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JAMES D. JACOBUS,  
 Appellant,

v.

President, UNIVERSITY OF  
 WISCONSIN SYSTEM (Madison),  
 Respondent.

Case No. 88-0079-PC

\* \* \* \* \*

DECISION  
 AND  
 ORDER

This matter is before the Commission on respondent's motion to dismiss for lack of jurisdiction. The parties were provided an opportunity to file briefs. The following facts appear to be undisputed.

FACTS

1. Until February 15, 1988, the appellant was employed as a Building Maintenance Helper 2 (BMH 2) in Pay Range 3-04 at the Mendota Mental Health Institute. The maximum of the pay range for Pay Range 3-04 is \$8.217 per hour. However, appellant's pay was "red circled" at the rate of \$8.832 per hour.

2. On February 15, 1988, appellant voluntarily transferred to the Custodial Department of the University of Wisconsin-Madison. Appellant was informed in his letter of appointment that his rate of pay would remain at the \$8.832 level.

3. By letter dated April 11, 1988, appellant was informed as follows:

It was recently brought to our attention that [your current rate of pay] is incorrect. Your transfer is considered a non-contractual transfer and your rate of pay is limited by the maximum of the pay range which is \$8.217 per hour. Therefore,

you have been overpaid \$.615 per hour since you began with this Division.

We will be changing your hourly rate for the April A 1988 payroll which we are currently processing (for the period March 27 through April 9, 1988). You have been paid a total of 240 hours and have been overpaid a total of \$147.60 (240 hours times \$.615). We will need to deduct this overpayment from your paycheck(s).

4. The appellant filed a contractual grievance based on the respondent's action. That grievance reached the second step on April 21, 1988.

5. On July 6, 1988, appellant filed the instant appeal with the Personnel Commission seeking a return to his prior salary level of \$8.832 per hour.

#### CONCLUSIONS OF LAW

1. This appeal was not timely filed pursuant to §230.44(3), Stats.
2. The Commission lacks subject matter jurisdiction over this appeal.

#### OPINION

Pursuant to §230.44(3), Stats., appeals filed with the Commission under §230.45(1)(a),<sup>1</sup> "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 Commission has previously held that the 30 day time period is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79.

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<sup>1</sup>This matter cannot be considered a fourth step grievance filed pursuant to §230.45(1)(c), Stats., because the appellant is an employee covered by a collective bargaining agreement and, as such is not eligible to utilize the non-contractual grievance procedure. §ER 46.01(2), Wis. Adm. Code.

Here, the appellant filed his appeal more than 30 days after he was notified that his pay rate was being reduced during April to the pay range maximum.

The Commission declines to apply a continuing violation theory to the facts of this case. In Junceau v. DOR & DP, 82-112-PC, 6/14/82, the appellant sought review of a decision relating to the computation of the appellant's salary upon regrade pursuant to the attorney's pay plan. In ruling on a timeliness objection, the Commission considered a continuing violation theory:

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.


The decision to reduce the appellant's salary soon after his transfer to a new position is comparable to the other salary determinations listed in the Junceau decision. Also, in Kimble v. DILHR, 87-0061-PC-ER, 2/19/88, a case filed under the Fair Employment Act, the Commission declined to apply a continuing violation theory to each of several decisions not to provide the complainant with salary increases.

Because the appeal was not timely filed, there is no need to discuss the respondent's other jurisdictional objections to the appeal.


ORDER

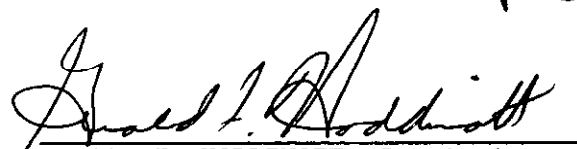
Respondent's motion to dismiss for lack of jurisdiction is granted,  
and the appeal is dismissed.

Dated: October 20, 1988 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

KMS:jmf  
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DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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