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RITA BLACK-RADLOFF,

Appellant,

v.

Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,

Respondent.

Case No. 90-0353-PC

\* \* \* \* \*

FINAL  
DECISION  
AND  
ORDER

The Commission, after reviewing the proposed decision and order and the hearing record, and after consulting with the hearing examiner, hereby adopts portions of the proposed decision and order, rejects portions of the proposed decision and order, and adopts additional language, as follows:

I. Findings of Fact 1. through 3. and 6. are adopted:

1. At all times relevant to this proceeding, the appellant has been employed at the State Office Building at 1 West Wilson Street in Madison by the Department of Health and Social Services as an Account Specialist 3.

2. At the appellant's place of work, interdepartmental mail is picked up twice. The morning pick-up time is 9:00 a.m.

3. On July 17, 1990, the appellant received written notification that her request for reclassification from Account Specialist 3 to Account Specialist 4 had been denied. The denial letter specifically mentioned that the appellant had 30 days from receipt of the letter in which to file a written appeal with the Personnel Commission.

6. The appeal memo bears a Personnel Commission date stamp as having been received on August 17, 1990, and also bears a notation that it was received via inter-departmental mail.

II. Findings of Fact 4., 5., and 7. are rejected.

III. The following Findings of Fact are added:

8. On or before Wednesday, August 15, 1990, appellant prepared a memorandum appealing respondent's denial of the subject reclassification request. Appellant, on August 15, 1990, before 9:00 a.m. placed this memorandum in an inter-departmental mail envelope and deposited it into a receptacle in or near her work unit designated for the deposit of inter-departmental mail. Such mail is picked up by the inter-departmental mail carrier from such receptacle each work day around 9:00 a.m.

9. Mail, both U.S. mail and inter-departmental mail, is delivered to the Commission twice each work day, once around 7:45 a.m. and once around 12:45 p.m. The latest the morning mail has been delivered is around 8:45 a.m. and the latest the afternoon mail has been delivered is around 1:30 p.m.

10. The Commission has an established procedure for opening, date-stamping, logging, and routing incoming mail. This procedure involves opening the mail upon receipt; date-stamping each page of certain documents upon removing them from their envelope; attaching the envelope to most documents received through the U.S. mail; not attaching the envelope to a document received through the inter-departmental mail; hand-writing the words "inter-departmental" next to the date stamp of those documents received through the inter-departmental mail; and logging manually and by computer the receipt of certain documents.

11. The Commission has a Program Assistant 3 (PA 3) position which is assigned primary responsibility for receiving, opening, date-stamping, and logging the mail. At all times relevant to this matter, this position was held by Rita C. Richardson. Ms. Richardson has held this position since August of 1987. Ms. Richardson is familiar with the mail procedure described above and it is her usual and customary practice to follow such procedure. Ms. Richardson also makes it her usual and customary practice to clear other documents and materials from her desk when she is receiving and processing the mail.

12. The Commission has a Program Assistant 1 (PA 1) position which is assigned primary responsibility for answering phone calls to the Commission. At all times relevant to this matter, this position was held by Glenda D. Taplick. Ms. Richardson's position has secondary responsibility for this function. On August 15, 16, and 17, 1990, Ms. Taplick was on vacation and was not present in the Commission's offices. During Ms. Taplick's absence, Ms. Richardson would carry out the duties and responsibilities of the PA 1 position as well as her

own. Ms. Richardson's workload on August 15, 16, and 17, 1990, involved additional responsibilities but was not characterized by Ms. Richardson to be hectic.

13. The only errors relating to date-stamping incoming documents which Ms. Richardson has made during her tenure in the PA 3 position at the Commission related to failing to advance the date stamping device which resulted in documents bearing a date one day prior to the date actually received by the Commission and to failing to date-stamp each page of a document.

14. Subsequent to the incident relating to failing to advance the date stamping device, Ms. Richardson has made it her usual and customary practice to advance the device to the next day's date upon preparing to leave the office for the day and then locking the device in her desk. The earliest that she would do this would be 4:00 p.m. The Commission's offices close at 4:30 p.m.

15. Appellant testified that she called the Commission's offices around 2:00 or 3:00 p.m. on August 16, 1990, and that a woman answered the phone; that she told this woman that she had a question about an appeal; that the woman asked for her name and, upon being given appellant's name, told her that her appeal was "right here." None of the women who are employed by the Commission, including Ms. Richardson, recall taking such a call on that date.

16. Appellant's calendar has a notation on the page for August 16, 1990, that "called PC - received memo - spoke w/ lady." Appellant's calendar has a notation on the page for August 17, 1990, that "Told Nancie about PC." Appellant testified in the hearing in this matter that she made this notation on the page for August 17, 1990, because, on August 17, 1990, she started thinking, "Well, gee, what if they say they didn't get my call? Then I can at least prove that I talked to Ms. Young about this situation."

17. Appellant and two of her witnesses at the hearing in this matter characterized appellant as "compulsive" and "meticulous" about meeting deadlines and keeping records. Appellant's usual and customary practice, when making or receiving a telephone call relating to a matter she felt was significant, was to note the date and time of the call as well as the name of the person to whom she had spoken. For example, appellant's calendar contains such a notation on the page for April 11, 1990. Appellant had called Edgewood College Library that day to substantiate that she had no overdue library books and noted "Edgewood Library - Ginny - no overdue books." As an additional example, appellant's calendar contains such a notation on the page for July 5, 1990.

Appellant had called a bank that day to make an inquiry regarding the manner in which the bank had reconciled appellant's interest on a loan and noted: "Tammy - 0 interest - 4 yrs to pay - will send letter."

18. When asked at the hearing in this matter on cross-examination why she didn't ask for and note in her calendar the name of the person she had allegedly spoken with at the Commission on August 16, 1990, appellant testified that:

Because of the fact that, if she (person answering phone) had it, she would have stamped it. I relied on the reasonableness of the Personnel Commission to be meticulous. And because you're so concerned or they're so concerned with date-stamping, whoever answered the phone said, "Yeah, we got it." So, if she would have said, "No, I'm sorry, I can't find it, or no, you shouldn't, you know." If she would, like I said, if she would have said anything but, "It's right here," I would have brought another one down and because this is the thirtieth day and she said it was here, what was I concerned about whether or not--why would she lie? Why would whoever, you know. As far as getting the name, no, because it was the Personnel Commission. I got the right place. Why would I care who had I been speaking with?

19. When asked at the hearing in this matter on re-direct examination why she didn't ask for and note in her calendar the name of the person she had allegedly spoken with at the Commission on August 16, 1990, appellant testified that:

I did not know that more than one person could answer the phone prior to coming to the prehearing conference where then I was told. Had I known that, I mean most places that are very small, I know this organization is small, and I assumed that you had one or two people who answered the phone. And so that's why I didn't concern myself with asking, "Whom?" And, again, when she said, "It's right here," I thought, "Well, how could I lose?" Why do I need to know who I'm talking to? She's got it. Obviously, you've got your procedures and I figured, well, since you're so concerned with the 30-day time frame, you've got to have some procedure for date-stamping and assuming that this came in when it did come in. So when she said, "It's right here," I was like, hey, great, OK, thank you, good-bye. And I wasn't concerned any more beyond that as to whether I talked to, you know, Rita . . .

20. Nancie Young is a friend and co-worker of appellant's. Ms. Young testified in the hearing in this matter that appellant is meticulous about keeping detailed records and consistently keeps notes with the name, date, and time indicated on them.

21. Upon receiving the denial of the subject reclassification request, appellant told Ms. Young that she intended to appeal this denial. Ms. Young advised appellant to be careful of the 30-day filing requirement for an appeal to the Commission and showed her a copy of the Commission's decision in Young v. DP, Case No. 81-7-PC (6/3/81). Ms. Young was the appellant in this earlier case. Ms. Young reminded appellant of this 30-day filing requirement 5 or 10 times between then and August 15, 1990. Ms. Young testified at the hearing in this matter that she was out of the office on August 16, 1990, and, upon arriving in the office on August 17, 1990, asked appellant whether she had filed her appeal. Ms. Young further testified that appellant told her that she had "called the Personnel Office on Thursday and they have received it."

22. Appellant did not file her appeal immediately upon receiving the subject denial because she was hopeful that the matter could be resolved by informal means.

23. During the week of August 13, 1990, appellant was very busy due to her full class schedule, her full-time job, and the fact that she was assisting Ms. Young in preparing for a meeting on August 16, 1990.

24. Prior to filing the instant appeal, appellant had had no contact with the Commission.

25. The instant appeal was filed with the Commission on August 17, 1990.

IV. The Conclusion of Law is rejected and the following Conclusion of Law is added:

The appeal memo filed by the appellant on August 17, 1990, was not timely filed.

V. The first two paragraphs of the Opinion section are adopted:

The time limit for filing an appeal of a reclassification decision under §230.44(1)(c), Stats., is established in §230.44(3), Stats.:

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. . . .

This 30 day time limit is mandatory rather than discretionary and is jurisdictional. Richter v. DP, 78-261-PC (1/3079). In the present case, the focus is on whether the appeal memo was received by the Commission on

August 16th, the thirtieth day after July 17, 1990, the date the appellant was notified of the reclassification denial.

In a dispute as to jurisdiction, the burden of proof is on the party asserting jurisdiction. Allen v. DHSS & DMRS , 87-0148-PC, (8/10/88). Here, that party is the appellant.

VI. The remainder of the Opinion section is rejected.

VII. The following language is added to the Opinion section:

This decision of the timeliness issue presented here hinges on whether the Commission believes that appellant made the phone call she alleges she made to the Commission on August 16, 1990, and whether she received the response to the alleged call that she alleges she received. This involves an assessment of the credibility of the witnesses at the hearing and the plausibility of the scenarios posited by the parties. In the Proposed Decision and Order, the hearing examiner concluded that appellant made the telephone call on August 16, 1990, as alleged and received the response to the telephone call as alleged and based this conclusion on the testimony of other witnesses that appellant is meticulous, very conscious of deadlines, and highly dependable; on the fact that appellant's calendar included notes verifying her testimony relating to the alleged call to the Commission; and on the testimony of Ms. Young that, on August 17, 1990, appellant had mentioned the August 16th call to her.

The only two witnesses who testified that they could recall specifically any details relating to the alleged telephone call were appellant and Ms. Young. Both appellant and Ms. Young testified that appellant was a meticulous and compulsive record-keeper and made it a practice, in making or receiving a telephone call relating to a matter she felt was significant, to note the date and time of the call as well as the name of the person to whom she had been speaking. However, despite the fact that appellant felt that her appeal was very important to her, that she had been reminded repeatedly by her supervisor of the importance of meeting the 30-day filing requirement, and that she was aware of the consequences of failing to meet the 30-day filing requirement through conversations with Ms. Young and through reviewing the Commission's decision in Young v. DP, cited above, appellant failed to note either the name of the person to whom she had been speaking or to note the time of the alleged telephone call to the Commission on August 16, 1990.

Moreover, appellant was unable to offer a clear or convincing reason for this failure and the testimony she offered in this regard at hearing was inconsistent. (See Findings of Fact 18 and 19, above). The only reason she offered on cross-examination was that she relied on the Personnel Commission to be meticulous in date-stamping incoming documents. However, the only contact she had ever had with the Commission was the indirect contact through her familiarity with the Commission's decision in Young v. DP in which the Commission had decided that it had erred in date-stamping an incoming appeal. The only reason appellant offered on re-direct examination in this regard was that she did not know that more than one person could answer the phone at the Commission. She later modified this reason by stating that she assumed, given that she knew that the Commission was a small organization, that there were only one or two people who answered the phone. Again, the only contact appellant had ever had with the Commission was the indirect contact noted above so she did not know or have any reason to know either the size of the Commission's staff or the number of people at the Commission who answer the phone. Moreover, in the Young decision, on page 3, it states, "Two of the Commission's clerical staff testified." From that alone, appellant should have been aware that the Commission, at least in 1981, had at least two clerical staff positions. Finally, the Commission notes the inconsistency in the record between Ms. Young's testimony that appellant was "meticulous" and "compulsive" about deadlines and record-keeping and her testimony that she felt it necessary to remind appellant "five or ten times" about the 30-day filing requirement. These factors undermine appellant's credibility in regard to the alleged phone call to the Commission.

The Commission also feels that it is important to review the plausibility of the scenarios posited by the parties. Appellant proposes that Ms. Richardson answered appellant's phone call; opened the mail which had recently been delivered, including the inter-departmental mail envelope containing appellant's memo of appeal; told appellant that her appeal had been received; set appellant's memo aside when she became busy with other matters; discovered appellant's memo on her desk the next day and date-stamped it in then. One of the problems with this scenario is that it requires that Ms. Richardson place appellant's memo back in its inter-departmental envelope after speaking with appellant on the phone for there is no other way for Ms. Richardson to have known it came in the inter-departmental mail

when she allegedly discovered it the next day, i.e., not only did she hand-write a notation on the memo that it had been received via inter-departmental mail but it was the practice to separate an inter-departmental mail envelope from the document which it was enclosing once it was opened. It is highly unlikely that Ms. Richardson, answering a phone call while opening and processing the mail, would have placed a memo back in its envelope when she was interrupted. In addition, it is highly unlikely that an experienced employee in the Commission's PA 3 position who was aware of the importance of the 30-day filing requirement would have failed to immediately date-stamp an incoming appeal when alerted by a phone call that there was concern about its date of receipt by the Commission. Appellant also argues that Ms. Taplick's absence from the office that week made it more likely that Ms. Richardson would have made an error since her workload would have been heavier than usual. However, this is not supported by Ms. Richardson's testimony. Finally, an alternative scenario put forth by appellant is that that date-stamping device was turned to the wrong date. However, the record clearly shows that Ms. Richardson was unaware that this had ever occurred at the Commission and that Ms. Richardson would not have advanced the date on the device until at least 4:00 p.m. and then locked it in her desk so that no one else on the staff could have used it to stamp the next day's date.

The Commission concludes, based on the defects in appellant's credibility and the defects in the scenarios put forth by appellant, that appellant has failed to show that she made the alleged telephone call to the Commission on August 16 and that she received the answer she alleged she received from the Commission during the alleged call. Since the facts of the alleged phone call to the Commission and alleged answer from the Commission constitute the foundation for appellant's claim of timely filing, appellant's claim fails and the Commission concludes that appellant's appeal was filed on August 17, 1990, and was, therefore, untimely.

VIII. The Order is rejected and the following substituted:




Order

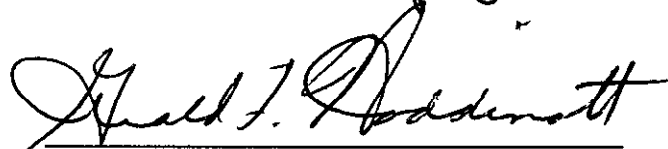
This appeal is dismissed due to untimely filing.

Dated: March 25, 1991      STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Rita Black-Radloff  
DHSS - Room 518  
1 West Wilson Street  
P.O. Box 7935  
Madison, WI 53707

Jon E. Litscher  
Secretary, DER  
137 East Wilson Street  
P.O. Box 7855  
Madison, WI 53707