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KENNETH A. KELLING, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF HEALTH \*

AND SOCIAL SERVICES, (DOC) \*

Respondent. \*

Case No. 87-0047-PC \*

\* \* \* \* \*

RULING DENYING  
MOTION TO DISMISS

NATURE OF THE CASE

This is an appeal of a decision with respect to appellant's starting salary. This matter has been held in abeyance pending litigation of a case raising a similar issue, Siebers v. DHSS, 87-0028-PC. Following the final resolution of that matter in circuit court, a prehearing was convened on March 13, 1990, at which time respondent raised an objection to subject matter jurisdiction on the ground of untimeliness, and subsequently filed a motion to dismiss. Both parties filed briefs. The underlying facts material to timeliness do not appear to be in dispute and are set forth hereafter. These findings are made for the sole purpose of resolving the instant motion.

FINDINGS OF FACT

1. By a letter to appellant dated February 6, 1987, the Superintendent of Taycheedah Correctional Institution (TCI), confirmed appellant's appointment to a Stock Clerk 2 position effective February 9, 1987, with a starting salary of \$7.481 per hour.
2. Appellant began working at TCI on February 9, 1987.
3. On or about February 11 or 12, 1987, appellant was informed verbally that his pay would be \$6.694.
4. Appellant received his first pay check at TCI on February 26, 1987. This check reflected an hourly wage of \$6.694.

5. In a letter to the TCI business administrator dated March 8, 1987, appellant stated as follows:

Would you please clarify in writing why I did not receive \$7.481 per hour as stated in my appointment letter. . . I did receive \$6.694 per hour on my first check. . . .

The difference of \$.787 may have initially been a factor on whether or not I would have accepted the position of Stock Clerk 2. Would you please send your reply within 10 days.

6. By letter dated March 24, 1987, the business administrator replied that the salary change was due to the implementation of the revision of the pay plan that had been taken to implement comparable worth. Since the revised pay plan lowered the Stock Clerk 2 starting salary from \$7.481 to \$6.694, and went into effect February 1, 1987, the respondent established his starting salary at \$6.694.

7. Appellant filed this appeal with this Commission on April 1, 1987.

#### DISCUSSION

Section 230.44(3), stats., provides:

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. . . .

It is clear that the effective date of the action in this case was no later than February 26, 1987, when appellant received his first paycheck. This is untimely with respect to the April 1, 1987, appeal date.

The parties disagree as to the date of notice. Respondent contends the date of notice was on February 11, 1987, when appellant was informed verbally what his pay rate was, and in any event no later than February 26, 1987, when he received his first paycheck which reflected his actual pay rate. Appellant contends the date of notice was when he received the March 24, 1978, letter from the institution business administrator which contained the reason for the change in pay rate that had been set forth in his appointment letter.

In the Commission's opinion, appellant did not have notice of the action for purposes of §230.44(3), stats., until he received the March 24, 1987, letter from the business administrator setting forth the basis for the salary rate change. The earlier notices simply informed appellant that his salary rate

would be different than he had been advised initially by respondent. On the bases of those notices, appellant had no way of knowing whether that change was attributable to a clerical error or to some other reason that would not need to, or could not be appealed to, this Commission.

Respondent cites Bachman v. UW, 85-0111-PC (11/7/85). In that case, appellant was informed that he had not been selected for a position. He then sought an explanation for his nonselection and finally appealed, but more than 30 days after having been notified of his nonselection. The Commission held the appeal was untimely. The facts of the instant case are distinguishable from Bachman because there appellant knew or should have known there was an appealable transaction as soon as he became aware of his nonselection. Here, appellant had no idea whether the reduction in his pay was due to an appealable transaction until after he had received the explanation from the business manager. If, for example, appellant had received a notice of reallocation and downward regrade with his February 26th paycheck and then had sought an explanation and finally appealed more than 30 days after February 26th, presumably the appeal would be untimely, just as in Bachman. However, appellant can not be charged with notice of a transaction for appeal purposes when all he received was notice of the "bottom-line" effect of the transaction -- i.e., his rate of pay had been changed from \$7.481 to \$6.694. To return to the foregoing hypothetical, if appellant had received notice of a reduction in pay rate in connection with an adverse classification action, but employer inadvertently did not include the notice of the classification action with the paycheck, it would not follow that the employe then had notice of the employer's action and the time for appeal would then begin to run.<sup>1</sup> Under respondent's approach to timeliness, anytime an employe receives a paycheck in an amount less than he or she anticipated, the employe has an obligation to file an appeal with this Commission within 30 days, regardless of the fact that the paycheck is unaccompanied by any indication of the reason for the difference, and the employe does not know whether the discrepancy is due to a clerical error, an appealable transaction, or an unappealable transaction.


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<sup>1</sup> In this hypothetical, the reduction in pay might give rise to a duty to make inquiry to determine what happened. This of course is what appellant did in the instant case.

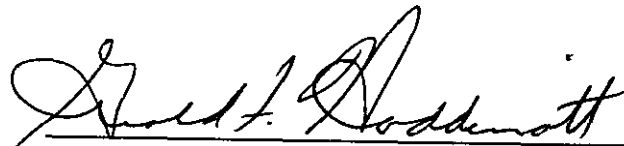
ORDER

Respondent's motion to dismiss on the ground that this appeal was untimely filed is denied.

Dated: May 30, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:gdt/2

  
GERALD F. HODDINOTT, Commissioner