STATE OF WISCONSIN PERSONNEL COMMISSION

LLOYD S. KENYON,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 95-0126-PC

RULING ON MOTION TO DISMISS

This appeal arises from a decision to reallocate the appellant's position. Respondent has filed a motion to dismiss the appeal, contending the appeal was untimely filed. The parties filed briefs. The following facts appear to be undisputed.

1. On April 21, 1995, the appellant, an employe of the Department of Transportation (DOT), signed a document acknowledging receipt of a reallocation notice. The notice indicated the appellant's position had been reallocated from Real Estate Specialist Advanced to Engineering Specialist Advanced 1, effective April 16, 1995. The notice included the following statement:

> Whenever a position is reallocated by the Secretary, Department of Employment Relations or his/her designated representative, the employe and/or the appointing authority shall have the right of appeal.... If you wish to appeal this reallocation you must submit a written request to the State Personnel Commission. The appeal should state the facts which form the basis of the appeal, the reason or reasons you feel the reallocation is improper, and the relief sought. This appeal must be received by the State 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.

2. In a memo dated May 15, 1995, directed to Judy Burke and June Streveler, two employes of respondent Department of Employment Relations (DER), the appellant sought to appeal the reallocation decision.

3. Ms. Burke and Ms. Streveler received the appeal letter on May 17, 1995.

4. On May 15, 1995, appellant also provided a copy of his appeal to DOT:

> On May 15 I contacted Ms. Doris Ziegler's office, Administrative Services Section Chief, to provide my Bureau's personnel office with a copy of my appeal, which I had addressed to Judy Burke and June Streveler. Ms. Patty Peterson, Position Management, informed me Ms. Ziegler was not in. Ms. Peterson took the copy of my appeal letter and stated she would place the copy in my personnel file. At that time, I asked Ms. Peterson if I had addressed my appeal letter to the right persons. Her reply was that Ms. Judy Burke of the department of Employee Relations handles all Engineer Specialist appeals and I had addressed my appeal properly.

5. On June 16, 1995, appellant filed with the Commission a copy of his May 15th memo along with a cover letter and other attachments.

## DISCUSSION

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; accord, Byrne v. State Pers. Comm., Dane County Circuit Court, 93-CV-3874, 8/15/94.

Here, the appellant received notice of the reallocation decision on April 21, 1995, and the decision was effective April 16, 1995. The 30th day after April 21st was May 21st, a Sunday. Pursuant to §990.001(4)(b), Stats., where the 30th day falls on a Sunday, the filing period is extended until the next secular day, or Monday, May 22, 1995. Starczynski & Mayfield v. DOA, 81-275, 276-PC, 12/3/81. Appellant did not file his appeal with the Commission until June 16, 1995.

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

In the present case, the appellant appears to identify two areas of government conduct to support an equitable estoppel theory.[1] First, the appellant notes that in response to his question as to whether he had addressed his appeal letter "to the right persons," Patty Peterson, of DOT's Administrative Services Section, stated that the letter had been addressed properly.

One problem with the appellant's assertion is that Ms. Peterson was not an employe of DER. The Commission has previously ruled that alleged misconduct by the employing agency cannot serve as the basis for an equitable estoppel theory when it is undisputed that the underlying action of reallocating the appellant's position was taken by DER rather than by the employing

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[1]The appellant also describes events which occurred *after* May 22nd. However, this subsequent conduct is irrelevant to the Commission's determination.

agency. Brady v. DER, 91-0085-PC, 9/19/91. There is also nothing to suggest that Ms. Peterson was the appellant's "Agency Personnel Officer," the person identified in the reallocation notice as being able to answer questions "on the procedural aspects of filing an appeal." It was not reasonable for appellant to rely on Ms. Peterson's statement under these circumstances.[2] Therefore, Ms. Peterson's conduct cannot serve as the basis for applying equitable estoppel in this matter.[3]

The appellant also appears to be contending that equitable estoppel may be based upon the nonaction of Ms. Burke and Ms. Streveler when, on May 17, 1995, they received his May 15th memo. There is no dispute that both Ms. Burke and Ms. Streveler are DER employes and that they could have forwarded, to the Commission, the appellant's May 15th memo. If the forwarded memo had reached the Commission by Monday, May 22nd, it would have been timely filed.

In light of the very explicit directions in the reallocation notice and the relatively short period between the time DER received the appellant's May 15th

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[2]In Millard v. DER, 92-0713-PC, 3/19/93; affirmed, Millard v. Wis. Pers. Comm., Dane County Circuit Court, 93CV1523, 1/26/94, the Commission concluded that a receptionist in the DOT personnel office was not an agent of DER for purposes of the application of equitable estoppel merely because DER had indicated in the reallocation notice that the employe was to "contact your agency Personnel Officer" if the employe had "questions on the procedural aspects of filing an appeal. In Millard the appellant had asked the receptionist for the Commission's address and the receptionist had gratuitously offered to have the appeal forwarded to the Commission. Here, the appellant has merely identified Ms. Peterson's capacity as "Position Management," has indicated that she has access to the appellant's personnel file and that she offered the opinion that the appellant had addressed his appeal properly. This information is insufficient to establish that Ms. Peterson was serving in the capacity of the appellant's "Agency Personnel Officer."

[3]Even if the conduct of Ms. Peterson was a basis for applying equitable estoppel, the appeal would still be untimely. Ms. Peterson's statement could only toll the filing period until such time as any incorrect procedural information she might have supplied had been corrected. This occurred no later than June 9, 1995, which is the date of an E-mail message to the appellant from Joe Dresser, which states:

> Si, we need to get this to the Personnel Commission. I suggest you print and attach these E-Mail messages to establish a paper trail.

Ms. Peterson's actions on May 15th occurred on the 24th day after appellant received notice of the reallocation decision. If the filing period was tolled until June 9th, the appeal still would have been due at the Commission no later than June 15th. However, the appeal did not reach the Commission until June 16th.

memo and the May 22nd filing deadline, the appellant has not shown that equitable estoppel should apply in this case. This is not a situation where the notice of the personnel action was silent as to the appeal procedure. The notice very clearly stated that, in order to appeal, the employe had to "submit a written request *to the State Personnel Commission.*" The notice also stated that the appeal "*must be received by the State Personnel Commission* within 30 days." The appellant either did not read or failed to follow these explicit instructions. He sent his appeal to the wrong place, i.e. to DER, where it was received just 2 working days before the final day for filing with the Commission. Under these circumstances, it cannot be said that the appellant reasonably relied upon the nonaction of Ms. Burke or Ms. Streveler.

In light of the appellant's conduct, 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 reallocation decision even though the appellant failed to heed clear instructions as to where to file his appeal. 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: September 14, 1995 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

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