

STATE OF WISCONSIN

PERSONNEL COMMISSION

**MICHAEL H. LIVINGSTON,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
TRANSPORTATION,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
MOTION TO DISMISS**

Case No. 98-0001-PC

Respondent filed a motion to dismiss by cover letter dated March 6, 1998. A briefing schedule was established to afford both parties an opportunity to submit written arguments. Both parties filed briefs. By letter dated April 3, 1998, respondent informed the Commission that it would not file a final brief.

A prehearing conference was held on February 10, 1998, with the parties agreeing to the following statement of the hearing issue:

Whether respondent's failure to award appellant a lump sum payment for the period of July 6 to September 28, 1997, was illegal or an abuse of discretion.

Respondent contends in its current motion that the Commission lacks jurisdiction to review the subject matter contested and further contends the appeal was filed untimely.

The information provided in the Findings of Fact below appears undisputed by the parties, unless specifically noted to the contrary.

#### FINDINGS OF FACT

1. Appellant worked for respondent's Division of State Patrol in 1986, as a Police Communications Operator; a position represented by the Wisconsin State Employees Union (WSEU).

2. Effective October 12, 1997, appellant voluntarily transferred to the position of Program Assistant Supervisor 3; a position not represented by the WSEU or any other union contract. As such, the position is considered as a "non-represented" position. Appellant received a 3% general discretionary pay award, and a lump sum payment to compensate for the delay in distributing FY 1997-98 general discretionary awards to non-represented employees, on November 6, 1997. Apparently, this

monetary payment was made pursuant to a bulletin from the Department of Employment Relations (DER), Bulletin Locator #CC/PP-99, dated September 24, 1997 (Exh. 3 attached to respondent's letter dated March 6, 1998).

3. Appellant did not receive a lump sum payment under the WSEU contract for Police Communication Operators for the period July 6 to September 28, 1997, and this is the wage payment disputed in the appeal.

4. DER issued a bulletin regarding the WSEU contract covering who was eligible to receive a lump sum payment for the period July 6 to September 28, 1997. DER Bulletin Locator #CC/PP-105/CBB-52, is dated October 12, 1997, and a copy is attached to respondent's letter dated March 6, 1998 (Exh. 2). The bulletin provides in relevant part as noted below (with same emphasis as appears in the original document):

This information is provided to assist appointing authorities in determining FY 1997-98 base pay adjustments and lump sum payments to employe in all of the Wisconsin State Employees Union (WSEU) bargaining units: . . . These base pay adjustments and lump sum payments are granted in accordance with the wage provisions of the Agreement between the State and the WSEU bargaining units and are effective October 12, 1997. . . .

**SECTION III. LUMP SUM PAYMENT RELATING TO DELAY IN EFFECTIVE DATE OF FY 1997-98 GRID IMPLEMENTATION**

**A. Eligibility.** The employes specified under 1. through 4. below, shall be eligible for a lump sum payment relating to the delay in the effective date of the FY 1997-98 grid implementation:

1. Employes in pay status on October 12, 1997, in a position in a WSEU bargaining unit.
2. Former employes of the bargaining unit(s) who retired . . .
3. Former employes of the bargaining unit(s) who died . . .
4. Employes in the bargaining unit(s) who began a leave of absence or were laid off . . .

5. On November 6, 1997, appellant received notice that he would not receive the FY 1997-98 base pay adjustments under the WSEU contract.

6. Appellant filed his appeal with the Commission on January 7, 1998.

**OPINION**

This appeal was filed untimely. Appeals 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." §230.44(3), Stats. On November 6, 1997, Mr. Livingston received notice that he was not entitled to the additional pay. A timely appeal would

have been filed by 4:30 p.m. on December 8, 1997 (extended due to the 30<sup>th</sup> day falling on the weekend). This appeal filed on January 7, 1998, was filed too late.

Appellant made the equitable argument that his appeal should be considered even though filed late because (from his letter dated 3/19/98):

No one at any time advised me of any time limits as to when I had to file an appeal by. I asked about time limits and was not advised of any. I was inquiring into this matter since November 6, 1997, when it was learned that all other non-represented employees received back (sic) to July 6, 1997 to September 28, 1997.

It appears he is saying DOT misled him regarding his appeal rights which, if true, could result in the Commission accepting the late appeal. (*See, Stone v. DHSS*, 92-0789-PC, 12/29/92.) Complainant, however, provides no details regarding this allegation, such as upon what date he asked for appeal information, with whom he spoke, the question asked and the answer given. For example, the nature of the actual statement made is critical to an equitable estoppel analysis. (*See, Blomquist v. DATCP*, 94-1032-PC, 5/26/95; petition for judicial review dismissed as untimely filed, *Blomquist v. Wis. Pers. Comm.*, 95-CV-230, Douglas County Circuit Court, 12/2/97; standing for the proposition that statements such as “nothing can be done” are insufficient to support equitable estoppel argument.) Also critical to the analysis is the name and position of the person who responded to appellant’s inquiries. (*See, Kenyon v. DER*, 95-0126-PC, 9/14/95.)

It is appellant’s burden of proof to show that he was misled by respondent regarding his appeal rights. (*See, Lawry v. Div. of Pers.*, 79-26-PC, 7/31/79, and *Lawrence & Wermuth v. DER*, 94-0443-PC, 1/20/95; standing for the proposition that appellant has the burden of proof on questions regarding the timely filing of an appeal.) The lack of details noted in the prior paragraph result in a finding that appellant has not met his burden of proof on the equitable estoppel issue.

The Commission further notes that even if the Commission had applied the doctrine of equitable estoppel and thereby accepted the untimely-filed appeal, this case would be dismissed for lack of subject-matter jurisdiction. Appellant’s entitlement to the lump sum payment at issue is governed by the WSEU contract. Any authority the Commission might have had to review the pay issue is superseded by the contract, pursuant to §111.93(3), Stats. The statutory text is shown below in pertinent part:

[I]f a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit,

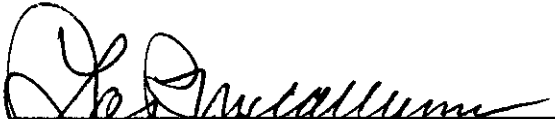
the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes . . . related to wages, fringe benefits, hours and conditions of employment . . .

ORDER

That this case be dismissed for untimely filing.

Dated: April 8, 1998.

STATE PERSONNEL COMMISSION

  
LAURIE B. 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 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