by the appellant, State ex rel Susedik v. Knutson, 52 Wis. 2d 593, 191 N.W. 2d 23 (1971), involving the application of estoppel with respect to a motion to dismiss based on the statute of limitations. The court listed the following rules to be applied when determining whether the defendant should be estopped from asserting the statute of limitations:

> 1. The doctrine of estoppel in pais may be applied to preclude a defendant who has been guilty of fraudulent or inequitable conduct from asserting the statute of limitations.
>
> * * *
>
> 2. The aggrieved party must have relied on the representation or acts of the defendant, and as a result of such reliance failed to commence action within the statutory period.
>
> * * *

> 3. The acts, promises or representations must have occurred before the expiration of the limitation period.
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> * * *
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> 4. After the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay.
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> * * *
>
> 5. Affirmative conduct of defendant may be equivalent to a representation upon which the plaintiff may to her disadvantage rely.
>
> * * *
>
> 6. Actual fraud, in a technical sense, is not required to find "estoppel in pais." 52 Wis. 2d at 596-597.

The appellant states in his brief that "...the State's conduct consisted of a misrepresentation in each regrade that the regrade was in accordance with the current attorney pay plan provisions, when the regrade was to a wage in the expired pay plan (to which was added an economic wage increase negotiated by WSAA and the State)."

The appellant was given the same kind of advice with respect to each regrade, as the letters were identical except for the pay data. The letter dated July 11, 1979, for example, stated as follows:

> This is to advise, in conformity with attorney pay plan provisions, that you have been assigned to a new regrade point in the current compensation schedule.
>
> Upon the recommendation of your division your position has been assigned to regrade point B. Such action entitles you to either an increase to the new regrade point or one step greater than your current pay, whichever is greater. As a result, effective July 1, 1979, your pay was increased to $10.664 per hour ($1856 per month).

As of the dates of this letter and the letter of July 1, 1981, the contracts between the State and the WSAA had not been ratified and were not effective. See Chapter 43, Laws of 1979, and Chapter 32, Laws of 1981.

Therefore, as of the dates of the letters, the appellant's salary was governed by the operation of §230.10(2), Stats., which provides for freezing of wage rates pending the effective date of the new agreement, and specifically provides that "...employes in such a certified bargaining unit shall not be covered by the compensation plan under §230.12." The reference in those letters to the "current" compensation plans could not reasonably have been construed as a reference to the "new" plans, which had not yet been ratified and which were not yet effective.

Since compensation plans are in effect for two year periods, the reference in the letter of July 2, 1980, to the "current" schedule could reasonably be interpreted as a reference to the 1979-1981 plan. Apparently what happened with respect to the 1980 regrade was that the appellant was moved to the minimum pay for regrade point C in the "old" (1977-1979) schedule ($12.427), and then the seven percent economic adjustment was effected to bring his salary to $13.297. This latter figure is above the minimum for Regrade Point C in the 1979-81 schedule ($13.295). However, the July 2, 1980, letter makes reference only to the first part of the transaction (the movement to Regrade Point C), and since it states that this was done pursuant to the "current", or 1979-81 compensation schedule, when it was not, this letter can be deemed misleading and as constituting inequitable conduct.

The one element for equitable estoppel which in the Commission's opinion is not present with respect to all of the transactions is "after the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay." id.

In his brief the appellant became aware of the "underlying premise" of the Stellick appeal in "late fall of 1981." He argues:

> At the point appellant learned of the possible illegality of the State's action, he was far beyond the appeal periods in question as it concerns the actual regrades. His opting to see whether the Commission's decision in Stellick would be affirmed was out of deference to the State in avoiding needless and duplicative appeals. Nevertheless, he acted promptly after the judicial decision to see how he would be treated and whether the decision would be challenged in a higher court. Such delay was not unreasonable considering that he was the only other attorney in Revenue who stood in the same predicament as Stellick. No doubt any appeal he would have filed would have been tabled "pending the outcome" of Stellick.

While it may be that if the appellant had filed promptly in 1981, his appeal might have been tabled pending the outcome of the Stellick case, it also is possible that the Commission would have proceded with a decision on the jurisdictional issue. Furthermore, the filing of an appeal with the Commission serves the function, among others, of alerting the respondent agencies to what may amount to a claim against them and the possibility of liability in connection therewith. At the time that DER made the determination not to appeal the Stellick decision, the appellant had not filed his appeal with this Commission, and therefore DER could not have been aware of the potential liability associated with this salary claim, with respect to which the court's decision constitutes a significant and possibly determinative precedent. That the delay of several months in filing this appeal until after the appellant was aware that the Stellick decision would be favorable to him, and after the time for appeal of that decision had run, was unreasonable.

Finally, the appellant argues that his injury is a continuing one and that his rights to appeal did not expire within 30 days after he received his regrade points in 1979, 1980, and 1981.

The general rule is that "...the statute of limitations begins to run immediately upon the accrual of the cause of action." 51 Am Jur 2d Limitation of Actions §107. There is an exception to this rule under the theory of a continuing violation:

> ... in case the wrongful act is continuous or repeated, so that separate and successive actions may be instituted for the damages as they accrue, the statute of limitations does not run, as to such actions for subsequently accrued damages, from the date when the first wrong was suffered, but only from the successive dates of the accrual of such damages. Id. §135.

The fact that a wrongful act may result in subsequent damages does not produce a continuing violation:

> As a general rule, where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the Statute of Limitations attaches at once. It is not required that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action, and is not legally severable from its consequences. It is from then that the statute begins to run, and not from the time of the damage or discovery of the injury. supra.

In United Air Lines, Inc. v. Evans, 431 US 553, 97 S Ct 1885, 52 L Ed 2d 571, 14 FEP Cases 1510 (1977), the Title VII plaintiff had been forced to resign in 1968 when she married due to the employer's then current policy. However, she never filed a timely challenge subsequent to her forced resignation. In 1972, she was rehired but was treated as a new employe for seniority purposes. She challenged this and alleged that the seniority policy perpetuated the violation that occurred in 1968. The Supreme Court determined that her Title VII action had been filed untimely:

> Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on

> mere continuity; the critical question is whether any present violation exists. 431 U.S. at 558, 52 L. Ed. 2d at 578.

In the Wisconsin civil service system, there are a number of personnel transactions which usually require base salary adjustments which can affect the employe's salary throughout his or her tenure with the state. Examples include demotions, promotions, reclassifications and reallocations. If these were considered continuing violations because of the fact that the impact of the alleged improper salary recalculation on the employe each payday, clearly the 30 day period of limitations contained in §230.44(3), Stats., would effectively be nullified. They are not continuing violations because the violation occurs when the employe's salary is recalculated upon the happening of the transaction in question. The employe may continue to be paid less each payday, but this is only a reflection of the continuing nature of the damages, not the continuing nature of the violation itself. An attorney regrade is very similar to a reclassification and should not be treated any differently than the transactions enumerated above in the determination of whether there is a continuing violation.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: October 14, 1982 STATE PERSONNEL COMMISSION

AJT:jmf

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

Parties:

Robert C. Junceau
P. O. Box 8933
Madison, WI 53708

Mark Musolf, Secretary
DOR
P. O. Box 8933
Madison, WI 53707

Charles Grapentine
DP
P. O. Box 7855
Madison, WI 53707

State of Wisconsin
Division of Personnel AN EQUAL OPPORTUNITY EMPLOYER

April 19, 1982

Lee Sherman Dreyfus
Governor
Hugh C. Henderson
Department Secretary
Chuck Grapentine
Division Administrator

Robert C. Junceau, Jr.
Department of Revenue
Legal Counsel's Office
125 S. Webster Street
Madison, WI 53708

Dear Sir:

I have considered the matter raised in your letter to me dated March 31, 1982. As you know, the 30-day period during which you were provided the right to appeal a 1979 action of the Administrator has long since expired (s. 230.44 (3), Stats.).

Besides extinguishing your right of appeal, the running of the statute of limitations in this matter creates a new right protecting the Division from any further appeals of the matter. Reistad v. Manz, 11 Wis. 2d 155, 159, 105 N.W.2d 324 (1960).

Generally speaking, a statute of limitations is an expression of legislative policy which promotes the public interest in protecting defendants from stale claims by laying to rest forever cases and controversies, whatever their merit, if not litigated promptly. Gamma Tau Educational Foundation v. Ohio Cas. Ins. Co., 41 Wis. 2d 675, 683, 165 N.W.2d 135 (1969).

Although you raise the issue of fair play in your letter, you failed to indicate that granting your request for a double regrade increase in July 1979, because your regrade date happened to fall on the date the pay plan changed, would provide you with approximately twice the amount of regrade increase provided attorneys whose regrade date fell on any other date. I would not consider granting your request an act of fair play. Balancing the budget based on a regrade increase for one attorney has never been a consideration in administering the pay plan.

I believe that my duty to promote the public interest in laying to rest forever stale controversies supersedes whatever public interest may be served by meeting your demands. Therefore, I must deny your request.

Sincerely,

CHUCK GRAPENTINE
ADMINISTRATOR
DIVISION OF PERSONNEL

CG:DRR:bm

State of Wisconsin \ DEPARTMENT OF REVENUE

OFFICE LOCATED AT
125 SOUTH WEBSTER STREET

MAILING ADDRESS
POST OFFICE BOX 8933
MADISON, WISCONSIN 53708

March 31, 1982

Charles Grapentine, Administrator
Division of Personnel
Department of Employment Relations
149 E. Wilson St.
P.O. Box 7855
Madison, Wisconsin
53707

Dear Mr. Grapentine,

I am an attorney employed by the Wisconsin Department of Revenue in the classified state service. My classification is Attorney-13. You are well aware, I am certain, of the recent decisions in Mary Runkel v. Personnel Commission and in Robert C. Stellick, Jr. v. Personnel Commission wherein the Dane County Circuit Court determined that the Personnel Commission had erred in its interpretation of the proper wage incident to a regrade which occurred on July 1, 1979 under the plan in that the regrade was computed by reference to the 1978-79 plan which had expired on June 30, 1979. The Court's ruling was that such regrade entitled the employee to a salary minimum provided in the new 1979-80 plan. In overturning the Commission the Court in effect reversed a policy of the Division of Personnel which had been aided in implementation by the appointing authority.

It is apparent to me as a result of such decision that I have erroneously, continuously and illegally been underpaid since July 1, 1979. I have been informed that the State has not appealed these decisions. I have further been informed by my supervisor Allan P. Hubbard, Revenue Chief Counsel , verbally on March 18, 1982 that no adjustment was to be made to my salary, either retrospectively or prospectively. The situation has apparently been reviewed in both the personnel bureau of my appointing authority and in your Division. The State's position in this regard has been confirmed by David C. Rice, Assistant Attorney General, related to me by Asst. Atty. Gen. Gerald Wilcox.

On the other hand, a settlement has been made with Stellick including the 1980 regrade which was done on the same erroneous basis as that on July 1, 1979. I followed the same salary progression as Stellick

through Points A, B, C and D of the plan and on the same dates. Unlike Stellick, I did not have the vigilance to detect this erroneous payment scheme. I relied to my detriment upon the appointing authority's representation upon each regrade that I had been assigned to a new regrade point in the "current" compensation schedule, whereas I had actually been assigned to a new (higher) regrade point in the expired compensation schedule.

The compensation plan is state law. State law was in fact not followed which has derived me of thousands of dollars of back wages and because of the cumulative effect of wage progression is currently costing me and will cost me in the future many more thousands of dollars. This is a result of your inability as a state institution to read the pay plan. Your action in denying to me an adjustment in salary in recognition of your past flagrant error is unfair. In the words of Judge Jackman:

> "... It may make good economics for holding petitioner's increase down in an effort to save money, but it is not fair to petitioner on the basis of respondent's own terms."

I must, therefore, request that you reconsider your position on this matter and correct your past error which has deprived me of a duly entitled salary attendant to the regrade points I long ago reached and passed. I must trust that despite economically difficult times and circumstances the State will elect to follow its traditional course of fair play, rather than try to balance the budget on a relatively small back.

I expect that you will expeditiously advise me of your decision on this request. I have no doubt that you have the power to correct this situation, and that you will give the matter serious reconsideration.

Sincerely,

Robert C. Junceau, Jr.

Robert C. Junceau, Jr.
Department of Revenue
Legal Counsel's Office
Second Floor--Room 280
P.O. Box 8933
125 S. Webster St.
Madison, WI. 53708
(608)266-8422