

ANDREW D. RUNDE,
Appellant,

v.

**Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondent.

RULING ON FILING
FEE ISSUE

X

Case No. 97-0088-PC

This case is before the Commission due to the Commission's late receipt of Mr. Runde's filing fee. Written arguments were submitted by the Division of Merit Recruitment and Selection (DMRS) by letter dated November 7, 1997; additional information was obtained orally via telephone conference call on November 14, 1997, as summarized by Commission letter dated November 17, 1997.

The facts recited below are undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. On September 8, 1997, the Commission received a letter from Mr. Runde "appealing the decision of not being selected for an interview for the position of Budget and Policy Supervisor 2 in the DWD."¹

2. The Commission sent Mr. Runde a letter on September 12, 1997, stating as shown below in pertinent part. The emphasis shown is as it appeared in the original document.

You filed an appeal recently over the test score received for the position of Budget and Policy Supervisor 2, which was insufficient to qualify for an interview. Your appeal, however, failed to include the filing fee or hardship affidavit required by §230.45(3), Stats. and by §PC 3.02, Wis. Adm. Code. (A copy of the rule is attached for reference.) . . .

The Commission must receive within 30 calendar days from the date of this letter (by October 13, 1997 - extended one day because the 30th day falls on a Sunday) either the filing fee of \$50.00, or an executed hardship affidavit. Failure to meet this requirement will result in dismissal of your appeal. . . .

¹ "DWD" is an acronym for the Department of Workforce Development.

3. Mr. Runde received the letter described in the prior paragraph on September 18, 1997.

4. The Commission received Mr. Runde's filing fee on October 14, 1997. It was enclosed with a letter dated October 9, 1997, which had been sent by Express Mail from his home in Gaithersburg, Maryland for "next" day delivery to the Commission. The Express Mail envelope indicates the post office received the parcel on October 10, 1997 at 12:58 p.m. The post office in Madison, Wisconsin, attempted delivery on October 11, 1997, but such attempt was unsuccessful due to the fact that October 11th was a Saturday and the office was not open for business.

5. The Commission's next business day was Monday, October 13, 1997, when Mr. Runde's filing fee was due. It also was Columbus Day and, according to respondent's inquiries to the post office, while first class mail was not delivered on Columbus Day the holiday should not have affected Express Mail delivery. Mr. Runde contends he was unaware at the time he mailed the filing fee that the Commission's offices would not be open on Saturday and that Monday was a federal holiday.

6. The Commission received Mr. Runde's filing fee on October 14, 1997. The postman told the Commission's receptionist at the time of delivery that the post office should have attempted delivery on October 13th, but that the post office had "screwed up."

OPINION

Filing fee requirements for certain appeals are described in Ch. PC 3.02, Wis. Adm. Code. The rule provides (§3.02(6), Wis. Adm. Code) that the Commission "shall dismiss" (emphasis added) the appeal "of any appellant who has failed to submit the required fee payment . . . within the time limits under sub. (5)," which accepts as "timely paid" a filing fee "received by the commission within 30 days of the date appearing on the commission's letter." The question presented in this case is whether the 30-day time limit for receipt of a filing fee is mandatory or directory in character.

The Commission in determining whether a time limitation is mandatory or directory has looked for guidance from the Court of Appeals decision in *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 405 N.W.2d 732 (1987). (See, *Stronach v. DOT & DER*, 95-0177-PC, 12/7/95, where the Commission applied the guidance in the *Midwest Mut.* case and found that the 30-day timeline for filing an appeal in §230.44(3), Stats., was mandatory and that an appellant's failure to meet the mandatory

timeline left the Commission without competency to proceed on the appeal. *In Accord, Hallman v. WCC & DOA, 96-0146-PC, 2/12/97.*)

The Commission now turns to the guidance found in the decision in the *Midwest Mut.* case. The Court of Appeals indicated that if the language used in the provision is clear and unambiguous then a mandatory construction is more likely. *Id.* at 198. The language of the rule is clear and unambiguous. Section PC 3.02(6), Wis. Adm. Code, clearly states that the Commission “shall dismiss” the appeal of any appellant who has failed to submit the required fee payment “within the time limits” established under §PC 3.02(5), Wis. Adm. Code.

The Court of Appeals also indicated that if a provision is accompanied by a penalty for failure to observe it, then the provision generally will be considered as mandatory. *Id.* at 199. The directive previously mentioned that the Commission “shall dismiss” such appeals is the ultimate or harshest penalty conceivable and is clearly stated in the rule as the penalty to be imposed. In a related vein, the Court of Appeals indicated that a provision remedial in nature is “more apt” to be construed as directory than one which is punitive in nature. *Id.* at 199. The rule under consideration here is punitive in nature rather than remedial because it deprives the appellant of the right to go forward with the appeal.

The Court of Appeals said a strong indication that a provision was of a mandatory character could be found in the “use of negative, prohibitory, or exclusionary words.” *Id.* at 199. The statutory provisions under consideration in the *Midwest Mut.* case were §§334.15(4) & (5), Stats., which included a 30-day filing limit in sub. (4) and which stated that failure to meet the time limit meant the insurer “is estopped from using as a defense to its liability the insured’s failure to give permission” to drive the insured’s car. *Id.* at 195, fnt. 3. While the Commission’s rule does not expressly include similar estoppel words, clearly the exclusionary import is present by the requirement that the Commission “shall dismiss” an appeal if the filing fee is received by the Commission later than the required filing period.

The Court of Appeals also discussed that policy reasons existed for tending to characterize a provision as directory rather than mandatory if compliance with the statutory directive rests with a public officers rather than a private person. *Id.* at 199-200. In contrast, the Commission’s time limit for filing fees is aimed at private persons a fact which supports a mandatory reading of the filing fee deadline.

Based on consideration of all the foregoing factors as noted in the *Midwest Mut.* case, the Commission concludes that the 30-day timeline for Commission receipt of a

filing fee is mandatory. The Commission, accordingly, lacks competency to proceed with consideration of this appeal regardless of the nature or extent of appellant's actions related to the Commission's late receipt of his filing fee.²

ORDER

This case is dismissed without prejudice for failing to timely tender the filing fee required under s. PC 3.02, Wis. Adm. Code, and the uncashed check appellant tendered as his filing fee is returned to him with his copy of this decision.

Dated: December 17, 1997.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

JMR
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Parties:

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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

² The only exception made by the Commission in a prior decision is where the Commission's then-agent for mail delivery was found to be at fault for the late receipt of a filing fee. *Bouche v. UW-Milw. & DER*, 96-0095-PC, 10/29/96; reconsideration denied 12/20/96. *In Accord*, *Noyes v. UW System and DER*, 97-0083-PC, 11/6/97, where the appellant indicated her agent was responsible for the delay in the Commission's receipt of her filing fee and the Commission held appellant responsible for the actions of her own agent.

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