

STATE OF WISCONSIN

PERSONNEL COMMISSION

**DENNIS J. SHESKEY**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS**  
*Respondent.*

**RULING ON  
COMPLAINANT'S  
PETITION FOR  
REHEARING**

Case No. 98-0225-PC-ER

The Commission dismissed the above-noted case for untimely filing, by ruling dated May 5, 1999 (hereafter referred to as the Prior Ruling). The Commission received a letter from complainant on May 10, 1999, and treated it as a petition for rehearing. The letter text is shown below:

As I filed a discrimination complaint against the Personnel Commission concerning their decisions, I request that the Personnel Commission be disqualified from any proceedings concerning my complaints.

The Commission, by letter dated May 13, 1999, notified the parties that complainant's letter was being treated as a petition for rehearing. The parties were provided with an opportunity to file written arguments. Respondent filed no arguments. Complainant filed arguments on May 18, 1999.

The findings of fact recited below appear to be undisputed by the parties and are made solely for purposes of resolving the present petition for rehearing.

#### FINDINGS OF FACT

1. Complainant, by letter dated May 10, 1999, requested that the Commission disqualify itself from consideration on all cases he filed with the Commission due to two discrimination complainants that he filed against (and with) the Commission. The complainant filed his first discrimination complaint against the Commission on April 5, 1999 (*Sheskey v. PC, 99-0075-PC-ER*) and the second case on May 10, 1999 (*Sheskey v. PC, 99-0085-PC-ER*). The Commission, by rulings dated May 24, 1999, denied complainant's disqualification request and dismissed both cases for lack of jurisdiction.

2. The Commission considered and denied complainant's disqualification motion in the following additional cases filed by complainant: *Sheskey v. DER*, 98-0063-PC-ER, 5/24/99; *Sheskey v. DER & DETF*, 98-0106-PC-ER, 5/24/99; and *Sheskey v. DER & DETF*, 99-0076-PC-ER, 5/24/99.

3. The Commission's rationale for denying complainant's disqualification motions (noted in the prior two paragraphs) is demonstrated by the following excerpt from *Sheskey v. PC*, 99-0085-PC-ER, 5/24/99:

The legal principles regarding the jurisdictional issue posed here (as discussed later in this ruling) are clear-cut and of long standing. Complainant's arguments on the jurisdictional issue could be viewed as a sham or as frivolous if filed by an attorney on complainant's behalf.<sup>1</sup> The complainant is not represented by counsel which may explain why the complaint was filed in the first instance, but does not change the fact that the suit is without merit. All Commissioners feel they are able to preside over complainant's cases in a neutral manner. There is no room for bias to enter the legal analysis under these circumstances. Furthermore, complainant's right to a decision based on correct legal principles and not on bias is protected due to the fact that he may request review of the Commission's decision to the court system. Accordingly, complainant's disqualification motion is denied.

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<sup>1</sup> The Commission as an administrative body is not held to the same standard as exists for disqualification of a judge under §757.19, Stats. It is instructive to note, however, that under 757.19(2)(b), Stats., a judge who is a party to a case need not disqualify himself if the judge determines that any pleading purporting to make him or her a party is false, a sham or frivolous.

4. Complainant's written arguments delivered to the Commission on May 28, 1999, included arguments in support of the petition for rehearing other than those raised in his disqualification motion.

#### CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to s. 230.45(1)(b), Stats.
2. Complainant has the burden to show that he is entitled to rehearing.
3. Complainant has failed to sustain this burden.

OPINION

Petitions for rehearing are governed by 227.49(3), Stats., the text of which is shown below:

Rehearing will be granted only on the basis of:

- (a) Some material error of law.
- (b) Some material error of fact.
- (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Complainant's disqualification motion is insufficient to establish a right to rehearing. The subject matter raised in the motion does not involve a material error of law or fact, or the discovery of new evidence.

The Commission now turns to the new arguments filed by complainant on May 28, 1999. The Commission in the Prior Ruling found that the period of limitations did not commence upon the date that complainant actually discovered information regarding positions to which he was not recalled because he had formed the opinion that respondent was treating him unfairly as early as July 1995. The Commission concluded that a person with a reasonably prudent regard for his or her rights similarly situated to complainant would have made inquiry about why he had not been recalled prior to February 1998. The Commission, accordingly, dismissed the complaint as untimely filed.

The Commission, before issuing the Prior Ruling, considered the written arguments filed by both parties including complainant's arguments filed by letter dated March 31, 1999. Complainant cited no case law in his letter of March 31, 1999. Today, the Commission checked its circuit court file for another of complainant's cases, *Sheskey v. PC & DER*, 98-CV-2196, and found that in a filing dated November 4, 1998, complainant cited the same case law which he failed to cite in this case until his letter of May 28, 1999. Clearly complainant knew of the case law at least as early as November 4, 1998. He has not provided any explanation for his failure to include those citations when he filed initial arguments in this case by letter dated March 31, 1999. This is troublesome to the Commission because it suggests a

disregard of the time the Commission spent in reviewing, discussing and preparing the Prior Ruling.

Complainant continues to dispute the Commission's conclusion that his complaint was untimely filed. He cited the following cases for the proposition that the limitations period did not commence until he actually discovered information regarding positions to which he was not recalled. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 11/7/85; *DuPuis v. DHSS*, 90-0219-PC, 10/18/90 and *Grimmenga v. DOR*, 83-0007-PC-ER, 10/10/83.<sup>1</sup> The cited cases, however, did not involve circumstances where the employee knew sufficient facts at an early date, which triggered his/her duty to make inquiries before he/she did. The cited cases are unpersuasive to show that the Prior Ruling is based upon an error of law.

Complainant also raised a new factual assertion as a basis for a new legal theory in his letter dated May 28, 1999. Specifically, complainant met on July 31, 1995, with his supervisor, Jean Hale, and respondent's Director of Human Resources, Janet Smith. Ms. Smith told him during the meeting that he would be kept on a mandatory lay-off list for 3 years from the date of his lay-off. Complainant asked what this meant and Ms. Smith replied that if DER had a vacancy at the same level as the position from which he was laid off, then DER would have to contact him. Hand-written notes made by Ms. Smith on or near July 31, 1995, memorialized this conversation. Complainant provided a copy of Ms. Smith's notes as an attachment to his letter dated May 28, 1999.

Complainant contends in his letter dated May 28, 1999, that he "reasonably relied" on Ms. Smith's statement that DER would contact complainant for certain vacancies. He concludes that under these circumstances his complaint should be accepted as timely filed under the doctrine of equitable estoppel. He cites as support of this argument the Commission's decision in *Johnson v. DHSS*, 94-0009-PC, 3/3/95. Complainant also had cited the *Johnson* case in his submission to the circuit court in November 1998, so he was aware at

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<sup>1</sup> The complainant provided the names and case number for the cited cases, but not the decision dates. This was problematic in some instances because the Commission issued more than one decision in some of the cited cases. The Commission instructs the complainant to include the decision date in future citations to ensure that the Commission will be able to identify the decision to which he refers.

that time of the doctrine of equitable estoppel. He may not have recalled in November 1998, that Ms. Smith had told him that DER would contact him if certain vacancies occurred. However, he had a copy of Ms. Smith's handwritten notes on or about January 29, 1999 (as an attachment to respondent's letter dated January 29, 1999, submitted in *Sheskey v. DER*, 98-0063-PC-ER). In short, complainant could and should have presented this information to the Commission with his initial arguments dated March 28, 1999.

New evidence is a potential basis for rehearing under §227.49(3)(c), Stats., but only if it is newly-discovered evidence which previously could not have been discovered by due diligence. For the reasons noted in the prior paragraph, complainant cannot successfully argue here that he has raised newly discovered evidence which he previously could not have discovered by due diligence.

Complainant also requested in his letter dated May 28, 1999, that the Commission stay its ruling on his petition for rehearing until such time as the Court of Appeals and the Equal Employment Opportunity Commission renders decisions regarding a different case—*Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; aff'd Dane Co. Circ. Ct., *Sheskey v. Wis. Pers. Comm. and DER*, 98-CV-2196, 4/27/99. Pertinent to this request is §§227.49(2), (5) and (6), Stats. Paragraph (2) was cited previously in this ruling. The text of paragraphs (5) and (6) are shown below in relevant part:

- (5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.
- (6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable . . .

The Commission interprets §§227.49(2), (5) and (6), Stats., as permitting rehearing only in the limited circumstances noted in paragraph (2) and, if timely granted, as requiring the Commission to resolve the case as soon as possible. Complainant's request to place the present case on hold until a decision is reached by the Court of Appeals in a different case is contrary to the controlling statutes. The Commission first notes that awaiting the Court of Appeals decision is not a statutory basis for granting a petition for rehearing under §227.49(2),

Stats.. The Commission also notes that the request is contrary to the statutory requirement of completing further proceedings as soon as practicable.

ORDER

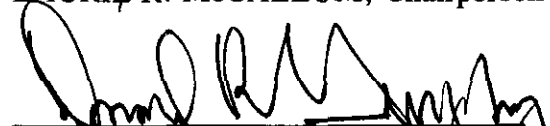
Complainant's request for a stay is denied and his petition for rehearing is denied.

Dated: June 3 <sup>[1999]</sup>, 1998.

JMR  
980225Cru12

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Dennis J. Sheskey 217 Gilman Street Verona, WI 53593	Peter Fox Secretary, DER P. O. Box 7855 Madison, WI 53707-7855
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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