STATE OF WISCONSIN PERSONNEL COMMISSION

KENT KLEPINGER,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 83-0197-PC

FINAL DECISION AND ORDER

This matter is before the Commission on consideration of a proposed decision and order. The Commission has heard the parties' oral arguments and consulted with the examiner.

The Commission will adopt the proposed Findings of Fact, with one amendment, Conclusions of Law 1 and 2, and part A of the Opinion. The Commission will reject the remainder of the proposed decision and order, reject the action of the respondent, and remand this matter to him for further proceedings, for the following reasons.[1]

In Part B of the proposed opinion, the examiner states: "The appellant, as the incumbent in Mr. Kabat's former position, is essentially seeking to enforce the settlement agreement...," and then goes on to conclude inter alia, that "... the Commission lacks jurisdiction over enforcement actions...." However, the Commission cannot agree that this appeal should be characterized as an attempted enforcement proceeding.

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[1] Since the basic facts are set forth in the attached proposed decision, they will not be reiterated here.

The findings reflect that Mr. Klepinger is the incumbent of the position previously occupied by Mr. Kabat. On July 15, 1983, the respondent issued a reallocation notice to Mr. Kabat that the position was reallocated from Natural Resources Administrator 3 (NRA 3) to Natural Resources Administrator 4 (NRA 4), effective August 26, 1979.

On July 15, 1983, the respondent issued a reallocation notice to Mr. Klepinger, the incumbent, informing him that the same position was reallocated from Natural Resources Administrator 3 (NRA 3) to Natural Resources Administrator 4 (NRA 4) effective June 12, 1983. Mr.Klepinger appealed this action to the Commission with respect to the effective date, and there is no question but that the Commission has jurisdiction over this matter pursuant to §230.44(1)(b), Stats.

The stipulated issue for hearing was:

> Whether the decision of the respondent as to the effective date of the reallocation of appellant's position was correct.

The settlement agreement in question (Case No. 79-138-PC), executed July 7, 1983, provided:

1. Respondent will reallocate the position of Director of the Bureau of Research, Department of Natural Resources, from Natural Resources Administrator 2 (PR1-18) to Natural Resources Administrator 3 (PR 1-19), effective August 26, 1979.

2. The appellant will withdraw his appeal in Case No. 79-138-PC. Appellant's Exhibit 6.[FN]

Mr. Klepinger argues that the settlement agreement and the subsequent reallocation with the effective date of August 26, 1979, is material and determinative as to the stipulated issue. That the appellant advances this argument does not change this proceeding from an appeal pursuant to

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FN The parties stipulated that the settlement agreement incorrectly referred to NRA 2 and 3 rather than NRA 3 and 4.

§230.44(1)(b), Stats., of a reallocation decision by the secretary into an enforcement proceeding.

This situation may be compared to that found in Kuter v. DILHR, No. 82-0083-PC (5/23/84), which involved an appeal pursuant to §230.44(1)(c), Stats., of a layoff action. The respondent argued that the Commission should not consider evidence concerning an alleged commitment by the respondent that arguably guaranteed the employe job security, on the ground that the Commission lacked the authority to enforce a contract. The Commission rejected this contention, holding that in evaluating the effect of the commitment in its review of the layoff action under the standard of whether it was "arbitrary, capricious or in bad faith," see Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 456, 52-53, 237 N.W.2d 183 (1976), it was not "enforcing" the contract.

This principle can also be illustrated by a hypothetical. Presume an employe's position is reclassified from Program Assistant 1 (PA 1) to PA 2, effective March 1, 1985. S/he appeals, arguing the effective date should have been January 1, 1985. The appeal is resolved by a settlement agreement fixing the effective date as February 1, 1985. Some months later, the employe appeals the effective date of another reclassification of the same position to PA 3, and argues the effective date should be January 1, 1985. If the respondent then argues that this effective date is foreclosed by the stipulation reached in, and the resolution of the earlier appeal, it hardly seems likely the appellant could successfully maintain that the Commission could not hear this argument because it lacks the authority to enforce a settlement agreement.

Essentially, what the appellant is arguing in this case is that the settlement agreement and resultant order should have a res judicata or

collateral estoppel effect on his appeal. The Commission has not infrequently been called on to deal with these issues, see, e.g., Massenberg v. UW-Madison, 81-PC-ER-44; Kotten v. DILHR, 81-PC-ER-23 (1/31/83); Lee & Jackson, 81-PC-ER-11,12 (10/6/82). Res judicata has been defined as follows:

> ... the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collision, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. 46 Am Jur 2d Judgments §394. (emphasis supplied)

See also, Leimert v. McCann, 79 Wis. 2d 289, 293, 255 N.W. 2d 526 (1977):

> The doctrine of collateral estoppel or estoppel by record is closely related to the doctrine of res judicata, and has been described as another aspect of the doctrine of res judicata. See 45 Am Jur 2d Judgments §397. It has been said that the doctrine of estoppel by record prevents a party from litigating again what was litigated or might have been litigated in a former action.

It also is well settled that res judicata or collateral estoppel can be applied with respect to an administrative quasi-judicial adjudication with respect to historical facts. See Kotten v. DILHR, supra; Dehnart v. Waukesha Brewing Co., 21 Wis. 2d 583, 589 (1963); Sheehan v. Industrial Commn., 272 Wis. 595, 604, 605, 76 N.W. 2d 343 (1956); United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-422, 86 S. Ct. 1545, 1559-60, 16 C. Ed. 2d 642 (1962); 46 Am Jur 2d judgments §455.

As set forth above, the requisites for the application of res judicata or collateral estoppel are an existing final judgment or order, identity of the cause of action or issues, and the identity of the parties or their privies.

In this case, the final order in No. 79-318-PC was not made part of the record. However, it can be inferred that the Commission did dismiss that appeal on the basis of the parties' stipulation. This would follow from the Commission's normal procedures, and see also the letter from respondent's attorney to the Commission, dated July 29, 1983, Appellant's Exhibit 9:

> As you know, the parties in the above appeal have signed a settlement agreement which is contingent upon the processing of certain documents for completion of a reallocation action. Attached, please find copies of the processed documents signifying completion of said reallocation action.
>
> It is respondent's understanding, then pursuant to the settlement agreement, that the appeal should be dismissed.

Accordingly, Finding No. 9 will be amended by addition of the following:

> The Commission thereafter entered a final order which dismissed Case No. 79-318-PC on the basis of the aforesaid settlement agreement.

Both this case and No. 79-318-PC are §230.44(1)(b), Stats., appeals which involve the same subject matter -- the reallocation of the same position.

While Mr. Klepinger was not a party to Mr. Kabat's appeal, Case No. 79-318-PC, he was the successor to Mr. Kabat as the incumbent of the position in question, and as of the time of the agreement (July 1983) had been the incumbent for over two years, Mr. Kabat having retired from state service in 1981. The agreement called for the resolution of Mr. Kabat's appeal by reallocating the position then occupied by Mr. Klepinger with an effective date of August 26, 1979.

In McCourt v. Algiers, 4 Wis. 2d 607, 611-614, 91 N.W. 2d 194 (1958), the Wisconsin Supreme Court held that under certain circumstances, a party can invoke res judicata without having been either a party to the prior proceeding or in strict legal privity with a party. In a prior federal

lawsuit involving the same automobile accident, the plaintiff (Ms. McCourt) had not been a party but her insurer was. The federal jury's special verdict exonerated Ms. McCourt from negligence. In the subsequent state court tort action, the defendant alleged that Ms. McCourt's own negligence was the sole cause of the accident. Ms. McCourt then contended that her freedom from negligence had been conclusively determined in her favor in the federal action. The Court's discussion of the res judicata issue included the following:

> The difficulty here arises from the fact that while McCourt's insurer was a party to the federal court action, McCourt herself was not. In our opinion that fact does not destroy the conclusive effect of the federal court's determination with respect to the issues of causal negligence.
>
> While McCourt was not in privity with her insurer Northwestern in the strict sense of that term, nevertheless there was a close relationship between them with respect to the negligence issues in the federal court. Any potential liability of Northwestern was wholly derived from McCourt and based upon her conduct. Algiers asserted his claim against Northwestern because Northwestern was her insurer, and founded the claim on the premise that she had been negligent. In defending against the claims of Rude and Algiers, Northwestern was in a sense representing McCourt. With respect to the negligence issues it stood in her shoes.
>
> Defendants contend that they cannot be concluded by the federal court determination in this action by McCourt, because McCourt would not have been concluded had the federal court found her negligent and Algiers not negligent, and the rule must work both ways, both parties being concluded or neither.
>
> Such mutuality is not universally required in the operation of res judicata. Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 17, 9 N.E. (2d) 758.
>
> "This desirability for equality between litigating parties with reference to the rules of res judicata is not, however, of pervading importance and disappears when there are countervailing reasons for requiring one to be bound while the other is not." Restatement, Judgments, p. 473, sec. 96, comment a.
>
> Here such countervailing reasons are present. McCourt would not have been concluded by a determination adverse to her, because she was not in court and had no opportunity to present her case. Algiers and his insurer are concluded because they had full opportunity to litigate the material issues with McCourt's insurer in the federal court, and did so, Algiers voluntarily choosing that forum to assert his own claim. It would be unfair to bind McCourt; there is no unfairness in binding Algiers and

his insurer. See Restatement, Judgments, p. 472, sec. 96(1)(b), and comment a, pp. 473, 474.

We are impressed by the reasoning and decision of the court of appeals of New York in a somewhat similar case, Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 9 N.E. (2d) 758. There, in a collision between a truck owned by Mary C. Emery and driven by her son and another vehicle owned by Good Health Dairy Products Corporation, both drivers were injured and both vehicles were damaged. Driver Emery sued Good Health and its driver in the city court and recovered judgment against them for his damages. Good Health and its driver then sued Mrs. Emery for their damages, under a statute making the automobile owner liable for the negligence of the driver. Mrs. Emery contended that the city court judgment in favor of her driver was res judicata on the issues of negligence. The court of appeals sustained that contention, although she had not been a party in the city court. The following extracts from the opinion are pertinent to the present case (pp. 18, 19):

> Behind the phrase res judicata lies a rule of reason and practical necessity. One who has had his day in court should not be permitted to litigate the question anew. Although normally it is necessary that mutuality of estoppel exist, an exception is at times made where the party against whom the plea is raised was a party to the prior action and 'had full opportunity to litigate the issue of its responsibility.' ... Under such circumstances the judgment is held to be conclusive upon those who were parties to the action in which the judgment was rendered. Where a full opportunity has been afforded to a party to the proper action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues.
>
> ... It is true that Mary C. Emery, not being a party to the earlier actions, and not having had a chance to litigate her rights and liabilities, is not bound by the judgments entered therein, but on the other hand, that is not a valid ground for allowing the plaintiffs to litigate anew the precise questions which were decided against them in a case in which they were parties.

The situation in the case before the Commission is parallel in a number of respects. While there probably was no strict legal privity between Mr. Kabat and Mr. Klepinger in connection with Case No. 79-138-PC, their relationship with respect to the issues in that case were close because both were incumbents in the position whose reallocation was in issue. At the time the settlement agreement was reached, Mr. Kabat had

been retired, and Mr. Klepinger had been in the job, for approximately two years.

Also, the Commission does not believe that it would be unfair to the respondent to permit Mr. Klepinger to assert the binding effect of the disposition of Case No. 79-318-PC.

In negotiating the settlement agreement, the respondent resolved Mr. Kabat's pending claim. DER knew when the agreement was signed that Mr. Klepinger was in the position and that Mr. Kabat had retired; this is obvious from the paperwork surrounding the settlement, Appellant's Exhibit 9.

Further, the Commission cannot accept the respondent's argument that the settlement agreement was based on an erroneous perception and is legally invalid, as respondent set forth in Respondent's Exhibit 3, the August 6, 1984 letter to Mr. Kabat:

> In connection with a personnel transaction involving your former position, it has been brought to our attention that the reallocation made in your case was in error. Specifically, since you were not on the payroll in June and July of 1983, the reallocation notice we went you could not be effectuated. Your successor in the position, however, was reallocated effective 6/12/83.
>
> Since we cannot effectively reallocate your position retroactively to 8/16/79, we must inform you that the action we took is effectively null. We are therefore rescinding the reallocation notice we sent you....

To begin with, the respondent was of the opinion at the time it agreed to the settlement that the settlement could have no effect on Mr. Kabat's remuneration, but still felt that the reallocation of the position could be processed. See Appellant's Exhibit 9, p.2, memo dated 7/15/83 from DER to DNR personnel:

> Cy Kabat Appel/Kent Klepinger position.
>
> Per our conversation and our settlement offer to Mr. Kabat, we are asking you to process these reallocation notices. For Kabat,

> merely distribute to P [Personnel] file and make any changes in employ's record to indicate reallocation took place, as you can't do payroll processing.

Second, it is not apparent from Respondent's Exhibit 3, the letter rescinding the reallocation, or from the Commission's perusal of the hearing tapes containing the testimony concerning this transaction, why the agreed upon action -- reallocation of the position from NRA 2 to NRA 3 effective August 26, 1979, could not be accomplished.

A reallocation is the "assignment of a position to a different class...," §ER-Pers 3.01(2), Wis. Adm. Code (emphasis added). The fact that Mr. Kabat was not on the payroll in June and July of 1983, cited in Respondent's Exhibit 3, may have some bearing on his salary transactions, but it would not have any bearing on the effective date of the reallocation of the position.

In his post-hearing brief, the respondent argues as follows:

> The facts which permitted the reallocation of the Appellant's position occurred in June, 1983. The appellant as the current incumbent was regraded at the same time as the reallocation occurred. The rules will not permit another result under these circumstances. (See ER-Pers. 3.01(2) & (4), Wis. Adm. Code)... Since Kabat was no longer a state employe and not on the payroll, the reallocation action could not technically be effectuated.

The settlement agreement by its terms covered only the effective date of reallocation of the appellant's position. However, the respondent seems to infer that it at least impliedly also covered the regrade of the incumbent. A regrade is "the determination of the administrator under §230.09(2)(d), Stats., that the incumbent of a filled position which his been reallocated or reclassified should remain in the position without opening the position to other candidates." §ER-Pers 3.01(4), Wis. Adm. code. Even if the regrade of Mr. Kabat were not possible for the reasons enunciated by the respondent, there simply does not appear to be any reason

why the reallocation of the position could not have been effectuated with the August 26, 1979, effective date.

For these reasons, the Commission is of the opinion that the disposition of Case No. 79-318-PC should be considered to have a res judicata or collateral estoppel effect as to the instant appeal, and is controlling with respect to the effective date of the reallocation of the position in question.

ORDER

1) The Commission adopts the Findings of Fact contained in the proposed decision with the amendment of Finding No. 9 by addition of the following:

The Commission thereafter entered a final order which dismissed Case No. 79-318-PC on the basis of the aforesaid settlement agreement.

2) The Commission adopts Conclusions of Law 1 and 2 contained in the Proposed Decision, rejects Conclusions of Law 3 and 4, and substitutes in their place the following:

3. The appellant has sustained his burden of proof.

4. The respondent's decision to reallocate the appellant's position with an effective date of June 12, 1983, instead of August 26, 1979, was incorrect.

3) The Commission adopts Section A of the opinion in the proposed decision and rejects Section B for the reasons set forth above.

4) The Commission rejects the proposed order and substitutes in its place the following:

The respondent's action reallocating the appellant's position with an effective date of June 12, 1983, instead of August 26, 1979,

is rejected, and this matter is remanded to the respondent for action in accordance with this decision.

Dated: May 9, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf
ID9/4

(NOTE: Commissioner Murphy did not participate in the consideration or decision of this case.)

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

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

KENT KLEPINGER,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 83-0197-PC

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

PROPOSED DECISION AND ORDER

This matter is before the Commission as an appeal arising out of a reallocation decision. The sole issue for hearing is:

> Whether the decision of the respondent as to the effective date of the reallocation of appellant's position was correct.

FINDINGS OF FACT

1. Since May 31, 1981, the appellant has been employed by the Department of Natural Resources as the Director of its Bureau of Research. Appellant's responsibilities include planning and administering a comprehensive natural resources research program.

2. Appellant's predecessor as Bureau Director was Mr. Cyril Kabat.

3. In 1979, the respondent implemented a civil service classification survey (the natural resource survey) covering Mr. Kabat's position. Pursuant to the survey, Mr. Kabat's position was laterally reallocated from the old classification of Natural Resources Administrator 3 (NRA3) to the new classification of the same title (NRA) class level (3), and pay range (18).

4. Mr. Kabat appealed the reallocation decisions to the Personnel Commission, contending his position should have been reallocated to the NRA4 level assigned to pay range 19.

5. The parties to Mr. Kabat's appeal (Kabat v. DP, 79-318-PC), agreed to hold the case in abeyance pending the results of a second classification survey, which is generally referred to as the research and planning survey.

6. The research and planning survey encompassed two positions considered by respondent to be peers of the Kabat position. The two positions were that of the research director for the Department of Industry, Labor and Human Relations and the director of the Bureau of Health Statistics in the Department of Health and Social Services.

7. Mr. Kabat retired from state civil service in 1981 but did not withdraw his pending appeal before the Commission. On May 31, 1981, appellant completed a Career Executive lateral transfer from a pay range 18 position into Mr. Kabat's former position.

8. The results of the research and planning survey caused respondent to conclude that the two peer positions were more properly classified at pay range 19 rather than at their prior pay range 18 classification. The effective date of the survey was June of 1983.

9. On June 10, 1983, counsel for the Division of Personnel made an offer to Mr. Kabat to settle his pending appeal. The offer was accepted by Mr. Kabat and a settlement agreement was executed by the parties on July 7, 1983. The document provided that the respondent agreed to reallocate the position of Director of the Bureau of Research from NRA3 to NRA4 effective August 26, 1979 and Mr. Kabat agreed to withdraw Case No. 79-318-PC.

10. Pursuant to the provisions of 1983 Wisconsin Act 27, published on July 1, 1983, the authority previously held by the Administrator, Division of Personnel over classification matters was assumed by the Secretary, Department of Employment Relations.

11. On July 15, 1983, respondent issued a reallocation notice to Mr. Kabat stating that his position had been reallocated from NRA3 to NRA4 effective August 26, 1979. That date was the effective date of the natural resources survey and also the date to which Mr. Kabat had demanded he be reallocated in his letter of appeal for Case No. 79-318-PC.

12. Also on July 15, 1983, respondent issued a reallocation notice to the appellant reallocating his position to NRA4 effective June 12, 1983. Appellant subsequently filed an appeal with the Commission.

13. On August 6, 1984, the Administrator of the Division of Classification and Compensation, Department of Employment Relations sent a letter to Mr. Kabat, stating:

> In connection with a personnel transaction involving your former position, it has been brought to our attention that the reallocation made in your case was in error. Specifically, since you were not on the payroll in June and July of 1983, the reallocation notice we sent you could not be effectuated. Your successor in the position, however, was reallocated effective 6/12/83.
>
> Since we cannot effectively reallocate your position retroactively to 8/16/79, we must inform you that the action we took is effectively null. We are therefore rescinding the reallocation notice we sent you. We understand that this may motivate you to reopen your appeal. Such action can be taken by contacting the State Personnel Commission.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(b), Stats.

2. The appellant has the burden of showing that the respondent's decision as to the effective date of the reallocation of his position was incorrect.

3. The appellant has not sustained his burden of proof.

4. The respondent's decision to set June 12, 1983 as the effective date for reallocating the appellant's position was not incorrect.

OPINION

There are two questions raised by this appeal: 1) irrespective of any settlement agreement between Mr. Kabat and the respondent, what is the appropriate effective date for reallocating the position held by Mr. Kabat and the appellant; and 2) what effect, if any, does the existence of a settlement agreement have on the answer to the first question. These questions will be addressed separately below.

A. Effective date irrespective of settlement agreement.

Mr. Kabat appealed the 1979 decision to reallocate his position to the NRA3 classification assigned to pay range 18. The appeal was held in abeyance pending the results of a second survey that covered two peer positions in other agencies. Pursuant to the second survey (and the new position standards that were adopted as a result of the survey) the two peer positions were reallocated from pay range 18 to pay range 19, effective June of 1983. What is the appropriate effective date for reallocating Mr. Kabat's position to NRA4 at pay range 19? The fact that Mr. Kabat retired and the appellant subsequently transferred into the vacant position are facts that are extraneous to the underlying question.

The key to resolving the question at hand is the nature of the class specifications that are typically created as a consequence of a personnel survey. As provided in §230.09(2)(am), Stats:

> The secretary shall maintain and improve the classification plan to meet the needs of the service, using methods and techniques which may include personnel management surveys, individual position reviews, occupational group classification surveys, or other appropriate methods of position review. Such reviews may be

> initiated by the secretary after taking into consideration the recommendations of the appointing authority, or at his or her own discretion. The secretary shall establish, modify or abolish classifications as the needs of the service require.

According to §ER Pers 2.04(2), Wis. Adm. Code, "[c]lass specifications shall be the basic authority for the assignment of positions to a class." At any given time, the existing class specifications are analogous to a set of statutes or rules. In order to determine the best fit for individual positions not specifically identified, the specifications must be interpreted in the same way that statutes and rules must be interpreted in order to apply them to particular fact situations.

When a survey is conducted and the old class specifications are abolished and new ones are adopted, the new specifications become effective on a certain date. Here, the new Natural Resources Administrator series went into effect on August 16, 1979, while the effective date of the Research and Analysis position standard was June 12, 1983. The record in this matter is consistent with the conclusion that these new position standards were not to have a retroactive effect but were intended to be prospective only. In construing statutes, courts observe a strict rule of construction against a retrospective operation. 73 Am Jur 2d 487. That rule of construction along with the evidence that the new position standards had specific effective dates, compel the conclusion that, irrespective of any settlement agreement between Mr. Kabat and respondent, the correct effective date for reallocating Mr. Kabat's position was June 12, 1983.

This result would be different if, instead of having established an entirely new position standard in 1983 that resulted in reallocating the peer positions in DILHR and DHSS from pay range 18 to 19, the respondent had merely reinterpreted the existing position standards and concluded that based

on those standards the two peer positions were better classified in a pay range 19 classification. If that had occurred, Mr. Kabat would have been entitled to rely upon the change in classification of the two peer positions as a basis for arguing that NRA specifications should be interpreted in such a way as to place his position at the NRA4 level in pay range 19 as of 1979.

It may also be helpful to note that not all positions are reallocated to higher pay ranges by surveys. If as a result of the research and planning survey, the two peer positions in DHSS and DILHR were reallocated downward to pay range 17, Mr. Kabat's pending 1979 appeal would have been unaffected, at least until the effective date of the second survey.

B. Effect of the settlement agreement.

Mr. Kabat and the respondent entered into a settlement agreement on July 7, 1983 reallocating Mr. Kabat's former position to the NRA4 classification in pay range 19 effective August 26, 1979. On August 6, 1984, respondent unilaterally rescinded its action and suggested that Mr. Kabat might wish to reopen his 1979 appeal with the Commission. The appellant, as the incumbent in Mr. Kabat's former position, is essentially seeking to enforce the settlement agreement. There is some question whether the appellant is a third party beneficiary with the right to enforce the agreement in an appropriate forum. See, generally, 17 Am Jur 2d 721-749.

Regardless of who seeks to enforce the settlement agreement, the Commission lacks the jurisdiction to consider such a request. Pursuant to §230.44(4)(c), Stats:

> After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in

> accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service and the commission's decisions.

No other provisions in ch. 230, Stats., discuss the mechanism for enforcing an order of the Commission. The reference in §230.44(4)(c), Stats., to bringing an action for failure to comply with the Commission's order relates to the title of ch. 801, Stats., "Civil Procedure - Commencement of Action and Venue." This reference suggests that enforcement actions are to be filed in circuit court. In contrast, the Commission may hear appeals and complaints as provided in §230.45, Stats.[FN]

A second indication that the Commission lacks jurisdiction over enforcement actions is that the Commission has no authority to impose fines or other penalties against noncomplying parties. Here the Commission already ordered the dismissal of the Kabat appeal "pursuant to the settlement agreement entered into by the parties." Enforcement proceedings would be meaningless if there was no punishment available.

In his brief, appellant also argues that respondent is equitably estopped from contending that he has unilaterally rescinded the settlement agreement with Mr. Kabat. According to his brief (p. 6), appellant:

FN In Elder v. DHSS, 79-PC-ER-89 (3/19/82), the Commission considered complainant's motion to vacate a year-old order dismissing the case pursuant to a stipulation between the parties. The Commission held that it lacked the authority to reopen, citing State ex rel. Farrell v. Schubert, 52 Wis. 2d 351 (1971), and noted that there was at least a reasonable doubt as to the existence of such authority. In addition, the complainant had the option of seeking enforcement of the stipulation pursuant to §111.36(3)(d), Stats., of the Fair Employment Act. That enforcement mechanism does not exist for appeals, such as the present case, that are filed under §230.44(1), Stats.

> relied on the settlement agreement in Mr. Kabat's appeal, took action to pursue his claim on the basis of the agreement, incurred attorney's fees to his detriment, and two days prior to hearing, more than a year after the agreement was entered into, the DER reneges on the agreement and takes the position that it was error and/or illegal.

The elements of equitable estoppel were recently enumerated by the court in State v. City of Green Bay, 96 Wis. 2d 195 (1980), affirming in part and reversing in part 87 Wis. 2d 913 (1978). There, the court held that "three facts or factors must be present: (1) Action or nonaction which induces (2) reliance by another (3) to his detriment," and that in order to estop the government, the government's conduct must be "unconscientious" or "inequitable." 96 Wis. 2d 195, 202-03 (citations omitted). In addition, "in order to estop a governmental entity, the court must balance the public interest at stake if the doctrine is applied against the injustice that might be caused if the estoppel doctrine is not applied." 96 Wis. 2d 195, 210.

In the present case, the appellant alleges that respondent's action induced him to commence an appeal and to incur attendant attorney's fees. In Wisconsin, as well as in many other jurisdictions, the commencement of proceedings does not constitute the detrimental reliance required for the operation of equitable estoppel. In Warden v. Baker, 54 Wis. 49 (1882), one summoned as a garnishee was held not to be estopped from denying his indebtedness to the principal defendant by the fact that, previous to the commencement of the proceedings against him, he had admitted such indebtedness and thereby induced the plaintiff to commence such proceeding, where it did not appear that the plaintiff sustained any other injury thereby except the expense of the proceeding. Most jurisdictions considering the question of whether the bringing of a suit or other legal proceeding is a change of

position within the law of estoppel have concluded that it is not. 28 Am Jur 2d 714.

The appellant has failed to establish that he changed his position to his detriment as a result of the respondent's settlement agreement with Mr. Kabat Therefore, equitable estoppel does not operate in this case.

Because the respondent has unilaterally rescinded the settlement agreement with Mr. Kabat, and because the Commission lacks jurisdiction over an "action" to enforce the agreement, the conclusion that the correct reallocation date for the position of Director, Bureau of Research, was June 12, 1983 is determinative.

ORDER

Respondent's decision setting june 12, 1983 as the effective date for reallocating the appellant's position is affirmed and this appeal is dismissed.

Dated: _____, 1985 STATE PERSONNEL COMMISSION

_____
DONALD R. MURPHY, Chairperson

_____
LAURIE R. McCALLUM, Commissioner

_____
DENNIS P. McGILLIGAN, Commissioner

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