STATE OF WISCONSIN PERSONNEL COMMISSION

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ROBERT E. BLOMQUIST,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND COMSUMER PROTECTION,

Respondent.

Case No. 94-1032-PC

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DECISION AND ORDER

This matter, which arises from the respondent's decision to lay the appellant off from employment, is before the Commission on the respondent's motion to dismiss the appeal as untimely filed. The parties filed briefs. Neither party has requested an evidentiary hearing.

The appellant was employed by respondent for nearly thirty years until his layoff from his position located in Superior, effective July 5, 1992. He filed his appeal of the layoff decision on December 14, 1994.

Appellant made the following inquiries regarding the layoff decision:

> After receiving his official "layoff letter" on June 19, 1992, via fax, he attempted to find out what he could from supervisory personnel in Superior. Since he himself was a supervisor and was unaware of the procedure, it was not unusual that he proceed in the manner he did.... Thereafter, and specifically because he was unaware of the appropriate procedure, he drove to Madison with another employee for a meeting with Ms. Cheryl Anderson, the [respondent's] Director of Human Resources, and Ms. Georgia [Pedracine], the Assistant Director of the Bureau of Human Resources. In Mr. Blomquist's own words, "we asked if there was anything that could be done, and what our rights were." They were told that it was unlikely that anything could be done.
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> Thereafter, the layoff was "appealed" to the next level of management, Mr. Jim Smith. Again, questions were asked about what could be done and what rights were had. Again, nothing of substance was said.
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> Despite attempts to contact those individuals "up the hierarchy," who should have know[n], little or nothing was said regarding appeal rights. Despite direct questions about what rights

> they had, both employees were told "nothing could be done." As a result of this information, Appellant truly believed, until speaking to this attorney, that he had exhausted his appeal rights already. Even if Appellant had been aware of the additional requirements of appeal, it would have been fruitless in his opinion because he had been told "nothing could be done."
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> As a result of these statements and trust in the upper echelons of management, Appellant relied upon the failure to give any appeal advise and/or misleading statements offered by the folks he spoke with, all to his detriment.

The time limit for filing 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. Here, the appellant received notice of the layoff decision on June 19, 1992, and the decision was effective July 5, 1992. He did not file his appeal until nearly 30 months later.

Under certain circumstances, the 30 day time limit for filing an appeal is not controlling. The Commission has applied the doctrine of equitable estoppel to preclude an agency 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 elements which are essential in order to apply equitable estoppel are: "(1) Action or nonaction which induces (2) reliance by another (3) to his detriment." The doctrine "is not applied as freely against governmental agencies as it is in the case of private persons," Libby, McNeil & Libby v. Dept. of Taxation, 260 Wis. 551, 559, 51 N.W. 2d 796 (1952), and in order for equitable estoppel to be applied against the state, "the acts of the state agency must be established by clear and distinct evidence and must amount to a fraud or manifest abuse of discretion." Surety Savings & Loan Assoc. v. State, 54 Wis. 2d 438, 445, 195 N.S.2d 464 (1972). However, "the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable." State v. City of Green Bay, 96 Wis. 2d 195, 203, 291 N.W. 2d 508 (1980). The Supreme Court has also offered the following description of the analysis to be used when a party seeks to invoke equitable estoppel against governmental agencies:

> [W] 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. Department of Revenue v. Moebius Printing Co., 89 Wis 2d 610, 638-39, 279 N.W. 2d 213 (1979). (citations omitted)

The information presented by the parties relative to appellant's equitable estoppel theory is quite limited. The appellant's assertions in terms of the statements made to him during his various conversations with respondent's representatives are set out above. In its reply brief, respondent states:

> The appellant was a manager in the civil service. He attended a meeting with the bureau of human resources prior to layoff during which his rights were fully explained and he was given an opportunity to ask questions. The appellant should be responsible for understanding his rights.

Neither party has seen fit to file a copy of the June 19, 1992 notice supplied to the appellant. According to §ER-MRS 22.07, Wis. Adm. Code (October, 1994), the written layoff notice "shall, to the extent practicable, include the specific alternatives within the agency available at that time to the employe in lieu of termination." That administrative rule goes on to set forth the appeal rights of the employe, but there is nothing in the rule or in the provisions of ch. 230, Wis. Stats., which expressly require that the appeal rights be set forth in the notice to the employe.[1]

This is not a situation where the appellant is alleging that he was specifically told that he did not have any appeal rights. Instead, appellant contends that he and another employe "asked if there was anything that could be done, and what our rights were." "Rights" in this context are not limited to appeal rights. Rather, they may also refer to the "specific alternatives within the agency available at that time to the employe in lieu of termination" as referenced in §§ER-Pers 22.07 and .08, which include transfer, demotion and displacement, as well as the restoration rights described in §ER-Pers 22.10. When

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[1] In contrast, an employing agency notifying an employe of a demotion must, pursuant to §ER-MRS 17.03, Wis. Adm. Code, "advise the employe of his or her right to appeal the action under s. 230.44(1)(c), Stats."

appellant states he was told "nothing could be done," such a comment is not inconsistent with a statement by the employing agency to the effect that as of that time, there were no positions available into which the appellant could transfer, demote or displace.

Although there is no indication that respondent ever informed the appellant that he did not have any right to appeal the layoff decision, even if respondent had made such a statement, the appellant states that it would have been "fruitless" to appeal because he had been told that "nothing could be done." Appellant is acknowledging that he would not have pursued an appeal even if he had known it was an option. Therefore, there can be no finding of "reliance" on an absence of information as long as the appellant is indicating he would not have filed an appeal anyway. Appellant's conclusion that he would not have filed was, in turn, based upon respondent's statement that "nothing could be done." As noted above, the Commission has interpreted this statement to refer to the absence of any positions into which the appellant could transfer, demote or displace.

In light of this understanding of the context of the information provided by respondent, there is no indication that the respondent's conduct caused "a serious injustice" to the appellant. In contrast, the public's interest would be harmed to the extent that it would be required to defend a layoff decision made nearly two and one-half years after the statutory period for obtaining review of that decision had ended.

Under these circumstances, it cannot be said that the conduct of respondent's agents was inequitable or a manifest abuse of discretion or that appellant suffered a serious injustice. There is no basis for applying the doctrine of equitable estoppel against the respondent in this matter.

ORDER

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

Dated: May 26, 1995 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-5/95 Blomquist

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95