STATE OF WISCONSIN PERSONNEL COMMISSION

MARY ANNE HEDRICH,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 98-0165-PC-ER

RULING ON MOTION TO DISMISS

This is a complaint of discrimination on the bases of age, sex, and sexual orientation, and of retaliation for engaging in protected fair employment activities. On October 28, 1998, respondent filed a motion to dismiss for untimely filing. The parties were permitted to brief the motion and the schedule for doing so was completed on January 12, 1999. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion. Neither party requested a hearing on the motion.

FINDINGS OF FACT

1. This complaint was filed with the Commission on September 1, 1998.

2. The actions which are the subject of this complaint are certain terms and condition of complainant's employment, and respondent's denial of complainant's application for tenure.

3. In the fall of 1990, complainant joined the Department of Health, Physical Education, Recreation, and Coaching (HPERC) at the University of Wisconsin-Whitewater (UWW) as an instructor. In accordance with the terms of her appointment, she was considered for tenure in the 1995-96 academic year.

4. Complainant's application for tenure was considered by the tenured faculty of HPERC in December of 1995. On December 18, 1995, they voted to deny complainant's application for tenure. The result of this vote was communicated to UWW Chancellor Gaylon Greenhill and to complainant on January 16, 1996. By letter dated January 25, 1996, UWW Provost Kay Schallenkamp informed complainant of the denial of tenure, and advised her that the 1996-97 academic year would be her final year of appointment at UWW.

5. Complainant then initiated the process for appealing this denial of tenure by requesting of Jim Miller, Chair of HPERC, the reasons for the tenure denial. In a memo dated January 29, 1996, Mr. Miller replied as follows:

> I am responding to your memo requesting reasons for your denial of tenure. You were rated a 3 in Research and Scholarly Activity because you have not published any articles in a peer review journal. While you have several articles in the works, none are currently published. After your last two reviews, it was stated that it was imperative that you concentrate on high caliber scholarly works that have passed peer review.

6. Complainant requested a reconsideration of the HPERC tenure denial. Meetings to consider this reconsideration request were held on February 16 and February 21, 1996. The HPERC faculty did not change its recommendation to deny tenure as a result of this reconsideration.

7. Complainant then appealed her tenure denial to the UWW Faculty Grievance and Hearing Committee, which formed the Mary Anne Hedrich Tenure Appeals Panel to review this appeal. In a memo dated June 14, 1996, this panel concluded as follows:

> 1. The HPRC Department's evaluation of Dr. Hedrich's research was not consistent with the performance criteria adopted by the department and stated in the University Handbook.
>
> 2. A recommendation for reconsideration by the tenured faculty of the HPRC Department would serve no useful purpose.
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> 3. The panel retains jurisdiction of this appeal pending its final resolution.

8. This report of complainant's Tenure Appeals Panel was forwarded to Chancellor Greenhill. In a memo dated June 28, 1996, to the panel which was copied to complainant, Chancellor Greenhill stated as follows:

> This memorandum will acknowledge receipt of the Report of the Mary Anne Hedrich Tenure Appeals Panel.
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> The Department of HPRC may be negligent in not developing written standards required of faculty to attain tenure and be promoted to Associate Professor. However, the UW-Whitewater has a long standing policy of demonstrating that a faculty member is a teacher/scholar. Certainly, this demands some indication of scholarship. Submission of an article means very little because it carries no assurance that the article will be published.
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> Tenure cannot be attained by a technical problem but must be a positive action. In the absence of clear evidence of credentials as a teacher/scholar, I must reaffirm her terminal appointment for 1996-97. If she compiles the credentials expected of a teacher/scholar by UW-Whitewater during the coming year, I will be open to reconsider.

9. Complainant then requested a "Notestein Review," i.e., a review pursuant to §36.13(2)(b), Stats., of Chancellor's Greenhill's decision. Chancellor Greenhill denied this request on or around July 10, 1996.

10. On September 23, 1996, complainant asked that her Tenure Appeals Panel (Panel) amend its original report in order to allow the Notestein Review process to proceed. The Panel granted this request and recommended that the matter by remanded to the HPERC faculty for further deliberation on the question of complainant's scholarly activity.

11. On November 22, 1996, however, Chancellor Greenhill, in a memorandum to complainant, reaffirmed that the appeals process had been concluded and stated as follows, in relevant part:

> . . . I issued my decision on June 28, 1996. Because there was no remand to the department for reconsideration, the Panel's jurisdiction over the matter was at an end, and my decision became the final institutional decision in the case, pursuant to s. UWS 3.08(3), Wisconsin Administrative Code. The subsequent correspondence and purported

> amendment of the Panel's findings were not consistent with the applicable procedures and administrative rules, and should not have been entertained or accepted.
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> The Appeal Panel's statement that it retains jurisdiction of the appeal "pending its final resolution" does not alter this conclusion. Section UWS 3.08(3) does not grant such broad jurisdiction to the Panel. The rule provides only that the Panel's jurisdiction continues "during the pendency of any reconsideration." In this case, however, reconsideration was not recommended and did not occur. Under these circumstances, the Panel did not retain jurisdiction. My decision of June 28, 1996, became the final institutional decision in this appeal process and no further proceedings before the Appeals Panel were proper.
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> . . . In sum, because the Appeals Panel was without jurisdiction of the appeal after the matter was forwarded to me in June, 1996, and further because the Panel's "amendment" to its earlier decision is contrary to the undisputed facts of record, I have determined that a remand to the department at this time is not appropriate. My previous directions to this effect are hereby withdrawn, and the matter is concluded.

12. Complainant continued to seek review of the HPERC decision and brought the matter to the Executive Committee of the UWW Faculty Senate. On or around November 20, 1997, the Faculty Senate found that complainant's qualifications and credentials were inadequate for tenure. In a memo dated November 20, 1997, Chancellor Greenhill indicated to a representative of the Faculty Senate that he had considered the matter closed as of June 28, 1996, but he thanked them for their efforts and indicated he was pleased that the committee had concurred with the original tenure denial decision. Complainant contends that she never received a copy of this memo.

13. Complainant ended her employment with the UWW at the conclusion of the 1996-97 academic year on May 24, 1997. Complainant has not performed or been compensated for any services as a UWW faculty member since May 24, 1997. Complainant stated as follows in the affidavit she filed in opposition to this motion to dismiss (¶10 on page 4 of affidavit dated December 14, 1998):

> Courses that I teach are listed in the Timetable of academic classes for the University of Wisconsin-Whitewater for the Fall semester

> 1997-1998 academic year. However, I have been denied the opportunity to teach those courses, and it was only when that occurred that I learned of the *de facto* termination of my employment at University of Wisconsin-Whitewater. It was only after that occurred, namely on September 1, 1998, that I filed my Discrimination Complaint in the above-captioned matter.

14. Complainant continued, after her separation from employment with the UWW, to seek review of the tenure denial decision and the process followed in reaching the decision. These reviews, according to complainant, are currently pending before the UWW Faculty Senate and the Walworth County Circuit Court.

DISCUSSION

This is an action filed under the Wisconsin Fair Employment Act (FEA). Pursuant to §§230.44(3) and 111.39(1), Stats., the time limit for filing a complaint of discrimination with the Commission under the FEA is 300 days from the date the alleged discrimination occurred.

This complaint was filed on September 1, 1998. In regard to the allegation of discrimination or retaliation in the terms and conditions of her employment, complainant has offered no rationale for concluding that any such term or condition extended beyond the date that she was no longer employed at UWW, i.e., May 24, 1997. Since September 1, 1998, is more than 300 days after May 24, 1997, this allegation was not timely filed.

Complainant's other allegation of discrimination/retaliation relates to the denial of her application for tenure. In *Delaware State College v. Ricks*, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980), the United States Supreme Court held that, in a Title VII proceeding, the "alleged unlawful employment practice occurred," and the period of limitations began to run, at the time the decision was made to deny tenure and this was communicated to the complainant. The Court rejected arguments that the period should be deemed to have commenced on the complainant's final day of employment. In addition, the Court, after noting that discrimination cases arising from

terminations present widely varying circumstances and must be decided on a case-by-case basis, carefully examined the tenure review process at issue in *Ricks* to determine at what point in this process the limitations period should commence. The following language in the Court's decision is instructive in this regard:

> . . . [W]e think that the Board of Trustees had made clear well before September 12 that it had formally rejected Ricks' tenure bid. The June 26 letter itself characterized that as the Board's "official position." . . . It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.
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> As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. Electrical Workers v Robbins & Myers, Inc., 429 US 229, 50 L ed 2d 427, 97 S Ct 441 (1976). The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made, Cf. id., at 234-235, 50 L Ed 2d 427, 97 S Ct 441. (footnote: We do not suggest that aspirants for academic tenure should ignore available opportunities to request reconsideration. Mere requests to reconsider, however, cannot extend the limitations period application to civil rights laws.)

In *Hilmes v. DILHR*, 147 Wis. 2d 48 (Ct. App. 1988), the Wisconsin Court of Appeals considered the issue of when an allegedly discriminatory act "occurred" within the meaning of §111.39(1), Stats,[1] and concluded that ". . . it is when the employer makes known its decision to discriminate. . . that an unlawful employment practice occurs." In applying this general principle to the termination case under consideration,

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[1] Section 111.39(1), Stats., is a provision of the Fair Employment Act and states as follows:

> The department may receive and investigate a complaint charging discrimination or discriminatory practices or unfair honesty testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination or unfair honesty testing occurred.

the court concluded that the operative date for the commencement of the limitations period was the date of notice of termination.

In *Dahl v. UW-Milwaukee*, 84-0205-PC-ER, 11/7/85, the Commission relied on *Ricks*, *supra*, to resolve a timeliness issue in a complaint involving the denial of tenure. In that case, a campus department recommended that the complainant not be granted tenure and, in a letter to complainant, a UW-Milwaukee dean stated as follows:

> Since the 1983-84 academic year will be the seventh year of probationary service and since a recommendation for your promotion and tenure effective at the start of the 1983-1984 academic year will not go forward, I am obliged to notify you that you will not be retained as a member of the faculty beyond the 1983-84 academic year.

Subsequent to her receipt of this letter, the complainant requested reconsideration of the subject tenure decision. The Commission decided that the date that the complainant had received the letter from the dean would mark the commencement of the limitations period, noting with favor the language in *Ricks* that a request for reconsideration of an earlier decision normally does not toll the running of the period of limitations.

In *Harris v. UW-LaCrosse*, 87-0178-PC-ER, 11/23/88, the Commission held, based on *Hilmes, supra*, that the statue of limitations would begin to run when complainant received notice of the decision of the departmental Promotion, Retention and Tenure Committee that his contract not be renewed, unless, because of further steps in an in-house review process, it could be said that a reasonable person in complainant's position would not have been put on notice by receipt of the committee decision that it was the university's official and final decision on his status. In *Harris*, the Commission, relying on *Carpenter v. Bd. of Regents*, 529 F. Supp. 525, 27 FEP Cases 1569 (W.D. Wis. 1982), and citing §UWS 3.08(3), Wis. Adm. Code,[2] concluded that a reasonable person similarly situated to the complainant would not have been put on notice that a final decision had been made on his nonretention when he received notification from his department that that he would not be retained for the upcoming

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[2] Section 3.08(3), Wis Adm. Code, states, in regard to faculty nonrenewal decisions, that "[t]he decision of the chancellor shall be the final decisin."

academic year, but would have been put on notice that a final decision had been made had the notification of nonretention come from the chancellor. *See, Franz v. UW-Oshkosh*, 86-0110-PC-ER, 8/24/89.

Applying the general principles set forth in the cited decisions, it is concluded that a reasonable person similarly situated to complainant would have concluded upon receipt of Chancellor Greenhill's memo of June 28, 1996, that an official and final decision on her application for tenure had been made. Complainant's subsequent efforts to have this decision reviewed were in the nature of requests for reconsideration or for collateral review and, consistent with *Ricks, supra*, do not justify the tolling of the statute of limitations. Complainant's argument that only a decision of the University of Wisconsin Board of Regents would have the finality equivalent to that of the Board of Trustees of Delaware State College in *Ricks* is unpersuasive. First of all, the description of the tenure review process of Delaware State College laid out in *Ricks* is insufficient to support such a conclusion. Furthermore, the *Ricks* court takes care to point out that the widely varying circumstances presented by discrimination actions must be examined on a case-by-case basis. To conclude from *Ricks* that only tenure decisions by an institution's or system's governing board can be official and final decisions would conflict with this direction from the court.

It should be noted that complainant did not file her charge within 300 days of her receipt of Chancellor Greenhill's memo of November 22, 1996, when he stated that, "My decision of June 28, 1996, became the final institutional decision in this appeal process and no further proceedings before the Appeals Panel were proper." Certainly, even if it could be argued that the language of the June 28, 1996, memo left some room for uncertainty as to the finality of the tenure denial decision, the language of the November 22, 1996, memo does not.

Furthermore, it should be noted that complainant did not file her charge within 300 days of her last day of employment. Certainly, no reasonable person would continue to believe after she was no longer employed in her position that a final decision on her employment status had not yet been made. Although complainant

represents in the affidavit accompanying her brief in opposition to the motion to dismiss (See ¶13, above), that she did not realize that she would not be teaching a class during the 1997-1998 academic year until the start of classes on September 1, 1998, it is clear that classes would have started in the 1997-1998 academic year on or around September 1, 1997, not September 1, 1998. Even September 1, 1997, was more than 300 days before she filed this charge of discrimination/retaliation.

It is concluded that complainant failed to file her charge within the 300-day filing period and, as a result, the motion to dismiss must be granted.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to show that her complaint was timely filed.

3. Complainant has failed to sustain this burden.

ORDER

Respondent's motion to dismiss is granted and this complaint is dismissed.

Dated: February 10, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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