STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM FLETCHER,

Appellant,

v.

Executive Director, EDUCATIONAL COMMUNICATIONS BOARD,

Respondent.

Case No. 91-0134-PC

DECISION
AND
ORDER

This matter, arising from a decision not to promote the appellant made on or about January 6, 1988, is before the Commission on the respondent's motion to dismiss as untimely filed. The parties have filed briefs. With the exception of finding 8 and 9, the facts set forth below appear to be undisputed. In ruling on the respondent's motion, the Commission has accepted as true all those facts alleged by the appellant.

1. The appellant has been employed by respondent Educational Communications Board (ECB) since May of 1974.

2. During his tenure at ECB, the appellant has documented certain activities of his co-workers in a personal journal or file. This activity has been referred to by the parties as "keeping book."

3. On or about January 18, 1983, the appellant received a written reprimand from his supervisor, Don Moran. The reprimand stated, in part:

> This correspondence is in follow-up to our investigatory interview of January 11, 1983 and is a formal written reprimand for spreading false and malicious information about the agency and your continued harassment of your co-workers. Specifically on December 16, 1982, you called John Frank at ROC to inform him that ECB was shutting down ROC and that John Frank and Marie Piebenga would be laid off. Additionally, you have been keeping book on Lonnie, going through his desk and waste basket and generally spend a great deal of time trying to find problems at the ROC.
>
> Spreading rumors about ECB shutting down ROC constitutes making false and malicious statements against this agency and is against our Work Rules (ECB Internal Policies and Procedures;

> Section: Administration; Subject: Standard Work Rules; Section IV (10)). "Keeping book" on another employee is interfering with that employee's duties and responsibilities and is also against our Work Rules (ibid, Section IV (2)).
>
> Your constant grumbling about petty concerns, harassment of your co-workers at home and on the job, and "keeping book" on Lonnie have seriously harmed the morale of your work unit.

4. On or about October 1, 1984, the appellant received a second written reprimand from his supervisor, Mr. Moran. This reprimand was revised on November 1st so that it read, in part:

> This correspondence is in follow-up to our investigatory interview of September 4, 1984 with you, Sam Amacher, Larry Dokken, and myself. This is a formal written reprimand for harassing your co-workers, telling sexist or ethnic jokes and keeping book on your co-workers. These activities are in violation of our work rules (ECB Internal Policies and Procedures; Section Administration; Subject: Standard Work Rules; Section IV (2)) which include "threatening, intimidating, interfering with, or using abusive language toward others".
>
> On July 31, 1984, we received a letter signed by all of your co-workers complaining about your constant grumbling about petty concerns, keeping book on your co-workers and telling sexist and ethnic jokes. Your inability to get along with your supervisors and co-workers has been a continuing problem during your employment with the ECB and appears to be getting worse. This has a detrimental effect on the morale of your work unit.

5. Appellant relied on the representations made in his letters of reprimand and believed his conduct of "keeping book" was a violation of Section IV(2) of ECB's work rules.

6. Late in 1987, appellant was considered for a promotion from Radio Broadcast Technician 2 to 3.

7. On or about January 6, 1988, the appellant met with Mr. Moran and Larry Dokken.

8. During the meeting, the appellant was told that he would not receive the promotion to the Radio Broadcast Technician 3 level because he continued to "keep book" on other employes, in violation of the ECB's work rules, Section IV(2). Appellant relied on this representation.[1]

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[1]Mr. Dokken submitted an affidavit in which he stated that there was never a work rule prohibiting employes from "keeping book," that appellant was

9. Early in 1991, appellant wrote a letter to State Senator Fred Risser concerning ECB's rule against "keeping book" on other employes.

10. In a letter to Senator Risser dated June 25, 1991, Paul Norton, Executive Director of the ECB, wrote:

> In response to your recent letter stating that you had learned from one of your constituents that the Wisconsin Educational Communications Board "has a rule against employees keeping notes concerning the actions of other Board employees," this is to inform you that neither the Board nor management has such a rule. I would be interested in knowing where the constituent got the idea that such a rule exists. Please know that there has never been nor does there currently exist such a rule.

11. On or about July 3, 1991, appellant received a copy of Mr. Norton's letter.

12. On August 2, 1991, the appellant filed a letter of appeal with the Commission relating to the 1988 decision not to promote him.

13. The respondent's work rules which were in effect during the period in question read, in part:

> The following work rules are issued by the management of this agency as part of its responsibility to inform all employes of personal conduct considered unacceptable as an agency employe. These rules are established to enable this agency to attain its objectives in an orderly and efficient manner and are not intended to restrict the individual rights of employes.
>
> Employes of this agency are prohibited from committing any of the following acts:
>
> * * *
>
> IV. Personal Actions/Appearance
>
> 2. Threatening, intimidating, interfering with, or using abusive language toward others.

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advised not to keep notes on the activities of his co-workers, but that he was never denied a promotion because he "kept book" on his co-workers. As noted above and for the purpose of ruling on the respondent' motion, the Commission accepts the appellant's version of the January 6th meeting.

CONCLUSION OF LAW

This appeal was not timely filed.

OPINION

This matter, which arises from a promotion, is before the Commission on the respondent's motion to dismiss for untimely filing. The appellant contends that the Commission has subject matter jurisdiction under §230.44(1)(d), Stats., which provides that a "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission."

The time limit for filing non-selection appeals is established in §230.44(3), Stats., which states that an appeal "may not be heard" unless it "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 ruled that this time limit is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79. The language of §230.44(3) precludes the use of a later date where the appellant learns of something that suggests the action was improper. Oestreich v. DHSS & DMRS, 89-0011-PC, 9/8/89. Here, it is undisputed that the appellant was informed of the decision not to promote him in January of 1988. The effective date of the decision was no later than the date of notification, because the subject decision was the decision not to promote the appellant rather than a decision to select someone else for the vacant position. See Cozzens-Ellis v. UW-Madison, 87-0085-PC, 9/26/88; affirmed by Dane County Circuit Court, Cozzens-Ellis v. Wis. Pers. Comm., 88 CV 5743, 4/17/89; affirmed, 155 Wis. 2d 271, 455 N.W. 2d 246 (Court of Appeals, 1990).

The appellant contends that the doctrine of equitable estoppel should be applied to prevent the respondent from raising a timeliness objection. According to Gabriel v. Gabriel, 57 Wis. 2d 424, 429, 204 N.W. 2d 494 (1973), the three facts or factors which are essential for equitable estoppel to lie are : "(1) Action or nonaction which induces (2) reliance by another (3) to his detriment." The appellant cites the Commission's decision in Desrosiers v. DMRS, 87-0078-PC, 8/5/87; motion for reconsideration denied, 9/10/87, in support of his contention. In Desrosiers, the appellant sought to appeal the decision to remove his name from a register of eligible candidates for a vacant position

The appellant had been informed of the action by letter which advised him that his name had been removed because he had been considered for appointment three times and not selected. The appellant then followed a procedure outlined in the letter and requested a statement of the exact cause of the removal. He received a response from DMRS 26 days after the first letter. The second letter informed the appellant that in addition to the reasons set forth in the first letter, his name had been removed because of unsatisfactory interviews and work references. The appellant then filed a letter of appeal with the Commission within 30 days thereafter, but nearly two months after respondent's first letter. The letter of appeal was directed solely at respondent's reliance on the unsatisfactory employment references. In its decision the Commission overruled respondent's timeliness objection:

> If respondent's initial letter informing appellant of his removal from the register had not given a reason, but had simply advised appellant of his right to request one, as well as of his right to appeal the removal, there would seem to be little question but that appellant's time for appeal would run from the date he received that letter. However, where appellant was given one reason for the removal in the initial letter, and only subsequently given a different, additional reason (with which he took issue), it would be inequitable to permit respondent to argue the period of limitations should run from the date of receipt of the first letter. Appellant obviously relied on the information contained in the first letter to his detriment, as there not only was nothing in that letter which indicated his removal from the register had been caused by a poor reference, but also a different reason was cited. Given the nature of appellant's appeal, there was no reason for him to have pursued an appeal after he got the first letter. At the time he received the second letter and was first informed of respondent's reliance on the employment reference, the time for appeal based on the first letter probably had nearly or completely expired, although the exact dates are not apparent from this record. Under all these circumstances, the requirements for equitable estoppel as set forth in Porter v. Pers. Comnn., are present, and respondent is estopped from raising a timeliness defense.

While the Desrosiers decision shows that under certain circumstances, the Commission will apply the equitable estoppel doctrine where the appellant has alleged that the respondent has changed or inaccurately expressed its reasons for taking an adverse employment action, Desrosiers should not be read as making all such appeals timely.

The right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence. Monahan v. Department of Taxation, 22 Wis. 2d 164, 168, 125 N.W. 2d 331 (1963). The conclusion as to whether or not an employe has exercised due diligence is, in part, a function of the nature of the respondent's action. For example, in DOT v. Wis. Pers. Comm. (Porter), Dane County Circuit Court, 79-CV-3420, 3/24/80, the court affirmed the Commission's decision which held the respondent was equitably estopped from relying on the civil service code to reduce appellant's salary several weeks after she began work where the respondent had erroneously informed the appellant that she could transfer into the new position at not less than her salary in her previous position. The court specifically rejected the contention that the appellant had acted without due diligence by not investigating whether the information she was given was a correct interpretation of the applicable administrative rules. In Porter, the personnel action was a transfer at the employe's same salary level. The employe's responsibility to investigate the employer's information must be viewed in a different light where the personnel action is adverse to the employe's interests. For example, an employe who receives a letter of discharge must be said to have a substantially greater responsibility to investigate and seek review of that adverse action than a second employe who receives notice of a pay raise.[2] This distinction was addressed by the Commission in its decision in Oestreich v. DHSS & DMRS, 89-0011-PC-ER, 9/8/89, in a related context. In Oestreich, the appellant sought to appeal a hiring decision. The appellant stated that it was not until approximately three months

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2 The instant case can be contrasted with Junceau v. DOR & DP, 82-112-PC, 10/14/82. There, the appellant sought review of the computation of his salary upon regrade pursuant to the attorney's pay plan. The appellant contended that the state had "misrepresent[ed] in each regrade letter that the regrade was in accordance with the current attorney pay plan provisions, when the regrade was to a wage in the expired pay plan," and that the appellant had relied on this misrepresentation and failed to appeal the regrades "on the assumption that they were properly and legally computed." However, once he learned "of the possible illegality of the State's action," the appellant still did not appeal. He waited several months until another case pending before the Commission was decided and until after the time for obtaining judicial review of that decision had run. Based upon that wait, the Commission held that the appellant had unreasonably delayed his appeal and dismissed it. However the Commission indicated that, with the exception of the delay for the resolution of the other case, the elements of equitable estoppel were present.

after the position had been filled that he learned the successful candidate's handicapped status had not been verified prior to the time he was certified as eligible for consideration for the vacancy. The Commission held the subsequent appeal to be untimely:

> In the context of a §230.44(1)(d), stats., appeal, appellant's contention that he learned about the non-verification of handicapped status only about two weeks before he filed his complaint cannot salvage the timeliness of the appeal. The time for appeal under §230.44(3), stats., runs from the effective date of the action or the date of notice of the action. This precludes the use of a later date where the appellant learns of something that suggests the action was improper. In Sprenger v. UW-Green Bay, Wis. Pers. Commn. No. 85-0089-PC-ER (1/24/86), an age discrimination case, the Commission held that the 300 day period of limitations for discrimination cases set forth in §230.44(3) and 111.39(1), stats., would not begin to run on [the] date of first notice of the transaction if "as of that date the facts which would support a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights."
>
> In Sprenger, the complainant was laid off and the employer told him at the time that his position was being eliminated. A number of months later, complainant learned that his position had been "reinstated" and a younger person had been hired. Under these circumstances, at the time of the layoff the facts which would have supported a charge of discrimination were not apparent and would not have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights.
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> The general rule is that when a "reasonably prudent" person is affected by an adverse employment action such as a disciplinary action, denial of reclassification, failure to promote, etc., he or she could be expected to make whatever inquiry is necessary to determine whether there is a basis for believing discrimination occurred. In Sprenger, there obviously was no way complainant could have known at the time of his layoff that his position would be filled later by a younger person. However, in most cases an employe must look into the transaction at the time it occurs.
>
> Assuming *arguendo*, that the same principles would apply to an appeal (versus a discrimination charge), the instant case does not involve a situation where respondent gave appellant misinformation about what occurred, or where, as in Sprenger, the underlying facts suggestive of discrimination were simply unknowable at the time the transaction occurred. Under these circumstances, appellant is charged with the obligation to make inquiry at the time he learned of his nonselection to determine whether

> respondent had effected the transaction in compliance with the civil service code. (citations omitted)

A similar analysis must be applied with respect to an effort to assert equitable estoppel. For example, in Eslien v. DER, 84-0020-PC, 8/1/84, the Commission declined to apply equitable estoppel with respect to a 1983 reallocation decision. In 1979, the appellant in Eslien had laterally transferred into his position and his new supervisor was concerned about the appropriate classification of the position. The supervisor had called DNR's Bureau of Personnel and followed up with a memo but never received a response and it was not known whether the appellant's position description was ever signed by DNR's personnel manager. The Commission held that the appellant was not justified in relying on these events so as to prevent DER from reallocating his position to a lower classification several years later.

The facts of the present case are comparable to those in Oestreich in that the appellant was very clearly notified that an adverse personnel action had been taken against him; i.e., he was not being promoted. According to the appellant, he was told that the reason for this adverse decision was the fact that he was keeping book on his co-workers and this was in violation of work rules. He had received two previous written reprimands referencing his conduct of keeping book on his co-workers. With respect to all three of these transactions, his supervisor, Mr. Moran, told him not only that keeping book on his co-empoyes was a violation of work rules, he also cited the specific work rules on which he based his statement. Appellant was free to have looked up these rules to determine if he agreed with Moran's interpretation. The June 25, 1991, letter to Sen. Risser from Executive Secretary Norton quoted in Finding 10 presumably is Mr. Norton's interpretation of the rules. The Commission finds that a reasonably prudent employe, knowing of the right to appeal a non-selection decision and of the 30 day time limit for filing such an appeal, should either have investigated the personnel action and promptly filed an appeal or should be barred from filing such an appeal months, years or even decades later after learning that the decision may have been based upon other factors. This result is not inconsistent with the Commission's decision in Desrosiers. There, the employer had a specific obligation under §230.17(2), Stats., to "give the applicant a full and explicit statement of the exact cause of [the] refusal... to certify" if the applicant has requested such a

statement within 10 days of the date of receipt of the notice of the rejection. The employe in Desrosiers had made that request and when he received the answer which he felt to be unfair, he then filed his appeal. In the instant appeal, the appellant did not take a similar action in accordance with his responsibility to act diligently once he was informed of the decision not to promote him.

The Commission notes that if the appellant's arguments would be adopted in this case, the consequence would be to essentially eliminate any time limitation on filing an appeal arising from an adverse personnel action for which the respondent agency announced a reason for its action which hindsight shows to have been subject to challenge.

ORDER

The respondent's motion is granted and this matter is dismissed as untimely filed.

Dated: December 23, 1991 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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