

2. The appellants have been at all relevant times permanent employes in the classified service in the Department of Health and Social Services.
3. The appellants filed unilateral (non-contractual) grievances protesting the cut-off point established for the payment of overtime.
4. These grievances were denied at all three levels (in some cases the first two levels were waived by mutual agreement).
5. The appeal with the Personnel Board was filed January 16, 1978.
6. The Department of Health and Social Services' unilateral (non-contractual) grievance procedure provides in part as follows:

"Department employes are afforded an opportunity to appeal any alleged unfair treatment or dissatisfaction with aspects of his working conditions within the department which are outside his control, or any alleged misapplication or misinterpretation of any provision of the civil service law, personnel board or department rule, or provisions of a labor contract.

Employes who are in a collective bargaining unit who allege a violation of a provision of their collective bargaining contract must use the procedure provided for in the contract. The procedure outlined herein is to be used in all other situations, except that if the grievance involves a reduction in pay or position suspension without pay, discharge or any action of the director of personnel, the appeal may be made directly to the personnel board or under this procedure."
(emphasis supplied)

7. The appellants failed to file an appeal with the Personnel Board within 15 days of the effective date of the decision contained in the July 11, 1978, memorandum on overtime pay, or within 15 days after they were notified of such decision.

CONCLUSIONS OF LAW

1. The respondent, having provided explicitly in its departmental grievance procedure that decisions of the director may be made directly to the Personnel Board or under the grievance procedure, is equitably estopped from arguing that the appeal with the Board was not timely filed where the appellants exhausted the grievance procedure and then filed an appeal with the Board.
2. Alternatively, the appellants' filing of their grievance tolled the running of the 15 day time limit set forth in Section 16.05(2), Wis. Stats.
3. This appeal was timely filed.
4. The respondent is not a proper party.
5. The administrator of the Division of Personnel should be added as a necessary party.

OPINION

The appellants did not file a direct appeal of the decision of the director contained in the July 11, 1977, memo. Rather, they filed through the departmental unilateral grievance procedure and followed up with an appeal to the Personnel Board at the fourth step on January 16, 1978.

In the opinion of the commission the respondent is estopped or prevented on an equitable basis from raising an objection on the grounds of untimeliness. Equitable estoppel against a state agency requires three elements:

- (1) Agency action constituting fraud or a manifest abuse of discretion;
- (2) Good faith and honest reliance by appellants on this agency action;

(3) Irreparable injury to the appellants as a result of this reliance.

See Pulliam & Rose v. Wettengel, Wis. Pers. Bd. No. 75-51 (11/25/75); Jefferson v. Eiffler, 16 Wis. 2d 123, 132-133 (1962); Surety Savings and Loan Assn. v. State of Wisconsin, 54 Wis. 2d 438, 445 (1972).

In the opinion of the commission, under the facts and circumstances of this case in its current posture, all three elements are present. While the appellants, who are unrepresented by counsel, did not argue that they relied on the language quoted in finding #6 when filing their grievance, the commission will infer reliance under these circumstances where a grievance is filed in compliance with a clear agency directive.

Alternatively, the filing of the grievance in accordance with a clear agency directive tolled the running of the 15 day time limit contained in Section 16.05(2), Stats.

The decision in question having been made by the director (now administrator) of the Division of Personnel, the administrator shall be substituted for the named respondent.

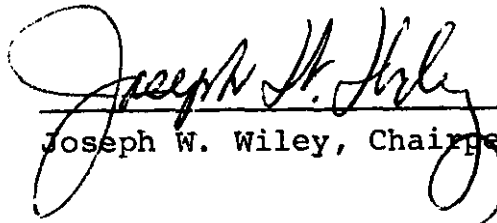
ORDER

The respondent's objection to subject matter jurisdiction on the ground that the appeal was untimely filed is overruled. The respondent secretary, Department of Health and Social

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Services, is dismissed as a party and the administrator,
Division of Personnel, is substituted as the party respondent.

Dated August 28, 1978



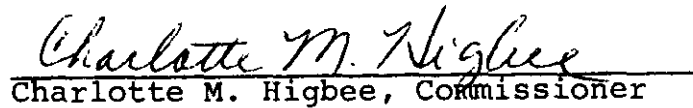
Joseph W. Wiley, Chairperson

Dated August 29, 1978



Edward D. Durkin, Commissioner

Dated August 28, 1978



Charlotte M. Higbee, Commissioner