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 JOAN KRIEDEMANN,  
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 Appellant,  
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 v.  
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 President, UNIVERSITY OF  
 WISCONSIN SYSTEM (Eau Claire)  
 and Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
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 Respondent.  
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 Case No. 85-0048-PC  
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INTERIM  
 DECISION  
 AND  
 ORDER

The appellant seeks to appeal a reclassification decision. At the prehearing conference, the respondent raised an objection based on timeliness:

Respondent objects to jurisdiction on the ground that the appellant received notice of the transaction on February 15, 1985, the effective date was in 1984, and §230.44(3), Wis. Statutes, requires that appeals be filed within 30 days of the effective date or notice date, whichever is later.

Both parties submitted briefs. In an interim decision and order dated June 18, 1985, the Commission deferred ruling until additional evidence was received. A hearing on the motion was held on August 7, 1985.

FINDINGS OF FACT

1. The appellant is employed in the Personnel Office of the University of Wisconsin-Eau Claire. Her supervisor is Jerry Witthoft.
2. In 1984, the appellant sought reclassification of her position from the Program Assistant 4-Confidential (PR 1-09) classification.
3. On January 23, 1985, Mr. Witthoft sent a memo to James Cimino, UW System Personnel Specialist, stating in part:

It is my understanding that you will soon complete the reclassification of [the appellant] from a Program Assistant 4-Confidential to the Management Information Technician series. Since that series is not excluded from a collective bargaining unit, I would like to request that every effort be made to add confidential status to the MIT series.

4. In a letter dated January 30, 1985, Mr. Cimino submitted Mr. Witthoft's request to Ms. Barbara Horton, Administrator of the Division of Classification and Compensation, Department of Employment Relations.

5. In a letter dated February 15, 1985, the appellant was notified that her position was reclassified from Program Assistant 4-Confidential to Management Information Technician 3 (PR 6-10) with an effective date of June 10, 1984. At the same time, the appellant also received written notification of her right to appeal the reclassification decision to the Personnel Commission. The notification read as follows:

Whenever a position classification decision is made by the Administrator of the State Division of Personnel or his/her designated representative, the employe and/or the appointing authority shall have the right to appeal. It should be noted that position classification actions are based upon the duties and responsibilities of the position. If you wish to appeal this action, you must submit a written request to the State Personnel Commission. The appeal should state the facts which form the basis of the appeal, the reason or reasons you feel the action is improper, and the relief sought. This appeal must be received by the State Personnel Commission within 30 days after you are notified of the action, whichever is later. If you have any questions on the procedural aspects of filing an appeal, please contact your Agency Personnel Officer and the State Personnel Commission.

6. On February 19, 1985, DER verbally requested that the reclassification on the appellant's position not be processed until February 28, 1985, so that they could have time to respond to the request to create a Management Information Technician (MIT)-Confidential series.

7. Mr. Cimino responded to DER's request by issuing a memo dated February 20, 1985, directed to Ms. Horton:

Yesterday I discussed with Bob Belongia and Kris Randal the review Bob was performing regarding the merits of Eau Claire's request to create a confidential MIT series. As requested, we have withheld the processing of this reclass (PA 4-Conf to MIT 3) pending DER's decision. In light of this hold, I asked the payroll supervisor at Eau Claire for the last possible date which would allow the processing of this reclass on the 6A payroll (March 14th paycheck). I was informed that Eau Claire needs to know DER's decision, at least verbally, on Thursday, February 28.

The appellant was provided a copy of this memo during the last week in February, 1985.

8. Respondent DER subsequently declined to create an MIT-Confidential series. DER informed Mr. Cimino of this conclusion on February 26, 1985. On the same date, Mr. Cimino advised Mr. Witthoft by phone that the decision had been reached not to create the confidential series and that Mr. Witthoft could proceed in processing the reclassification from PA 4-Confidential to MIT 3.

9. Later on February 26, 1985, Mr. Witthoft verbally advised appellant and the UW-Eau Claire Payroll Office of Mr. Cimino's information.

10. The UW-Eau Claire Payroll Office completed necessary payroll changes on February 28, 1985. These changes were reflected on Appellant's March 14th paycheck.

11. Appellant was never notified in writing that the respondents had lifted the hold on the preliminary decision to process her reclassification, thereby making final the decision to reclassify her position to the MIT-3 level.

12. On March 27, 1985, expecting that the 30 day time limit for filing her appeal was running out and basing her computations on the February 28th date when the payroll processing had been completed, appellant drafted a letter of appeal directed to the Administrator, Division of Classification and Compensation, Department of Employment Relations.

13. Appellant's letter of appeal was forwarded by the Division of Classification and Compensation to the Personnel Commission which received it on April 9, 1985.

#### CONCLUSION OF LAW

This appeal was timely filed with the Commission because the appellant was not provided the requisite written notice of the final reclassification decision.

#### OPINION

Pursuant to s.230.44(3), Stats., there is a 30 day time limit for filing appeals to the Commission:

Any appeal filed under this section may not be heard unless 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...

The 30 day time limit has been interpreted by the Commission to be jurisdictional in nature, and mandatory rather than directory. Richter v. DP, 78-0261-PC (1/30/79). Because the effective date of this transaction was in June of 1984, the focus is on the date of notification.

In its June 18th Interim Decision and Order, the Commission held:

The respondents' decision embodied in the February 15th letter, if viewed in a vacuum, would clearly constitute a final decision appealable to the Commission under s.230.44(1)(b), Stats. The appellant received two written notifications of the decision, one of which provided instruction for filing an appeal.

However, just a few days after that decision was made, the respondents directed that the processing of the reclassification be halted in order to obtain a decision from DER regarding the creation of a MIT-Confidential series. The appellant was made aware of the respondents' action in this regard. The only implication possible from the delay in processing is that if DER had decided to create a new MIT-Confidential series, the decision to reclassify appellant to the MIT-3 level would not have gone into effect. So even though respondents at one time had issued what would have been a final decision, they withdrew it (thereby causing it to be a preliminary

rather than a final decision), pending a determination of a related matter. Once a decision was rendered on the related matter, the respondents reconfirmed the initial reclassification decision. The 30 days for filing the appeal therefore began when the appellant was notified of the decision reaffirming, or finalizing, the preliminary decision.

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It is unclear from the documents in the file when the appellant was notified that respondents had lifted the hold on the preliminary decision to process her reclassification, thereby making the decision final. Respondents argue it was on or about February 28th. Appellant contends it was April 1, 1985. In order to determine this question, the Commission will schedule an evidentiary hearing on respondents' motion to dismiss.

At the hearing in this matter, the appellant modified her contention as to the date of notification. In a brief relied upon by the Commission in reaching its Interim Decision, appellant stated that she was notified on April 1. At the commencement of the hearing on the motion, appellant acknowledged that the date should have been March 4, 1985, which she subsequently alleged was the date of a conversation she had with Mr. Cimino in which he informed her that DER had declined to create the MIT-Confidential series. Later in the hearing, appellant contended that the correct date was February 28, 1985 which was the date that the payroll changes were made that effectuated the appellant's reclassification to the MIT-3 level. However, the appellant also testified that she was never told that she would not receive a written final decision. Her experience based on her employment in state civil service was that personnel decisions were always put into writing.

The personnel rules require written notification of reclassification:

ER-Pers 3.04 Notice of 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.

Here, the appellant had received an initial written notification on February

15th. The appellant was then notified, in writing, that the payroll processing would be held up until DER could review the related question of creating a MIT-Confidential series. The appellant was verbally notified on February 26th that the series would not be created and the payroll processing of appellant's reclassification could proceed. Under circumstances of this case, the appellant was entitled to written notice under s.ER-Pers 3.04, Wis. Adm. Code, of the decision to finally approve and effectuate the reclassification of her position from PA-4-Confidential to MIT-3. That final decision was not made until Mr. Cimino became aware of DER's conclusions and then directed that the UW-Eau Claire payroll unit proceed with the processing of appellant's reclassification to the MIT-3 level. Prior to that time, the decision was not final and, therefore, any written notification to the appellant before February 26, 1985 did not comply with §ER-Pers 3.04, Wis. Adm. Code.

Because the appellant was never provided with written notification of the final decision, her appeal must be considered to have been timely filed.

Respondent contends that even if the MIT-Confidential series had been created by DER, it would not have been applied retroactively: the appellant's position still would have been reclassified to MIT-3 effective June 10, 1984 and then would have been reallocated to the appropriate confidential classification as of the effective date of the new series. Assuming respondent's contention to be correct, there would have been no reason to hold up the processing of appellant's reclass to MIT-3 until the issue of the new series could be explored. Based upon respondent's decision to hold up the appellant's reclassification (a decision that was put in a memo that made its way to the appellant) the appellant would reasonably assume that the decision on creating the MIT-Confidential series would be

determinative as to her own reclassification. The record in this matter would clearly support the conclusion that the appellant did expect to obtain a final decision on her reclassification once DER reached a conclusion as to the MIT-Confidential series. The elements of equitable estoppel are present in this case to prevent the respondents from advancing a contention that the hold placed on appellant's reclassification could have had no effect on the decision to reclassify her position to the MIT-3 level effective June 10, 1984. These elements are described in Goeltzer v. DVA, 82-11-PC (5/12/82):

The only circumstances under which [dismissal for filing outside the 30 day limit] can be avoided are those which give [rise] to an equitable estoppel. Equitable estoppel has been defined as "the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct." Porter v. DOT, 78-154-PC (5/14/79). In order to establish estoppel against a state agency, "the acts of the state agency must be proved by clear and distinct evidence and must amount to a fraud or a manifest abuse of discretion. Surety Savings & Loan Assn. v. State of Wisconsin (Division of Highways), 54 Wis. 2d 438, 195 N.W. 2d 464 (1972).

Respondent UW's witness, Mr. Cimino, testified that while he had received numerous requests to change, abolish, or create class series, he has never notified affected UW employees in advance that the UW had asked DER to conduct a survey related to a certain classification nor has he notified those employees of a decision by DER not to conduct such a survey. Mr. Cimino's testimony fails to take into account that the procedure followed in this case indicated that the appellant's pending reclassification request could only be determined once the decision on creating a new MIT-Confidential series had been made by DER. The final reclassification decision, whether or not it referred to DER's decision on the confidential series, had to be provided to the appellant in writing.

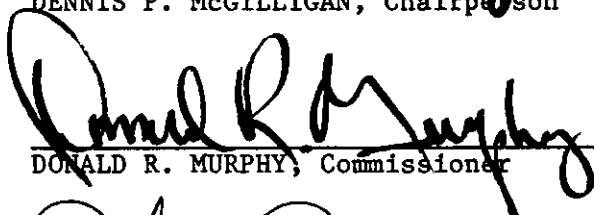
ORDER

Respondents' motion to dismiss is denied. A prehearing conference will be scheduled.

Dated: October 23, 1985

STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner

KMS:vic  
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