

STATE OF WISCONSIN

PERSONNEL COMMISSION

PETER STACY,
Appellant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING ON
MOTION TO DISMISS
AND FINAL ORDER**

Case No. 99-0024-PC

NATURE OF CASE

This case involves an appeal of a transfer.¹ Respondent objected to the appeal on timeliness grounds at a prehearing conference held on May 7, 1999, and the parties have filed briefs. The following findings appear to be undisputed, and are made for the sole purpose of resolving this motion.

FINDINGS OF FACT

1. Respondent transferred appellant to a new position effective January 31, 1999.
2. Appellant was notified of this by a letter dated January 27, 1999, that was given to him on January 28, 1999.
3. On January 29, 1999, appellant filed a noncontractual grievance concerning the transfer at the second step. Because of the nature of the matter grieved, appellant bypassed the first step.
4. On February 22, 1999, the time limit for a second step grievance had expired without any action having been taken by respondent, and appellant filed the grievance at the third step.

¹ Complainant also filed a whistleblower complaint regarding this transaction. That case is unaffected by this decision.

5. On March 8, 1999, respondent advised appellant by e-mail that the subject matter of his grievance was not grievable under the noncontractual grievance process and that appellant should take a direct appeal to the Personnel Commission.

6. On March 17, 1999, appellant filed this appeal with this commission.

CONCLUSIONS OF LAW

1. To the extent that this appeal is viewed as an appeal of a third step noncontractual grievance, it involves a non-grievable subject and the Commission can not consider the appeal on its merits.

2. To the extent that this appeal is viewed as an appeal under §230.44(1)(c), Stats., of a constructive disciplinary action, or an appeal of a transfer pursuant to §230.44(1)(d), it was untimely filed pursuant to §230.44(3), Stats., and the Commission can not hear the appeal on its merits.

3. Respondent is not estopped from raising the issue of untimely filing by the doctrine of equitable estoppel because appellant did not establish an essential element for application of that doctrine; i.e., that he reasonably relied on respondent's action or inaction to his detriment.

OPINION

There can be little question but that the subject matter of this complaint is not grievable under the noncontractual grievance procedure. Section ER 46.03(3)(2)(j), Wis. Admin. Code, provides that an employe may not grieve a condition of employment that is a management right under § ER 46.04.

Section 46.04(2)(d) provides that management rights include transferring an employe. Therefore, appellant can not grieve his transfer per se. To the extent he claims the transfer is a de facto disciplinary action, §ER 46.04(f) includes as a management right the disciplining of employes.

Since the subject matter of this appeal involves a personnel transaction which is non-grievable under the noncontractual grievance procedure, it follows that this commission can not hear this appeal as the fourth step in the grievance procedure.

However, since appellant contends that the transfer is a de facto disciplinary action, the commission can consider this case on a direct appeal basis as a disciplinary action pursuant to §230.44(1)(c), Stats.² See, e.g., *Davis v. ECB*, 91-0214-PC, 6/21/94. Also, to the extent the appellant contends that the transfer constitutes an illegal action or an abuse of discretion, §230.44(1)(d), Stats., provides a jurisdictional basis for the appeal. See, e.g., *Kelley v. DILHR*, 93-0208-PC, 2/23/94.

Pursuant to §230.44(3), Stats., an appeal under §230.44(1) would not be timely unless it is filed within 30 days of the later of the effective date of the transaction or the date of notice of the transaction. Here, the later date is the effective date of the transfer. Appellant did not file his appeal until March 17, 1999, or 45 days after the effective date of the transfer, and 15 days after March 2, 1999, which would have been the last day to have filed a timely appeal.

While this appeal is untimely, appellant argues that respondent deliberately delayed processing his grievance and telling him the subject of the grievance was not grievable and he should file with this commission, until after the §230.44(3) 30 day time limit had expired.

As a general rule, the employing agency does not have the responsibility to advise an employe of his or her rights under the civil service code. See, e.g., *Jabs v. State Personnel Board*, 34 Wis. 2d 245, 251, 148 N.W.2d 853 (1967). However, under certain circumstances the doctrine of equitable estoppel precludes an agency from arguing an appeal is untimely. See, e.g., *Kenyon v. DER*, 95-0126-PC, 9/14/95:

According to *Gabriel v. Gabriel*, 57 Wis. 2d 424, 429, 204 N.W.2d 494 (1973) the three . . . elements which are essential in order to apply equitable estoppel are: “(1) Action or nonaction which induces (2) reliance by another (3) to his detriment.” The doctrine “is not applied as

² Disciplinary actions involve management rights, §ER 46 04(2), and could not be grieved under the noncontractual grievance procedure.

freely against governmental agencies as it is in the case of private persons,” *Libby, McNeil & Libby v. Dept. of Taxation*. 260 Wis. 551, 559, 51 N.W.2d 796 (1952), and in order for equitable estoppel to be applied against the state, “the acts of the state agency must be established by clear and distinct evidence and must amount to a fraud or manifest abuse of discretion.” *Surety Savings & Loan Assoc. v. State*, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972). However, “the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable.” *State v. City of Green Bay*, 96 Wis. 2d 195, 203, 291 N.W.2d 508 (1980). The Supreme Court has also offered the following description of the analysis to be used when a party seeks to invoke equitable estoppel against governmental agencies:

[W]e have recognized that estoppel may be available as a defense against the government if the government’s conduct would work a serious injustice and if the public’s interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 638-39, 279 N.W. 2d 213 (1979). (citation omitted)

Also, equitable estoppel requires that the employe have acted with due diligence in relying on the employer’s action or inaction. See *Fletcher v. ECB*, 91-0134-PC, 12/23/91. This is another way of saying that the employe’s reliance was reasonable. To the extent Mr. Stacy may have relied on the respondent’s inaction in continuing to pursue his noncontractual grievance rather than filing an appeal with the Commission the Commission holds he did not act with due diligence, and his reliance on respondent’s inaction was not reasonable.

Appellant’s theory apparently is that the respondent should have responded to his second stage grievance in a timely fashion, and had it done so, the respondent would have denied his grievance as involving a non-grievable subject, and thus he would have known to file an appeal with the Commission. The problem with appellant’s theory is that there is no reason why appellant should have inferred from respondent’s inaction at the second stage that his grievance involved a grievable subject. Thus, any reliance on respondent’s inaction as a reason for having failed to

file a timely appeal with the Commission would have been misplaced and would not have been reasonable. While it is correct that respondent had a duty under § ER 46.06(2)(b)2, Wis. Adm. Code, to have answered the grievance within seven calendar days of its receipt, it does not follow from this that there was a reasonable connection between respondent's failure to answer and any reliance by appellant on that failure.

ORDER

This appeal is dismissed for untimely filing pursuant to §230.44(3), Stats., and because it does not involve subject matter grievable under the noncontractual grievance procedure pursuant to §§ER 46.03(2)(j) and 46.04(2)(d), Wis. Adm. Code.

Dated: August 25, 1999.

AJT rjb:990024Arul1

STATE PERSONNEL COMMISSION


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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