

JAN 31 1994

Personnel  
Commission

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 7

DANE COUNTY

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ROBERT W. MILLARD,  
Petitioner,

MEMORANDUM DECISION  
AND ORDER

v.

WISCONSIN PERSONNEL COMMISSION,  
Respondent.

Case Number: 93 CV 1523

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BACKGROUND

In this action for judicial review of a Decision and Order of the Wisconsin Personnel Commission, neither side disputes the facts as found by the hearing examiner and subsequently adopted by the Commission. Neither the determination by the examiner nor by the Commission address the merits of petitioner's appeal. Instead, the question is whether the respondent is estopped from raising an objection to the timeliness of the appeal.

The facts as found by the hearing examiner and subsequently adopted by the Commission are: <sup>1</sup>

1. Respondent reallocated appellant's position in DOT from Engineering Specialist - Transportation - Senior to Engineering Specialist Transportation - Advanced 1 as a result of a survey.
2. The effective date of this transaction was May 22, 1991. Appellant received a copy of the notice of reallocation issued by respondent, on May 29, 1991.
3. The aforesaid document includes the following instructions:  
If you wish to appeal this reallocation you must submit a written request to the State Personnel Commission...This appeal must be received by the State

<sup>1</sup> References to Exhibits have been omitted from this version.

Personnel Commission within 30 days after the effective date of the reallocation or within 30 days after you are notified of the reallocation, whichever is later. If you have any questions on the procedural aspects of filing an appeal, please contact your agency Personnel Officer. (emphasis added)

4. Subsequent to receiving the foregoing document, appellant prepared an appeal of the reallocation, dated June 14, 1991, and addressed to the Personnel Commission.

5. On June 14, 1991, he took this document to the DOT Bureau of Human Resources and spoke to Barbara L. Dull, a Program Assistant 1 who was filling in for the employe who usually acted as the receptionist.

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 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.

Wis. Stats. sec.230.44 requires an appeal to be filed within 30 days of receipt of the notice of decision. The actual filing of this appeal was more than a year after that time expired.

Mr. Millard relies on the doctrine of equitable estoppel to foreclose the Commission from raising the issue of the timeliness of his appeal. The Commission strongly resists application of that doctrine to the instant case. It reversed such an application by the hearing examiner and dismissed petitioner's appeal.

DECISION

#### A. Standard of Review

Although, as would be expected, respondent argues that this Court must defer to the "special expertise" of the Commission in making this determination, the fact is that the Commission's expertise lies in the area of a personnel issues, not in the application of common law equity considerations. "Deference is not required when this Court is as competent as the agency to decide the question involved." Dept. of Revenue v. Milwaukee Manufacturing Corporation, 80 Wis. 2d 44, 48 (1977), (Emphasis added).

Arguments based on equitable considerations are the daily fare of trial courts. Other than the names of the agencies involved in this case, no special reference to the specialized knowledge of the Commission is needed to decide the question of equitable estoppel. As the petitioner insists, the question to be decided does not go to the substantive merits of Mr. Millard's appeal. In fact, the decision of the Commission has kept that agency from addressing the merits of petitioner's appeal. This is a question of law which the trial court and the appellate court will review de novo. Weisensel v. DHSS, 179 Wis. 2d 637, 642 (C.A. 1993).

#### B. Elements of Equitable Estoppel

...The defense of equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment. [Citations deleted] It is elementary, however, that the reliance on the words or conduct of the other must be reasonable. Kohlenberg v. American Plumbing Supply Co., 82 Wis 2d 384, 396 (1978) Quoted with approval in Dept. of Rev. v. Moebius Printing Co., 89 Wis 2d 610, 634 (1979).

Contrary to petitioner's contentions, respondent argues that

the situation described by the findings of fact fails to meet this definition in two important regards: (1) any reliance induced was not caused by the party against whom the estoppel is asserted. In other words, respondent contends that a receptionist for the DOT's Bureau of Personnel is not an agent or even an employee of the State Personnel Commission, the entity with which the appeal was to be filed. (2) Any reliance by Mr. Millard on the representations of Ms. Dull was misplaced, and therefore not reasonable. These issues will be examined separately.

1. Identity of creator of petitioner's reliance.

According to Mr. Millard and to the hearing examiner, the instruction on petitioner's notice of reallocation to contact his agency's Personnel Officer, "If you have any questions on the procedural aspects of filing an appeal," [Emphasis added] was tantamount to that officer's functioning as an arm of the State Personnel Commission or Department of Employee Relations (DER). The hearing examiner found that this line in the notice "established an agency relationship with DOT." <sup>2</sup> This determination is difficult to comprehend. It may well be that if Ms. Dull or some other person representing DOT's personnel office gave procedural misinformation to Mr. Millard, this element of equitable estoppel would be met. What appears to have happened, however, is that a person who was clearly functioning in a clerical capacity offered to do a purely clerical favor, to forward the appeal to the proper place.

It is not the case that Mr. Millard was informed by Ms. Dull

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<sup>2</sup> Hearing examiner's proposed decision, p. 5.

that the only proper procedure for perfecting this appeal was by routing it through her office. Instead, what we have here is one employe of DOT offering to do a favor for a co-employe.

"Procedure" is defined as "PROTOCOL ...established way of conducting business (as of a deliberative body): as...the established manner of conducting judicial business and litigation.." <sup>3</sup> There is no procedural aspect to what Ms. Dull said or did in regards to Mr. Millard's inquiry. Her actions may or may not have been authorized by the Office for which she was working. In any event, they cannot be imputed to a completely different governmental agency by covering them with the unsuitable umbrella of "procedural aspects."

Such a stretch would run counter to the appellate cases that have declined to attribute the actions of an employe of a related agency (or an arm of the agency) to the principle agency itself. In Ryan v. Wis. Dept. of Rev., 68 Wis 2d 476 (1975) an employe of the Tax Appeals Commission, much like Ms. Dull, offered to file a petition with the proper agency (Department of Revenue) but did not do so within the time limit. The Supreme Court refused to find equitable estoppel. More recently, in the Weisensel case, supra, the Court of Appeals ruled the doctrine inapplicable even though service had been accomplished on an attorney for the proper agency who in another action had been served by the same petitioning

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<sup>3</sup> Webster's Third New International Dictionary (Unabridged), Encyclopaedia Britannica, Inc. Chicago, 1986. This portion of the definition was selected because it applied most closely to the quasi-judicial work of the Commission and/or DER.

attorney in the same kind of an action and no objection had been raised.

However the actions of Ms. Dull can be described, they cannot be characterized as those of the Personnel Commission.

## 2. Reasonableness of the reliance

While the hearing examiner found Mr. Millard's reliance on Ms. Dull to be "inherently reasonable," the Commission felt otherwise.

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 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, {footnote omitted} 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 the appellant never checked to see if his appeal had been filed with the Commission for approximately a year.<sup>4</sup>

In addition to these relatively-compelling reasons advanced by the Commission, the reasonableness of Mr. Millard's actions is questionable based on the following considerations:

1. He made no inquiry of Ms. Dull as to whether what she proposed was fact something she had ever seen done or whether

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<sup>4</sup> Pages 1 & 2 of the Commission's. 3/19/93 decision.

she had any experience, knowledge, or authority regarding appeals.

2. He asked for no receipt from Ms. Dull to establish the strength of her representations or that he had even left this time-limited document in her custody.
3. He established no mechanism whereby he could be assured that the promise made was kept. (Such as asking a fellow employe to double check the delivery a few days before due date while he was on vacation).
4. He offered no explanation as to why he did not persevere in obtaining the address of the Commission so that he could assure himself of being timely by mailing the appeal himself on that day.

These considerations, in combination with those listed by the Commission, render petitioner's reliance on the receptionist's representations to have been misplaced and unreasonable.

#### C. Other considerations

##### 1. Strict construction of time limits

"To dismiss an appeal because it came one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending." Kohnke v. ILHR, 52 Wis 2d 687, 690 (1971). Some statement along these lines is to be found in just about every appellate case addressing whether there is any basis to go beyond the time limits. In the instant case, the appeal was more than a year, not just a day, late. In one of the few cases in which the technical requirements

were not strictly enforced, Hamilton v. ILHR Department, 56 Wis 2d 673 (1973), there was no question but that the responding agency and the appellate tribunal were aware of the existence and basis for the appeal well before the time limits expired. In this case, the same cannot be said. Neither the Commission nor the respondent knew of the existence of this appeal until over a year after it was to have been filed. It cannot be said that no prejudice attached.

## 2. Higher standard to equitably estop the government

The doctrine of equitable estoppel against the government is not applied as "freely" as "in the case of private persons." Dept. of Revenue v. Moebius, supra at 633, and the government's conduct must rise to the level of "fraud" or "unconscientious" or "inequitable." State v. City of Green Bay, 96 Wis 2d 195, 203 (1980). In this case, it has been determined that there has been a failure to meet even the "private persons" standard for application of the principle. That finding makes it unnecessary to determine whether petitioner could meet the higher standard utilized in scrutinizing governmental actions, nonetheless it is worth noting that such a showing is also unobtainable under these facts.

## 3. Human side

While many of the cited authorities are quite rigid and almost condemnatory in tone, this writer does not mean to say that the actions of Mr. Millard are not understandable on a human level. That level, however, is not the standard by which this case must be decided. It is a sad commentary that petitioner could not rely on



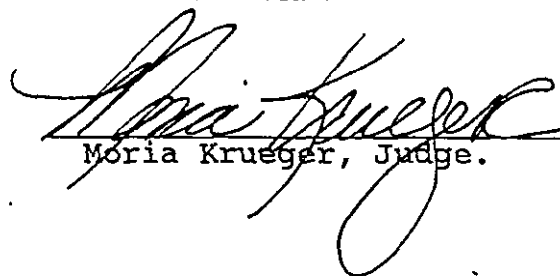
the representations made by a fellow employe. For many of us dealing with government bureaucracies, the receptionist is the closest we get to some sort authoritative word for making it through the morass of agencies and rules. Mr. Millard trusted the goodwill of another human, and that trust was not justified. More skepticism on his part might have led him at least to double check that what she said would occur, did in fact occur. The lesson this case teaches is that complete reliance such as Mr. Millard gave to Ms. Dull is inadequate when working with hard and fast rules and regulatory agencies. It is with regret that I must reinforce that lesson.

#### CONCLUSION

Because petitioner has failed to meet the elements constituting equitable estoppel against the Wisconsin Personnel Commission, it is necessary to AFFIRM the finding of the Commission that appeal was not timely filed and to AFFIRM the Order of DISMISSAL.

Dated this 26th day of January, 1994 at Madison, Wisconsin.

BY THE COURT:

  
Moria Krueger, Judge.

Copies:  
Att'y J. Zawadsky  
AAG S. Sobota