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JOHN H. KRAHLING,

Appellant,

v.

Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,

Respondent.

Case No. 90-0315-PC

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RULING ON  
MOTION  
TO DISMISS

John Krahling appealed the reallocation of his position by his employ- ing agency, the Department of Natural Resources to this Commission. The ap- peal letter is dated August 2, 1990, and bears date-stamp of receipt by the Commission on August 7, 1990. On October 30, 1990, a prehearing conference by telephone was held. The conference included the appeal of Ruth Johnson (Case No. 90-0284-PC) who, similarly, was appealing the reallocation of her position by DNR.

A hearing was scheduled for January 10, 1991 with subject matter ju- risdiction pursuant to §230.44(1)(b), Stats. Respondent advised Mr. Krahling and the Commission that consideration was being given to objecting Krahling's appeal on the basis of timeliness. The issue for hearing agreed to by the parties was: whether respondent's decision reallocating appellants' positions from Environmental Specialist 5 to Hydrogeologist 2 instead of Hydrogeologist 3 was correct.

On November 15, 1990 respondent filed with the Commission a motion to dismiss appellant's appeal. Respondent alleges that appellant failed to file his appeal within thirty (30) days as required by §230.44(3) Stats. Section 230.44(3), Stats. in pertinent part states:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days . . . after the appellant is notified of the action . . . .

In support of its motion, respondent submitted, as exhibits, the affidavits of Ronald W. Kazmierczak, Assistant District Director of appellant's work unit,

and Franklin C. Schultz, appellant's immediate supervisor, which state they hand-delivered the reallocation notice to appellant on or before July 6, 1990. Also in support, respondent cited Richter v. DP, 78-0261-PC, 1/30/79 and Acharya v. DHSS, 81-0296-PC, 10/1/81, which hold the 30 day time limit is mandatory and jurisdictional in nature.

In response, appellant contends in an affidavit that he mailed the appeal on August 2, 1990 and had "good and reasonable expectation that the appeal would be received and filed by the Commission on Friday, August 3, 1990 . . . well within the 30 day time period ending on July 6, 1990." In support he cites §801.15(5) which states:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of notice or other paper upon the party and the notice or paper is served by mail, 3 days shall be added to the prescribed period.

Also appellant argues that there is a question of whether or not the Commission properly dated his appeal when received. He states that he is aware of another appeal which was inappropriately stamped by the Commission.

The time limit for filing an appeal of a reallocation decision under 230.44(1)(b), Stats. is set forth in §230.44(3) Stats. Under §230.44(3), Stats., appellant was required to file his appeal within 30 days after he received his notification of reallocation.<sup>1</sup> The appellant does not dispute that he received notification no later than July 6, 1990. The thirtieth day thereafter was Sunday, August 5, 1990. By operation of §990.001(4)(b), Stats., the appellant had until Monday, August 6, 1990, to file an appeal of the reallocation decision. Starzynski & Mayfield v. DOA, 81-275, 276-PC, 12/3/81. The appeal bears a date stamp of August 7, 1990. The Commission has consistently held the 30 day time limit prescribed in §230.44(3) Stats., to be mandatory and jurisdictional. Richter v. DP, 78-261-PC, 1/30/79, Acharya v. DHSS, 81-296-PC, 10/1/81, Schroeder v. DMA, 86-0148-PC, 8/20/86 and Look v. UW & DER, 88-0140-PC, 2/22/89.

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<sup>1</sup> The statute refers to 30 days after the effective date or notification, "whichever is later." Here the effective date was June 3, 1990, so the focus of the dispute on timeliness is on the date of notification.

Appellant's argument that the filing period should be extended by three days pursuant to §801.15, Stats., fails to take into account the specific language of §801.01(2), Stats., which provides:

Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings . . . .  
(emphasis added)

The instant appeal is an administrative proceeding before the Personnel Commission rather than a civil or special proceeding in circuit court<sup>2</sup>, so §805.15, Stats., is inapplicable.

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, 6/3/81, 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.

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<sup>2</sup> The Commission has, pursuant to §PC 4.03, Wis. Adm. Code, made the discovery provisions of ch. 804, Stats., applicable to Commission proceedings. No comparable rule has been adopted with respect to the provisions of §801.15, Stats.

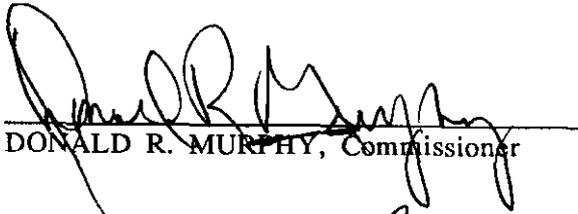
ORDER

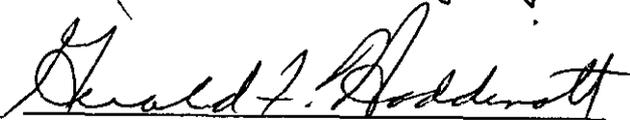
Respondent's motion to dismiss is granted and this matter is hereby dismissed for lack of subject matter jurisdiction.

Dated: January 11, 1991 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM/gdt/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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