STATE OF WISCONSIN | PERSONNEL COMMISSION

BARBARA L. EMMERICH,
Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
Respondent.

Case No. 00-0165-PC

RULING ON RESPONDENT'S MOTION TO DISMISS

This case is before the Commission to resolve respondent's motion to dismiss for untimely filing. Both parties filed written arguments. The Commission received the final argument on December 22, 2000.

The issue in this case is shown below (Conference Report dated 10/12/00):

> Whether respondent's decision to reallocate the appellant's position to Dietetic Technician-Administrative[1] was correct, or should the position have been reallocated under the classification specification entitled "Dietitian-Clinical (and) Dietician-Administrative Classification Series.[2]

Most of the facts recited below were included with the appellant's appeal in the form of a chronology with supporting documentation. For purposes of this motion, her recitation of facts is taken as true.

FINDINGS OF FACT

1 The Commission received this appeal on September 11, 2000.

2. The appellant works for the Department of Corrections (DOC).

[1] The conference report recited the classification of "Dietetic Technician Advanced." It is clear from appellant's exhibits #3, 4 & 35, that this is incorrect. Her classification was changed to "Dietetic Technician-Administrative" under the classification specification marked as respondent's Exh. 1.

[2] This change to the statement of the hearing issue correctly identifies the classification specification at issue (see appellant's exhibit #36).

3. The Department of Employment Relations (DER) conducted a classification survey, which resulted in reallocating the appellant's position to Dietetic Technician-Administrative effective April 9, 2000.

4. On May 4, 2000, the appellant's coworkers told her they had received a pay increase. She received no increase.

5. On May 18, 2000, coworkers told the appellant they had received a lump sum back-pay check. The appellant's pay stub (Exh. 3) showed no back pay. Her stub indicated that her "job title" had changed to Dietetic Technician-Administrative. The appellant contacted Nancy Gleason in the payroll department of the DOC and asked what the new job title meant. Ms. Gleason told the appellant that her position had been reallocated. Ms. Gleason indicated that the appellant should have received something from personnel about the change. The appellant indicated she had not received anything from personnel so Ms. Gleason said she would send the appellant a copy of the reallocation notice she received.

6. On May 18, 2000, Nancy Norwell Gasser, the appellant's supervisor, spoke to the appellant after talking to Ms. Gleason. Since the appellant said she did not receive her own copy of the reallocation notice, Ms. Gasser gave the appellant a copy of the "Employer's" copy of the appellant's reallocation notice (Exh. 4). The form indicated that the classification of the appellant's position changed from Dietitian 2 to Dietetic Technician-Administrative due to the abolishment of existing classifications and pursuant to §ER 3.01(2)(c), Wis. Adm. Code. The form also noted that her current pay was not impacted by the change. Ms. Gasser told the appellant that her salary would stay the same for a year and then probably would decrease by about $4.00 per hour. She further indicated that the reallocation to the Dietician series was based solely on a new requirement for certification and/or registration. Ms. Gasser advised the appellant to contact her union representative for clarification. The reallocation notice was dated April 21, 2000, and noted that the effective date of the reallocation was April 9, 2000. The reallocation notice also contained the following information regarding the right to appeal the decision:

> Whenever a position is reallocated by the Secretary, (DER) or his/her designated representative, under §§230.09(2)(a) and (d), Wis. Stats., 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 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 If you have any questions on the procedural aspects of filing an appeal, please contact your Agency Personnel Officer If you have any questions regarding the applicable filing fees, please contact the Personnel Commission.

7 On May 22, 2000, the appellant made the union contact with Lenore Wilson. Ms. Wilson was aware of the Food Service Survey results and proposed classification changes from Dietitian 1 and 2 to the newly created Dietitian series classification specification. Ms. Wilson was unaware of the new Dietetic Technical-Administrative classification used for the appellant's position. Ms. Wilson agreed to follow up and report back to the appellant.

8. Also on May 22, 2000, the appellant sent a letter to her union "requesting information and assistance in investigating possible unfair labor practice regarding the (DER) reallocation of the Dietitian 2 classification to a Dietetic Technician Administrative classification" (Exh. 5). One of the specific questions she asked was what filing deadlines apply when the employing authority has not provided any official written communication regarding the reallocation.

9. On June 15, 2000, Ms. Wilson reported to the appellant that she had not received a response from DER yet. She said the appellant should be patient and give DER time to respond.

10. On June 27, 2000, Ms. Wilson called the appellant saying she received no information from DER yet. She thought the appellant's receipt of back pay (on June 15, 2000) and a pay increase (on June 15th) was a sign that DER was trying to resolve the issue. Ms. Wilson said she would be talking to someone on June 29, 2000 and would get back to the appellant.

11 On July 10, 2000, the appellant contacted Ms. Wilson. Ms. Wilson said she heard from Bert St. Louis of DER who explained that the appellant's position could not be classified under the Dietitian series because the appellant was not a certified or registered

Dietitian. This was why the appellant's position was reallocated to the lower classification of Dietetic Technician-Administrative. Ms. Wilson suggested that the appellant contact Cindy Archer, the supervisor who oversees the bureau where the appellant worked, to seek clarification.

12. On July 11, 2000, the appellant delivered a letter to Ms. Archer requesting information and clarification (Exh. 13). The letter included the following paragraphs (emphasis in the original document):

> I understand that the survey and resulting reclassification process was initiated by DER to provide more monetary incentives aimed at attracting and retaining DOC employees in Food Service. As a result of this reclassification process, I have been told <u>unofficially</u> that my job duties have not changed, my salary will remain the same for 1 year and then my salary will decrease by approximately $5.00 or more per hour. I have been told that the reason for the title change was that I am not a registered or certified Dietitian. I questioned that very issue when I was re-allocated years ago to the Dietitian classification series, but I was told it was not a requirement at that time for state employment. I have a Bachelor of Science degree in Health Education and have been working in dietetics for the State of Wisconsin for 20 plus years in either the Dietetic Technician series or in the Dietitian series.
>
> I don't know if this second hand information is accurate or not. That is why I am asking for official notification, clarification and documentation of the changes that have been implemented and any change that is forthcoming regarding this classification change.

13. On August 11, 2000, the appellant received a letter from Sandy Powers of DOC's personnel office, written on behalf of Ms. Archer (Exh. 16). Mr Powers provided background on the union involvement and approval of the new classification specifications as well as a study of retention concerns. He confirmed that the appellant's position could not be placed at the higher classification because it required certification as a dietitian under §§448.70-448.94, Stats, or eligibility for certification. The appellant was neither certified nor eligible for certification. His letter included the following paragraph:

> You indicate in your letter that you have received no official letter, notification or communication regarding the change in class. However, your letter indicates

> that you received a copy of the Reallocation Notice from both the Payroll Unit and your supervisor. This notice is your official notification of the change in classification and bargaining unit. Therefore, you did receive the appropriate notification of the change. The notification via Reallocation Notice is prepared and distributed by the Bureau of Personnel and Human Resources. I am unable to explain why you may not have received the original pink copy of the form that was directed to you.

14. On August 11, 2000, the appellant sent a letter "To Whom it May Concern" to DER (Exh. 17), stating as follows:

> On a copy of a reallocation notice that I received from my supervisor (I was never sent a copy), it instructs employees to contact the Agency Personnel Officer regarding the procedural aspects for filing an appeal. Since Mr. James Pankratz of (DER) signed the copy of the reallocation notice, I am assuming that he or someone in your department would be the Agency Personnel Officer.
>
> Please send me information regarding the procedural aspects for filing an appeal. If you can not help me please advise me of the appropriate contact and/or forward this request to the appropriate department. My employing unit is the (DOC) - Central Office.

15. DER responded by letter dated August 15, 2000 (Exh. 21), noting (in part) as shown below:

> As you noted, the process for filing an appeal is outlined on the reallocation notice; this process includes the necessity of submitting a timely written request (fees may be applicable) to the State Personnel Commission.

16. On August 11, 2000, the appellant sent a letter to the Wisconsin Employment Relations Commission (WERC) requesting information about filing fees (Exh. 18). The reallocation notice she received had instructed such inquiries to be directed to the Personnel Commission (see ¶4 above). On the same day she sent a letter and enclosures to Lenore Wilson.

17. The WERC wrote to the appellant on August 15, 2000, saying her letter about filing fees was forwarded to the Personnel Commission. An attorney from the Personnel Commission attempted to reach the appellant by telephone on August 16 and 17, with regard

to the inquiry forwarded by the WERC. He left a voice mail message but she did not return his calls. He memorialized his efforts in a letter dated August 18, 2000, and enclosed a copy of the administrative rule pertaining to filing fees.

18. By e-mail dated August 21, 2000, the appellant asked Ms. Wilson how the union would represent the appellant if she filed an appeal. The appellant also contacted the union on August 25 and 31, 2000, and on September 5, 7, 9 and 10, 2000, exchanging or asking for information. On September 10, 2000, Ms. Wilson informed the appellant that the union would not represent the appellant in an appeal filed with the Commission.

19. The appellant contends Ms. Wilson "continued to assure me that the union had up to one year to file a grievance or appeal a contract dispute, so I didn't need to worry about any immediate deadline. It was only on 9-10-2000 that I was told that the union did not have jurisdiction in appealing a classification reallocation and essentially I would need to represent myself."

CONCLUSIONS OF LAW

1. It is the appellant's burden to show that her appeal was filed timely.
2. The appellant has not met her burden.

OPINION

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." The later date here is May 18, 2000, the date upon which the appellant noticed a different job title on her pay stub and upon which she received oral and written notice of the reallocation (see ¶¶ 3-4 of the Findings of Fact). A timely filed appeal would need to be received by the Commission on or before June 19, 2000 (within 30 days after May 18, 2000 and extended because the 30th day ended on Saturday, June 17th). See, §990.001(4)(b), Stats., and *Starczynski & Mayfield v. DOA*, 81-275, 276-PC, 12/3/81. The Commission did not receive this appeal until September 11, 2000, which was filed almost 3 months late.

The appellant argues that the oral and written notice she received on May 18, 2000, was insufficient to start the 30-day filing period. The crux of this argument is shown below (letter brief dated 12/4/00, pp. 1-2, emphasis contained in the original):

> During the pre-hearing conference I told the Commission and DER representative that when my position with the [DOC] had been reallocated in 1993 and then reclassified in 1998, I had been sent a memorandum or documentation from DOC Personnel informing me of the action taken, the rationale for the action, the financial implications of the action and notice of my right to appeal the action. Please see Appellant's Exhibit #30 and Appellant's new Exhibit #41 In Exhibit #30, my immediate supervisor (Ms. Norwell) had requested a re-classification of my position, but after a review by a DOC Personnel Specialist, the Personnel Specialist states that the position was incorrectly classified and the proper classification action at this time is a reallocation. The Personnel Specialist then indicates the effective date of the re-allocation and includes language explaining my right to an appeal. Exhibit #51 is the EMPLOYE copy of the Reallocation Action with an attached Gross Salary Detail Adjustment Sheet. Exhibit #30 and Exhibit #51 were addressed and sent to Appellant. Since Exhibits #30 and #51 were sent directly to Appellant and Exhibit #51 clearly indicates that it is the EMPLOYE copy, there is no question to whom the information is intended. In addition, the information provided to the Appellant clearly identifies what the action means and what the Appellant's rights are to appeal the action.
>
> Exhibits #30 & #51 involve reallocation. During the prehearing conference I was informed that reclassifications are handled differently than reallocation and the documentation I had received when my position was reclassified would not be applicable in this case. However under Wis. Adm. Code ER 3.04 entitled "notice of reallocation or reclassification" there is no distinction delineated.

The text of §ER 3.04, Wis. Adm. Code, is shown below. It requires notice to the employee of a change in classification whether such change occurred by reallocation or reclassification.

> 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 Commission concludes that the provisions of this code section were met in this case at least as of May 18, 2000. The appointing authority (DOC)[3] was provided notice of the reallocation of the appellant's position and a copy of the same was provided to the appellant. The fact that she received a copy of the appointing authority's notice rather than the employee copy is irrelevant. The information on the appointing authority's copy and the employee's copy is the same.

Furthermore, the notice provided (Exh. #4) was not deficient even accepting the appellant's version of what it should have contained. The action taken was explained (change in classification from Dietitian 2 to Dietetic Technician-Administrative), the financial implication was revealed (no change in current salary), the effective date was noted and her appeal rights were noted. In addition, Ms. Gleason told the appellant on May 18, 2000, that the decision could result in a significant pay decrease within a year. She also explained that the reason for the reallocation decision was that the appellant was not a certified dietician, a requirement of the new classification specification for the classification the appellant seeks here.

The appellant contends she should have received more information such as occurred in conjunction with her reclassification request. The slip indicates the classification of the employee's position has changed due to a reallocation decision, the old and new classification, the resulting change in pay (if any), and information regarding the right to appeal. Further, the appellant indicated that her co-workers also received reallocation notices but she does not allege that their notices were any different in format or content from her own.

The appellant also raises an equitable estoppel argument citing *Brady v. DER*, 91-0085-PC, 9/19/91. The Commission's discussion of equitable estoppel in the *Brady* case is shown below:

> [T]he appellant received notice of the reallocation decision on April 30th Therefore, according to the language of the statute, he had to file his appeal with the Commission no later than May 30, 1992, in order for it to be

[3] The appellant indicates in her brief that DER was the appointing authority. She is mistaken. See §230.06(a), Stats., which provides that the appointing authority is the agency with power to hire or fire an employee. It is DOC here who had such power, not DER.

> considered timely. The Commission does, however, recognize that it has implicit authority to apply the principle of equitable estoppel in deciding timeliness issues. *Desrosiers v. DMRS*, 87-0078-PC, 8/5/87; motion for reconsideration denied, 9/10/87. Equitable estoppel against a state agency requires inequitable conduct by the agency which amounts to fraud or a manifest abuse of discretion, and irreparable injury to the other party acting honestly and in good faith reliance on the agency conduct. *Schleicher v. DILHR & DP*, 79-287-PC, 8/29/80. However, the Commission has also held that the doctrine of equitable estoppel cannot be applied where the conduct on which the appellant relied was the conduct of another state agency and not the respondent agency. *Goeltzer v. DVA*, 82-11-PC, 5/12/82.

There was no conduct by DER that could be characterized as fraud or a manifest abuse of discretion. To the contrary, the appellant, through receipt of DOC's copy of her reallocation notice prepared by DER, received correct information pertaining to the reallocation decision and her appeal rights. She did not receive any misleading information from DER. She may have received incorrect information from her union (see ¶8, Findings of Fact) but this is not attributable to DER. She cites to the delay the union experienced in receiving information from DER (p. 8 brief dated 12/4/00). Even if the delay could be considered attributable to DER, the inquiries were made to confirm the information already provided to the appellant on May 18, 2000. In short, as of May 18, 2000, the appellant had all the information she needed to file an appeal. Under these circumstances, the cited delay cannot be used as the basis for applying the equitable estoppel doctrine.

As noted in *Fletcher v. ECB*, 91-0134-PC, 12/23/91, the right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence. The appellant in this case failed to act with due diligence to preserve her right to pursue this appeal. On May 18, 2000, she was given a written copy of the reallocation decision, which included information about the reallocation decision as well as a description of how to file an appeal. On the same date, Ms. Gasser also informed the appellant that the higher classification now required certification as a dietician and that while the decision did not impact on her present rate of pay it would have a significant negative impact in the following year. A person acting with due diligence under these circumstances would have used the appeal information provided and would have ensured that an appeal was filed within 30 days

of the date the notice was received, regardless of whether DER had responded to the union's inquiries.

ORDER

Respondent's motion is granted and case is dismissed as untimely filed.

Dated: January 19, 2001.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

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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