

**MARY AUSTIN-ERICKSON,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES and Secretary,  
DEPARTMENT OF EMPLOYMENT RE-  
LATIONS,**

*Respondent.*

Case No. 97-0113-PC

**RULING ON MOTION  
TO DISMISS ON THE  
GROUND OF UN-  
TIMELY FILING OF  
THE APPEAL**

**NATURE OF THE CASE**

This matter is before the Commission on respondent DHFS's (Department of Health and Family Services) motion to dismiss on the ground that the appeal was not timely filed. The parties have filed briefs and supporting documents. On the basis of these submissions, it appears the material facts are not in dispute.

**FINDINGS OF FACT**

1. In a memo dated August 6, 1997, and received by appellant shortly thereafter, Ralph Hantke of respondent's Bureau of Personnel and Employment Relations (BPER) informed appellant as follows: "This memo is to acknowledge the approval of your reclassification from a Social Worker-senior to a Treatment Specialist 1. Your new rate of pay will be \$18.567. The effective date of the reclassification is 6/22/97.

2. Appellant then sent a memo to the institution's personnel unit questioning the effective date. Barbara Hedrington responded via an August 18, 1997, memo, which included the following:

This is in response to your memo regarding the effective date of your reclass . . . A request is not considered to be "effectively received" until, at a minimum, an updated position description upon which the reclass request is based is received, per Chapter 236 of the DHFS Supervi-

sory Manual. The updated position description and accompanying justification memo was received in the Personnel Office on June 9, 1997. The effective date of the reclass, June 22, 1997, was the beginning of the pay period following effective receipt of the required materials.

3. On August 26, 1997, appellant sent a message to BPER regarding the effective date of her reclassification. Jana Reigstad Otto responded the same date as follows: "The effective date of an approved action is based on the date your request was received by your employing unit personnel office. Any delay in processing the request will not change this effective date. This means the material received by your employing unit. It does not mean the verbal notification. If you have any other questions, please let me know."

4. On August 29, 1997, appellant sent another note to Barbara Hedrington which stated as follows: "I would like the reclass date reviewed again. I have enclosed the written request and the other memos." After receiving no response to this message, appellant contacted Ms. Hedrington, who advised her that she wasn't going to review the matter any further.

5. On October 6, 1997, appellant met with Larry Metsala, NWC personnel officer. He contacted BPER and they were advised that the matter of the effective date of appellant's reclassification was not grievable, but that she should write to Kenneth DePrey, the BPER director, or "[o]therwise she could file with the Personnel Commission." Mr. Metsala gave appellant the Commission's phone number. This was the first time since appellant had received the August 6, 1997, notice of reclassification, that any of respondent's agents mentioned to her the appeal route to the Commission.

6. Appellant sent an email to Mr. DePrey concerning the effective date of her reclassification, and Mr. Hantke of BPER responded to her on Mr. DePrey's behalf, via a memo dated October 8, 1997. He reaffirmed respondent's decision on the effective date of the reclassification of her position, and provided an explanation of the basis for respondent's policy on this subject.

7. Appellant filed her appeal with the Commission on October 31, 1997.

8. Respondent promulgates an "Employees' Handbook" which is given to each employe. That document includes a section entitled "HOW TO AIR COMPLAINTS," which includes the following information concerning classification trans-actions:

If the classification request is denied by BPER, the employe may either request a re-review of the action by the Department of Employee Relations (DER) or appeal the action to the State Personnel Commission. The appropriate route is dependent upon whether final classification authority has been delegated to the BPER by the DER. In most cases, the authority has been delegated and the appeal route will be directly to the State Personnel Commission. In either case, the re-review request or appeal must be received by the DER or the State Personnel Commission within 30 days of the effective date of the action or within 30 days of the employe's notification of the action, whichever is later.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this appeal pursuant to §§230.44(1)(b) and 230.45(1)(a), Stats.

2. Inasmuch as this appeal was not filed in a timely manner in accordance with §230.44(3), Stats., the Commission lacks competency to hear the appeal, *see Association of Career Executives v. Klauser*, 195 Wis. 2d 602, 608-09, n. 7, 536 N. W. 2d 478 (Ct. App. 1995), and therefore the appeal must be dismissed.

#### OPINION

Section 230.44(3), Stats., provides that appeals under that section must be 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." Since appellant was informed of the reclassification of her position and the effective date of that transaction (June 22, 1997) in early August 1997, and did not file her appeal until October 31, 1997, she has failed to comply with §230.44(3), Stats.

An untimely filing usually deprives the Commission of "competency" to hear the appeal, *see Klauser, id.* However, under certain circumstances a failure to comply

with §230.44(3) will not be fatal to an employe's ability to pursue an appeal. The most common circumstance that leads to this result is when an agency responsible for the personnel transaction in question misleads the employe as to the nature of his or her appeal rights, and the employe, reasonably relying on this information, fails to file a timely appeal. *See, e. g., Newbury v. DILHR*, 80-0050-PC, 9/23/80. This is called equitable estoppel.

In this case, Ms. Austin-Erickson contends that respondent DHFS withheld the information she needed to have filed a timely appeal with this Commission. However, decisions by the Commission and the courts make it clear that the agency (DHFS) has no legal requirement to advise an employe as to the proper route for appeal. Equitable estoppel only occurs when the agency provides *misinformation* that the employe relies on and thereby fails to file a timely appeal. *See, e. g., Bong & Seeman v. DILHR & DP*, 79-0167-PC, 11/8/79; *Jabs v. State Board of Personnel*, 34 Wis. 2d 245, 250-51, 148 N. W. 2d 853 (1967). Furthermore, the filing of a contractual grievance or other misdirected appeal does not toll the running of the time limit, *see, e. g., Gensch v. DER*, 87-0072-PC (7/8/87). Therefore, appellant's argument that her appeal should be considered timely filed because it was filed within 30 days of her having been told she had the right to appeal to this Commission must be rejected.

ORDER


This appeal is dismissed as untimely filed.

Dated: February 25, 1998

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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 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.)

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