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 ARTHUR J. DESROSIERS, \*  
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                   Appellant, \*  
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 v. \*  
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 Administrator, DIVISION OF \*  
 MERIT RECRUITMENT & SELECTION, \*  
                   Respondent. \*  
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 Case No. 87-0078-PC \*  
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DECISION AND  
 ORDER ON  
 MOTION FOR  
 RECONSIDERATION

This matter is before the Commission on respondent's Motion for Reconsideration of the Commission's August 7, 1987, Decision and Order. That decision and order overruled respondent's objection on timeliness grounds to the Commission's jurisdiction over this appeal. The Commission determined that respondent was equitably estopped from relying on a timeliness defense.

In its motion for reconsideration, respondent points out that the time limit set forth in §230.44(3), Stats., "[a]ny appeal filed under this section may not be heard unless the appeal is filed within 30 days..." is jurisdictional in nature, and contends the Commission lacks the authority to rely on the principle of equitable estoppel in such cases. Respondent also states that it is unaware of any authority for the proposition that a state agency can acquire jurisdiction over a proceeding by virtue of equitable estoppel.

The Commission discussed the legal issues involved here in Ferguson v. DOJ/DP, 80-245-PC (7/22/81), as follows:

There is no rule which generally prohibits the application of equitable estoppel principles to defenses based on the statute of limitations. Although the time limit in §230.44(3) is of the

nature of a statute of limitations, it has been characterized as jurisdictional in nature because the subsection states that an appeal "may not be heard" if not filed within the time prescribed.

In Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 71 S. Ct. 760 (1959), the United States Supreme Court dealt with a somewhat similar question involving the Federal Employees Liability Act, 45 U.S.C. 51-60. This Act provides in part that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." The plaintiff had not filed within the prescribed period but argued that the defendant was estopped from raising the defense because it had represented to him that he had seven years in which to sue. The defendant contended that "while stoppel often prevents defendants from relying on statutes of limitation, it can have no effect in FELA cases for there the time limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period." 359 U.S. at 232, 79 S. Ct. at 761. The court rejected this argument:

"To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitation.

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We have been shown nothing in the language of history of the Federal Employers' Liability Act to indicate that this principle of law, older than the country itself, was not not apply in suits arising under that statute." 359 U.S. at 232-234, 79 S. Ct. at 762-763.

See also, Scarborough v. Atlantic Coast Line R. Co., 178 F. 2d 253, 259 (U.S. Ct. of Appeals, 4th Cir. 1949), also involving an action brought under FELA: "The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitation."

The Glus case is of particular interest in that it implicitly overrules Wisconsin case law refusing to allow the application of estoppel to prevent the defendant from pleading the statute of limitations under the FELA. See Gauthier v. Atchison, T. & S.F. R. Co., 176 Wis. 245 (1922).

The Wisconsin Supreme Court in Ryan v. Department of Revenue, 68 Wis. 2d 467, 228 N.W. 2d 357 (1975), addressed the issue

of whether DOR should be estopped from arguing that petition for judicial review was untimely filed pursuant to §227.16(2), Wis. Stats. Despite the fact, as pointed out in the decision, that the Court had "...consistently demanded strict compliance with the requirements of §227.16, Stats., for judicial review...", 68 Wis. 2d at 472, the Court did consider the merits of the estoppel issue and held that "appellants have failed to make an adequate showing of facts sufficient to create an estoppel" because of failure to act with due diligence and because of a lack of a justifiable reliance on the representations made by the Tax Appeals Commission.

The Commission cannot conclude that the legislature intended by the language of §230.44(3), Stats., to abrogate the long-standing rule of law underlying or cited in the foregoing cases that no one may take advantage of his or her own wrong.

The Commission also observed in Ferguson that Wisconsin Environmental Decade v. PSC, 84 Wis. 2d 504, 515, 267 N.W. 2d 609 (1978), cited by respondent, "did not involve agency misconduct of this nature."

Although there is no express statutory provision authorizing the Commission to apply the principle of equitable estoppel in cases involving timeliness issues under §230.44(3), Stats., the Wisconsin Supreme Court has recognized "...that an administrative agency's powers include not only those that are expressly conferred by the statute under which the agency operates, but also those that are fairly implied." Watkins v. LIRC, 117 Wis. 2d 753, 761, 345 N.W. 2d 482 (1984).<sup>1</sup> In construing and applying §230.44(3), Stats., as well as other statutes governing its operations, the Commission has to exercise a range of implicit authority.

The Commission is unaware of any Wisconsin case law, which holds specifically that an administrative agency either does or does not have the

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<sup>1</sup> In that case the Court held that DILHR had implied authority to award attorney's fees under §111.36(3)(b), Stats. (1975).

authority to apply the principle of equitable estoppel in deciding timeliness issues.<sup>2</sup> However, there is precedent in other jurisdictions.

For example, in Guy v. Stoecklein Baking Co., 1 A. 2d 839 (Pa. 1938), the Court upheld a decision by the Workmen's Compensation Board "holding that the employer was estopped by his declarations and conduct from interposing the bar of the statute of limitations." 1 A. 2d at 840. That statute provided:

In cases of personal injury all claims for compensation shall be forever barred, unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this article; or unless, within one year after the accident, one of the parties shall have filed a petition as provided.... (emphasis added) 1 A. 2d at 840.

Notwithstanding the underscored language, the Court upheld the Board's determination that the employer was estopped from raising the statute of limitations issue, also noting that unintentional deception as well as outright fraud was a basis for such an estoppel.

A number of subsequent cases have upheld the Board's authority to apply equitable estoppel with respect to this statute. For example, in Angermier v. Nublely Manufacturing Co., 213 A. 2d 171 (Pa. 1965), the Court held:

The general rule is that filing of the petition in the specified time is an express condition of the right to obtain an award for compensation and that failure to file it within the specified time is an absolute bar of the right... However, several exceptions to this rule have been recognized. For example, where there is fraud or deception, intentional or unintentional, the defendant may be estopped from asserting the period of limitations as a defense.... (citation omitted) 213 A. 2d at 173.

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<sup>2</sup> The Commission's application of equitable estoppel as to a substantive issue (starting salary), Porter v. DOT, No. 78-154-PC (5/14/79), was upheld in Dane Co. Circuit Court (per J. Currie), No. 79 CV 3420 (3/24/80).

The Court went on to conclude:

In many of the cases in which defendant has been estopped to avail itself of the limitations provision, its conduct was such as to lull the claimant into a sense of false security... After carefully considering the entire record in this case, we cannot hold as a matter of law that there is not sufficient evidence to support the Board's conclusion that claimant was misled by defendant's misconduct. (citations omitted) 213 A. 2d at 174-175.

Therefore, the Commission concludes its August 7, 1987, decision was not premised on an erroneous view of the law, and respondent's motion for reconsideration should be denied.

ORDER

Respondent's motion for reconsideration filed August 28, 1987, is denied.

Dated: September 10, 1987 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner

AJT:jmf  
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