STATE OF WISCONSIN PERSONNEL COMMISSION

APPELLANT	CASE NUMBER
JULIE BUTLER	**01-0094-PC**
VICKI HARKINS	**01-0095-PC**
VIRGINIA HELLENBRAND	**01-0096-PC**
SUSAN JEWELL	**01-0097-PC**
MARY KILLINGSTAD	**01-0098-PC**
ANGELO KING	**01-0099-PC**
SUZANNE KOPLIN	**01-0100-PC**
INDU RAJPAL	**01-0101-PC**
JUDITH SCHULZ	**01-0102-PC**
MURIEL STEPHENS	**01-0103-PC**
SHARON SENNHENN	**01-0104-PC**

Appellants,

v.

Secretary, DEPARTMENT OF TRANSPORTATION and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

RULING ON RESPONDENTS' MOTIONS TO DISMISS

NATURE OF THE CASE

These consolidated cases are before the Commission following the filing by respondents of a motion to dismiss on July 1, 2002. The parties have filed briefs and supporting documents.

OPINION

These are appeals of certain classification transactions. A conference report dated April 12, 2002, includes the following with regard to the issues related to these appeals:

The parties agreed to the following statement of issue:

1. Whether respondents' decisions to deny appellants' requests to reclassify their positions from Transportation-Customer Representatives 3 to Transportation- Customer Representatives 4 were correct.

The appellants also proposed the following issues:

2. Whether respondents used proper survey methodology when they conducted the classification survey that resulted in abolishing the Motor Vehicle Representative Series and creating the Transportation-Customer Representative Series in 1998.

3. Whether respondents' decisions to deny appellants' requests on October 30, 2001, to reallocate their positions from Transportation-Customer Representative 3 to Transportation-Customer Representative 4 were correct.

4. Whether respondents' decisions, effective June 7, 1998, to reallocate appellants' positions from Motor Vehicle Representative to Transportation Representative 3 (for appellants Butler, Jewell, Killingstad, King, Koplin, Rajpal, Schulz, Stephens, and Sennhan) were correct.

Respondents' first motion is to dismiss the proposed issue regarding survey methodology as outside the Commission's subject matter jurisdiction. Appellants advise they do not oppose this motion, and it will be granted.

Respondents' second and third motions are similar, and will be addressed together. The second motion is to dismiss Susan Jewell's appeal of the 1998 reallocation of her position as untimely. The third motion is to dismiss the appeals of appellants Butler, Killingstad, King, Koplin, Rajpal, Schultz, Stephens and Sennhenn of the 1998 reallocations of their positions as untimely. Appellant Jewell's situation is slightly different from that of the other appellants, but the essential facts relating to the issue of the timeliness of the appeals with regard to the 1998 reallocations are the same.[1] Since the Commission reaches the conclusion that all these

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[1] In her appeal, filed December 20, 2001, appellant Jewell states "I wish to appeal the denied reclassification decision made by the Department of Transportation, Bureau of Human Resources on November 15, 2001." Respondents assert, and it is not disputed, that appellant Jewell was in a position classified as MVR 4 (Motor Vehicle Representative 4), and that it was reallocated to TCR 2 (Transportation Customer Representative 2) effective June 7, 1998. Appellant Jewell was provided notice of this reallocation on July 2, 1998. Subsequently, in November 1998, her position was reclassified to TCR 3 because she had attained the appropriate level of proficiency at IRP processing. For purposes of this

appeals must be dismissed as to the 1998 reallocations as untimely filed, this moots respondents' argument that is peculiar to the Jewell case, and the Commission will address all the appeals as a group.

It is undisputed that appellants' positions were subject to reallocation effective June 7, 1998, that appellants received written notice of these transactions on July 2, 1998, and that their appeals were filed with the Commission on December 20, 2001. Section 230.44(3), Wis. Stats., provides that appeals of this nature 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 in the present situation is July 2, 1998, so the appeals, filed December 20, 2001, appear to be untimely. However, appellants contend that respondents are equitably estopped[2] from raising the issue of untimeliness, due to certain representations made by their then supervisor, Thomas Rubaglia, shortly after they received notice of the reallocation transactions. The parties are not in total agreement as to what Rubaglia told the appellants. In their brief in opposition to the respondents' motion to dismiss, complainants disagree with respondents' characterization of Rubaglia's representations. While it could be argued that this dispute is not suitable to resolution on a summary judgment motion,[3] since the Commission determines that these appeals must be dismissed as untimely as to the 1998 reallocations even under the appellants' version of the facts, it will simply assume those facts and decide the motion on that basis.

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motion, appellant Jewell's appeal is essentially subject to the same arguments regarding timeliness that apply to the other appeals.

[2] Briefly summarized, equitable estoppel is a legal remedy by which a party is prevented from asserting a legal claim or defense due to having taken a position which the other party reasonably relied on in acting or failing to act in some way, where the assertion of that claim or defense would cause the second party's interests to be negatively affected. *See Am Jur 2d Estoppel and Waiver,* s. 28. For example, if a person were injured in an accident and did not file a court action within the three year statute of limitations because the defendant's attorney said the defendant would not raise the statute of limitations defense as long as the parties continued to negotiate, the defendant could be prevented from raising the statute of limitations defense with regard to a case filed after the statute of limitations had run.

[3] In *Balele v. DOT,* 00-0044-PC-ER (10/23/01), the Commission addressed some factors to consider in determining how to handle a motion for summary judgment in this administrative context, which include whether the party opposing the motion is represented by counsel, and whether the disputed issue involves credibility determinations.

In their brief, appellants' characterization of Rubaglia's representations about appealing the reallocation decisions include the following:

> Thom Rubaglia never suggested appealing the survey as a choice. He told us flat out that we had no chance at an appeal and that our only recourse was to wait until we were fully trained in our positions and then apply for a re-class. At the time this was a great detriment to us because we were unclear as to the correct approach we should have taken as far as appealing the survey versus waiting to apply for a re-class at a later date. His lack of knowledge regarding the re-class system caused us to make a decision based on wrong information. If he fully understood the basis for a re-class he never would have suggested it in the first place. We believe this because at the time of the survey the IRP and IFTA units had only been merged a few months and a new PD had already been written and signed before the MCR team was actually doing the jobs as stated in their PD. In order to qualify for a re-class you would have to apply for it before the PD was written and then show the change in duties that evolved through the merging of the two units. . . .
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> . . . When it was announced that the MCR team would be reallocated to the TCR3 level the team made some inquiries of the union to find out their stance. The union was unhelpful, so ultimately the team looked to their supervisor for guidance. The supervisor at that time was Thom Rubaglia. He was the supervisor of the newly formed unit and he was the person that the MCR team looked to and relied on to give the information and guidance we needed to make the right decision. The team was led to believe that he was knowledgeable about our situation and we believed him when he told us not to appeal the survey. His advice was the basis for the decision the MCR team made not to appeal the survey at that time. . . .
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> The only accurate information we were given as far as an appeal was the document that stated the amount of time we had to appeal, the place to send the appeal and what documents to include when we sent it in. The rest of the information we received from our supervisor Thom Rubaglia was inaccurate. He told us we shouldn't appeal because we wouldn't win due to not knowing our jobs fully at that time and he also told us that the best thing to do would be to wait and go for a re-class at a later date. Due to his lack of knowledge in this area we made an important decision based on misinformation given to us by Thom Rubaglia. The only other people that the MCR team met with was the union, and after one meeting it was apparent that they did not have any answers for us as to whether we should appeal or not.

It is clear from the foregoing segment of appellants' brief that they do not contend Rubaglia misled them as to the appeal procedure--e. g., where, , how or when to file appeals.

Rather, they contend he misled them with regard to the substance of the appeals--i. e., whether an appeal of the 1998 reallocations would be successful on the merits, and the related issue of whether a subsequent reclassification request would be the better course of action in terms of the likelihood of success on the merits. Appellants attribute his action to a lack of knowledge about the classification system.

In a recent decision, the Commission addressed the law regarding equitable estoppel as follows:

> Complainant has the burden of proof to demonstrate that the allegations raised in the complaint were timely filed. See, for example, *Wright v. DOT*, 90-0012-PC-ER, 2/25/93; *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98; *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98; and *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98. The level or standard of proof required with regard to the equitable estoppel issue, is that complainant must establish the elements of equitable estoppel by clear and convincing evidence.4 See, e. g., *Yocherer v. Farmers Insurance Exchange*, 2002 WI 41, para. 25, 252 Wis. 2d 114, 643 N. W. 2d 457 (2002) (Defendant bears the burden of proving each element of equitable estoppel by clear and convincing evidence); *St. Paul Ramsey Med. Center v. DHSS*, 186 Wis. 2d 37, 47, 519 N. W. 2d 681 (Ct. App. 1994). The latter case summarizes the test to be applied when a litigant attempts to establish equitable estoppel against a state agency:
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> > The doctrine of equitable estoppel is not to be freely applied against government agencies. "Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position." The elements of estoppel are (1) action or inaction by the person against whom estoppel is asserted (2) upon which the person asserting estoppel reasonably relies (3) to that person's detriment.5 The party asserting estoppel has the burden of proving each element by clear and convincing evidence. Id. (citations omitted)

See also *Stacy v. DOC*, 99-0024-PC, 8/25/99:

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4 This is the intermediate level of proof in legal proceedings, in between preponderance of the evidence and beyond a reasonable doubt.

5 A related aspect of the equitable estoppel doctrine is that the party trying to establish equitable estoppel must show that his or her reliance on the conduct of the other party actually caused the first party to fail to file within the statutory time period, which is the "detriment" caused by the reliance. See *Bell v. Employers Mutual Casualty Co.*, 198 Wis. 2d 347, 373-74, 541 N. W. 2d 824 (Ct. App. 1995)

> [U]nder 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:
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> 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 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:
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> [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)

See also *DOR v. Family Hospital*, 105 Wis. 2d 250, 255, 313 N. W. 2d 828 (1982) ("It is elementary, however, that the reliance on the words or conduct of the other must be reasonable and justifiable." [citations omitted])

Thus, complainant must establish by clear and convincing evidence the elements of equitable estoppel, including establishing that his reliance on Ms. Sauer's statement was reasonable and justifiable, and the Commission must conclude that it would work a serious injustice if the respondent were allowed to raise the affirmative defense of untimeliness, and the public interest would not be unduly harmed if the equitable estoppel doctrine were applied in this case.

Adams v. DNR, 01-0088-PC-ER, 12/20/02, pp. 9-11.

It also should be noted that the decision whether to apply equitable estoppel involves an exercise of discretion, *see Moulette v. City of Rice Lake,* 2002 WI app 221, para. 16, __Wis. 2d __, 650 N. W. 2d 560; *Gonzalez v. Teskey,* 160 Wis. 2d 1, 13, 465 N. W. 2d 525 (Ct. App. 1990); 28 *Am Jur 2d Estoppel and Waiver* s. 27 ("[E]ach case of estoppel must in the nature of things stand on its own bottom--that is, the facts and circumstances of the particular case. It is thus a flexible doctrine." [citations omitted])

As mentioned above, in this case (assuming the facts appellants allege), they do not contend Rubaglia misled them as to the appeal procedure. Rather, they contend he misled them with regard to the substance of the appeals--i. e., whether an appeal of the 1998 reallocations would be successful on the merits, and the related issue of whether a subsequent reclassification would be the better course of action in terms of the likelihood of success on the merits. It is undisputed in this case that appellants knew they had 30 days after they received the reallocation notices to file appeals of the reallocations. What they were unsure about was the question of whether, if they did file appeals, they would be likely to prevail on their appeals and obtain the desired results. They allege they relied on Rubaglia's advice in deciding to forego filing appeals in 1998. This raises the question of whether Rubaglia's actions (again, assuming the facts as alleged by appellants) "amount to fraud or manifest abuse of discretion," *Surety Savings & Loan Assoc. v. State*, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972), with the caveat that in this context, "the word fraud . . . is used to mean inequitable." *State v. City of Green Bay*, 96 Wis. 2d 195, 203, 291 N.W.2d 508 (1980)

In, *Milas v. Labor Assn. Of Wis.,* 214 Wis. 2d 1, 14-15, 571 N. W. 2d 656 (1997), a recent decision of the Supreme Court addressing the issue of equitable estoppel, the Court noted "'the force of the proposition that estoppel should be applied against the Government with *utmost caution and restraint,* for it is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals.'" 214 Wis. 2d at 14 (citations omitted) (emphasis added) The Court went on to hold that:

> [E]stoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public interest would not be unduly harmed by the application of estoppel In each case the court must balance the public interests at stake if estoppel is applied against the injustice that might be caused if it is not. (citations omitted)

The meaning of such terms--e. g.., "serious injustice"--has been the subject of various interpretations. In *Milas,* the Court cited some cases on the subject and noted "these cases use the words 'serious injustice,' 'injustice,' 'unconscionable,' 'inequitable' and 'unfair' interchangeably." 214 Wis. 2d at 15, n. 17. However, the Court did use the term "serious injustice" in its holding, and emphasized that equitable estoppel should be applied against the state with the "utmost caution and restraint." 254 Wis. 2d at 16 Therefore, the Commission will apply those concepts here.

The parties disagree as to whether Rubaglia's advice was inaccurate. It is questionable whether the Commission could answer that question without having a hearing on the merits of the classification issues raised by these appeals, but at this point the Commission will assume, for the purpose of deciding these motions, that Rubaglia's advice was inaccurate, as appellants maintain. Appellants attribute this inaccuracy to Rubaglia's lack of knowledge of the classification system, and the Commission will also make this assumption.

There are several factors to consider when deciding whether there will be a serious injustice if the government agency (here DOT) is not estopped from maintaining a position that works to the detriment of the individual involved. One factor is the extent that the actual misrepresentation by the state's agent constitutes inequitable conduct. *See Gonzalez v. Teskey,* 160 Wis. 2d 1, 465 N. W. 2d 525 (Ct. App. 1990):

> Among the factors for consideration in an estoppel case is whether the party against whom estoppel is asserted has engaged in fraudulent or inequitable conduct. A party is estopped from asserting a defense when the conduct is so unfair and misleading as to outweigh the public's interest in setting a limitation on bringing actions. (footnotes and citations omitted)

See also Monahan v. Department of Taxation, 22 Wis. 2d 164, 169, 125 N. W. 2d 331 (1963):

> There is no estoppel if the party seeking to invoke it was aware of facts which made it its duty to inquire into the matter. There may be situations where the party, against whom an estoppel . . . is asserted, has been guilty of an intentional wrongful act which has misled the injured party. In such a situation it might well be inequitable to permit the wrongdoer to escape the doctrine of estoppel . . . on the ground that the injured party did not exercise diligence to discover the true facts. However, this is not the situation here because there is nothing in the record before us even to suggest that the chairman of the board, in executing the admission of service, acted from an improper motive.

In the cases before the Commission, the appellants do not assert, and there is no indication, that Rubaglia deliberately tried to deceive them by his expression of opinion regarding the merits of appeals of the reallocations, and this weighs against a conclusion that a serious injustice would result if appellants were unable to pursue the appeals of the reallocations because of the untimeliness of their appeals.

Another factor to consider besides the fact that Rubaglia did not have any improper intent, is the substantive nature of the agent's alleged misrepresentation. In these cases, Rubaglia did not give the appellants any advice about the time frame or other mechanics of filing an appeal--he expressed an opinion as to the likelihood of success of any appeals. Appellants admit they were well aware that they had 30 days to file appeals of the reallocations. They relied on Rubaglia's opinion about the possibility of success to make a decision that it would not be in their best interests to appeal at that time. Based on the Commission's collective experience, it certainly is not unusual for a state employee, whether a member of line management like Rubaglia, or a personnel specialist, to express opinions to employees about the merits of personnel transactions. It is up to an employee faced with this decision to decide whether it would be in his or her best interests to rely on that opinion and forego a possible appeal, grievance or complaint. The Commission is reluctant to conclude that this kind of situation gives rise to a serious injustice and the application of equitable estoppel against the agency to prevent it from raising a defense of untimeliness under s. 230.44(3), Stats., whenever it turns out after the fact that the agent's advice on which the employee relied was mistaken. This would turn what the Commission considers to be a common practice, and one that is usually by no means insidious, into a possible bar to prevent the state from invoking basic

law as to the statute of limitations when the agent is merely explaining to the employee his opinion that the agency decision could not be successfully challenged. *See Brandt v. Hickel,* 427 F. 2d 53, 56-57 (9th Cir. 1970), where certain lease applicants had a gas and oil lease application rejected, but elected to forego an appeal of that decision because the agency's decision on their application stated that they could submit an amended application without losing their priority on the list of applicants. Unfortunately, that advice was incorrect and had no basis in law or administrative enactment. The result was that the applicants lost their original priority after they submitted an amended application, and that prevented them from securing a lease. The court held that the agency was estopped from disavowing the misstatement:

> Not every form of official misinformation will be considered sufficient to estop the government. Yet some forms of government advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement . . . We conclude that the . . . doctrine can properly be applied in this situation where the erroneous advice was in the form of a crucial misstatement in an official decision. (citations omitted)

In that case, there was a complete misstatement of the law contained in an official agency decision on which the applicants relied, thus losing a valuable right. Such erroneous advice is clearly within the realm of advice that is "closely connected to the basic fairness of the administrative decision making process." *Id.* That situation is considerably different from these cases, where the advice Rubaglia rendered was merely his opinion on the merits of possible appeals.

This case is somewhat similar to *Blomquist v. DATCP,* 94-1032-PC, 5/26/95. In that case the appellant filed an appeal approximately two and one-half years after he had received a notice of layoff. He asserted that the employer should be equitably estopped from raising a statute of limitations defense. This was based on conversations the employee had with management shortly after having received his notice of layoff where he asked "if there was anything that could be done, and what our rights were" and was told "it was unlikely that anything could be done" and "nothing could be done." *Blomquist* at pp. 1-2. The appellant contended that he interpreted these statements to mean he had exhausted his appeal rights as a result of these conversations with management, and in any event it would have been "fruitless"

to file an appeal in the face of this advice. In denying the application of equitable estoppel, the commission noted that "[t]his is not a situation where the appellant is alleging that he was specifically told that he did not have any appeal rights." *Id.*, p. 3. The Commission rejected the application of equitable estoppel: "there is no indication that the respondent's conduct caused a 'serious injustice' to the appellant. In contrast, the public's interest would be harmed to the extent [respondent] would be required to defend a layoff decision made nearly two and one-half years after the statutory period for obtaining review of that decision had ended." *Id.*, p. 4.

ORDER

Respondents' motions to dismiss filed July 1, 2002, are granted. So much of these appeals which attempt to raise the issue of whether respondents used proper survey methodology when they conducted the classification survey that resulted in abolishing the Motor Vehicle Representative Series and creating the Transportation-Customer Representative Series in 1998 is dismissed for lack of subject matter jurisdiction. So much of these appeals which attempt to raise the issue of whether respondents' decisions, effective June 7, 1998, to reallocate appellants' positions from Motor Vehicle Representative to Transportation Representative 3 (for appellants Butler, Jewell, Killingstad, King, Koplin, Rajpal, Schulz, Stephens, and Sennhan) were correct, is dismissed for untimely filing.

Dated: JAN. 9, 2003. STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

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KELLI THOMPSON, Commissioner