

STATE OF WISCONSIN

PERSONNEL COMMISSION

BRENDA HEMSTEAD,
Appellant,

v.

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

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

Case No. 00-0155-PC

Respondent moved to dismiss the above-noted appeal as untimely filed. The appeal arises from a reallocation decision made in November of 1998.

Both parties filed written arguments. The Commission received the final argument on November 20, 2000. The Commission thereafter sought additional information (by letter to the appellant dated January 24, 2001, to which she replied by letter dated February 2, 2001, by supplemental response dated February 5, 2001 and by conference call on February 20, 2001). The Commission received a telephone call from respondent on February 7, 2001 indicating that respondent did not plan to submit additional arguments.

The facts recited below are made solely to resolve the pending motion. Any disputed facts are recited in the light most favorable to the appellant.

FINDINGS OF FACT

1. The appellant works at the University of Wisconsin - Madison in the College of Letters and Science. On November 8, 1998 her position was reallocated to Administrative Support Assistant 1 (ASA1), a transaction for which the Commission received her appeal on August 2, 2000.

2. On or about November 16, 1998, the appellant's supervisor, Ted Koch, received a memo (dated November 10, 1998) from Diana Allaby, Human Resource Manager of

the College of Letters and Science.¹ The memo indicated that the appellant's position had been reallocated to ASA1 as a result of a survey. The memo did not include any information regarding appeal rights. The text of the memo is shown below in relevant part:

This memo is to inform you that Brenda Hemstead's position has been reallocated to the [ASA1] classification. Because her position will remain in the same pay range she will not receive a rate increase with this reallocation. This reallocation became effective November 8, 1998. I will forward to Brenda an official reallocation notice once I receive it

I also want to make you aware I realize Brenda has a reclassification request submitted and this reallocation will not have any affect on the reclassification request. I have not been able to begin my review of it yet, but hope to in the next few weeks.

3. On or about November 16, 1998, Mr. Koch read the memo to the appellant and showed it to her. Mr. Koch did not leave a copy of the memo with the appellant because they both expected she would receive an official reallocation notice as stated in Ms. Allaby's memo (see prior paragraph). The appellant knew that Mr. Koch placed the memo in her personnel file. She had access to her own personnel file.

4. On March 18, 1999, Ms. Allaby wrote a memo to Mr. Koch informing him that the appellant's request to have her position reclassified was denied.² The memo specifically stated that the appellant's position was "correctly classified" as an ASA1. Mr. Koch discussed the memo with the appellant and placed it in her personnel file without providing her with a copy. The text of the final paragraph is shown below:

You have two options at this point. The first is to submit the changed position description as an "update" . . . Your other option is the right to appeal this decision to the next step which is a review by the Classified Personnel Office. If you decide to appeal, you must submit all of the appropriate reclassification paperwork to the Classified Personnel Office, 228 Peterson Building, 750 University Avenue, Madison, WI 53706.

¹ A copy of the letter was provided as Exh. 4 attached to the Department of Employment Relation's (DER) brief dated 10/19/00.

² A copy of this letter was provided as Exh. 2 attached to DER's brief dated 10/19/00.

5. Mr. Koch filed an appeal of the denial of the appellant's reclassification request to the Classified Personnel Office. The results of this appeal have not been determined yet.

6. On February 15, 2000, Georgiana Lowe of the University of Wisconsin's Classified Personnel Office wrote to Ken Woodring who works for the Department of Employment Relations (DER) requesting a re-evaluation of the 1998 reallocation decision.³ There is no indication on the memo that a copy was sent to the appellant or to anyone other than Mr Woodring. Pertinent portions of this memo are shown below:

Ms. Hemstead's position was reviewed as part of the Professional Program Support Survey and reallocated to [ASA1] effective 11/8/98 using a PD dated 8/96. In August 1998, Ms. Hemstead had submitted her position to L&S Human Resources for reclassification to an IS Geographic Data Professional - Entry. The reclass to that classification was denied by L&S with a memo dated March 18, 1999. Ms. Hemstead then appealed the denial to our office. When I audited the position [Ms. Hemstead] expressed concern that the PD used for the reallocation was not the most current. The audit did confirm that there had been significant change in her position and this was not considered at the time of reallocation. Although the 8/96 PD was the most current when the survey was begun, the length of the survey as well as ongoing implementation of it contributed to the incorrect PD being reviewed. Enclosed is the 8/98 position description and a copy of the 8/96 PD used for the reallocation. Because I do not feel that her current title of [ASA1] is appropriate and because there do not appear to be any titles that describe her position, I am requesting further review

In reviewing other titles for possible similarities, the Natural Resources Program Specialist 1 specification is a very good comparison. Although I understand that these specifications are meant for DNR positions only, I am referencing them because they are solid comparisons and yet are in a higher pay range than Ms. Hemstead's position. I believe they make a strong case for developing a title and specification that describe her position as identified in the 8/98 PD and assigning it to 07-13. Alternately, if DER prefers not to create another title, Ms. Hemstead's position could be placed in the [ASA2] title to correct an error, and the specs revised to reflect the change . . .

7. The appellant was unaware that she had the right to file an appeal of the November 1998 reallocation decision until late June or early July 2000, when she had a telephone conversation with Ms. Lowe. During this conversation Ms. Lowe told the appellant that it was

not possible to reclassify her position to the ASA2 level because the classification specifications would need to be changed and because she did not appeal the ASA1 reallocation decision of November 1998.

8. On July 6, 2000, the appellant requested a copy of the reallocation notice dated November 8, 1998. She received the same on July 12, 2000. The reallocation notice included the following information appeal rights:

Whenever a position is reallocated by the Secretary, Department of Employment Relations or his/her designated representative, the employee and/or the appointing authority shall have the right of appeal. If you wish to appeal this reallocation you must submit a written request to the State Personnel Commission. The appeal should state the facts which form the basis of the appeal, the reason or reasons you feel the reallocation is improper, and the relief sought. This appeal must be received by the State Personnel Commission within 30 days after the effective date of the reallocation or within 30 days after you are notified of the reallocation, whichever is later

9. On July 25, 2000, the appellant sent the following e-mail message to Ms. Lowe:

Was wondering if you can advise me on what course to take (appeal?) based on our phone conversation last Wednesday (7/12) pertaining to the fact that I had just received my pink 'employee' copy of the Reallocation Notice from L & S per my request. At that time, you indicated that you were going to contact Ken (DER) concerning this since all had assumed I had already received the official reallocation notification long ago.

Ms. Lowe replied by e-mail on July 25, 2000, saying she had not yet been able to "reach my contact at DER."

10. On July 31, 2000, Ms. Lowe sent the appellant the following e-mail message:

I confirmed with DER that you have 30 days from the recent receipt of your reallocation notice to appeal the classification decision. There should be language at the bottom of the notice that identifies what you need to do to appeal. Also, I was informed that Ken (the DER contact) is still exploring other classifications so I will keep you posted.

³ A copy of this letter was provided as Exh. 3 attached to DER's brief dated 10/19/00.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.44(1)(b), Stats.
2. The appellant has not met her burden of showing that her appeal was timely filed.

OPINION

Section 230.44(3), Stats., provides that 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.” This case involves an appeal of the November 1998 reallocation decision. The Commission received the appeal on August 2, 2000.

Respondent contends the 30-day period should commence on or about November 16, 1998 when Mr Koch showed the appellant his letter from Ms. Allaby (see ¶¶2-3, Findings of Fact). Respondent contends that the appellant thereby was notified of the reallocation decision. Respondent also contends that the limitations period should not commence on July 25, 2000 (the date the appellant actually received the reallocation notice), because a reasonably prudent person would not have waited so long to request a copy of the reallocation notice or to inquire about appeal rights. Both arguments fail to address the requirements of §ER 3.04, Wis. Admin. Code, the text of which is shown below (*italics added for emphasis*):

Approvals or denials of reallocations or reclassifications shall be made to the appointing authority in writing. The appointing authority shall immediately notify the incumbent *in writing*.

The question presented here is one of first impression – whether written notice to a supervisor which was shared with the appellant and of which the appellant could have requested a copy or made her own copy is sufficient to meet the written notice requirement of §ER 3.04, Wis. Adm. Code. The Commission concludes that the “in writing” requirement of §ER 3.04, Wis. Adm. Code, was met when Mr. Koch shared his copy of Ms. Allaby’s November 10, 1998 letter with the appellant. (See ¶¶2-3, Findings of Fact.) At this point in time, the appellant knew what decision had been made and why it was made. She could have asked Mr.

Koch for a copy of his letter. Also, she knew the letter was in her personnel file, which she could have accessed at any time to make herself a copy of the letter. In short, the "in writing" requirement was met for all practical purposes.

It is true that the appellant was unaware of her right to appeal the reallocation decision until late June or early July 2000, when she finally received a copy of the official reallocation notice. The Commission consistently has held, however, that employers have no legal obligation to advise an employee of their right to appeal a classification decision and, consequently, an employer's failure to do so does not toll the filing period. *Hallman v. WCC & DOA*, 96-0146-PC, 2/12/97 ("Lack of familiarity with the law does not toll a filing period," citing *Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89). *Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98 ([D]ecisions by the Commission and the courts make it clear that the agency (DHFS) has no legal requirement to advise an employee as to the proper route for appeal. Equitable estoppel only occurs when the agency provides *misinformation* that the employee relies on and thereby fails to file a timely appeal," citing *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)). Also see *Livingston v. DOT*, 89-0001-PC, 4/8/98.

The Commission also agrees with respondent's assertion that a reasonably prudent person would not have waited so long to request a copy of the formal reallocation notice. The appellant has known since November 1998, that she should receive a formal reallocation notice yet she waited until mid-2000 to request a copy of the same.

ORDER

Respondent's motion is granted and this case is dismissed for untimely filing.

Dated: March 21, 2001.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

JMR:000155Arul1.doc


JUDY M. ROGERS, Commissioner

PARTIES

Brenda Hemstead 3985 Shadows Court Deforest, WI 53532	Peter Fox Secretary, DER 345 W Washington Ave. PO Box 7855 Madison, WI 53707-7855
---	---

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