

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

ROBERT W. MILLARD,

Appellant,

v.

Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,

Respondent.

Case No. 92-0713-PC

\* \* \* \* \*

FINAL  
DECISION  
AND  
ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the examiner, a copy of which is attached hereto. The Commission has considered the objections and arguments of the parties and consulted with the examiner. While the Commission will adopt the examiner's findings of fact 1-9, it disagrees with the examiner's proposed conclusions that on these facts equitable estoppel is available to prevent respondent from objecting to the timeliness of the appeal.

A prerequisite for the application of equitable estoppel in this case is that appellant's reliance on the receptionist's representation that his appeal letter would be forwarded to the Commission must be reasonable and justifiable. Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 634, 279 N.W. 2d 213 (1979). The examiner's determination that this element had been satisfied was expressed as follows:

[I]t is inherently reasonable to rely on the representation of an employe in an agency personnel office that an appeal to the Commission would be forwarded there. Furthermore, the reasonableness of this reliance is reinforced by the statement in DER's reallocation notice ["if you have any questions on the procedural aspects of filing an appeal, please contact your Agency Personnel Officer."].

The Commission cannot agree with this conclusion. It is clear from appellant's testimony that he was aware of the need for timely filing of his appeal when he went to the DOT personnel office on June 14, 1991. His testimony about the receptionist's statement after he had asked her for the Commission's address, included the following:

I will give the letter to Sheila Cullen, she'll be in next week. I don't know if she said next week or she may have said June 20th or, I don't remember that, but it was the next week that she would be in. And I said, will she get it to the Personnel Commission before the 29th,<sup>1</sup> I have to have it in, I'm going to be on vacation, and she said that it would be taken care of and forwarded.

In the Commission's opinion, it was not inherently reasonable and justifiable to have relied on this representation under the circumstances. Appellant understood that the receptionist was in effect making a commitment on behalf of someone else who was not present, and who was not expected back in the office until some time the following week, which was when appellant was going on vacation. On this record, to have relied on this representation was in effect to assume the risk that the appeal would not be forwarded to the Commission in a timely manner. This was particularly the case in light of the fact that appellant never checked to see if his appeal had been filed with the Commission for approximately a year. Appellant may have been entitled under principles of equitable estoppel to have relied on the DOT personnel office for information about the procedural aspects of filing an appeal, as the reallocation notice stated. He was not entitled to have relied on what his own testimony characterized as an essentially gratuitous offer by the receptionist that someone else would perform the ministerial act of forwarding his appeal to the Commission when this third person returned from her vacation.

While it is unfortunate that appellant's appeal was not filed in a timely manner, these facts do not give rise to equitable estoppel. Since the appeal was not filed within the 30 days required by §230.44(3), Stats., and since this subsection consistently has been interpreted as mandatory and jurisdictional in nature, see, e.g., Richter v. DP, 78-261-PC (1/30/79); State ex rel DOA v. Personnel Board, Dane Co. Cir. Ct. 149-295 (1976); the Commission has no choice but to dismiss this appeal.

Since the Commission has concluded that there was no reasonable and justifiable reliance by appellant, and therefore an essential element of equitable estoppel is missing, it will not address the other elements.

---

<sup>1</sup> Since appellant received his notice of reallocation on May 29th, the appeal would have had to have been filed by June 28th, to have been timely filed -- i.e., within 30 days.

ORDER

1. Proposed Findings of Fact 1-9 are adopted.
2. Proposed Conclusions of Law 1 and 2 are adopted.
3. Proposed Conclusion of Law 3 is rejected and the following is substituted in its place:

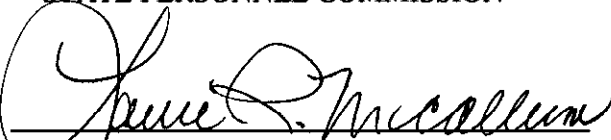
3. Appellant has not sustained his burden of establishing that respondent is equitably estopped from arguing that this appeal was untimely filed, and it is dismissed as untimely filed.

4. So much of the proposed decision as is inconsistent with the foregoing is rejected for the reasons discussed by the Commission above.

5. The proposed order is rejected, and the Commission substitutes in its place the following final order:

Respondent's objection to the timeliness of this appeal is sustained, and this appeal is dismissed as untimely filed.

Dated: March 19, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Robert Millard  
DOT  
P.O. Box 7916  
Madison, WI 53707

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

**NOTICE**  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.



6. Appellant asked Ms. Dull for the address of the Personnel Commission. She offered to have the appeal document forwarded to the Commission, and, in reliance on this offer, he left the appeal with her.

7 The reallocation appeal (Respondent's Exhibit 1) was never forwarded to the Commission

8 Appellant at first was not concerned about not having heard anything from the Commission concerning his appeal because he had heard and believed that the appeal process was and would be slow-moving. However, in June 1992 he spoke to Carl Richter, DOT Chief of Personnel Services, who advised that DOT had sent nothing to the Commission.

9. Appellant then filed his appeal with this Commission on July 2, 1992.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this appeal pursuant to §230.44(1)(b), Stats.

2. Appellant has the burden of proof as to all issues, including the establishment of equitable estoppel.

3. Appellant has sustained his burden of establishing that respondent is equitably estopped from arguing that this appeal was untimely filed.

#### OPINION

The subject matter of this appeal involves a reallocation which was effective May 22, 1991. Appellant received notice of the reallocation on May 29, 1991. His appeal of this transaction was not filed until July 2, 1992. Therefore, the appeal would be considered untimely under the 30 day time frame provided by §230.44(3), Stats., unless respondent is equitably estopped from making this contention.

The underlying facts material to the issue of equitable estoppel are in dispute. Appellant testified that after he had received his notice of reallocation, he prepared an appeal and went to the DOT Bureau of Human Resources to obtain the address of this commission. He further testified that he spoke to a receptionist<sup>1</sup> who offered to give the appeal to Shelagh Cullen (a

---

<sup>1</sup> Appellant testified that he was not sure whether he had spoken to Ms. Dull or another employe who served as receptionist, Linda Rogers, and had identified Ms. Rogers in an answer to an interrogatory because he thought he had to name one or the other. However, respondent introduced employe time

Personnel Specialist) who would in turn forward it to the Commission, and that therefore he left his appeal with Ms. Dull. He further testified that he did not think it out of the ordinary that he did not hear from the Commission about his appeal, because he knew that the appeal process was moving slowly. However, about a year later he checked and found out his appeal had never been submitted to the Commission, and he proceeded to file his appeal on July 2, 1992.

Ms. Rogers, Ms. Cullen, and Carl Richter, DOT Chief of Personnel Services, testified that while their bureau did not have a written policy on the subject, their unwritten policy was not to accept appeals or similar documents for forwarding to other agencies, and they could not recall this ever having been done. Ms. Dull testified that she could not recall whether appellant asked for the address of the Commission on June 14, 1991, and that, if he had, it is possible either that she would have told him she would give the document to Ms. Cullen for forwarding to the Commission, or that she would have told him to mail it himself.

Based on the record established at the hearing, the commission finds that the events occurred as appellant testified. There is no reason to doubt appellant's testimony that he went to the DOT Personnel Office on June 14, 1991, to obtain the Commission's address. Also, this was corroborated by his supervisor's testimony. It is illogical that he would have left this appeal, which was specifically directed to the Commission, with DOT personnel unless he had been advised that it would be transmitted by DOT to the Commission. Also, if, as respondent contends, DOT personnel had an unwritten policy of not accepting material for forwarding to other agencies, it is not logical that his appeal would have been accepted. Finally, Ms. Dull, who was the person who actually dealt with appellant, testified that she did not remember the incident, but that if appellant had approached her it was possible either that she would have accepted the appeal to give to Ms. Cullen to forward to the Commission, or that she would have told appellant to mail it himself. Again, if the latter had occurred, there is no reason why appellant would have left the document with DOT.<sup>2</sup>

---

records which clearly establish that Ms. Rogers was not in the office on the day that appellant left the document.

<sup>2</sup> This document apparently found its way into DOT's file with respect to this transaction. It may have been considered to have been a blind copy of appellant's appeal for the Commission.

Turning to the law involved in this matter, the elements of equitable estoppel are set forth in Mergen v. UW & DER, Case No. 91-0247-PC (11/13/92), as follows:

In Porter v. DOT, 78-0154-PC (5/14/79); affirmed, DOT v. Pers. Commn., Dane Co. Cir. Ct. 79CV3420 (3/24/80); the Commission discussed the legal principle of "equitable estoppel" as follows:

Equitable estoppel may be defined as the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. The person who in good faith relied on that conduct acquires some corresponding right, either of contract or remedy. (citations omitted)

The elements of equitable estoppel against a state agency are: "reasonable reliance by an employe to his or her detriment on conduct by the agency or its agents which amount to fraud or a manifest abuse of discretion." (citations omitted) Warda v. UW-Milwaukee & DER, 87-0071-PC (6/2/88).

In Porter, the Commission elaborated on the meaning of the requirement for "fraud or a manifest abuse of discretion".

28 Am. Jur 2d, Estoppel Sec. 43, "Fraud or bad faith, concealment," pp. 649-651, points out that "In many instances it is necessary to expand the terms 'fraud' or 'fraudulent' to situations which are more accurately described as 'unconscionable' or 'inequitable.' Neither actual fraud nor bad faith is generally considered an essential element. But there must be either actual fraud involving an intention to deceive or constructive fraud resulting from gross negligence or from admissions, declarations, or conduct intended or calculated, or such as might reasonably be expected to influence the conduct of the other party (emphasis provided), and which have so misled him to his prejudice that it would work a fraud to allow the true state of facts to be proved.

It is not always necessary that a fraudulent purpose be present at the inception of the transaction. "The fraud may, and frequently does, consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus injure the one who relied on it." *Ibid*, p. 651 (See also: Markese v. Ellis, 11 Ohio App. 2d 160 229 N.E. 2d 70.

This emphasis on constructive rather than actual fraud is consistent with recent reported cases involving equitable estoppel against the state. For example, in Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 638-39, 279 N.W. 2d 213 (1979), the Court did not mention the requirement that



the government agency action amount to fraud or a manifest abuse of discretion. Rather, the Court enunciated the following formulation:

[W]e have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied.

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. (footnote and citations omitted)

Turning to the instant case, the first question that must be answered is whether DOT's actions can be attributed to DER, the respondent agency. Normally, the actions of one agency are not attributable to another agency for equitable estoppel purposes, see Goeltzer v DVA, 82-0011-PC (5/12/82). However, in this case DER in effect established an agency relationship with DOT by its statement in its reallocation notice that: "[i]f you have any questions on the procedural aspects of filing an appeal, please contact your Agency Personnel Officer." (Respondent's Exhibit 1).

With respect to the elements of estoppel, appellant obviously relied to his detriment on DOT's representations that it would forward his appeal to the Commission, as by leaving the document with DOT personnel he failed to file it in a timely manner. In the Commission's opinion, it is inherently reasonable to rely on the representation of an employe in an agency personnel office that an appeal to the Commission would be forwarded there. Furthermore, the reasonableness of this reliance is reinforced by the statement in DER's reallocation notice quoted above. Finally, to the extent that constructive fraud is necessary, this is present in the sense set forth in Porter, above.

Looking to the criteria set forth in Mocbius Printing Co., failure to apply estoppel would work a serious injustice to the appellant, because he would lose his statutory right to appeal the reallocation of his position because of misleading conduct on the state's part, while allowance of the appeal will not interfere with the state's exercise of "the police power for the protection of the public health, safety or general welfare." 89 Wis. 2d at 639. Therefore, respondent should be estopped from objecting to the timeliness of this appeal.

ORDER

Respondent's objection to the timeliness of this appeal is overruled.

Dated: \_\_\_\_\_, 1992    STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
GERALD F. HODDINOTT, Commissioner