

STATE OF WISCONSIN

PERSONNEL COMMISSION

JOHN H. KRAHLING,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 90-0315-PC

RULING ON
PETITION
FOR
REHEARING

On January 11, 1991, the Commission granted the respondent's motion and dismissed this matter for lack of subject matter jurisdiction as untimely filed. The appellant filed a notice of a petition for rehearing on January 28th and then filed the petition three days later. Appellant contends that "new evidence is available that is sufficiently strong to reverse or modify" the Commission's decision.

The relevant language from the Commission's January 11th ruling reads as follows:

Appellant's second argument is that his appeal may have arrived at the Commission a day before the August 7, 1990, date reflected by the date stamp on the document. In Young v. DP, 81-7-PC, the Commission relied on testimony from the appellant that she had hand-delivered her appeal letter to the Commission on January 7, 1981, in concluding that the appeal was filed on the 7th, even though the letter bore a Commission date stamp of January 8, 1981. The Commission specifically noted that the appellant had the burden of proof and had to "prove by the preponderance of greater weight of the evidence that her appeal was filed in a timely fashion."

In the present case, the appellant merely asserts that it is his "expectation that the appeal was received by the [Personnel] Commission on or before August 6, 1990." The expectation is based on the appellant's statement that he mailed the appeal on Thursday, August 2, 1990. There is no record in this matter comparable to that in Young, supra, which could serve as the basis for a finding that the date stamp of August 7, 1990, was erroneous and that the letter of appeal was actually filed with the Commission on either August 3rd or August 6th. Based upon the materials in the case file, the Commission has no alternative

other than to conclude that the appellant failed to file his appeal within the 30 day period required by statute.

Appellant's petition is premised on the appellant's conclusion that it is a "customary and routine practice for the United States Postal Service to deliver mail sent on Friday in Milwaukee, to Madison on Monday." In support of this conclusion, the appellant submitted 35 documents which he had mailed in Milwaukee on a Friday and which were received by the Commission on the following Monday.

The documents submitted by the appellant still do not meet the applicable burden of proof. In its ruling, the Commission explained that the 30 day time limit is jurisdictional in nature and that the appellant has the burden of proving by a preponderance of the evidence that the appeal was timely filed. If the only evidence before the Commission was evidence that the appeal was mailed in Milwaukee on a Friday and evidence of subsequent tests involving 35 documents which were mailed from Milwaukee on Friday and were received by the Commission on a Monday, there would be a preponderance of the evidence that the appeal had been timely filed. However, this is not the only evidence regarding the timeliness of the instant appeal. The Commission's date stamp is very strong evidence that the letter of appeal was not received until Tuesday, August 7, 1990. It is common knowledge that mail can sometimes be inexplicably delayed so that it arrives later than is customary and routine. In the absence of direct evidence that the appeal was filed on August 6th, such as an affidavit of hand delivery or a certified mail receipt, it is far more likely that the postal service inexplicably delivered the appeal a day later (on August 7th) than is customary and routine, than it is that the appeal was inexplicably and incorrectly date stamped August 7th.

If the Commission were to adopt the appellant's argument, the 30 day time limit would be recast from a mandatory standard to a basically discretionary time limit which could be satisfied if an appellant merely had a reasonable expectation that a letter of appeal would reach the Commission within the 30 day period. This result would be inconsistent with the language in §230.44(3), Stats., which states that an appeal "may not be heard unless the appeal is filed within 30 days." The Commission realizes that dismissal of the instant appeal may appear to be a harsh result. However, dismissal is clearly re-

quired by the operative statutory language. See, e. g., Richter v. DP, 78-261-PC, 1/30/79.

The appellant also argues that equitable estoppel should apply to prevent application of the 30 day time limit. There is no evidence of inequitable conduct on the part of either the respondent or the Commission on which appellant reasonably relied in acting to his detriment.

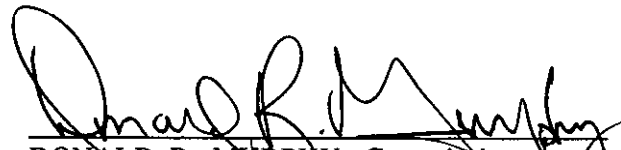
ORDER

The appellant's petition for rehearing is denied.

Dated: February 26, 1991 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

John H. Krahling
DNR
P.O. Box 12436
Milwaukee, WI 53212-0436

Jon E. Litscher
Secretary, DER
P. O. Box 7855
Madison, WI 53707