

\* \* \* \* \*

PETER W. SCHULER, \*

Appellant, \*

v. \*

Secretary, DEPT. OF HEALTH AND \*  
 SOCIAL SERVICES & Administrator, \*  
 DIVISION OF PERSONNEL, \*

Respondents. \*

Case No. 81-12-PC \*

\* \* \* \* \*

INTERIM  
 DECISION AND  
 ORDER

**OFFICIAL**

This is an appeal pursuant to § 230.44(1)(b), Stats., of an examination delegated by the administrator to DHSS. The department filed on February 2, 1981, a motion to dismiss on the ground that the appeal was not timely filed in accordance with § 230.44(3), Stats. The parties have filed written arguments on this motion.

Mr. Schuler's letter dated February 19, 1981, makes many factual allegations regarding what he was told and not told about the appeal process by various employes of the respondents, and argues, in essence, that he had difficulty ascertaining the correct appeal route and that this prevented him from filing the appeal in a timely manner.

In a letter dated March 16, 1981, DHSS requests an evidentiary hearing on the motion to dismiss for the following reason:

"The reason for this request is that the facts as stated in Mr. Schuler's letter dated February 19, 1981, are inconsistent with the facts given us in the process of our investigation, especially as it relates to Glen Blahnik's involvement."

Much of the matter in Mr. Schuler's February 19th letter has to do with what may be characterized as an argument that the respondents should be equitably estopped or prevented from arguing that the appeal was untimely

filed. The basis for this argument is the allegation that the respondents, through their employes, provided him misleading information regarding the appeal process.

In the opinion of the Commission, the motion to dismiss can be decided on a much simpler basis. It is undisputed that the Commission received this appeal on January 12, 1981. It also appears undisputed that the examination in question was administered on December 9, 1980. In his February 19th letter, Mr. Schuler states that he received his score from the examination on December 19, 1980.

Sec. 230.44(3), Stats., provides in part:

"Any appeal filed under this section may not be heard unless the the appeal is 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.."(emphasis added)

While the examinee may have concerns about the contents or conduct of an examination at the time it is taken, there is no notice of the administrator's action with respect to the examination process until the examinee receives the score that the administrator, through his agent, has determined.

In this case, Mr. Schuler may have proceeded to attempt to air his concerns after having taken the exam and before having received his exam scores. However, this did not alter the fact that time for filing his appeal with this commission pursuant to §230.44(3), Stats., did not start to run until he received notice of his exam score.

The respondents have not indicated specific disagreement with the appellant's assertion when he received his exam score. Furthermore, the parties have agreed that in the event that the Commission denies this motion to dismiss, this case can be consolidated for hearing with Zanck v. DHSS and DP, 80-380-PC, another appeal arising out of this examination, on April 30-

Peter W. Schuler v. DHSS & DP  
Case No. 81-12-PC  
Page 3

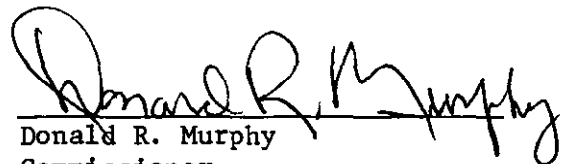
May 1, 1981. Therefore, the Commission will deny this motion to dismiss with leave to renew it on the basis of evidence that may be developed at the aforesaid hearing (presumably regarding the date on which Mr. Schuler received his exam score).

ORDER

The respondents' motion to dismiss on the ground that this appeal was not timely filed, filed on February 2, 1981, is denied, with leave to renew it on the basis of additional evidence which may be developed.

Dated: April 2, 1981.

STATE PERSONNEL COMMISSION

  
Donald R. Murphy  
Commissioner

  
Gordon H. Brehm  
Commissioner

AJT:lkr

PARTIES

Peter W. Schuler  
DHSS, 7th Floor  
819 N. Sixth St.  
Milwaukee, WI 53203

Donald Percy  
DHSS, Rm. 663  
1 W. Wilson St.  
Madison, WI 53702

Charles Grapentine  
Division of Personnel  
149 E. Wilson Street  
Madison, WI 53702