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SUSAN NEHLS,

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 92-0844-PC

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RULING  
ON  
MOTION  
TO DISMISS

This matter is before the Commission on respondent's motion to dismiss as untimely filed. Both parties have filed briefs.

Respondent's brief filed March 11, 1993, sets forth eight alleged underlying factual assertions relating to timeliness. Appellant's brief filed April 1, 1993, states that it concurs with respondent's statement of facts but would supplement it with one addition. Neither party has requested a hearing. For purposes of deciding this motion, the Commission will assume both respondent's eight statements of fact, concurred in by appellant, and appellant's supplemental statement of fact, and these are set forth as follows:

1. The appellant was notified of her appointment to a Typist position at Ethan Allen School by letter dated August 24, 1992, from Beverly Lewis-Moses. See respondent's attachment number one.
2. It was subsequently determined that the appellant was not eligible to be considered for the Typist position because even though her name was on a previous certification, it did not appear on the current certification list, but was mistakenly handwritten on the new list for inclusion. See memo dated January 26, 1993 to Jan Legler from Barb Svetlik regarding the chronology of Susan Nehls hire that the Commission has in their file and respondent's attachment number two.
3. This mistake was explained to the appellant and the resultant *change from permanent to limited term employment status*. The limited term status was confirmed in a September 14, 1992 letter from Beverly Lewis-Moses. Appellant states in her appeal that she received this letter on September 21, 1992. See paragraph number three of December 11, 1992 letter of appeal and respondent's attachment number three.

4. On September 21, 1992, the appellant received a September 18, 1992 letter from Beverly Lewis-Moses again confirming her limited term status but correcting the hourly rate of pay. See paragraph number three of the December 11, 1992 letter of appeal and respondent's attachment number four.<sup>1</sup>
5. The appellant's name appeared on a certification list for a Typist vacancy at Ethan Allen School and, therefore, she became eligible to compete for a permanent Typist position.
6. The appellant was interviewed for this Typist position on November 11, 1992.
7. The appellant was offered and accepted the Typist position on November 15, 1992. This appointment was confirmed by letter dated November 15, 1992 from Beverly Lewis-Moses. See respondent's attachment number five.
8. The Personnel Commission received an appeal on December 16, 1992 regarding the effective date of the appellant's permanent employment status.

Section 230.44(3), Stats., provides:

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 effective date the appellant is notified of the action, whichever is later....

Because this subsection uses the language "may not be heard," it has consistently been interpreted as mandatory and jurisdictional in nature. Richter v. DP, 78-261-PC (1/30/79); Smith ex rel DOA v. Personnel Board, Dane Co. Cir. Ct. No. 149-295; and see 73A CJS Public Administrative Law and Procedure §168; 2 AM JUR 2d Administrative Law §544.

The undisputed findings reflect that, after appellant was appointed to a position at Ethan Allen School, respondent reached the conclusion that she had not been eligible for that appointment because her name had not been on the relevant certification. Finding #3 states that "[t]his mistake was explained to the appellant and the resultant change from permanent to limited term employment status. The limited term status was confirmed in a September 14,

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<sup>1</sup> Appellant states she would supplement this assertion by adding that: "included with the back dated letters from Beverly Lewis-Moses was a back-dated Limited Employment Request/Report, attached hereto as Exhibit A, which appellant refused to sign." Respondent does not dispute the factual accuracy of this supplementation, but disagrees that the documents should properly be characterized as "back-dated."

1992 letter ... [appellant] received ... on September 21, 1992." Appellant subsequently interviewed for this position on November 11, 1992, and accepted an offer for appointment to this position on November 15, 1992, with an effective date of November 16, 1992.

In her appeal letter, filed December 16, 1992, appellant asserts that she is entitled to an August 24, 1992, effective date of permanent employment, consistent with her original letter of appointment of that date, rather than the November 16, 1992, effective date as set forth in the November 15, 1992, appointment letter.

Adverting to the provisions of §230.44(3), the "action" which is appealed here is respondent's rescinding of the original (August 24, 1992) permanent appointment to the position in question, and converting it after the fact to a limited term appointment. The effective date of this transaction, as established by management, was retroactive to August 24, 1992. It is undisputed that on September 21, 1992, appellant received two letters notifying her of this action.<sup>2</sup> Since the appeal was not received until December 16, 1992, more than 30 days after September 21, 1992, it appears to be untimely.

In her brief in opposition to the motion, appellant disputes "respondent's interpretation of what constitutes 'within 30 days after appellant is notified of the action.'" Appellant argues as follows:

Appellant acknowledges receipt of a flurry of correspondence, most of which was back dated, during September of 1992. Appellant notified her superior of her belief that she was a full time, permanent employee. She further confirmed this belief by refusing to sign the attached Limited Employment Request/Report. Nothing further was done or said in regard to her employment status until November 1992. Appellant had no way of knowing that she was not considered a full time [sic] employee.

While appellant acknowledges she interviewed for her job on November 11, 1992, but states that "[s]he believed, however, that the interview was necessary to protect her job because of 'office politics.'"

Based on the undisputed facts and associated documents, it is clear that based on an objective standard, appellant had notice that respondent was treating her original appointment as limited term in nature no later than September 21, 1992. Basically, appellant is arguing that because she refused to accept this decision that she had no notice of it. She states that after she

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<sup>2</sup> The second letter corrected the hourly pay rate involved.

received the correspondence in question, she "notified her superior of her belief that she was a full-time, permanent employe. She further confirmed this belief by refusing to sign the attached Limited Employment Request/ Report." Appellant's refusal to accede to the respondent's decision does not negate her notice though.

ORDER

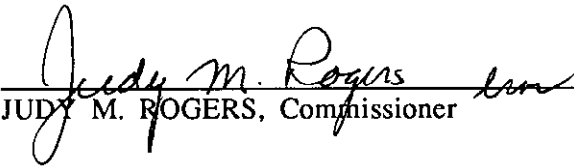
Based on the conclusion that this appeal was untimely filed, it is dismissed.

Dated: June 25, 1993

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

  
JUDY M. ROGERS, Commissioner

Parties:

Susan Nehls  
P.O. Box 541  
Fox Lake, WI 53933-0541

Gerald Whitburn  
Secretary, DHSS  
P.O. Box 7850  
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.