



The appellants were both required to complete a twelve-month probationary period following their demotions to PPA 1. At the time the appellants demoted to PPA 1, the respondent had a policy (Administrative Notice OHR 83-10) specifying that, in order to be reclassified to PPA 2, a PPA 1 must first perform the duties of a PPA 2 for six months. Under that policy, which had been in effect since the mid-1980s, the six-month period required for reclassification to PPA 1 could run concurrently with part of the twelve-month probationary period.

Heath began performing the duties and responsibilities of a PPA 2 sometime on or about May 1, 1992, less than two months into his twelve-month probation as a PPA 1. Mork began performing the duties and responsibilities of a PPA 2 on or about October 1, 1992, or a little more than six months into her twelve-month probation as a PPA 1.

Heath and Mork were each taken off probation in late March or April 1993. At about that same time, each requested reclassification to the PPA 2 level. At the time the appellants requested reclassification, they were informed verbally by their supervisors that, in order to be reclassified to PPA 2, they would be required to work at the PPA 2 level for another six months following the completion of their twelve-month probationary periods. (This decision reflected a new policy that was slated to go into effect on October 1, 1993, replacing the old policy.) According to both parties, the appellants were not given any written denial of their requests.

In June 1993, the appellants filed a union grievance contesting the respondent's decision to delay reclassification until six months after the end of their probationary periods. The grievance was denied at the first step in July 1993 and at the second step in August 1993. Each denial was based on the conclusion that the grievance did not present an issue that was grievable under the labor agreement.

On August 17, 1993, the Personnel Commission received the appellants' employe contract grievance form dated August 12, 1993. This form was the appellants' third-step grievance of the same issue. The appellants had mistakenly forwarded the grievance to the Commission. Upon receiving the grievance form, the Commission treated it as a personnel appeal and opened a case file. After corresponding with the appellants, the Commission agreed to

hold any proceedings on the appeal in abeyance pending the results of the appellants' third-step grievance.

Heath was reclassified to PPA 2 on or about October 31, 1993, and Mork was reclassified on or about November 14, 1993.

In February 1994, the appellants' third-step grievance was denied for the same reason it had been denied at the first two steps. In March 1994, the appellants notified the Commission in writing that their third-step grievance had been denied and that they wished to proceed with their appeal.

### DISCUSSION

The respondent has moved to dismiss this appeal for lack of timeliness. The parties also disagree as to the appropriate issue for hearing (assuming the appeal is timely). This interim decision will address each question. For the reasons set forth below, the Commission concludes that this appeal is timely and that it contests, under sec. 230.44(1)(b), Stats., the respondent's decision setting the effective date for the appellants' reclassifications.

Section 230.44(3), Stats., specifies that an appeal may not be heard unless it is filed within 30 days after the effective date of the action appealed, or within 30 days after the appellant is notified of the action, whichever is later. In its motion to dismiss, the respondent contends that this appeal is untimely because it was filed several months after the appellants were verbally informed by their supervisors that their requests for reclassification would be denied at that time (or delayed for another six months).

The appellants contend that the respondent, by virtue of several different actions, waived any timeliness objection. The time limit set forth in sec. 230.44(3), Stats., for filing appeals is mandatory, not discretionary, and is a question of subject matter jurisdiction. Richter v. DP, 78-261-PC (1/30/79). Under sec. PC 1.08(3), Wis. Admin. Code, motions to dismiss for lack of subject matter jurisdiction may be made at any time. Therefore, an objection to the untimely filing of an appeal cannot be waived.

The respondent states in its brief in support of the motion:

Appellants' appeal is untimely because it was filed more than thirty days after Appellants were verbally notified at or about the conclusion of their twelve months probationary periods that their reclassifications would be delayed or denied until they had completed a further six months trial period performing the work responsibilities of a probation and parole agent 2. An appeal filed in August 1993 was clearly untimely as an attempt to appeal a notification which took place in April or May of 1993. . . . [Respondent's brief in support of motion, at 2]

Before the question of timeliness can be considered further, it is necessary to examine the nature of this appeal. Effective sometime in October or November 1993, the appellants were reclassified to PPA 2 as part of a progression series. Under sec. 230.09(2)(a), Stats., the authority to reclassify positions in the classified service rests with the secretary of the Department of Employment Relations. However, the respondent reclassified the appellants under authority delegated by the DER pursuant to sec. 230.04(1m), Stats. Under sec. 230.04(1m), Stats., reclassification decisions made under sec. 230.09(2)(a), Stats., and delegated to the respondent, may be appealed to the Personnel Commission under sec. 230.44(1)(b), Stats.

Part of a decision to reclassify an employee under sec. 230.09(2)(a), Stats., is a decision setting the *effective date* of the reclassification. Popp v. DER, 88-0002-PC (3/8/89) at 5. The decision regarding effective date is, in effect, a decision as to the appropriate classification for a certain period of time, and that decision is appealable to the Commission under sec. 230.44(1)(b), Stats. Popp, at 5. In this case, although the appellants were actually reclassified in October or November 1993, the decision *when* to reclassify the appellants was made much earlier, sometime in the spring of 1993. At that time, the appellants requested that they be reclassified upon the completion of their twelve-month probationary periods and after having worked at the PPA 2 level for at least six months. In response to the appellants' requests, the respondent decided to require the appellants to work an additional six months before reclassifying them.

The respondent acknowledges in its brief that it is this decision -- the decision to set the effective date of reclassification six months after the conclusion of the probationary period -- that the appellants are appealing. The respondent does not contest the Commission's general jurisdiction to entertain an appeal contesting the effective date of a reclassification decision; rather, the respondent contends that this specific appeal was filed outside the 30-day time limit set forth in sec. 230.44(3), Stats.

As noted above, the respondent's decision regarding the effective date of the reclassification action was not communicated to the appellants in writing; rather, it was communicated verbally by their supervisors. Section ER 3.04, Wis. Admin. Code, requires that approvals or denials of reclassification requests shall be immediately communicated to the employee in writing. The 30-day time limit set forth in sec. 230.44(3), Stats., for filing an appeal does not begin to run until the employee has received written notice under sec. ER 3.04, Wis. Admin. Code. Verbal notice is not sufficient to put the appellants on notice of the respondent's decision and to commence the running of the 30-day time limit set forth in sec. 230.44(3), Stats. Piotrowski v. DER, 84-0010-PC (3/16/84) at 2. Therefore, the appellants filed a timely appeal of the respondent's decision to set the effective date of reclassification six months after the conclusion of their probationary periods.

The Commission is not deprived of subject matter jurisdiction by virtue of the fact that, in this case (as opposed to the appellant in Piotrowski), the appellants filed their appeal prior to *both* the date of official notice and the effective date of the action. Hoefl v. Carballo and Knoll, 74-37 (State Personnel Board, 5/24/76). It is true that, in Hoefl, the Board's holding that the premature filing did not present a jurisdictional defect hinged partly on the fact that the appeal in that case was not filed pursuant to specific statutory authority. However, under sec. PC 3.02(2), Wis. Admin. Code, the appellants here may amend their appeal, and any such amendment relates back to the *original* date of filing. In March 1994, the appellants notified the Commission in writing that their third-step grievance had been denied and that they wished to proceed with their appeal. That communication occurred after both the official notice and the effective date of their reclassifications. Any jurisdictional defect caused by the premature filing of the appeal was cured by

the subsequent official notice and effective date of the action and by the appellants' communications with the Commission after the denial of their third-step grievance. As in Hoeft, the appellants, having filed a premature appeal contesting events still in the future at the time of filing, were not required to file another appeal once those events were history. Their March 1994 communication to the Commission effectively amended their appeal to contest the effective date of their reclassification, and that amendment relates back to the original (and premature) August 1993 filing date.

In addition to the timeliness question, the parties disagree about the appropriate issue for hearing. The appellants incorrectly argue that this is a proceeding under sec. 230.45(1)(c), Stats. As noted above, this is an appeal under sec. 230.44(1)(b), Stats., of the respondent's decision setting the effective date for the appellants' reclassifications. Therefore, the issue for hearing shall be:

Whether the respondent's decision, which set the effective date for the reclassification of the appellants' positions to be six months after the conclusion of their probationary periods, was correct. If not, what is the correct effective date.

In its final brief on this question, the respondent states a potential jurisdictional objection relating to its "serious reservations regarding the Commission's jurisdiction to review Respondent's criteria of the minimum experience required for an individual to be considered for reclassification." (Respondent's letter to Judy M. Rogers, dated June 17, 1994, at 2).

It is undisputed that the Commission has jurisdiction to entertain an appeal challenging the effective date of a reclassification action. Popp, supra. The class specifications promulgated by the Department of Employment Relations are binding authority and cannot be ignored in making a classification decision. Mertens v. DER, 90-0237-PC (8/8/91). Therefore, the Commission also has jurisdiction to determine whether the respondent's policy specifying the minimum qualifications necessary for reclassification to PPA 2 comports with the class specifications. If the respondent's policy does comport with the class specifications, the Commission also has jurisdiction to determine whether the respondent has *applied* that policy to the appellants'

positions in a correct manner (just as the Commission could review for correctness the application of the class specifications themselves). Both questions are, by necessary implication, subsumed in the wording of the issue for hearing set forth above.

ORDER

The respondent's motion to dismiss is denied. The issue for hearing will be as set forth in this interim decision.

Dated: June 23, 1994 STATE PERSONNEL COMMISSION

Laurie R. McCallum  
LAURIE R. McCALLUM, Chairperson

Donald R. Murphy  
DONALD R. MURPHY, Commissioner

Judy M. Rogers  
JUDY M. ROGERS, Commissioner

ACK:Rulings/Orders:Heath & Mork