

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ARTHUR J. DESROSIERS, *
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 Appellant, *
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 v. *
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 Administration, DIVISION OF *
 MERIT RECRUITMENT & SELECTION, *
 *
 Respondent. *
 *
 Case No. 87-0078-PC *
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 * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §§230.17(2) and 230.44(1)(a), Stats., of the administrator's decision to remove appellant's name from a register of eligibles for the position of Civil Engineer 1 - Transportation. Respondent has objected to jurisdiction on timeliness grounds. The parties have filed briefs on the objection. The material facts relating to timeliness do not appear to be in dispute and are set forth below.

FINDINGS OF FACT

1. Appellant was on a register of eligible candidates for the position of Civil Engineer 1 - Transportation.
2. The Appellant was removed from that register by respondent.
3. Appellant was informed of this action by a letter dated April 2, 1987. The letter advised appellant his name had been removed from the register because he had been considered for appointment three times and not selected. It also advised appellant that he had 10 days to request an explicit statement of the exact cause of the removal, and that he could appeal the removal decision to the Personnel Commission within 30 days after

the effective date of the action, or within 30 days after being notified of the action, whichever is later, under §§230.17(2) and 230.44(1), Stats.

4. Appellant, by letter of April 14, 1987, requested a statement of the reason for his removal from the register, which respondent provided by letter of April 30, 1987. This letter advised that in addition to the reasons for removal set forth in the April 2, 1987, letter, his name had been removed because of unsatisfactory interviews and work references.

5. Appellant appealed his removal to the Commission by letter dated May 28, 1987, which was received by the Commission on June 1, 1987. The appeal letter was directed solely at respondent's reliance on the unsatisfactory employment references.

CONCLUSIONS OF LAW

1. The subject matter of this appeal is cognizable pursuant to §§230.17(2) and 230.44(1)(a), Stats.

2. The respondent is equitably estopped from arguing that this appeal was untimely filed.

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.... (emphasis supplied)

The first question is when the statute begins to run -- when someone receives notice of removal or when one receives the requested notice of the cause for removal. The wording of §230.17(2), Stats., is consistent with the former. The subsection provides that the appealable action is the administrator's refusal to certify: "Applicants may appeal to the Commission the decision of the administrator to refuse to examine or certify

under §230.44(1)(a)." Furthermore, the subsection goes on to state: "A notice of rejection shall notify an applicant or eligible of his or her rights under that subsection." Based on the language of the subsection, these rights include both the right to request a "full and explicit statement of the exact cause of such refusal...", and the right to appeal to the Commission. Clearly, an appellant's "cause of action" accrues at the time he or she receives notice of the removal, as he or she could file an appeal then. Normally, the time for appeal begins to run when the cause for action accrues. However, this case involves an unusual set of circumstances that give rise to an equitable estoppel against the respondent.

The doctrine of equitable estoppel has been defined as follows:

The most comprehensive definition of equitable estoppel... is that it is the principle that by which a party who knows or should know the truth is absolutely precluded... from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed. 28 Am Jur 2d Estoppel and Waiver §27.

In DOT v. Wisconsin Personnel Commission, No. 79CV3420 (Dane Co. Cir. Ct. 1980), affirming Porter v. DOT, 78-154-PC (5/14/79), the Court cited Gabriel v. Gabriel, 57 Wis. 2d 424, 204 N.W. 2d 494 (1973), as follows:

...the three factors essential for equitable estoppel to lie are: (1) Action or inaction which induces (2) reliance by another (3) to his detriment.

In this case, Mr. Desrosiers' letter of appeal runs strictly to the matter of the respondent's reliance on an employment reference from one of his former employers. However, in the letter informing him of his removal

from the register, the only reason respondent gave for the action was the fact that he had been considered for appointment three times and not selected. When he asked for "a full and explicit statement of the exact cause of such refusal," §230.17(2), Stats., respondent replied approximately two weeks later, when the time for appeal had almost run. In that letter, respondent advised that, there were additional reasons for removal:

In addition, job related reasons for he removal were submitted by the Department of Transportation in writing and approved by us. The Division of Highways and Transportation Services Interview and Selection panel did not feel you had the skills and abilities to effectively perform the duties of a Civil Engineer 1 - Transportation because:

- 1) You received relatively low ratings on the interview designed to evaluate essential skills, especially in the areas of: a) organization, leadership, and interpersonal skills; b) goals and objectives; c) overall communication skills.
- 2) Unsatisfactory work references were obtained including situations where you were unable to communicate effectively, used poor judgment in work performed, and were dismissed from an engineering position for cause.
(letter to appellant dated April 30, 1987)

If respondent's initial letter informing appellant of his removal from the register had not given a reason, but had simply advised appellant of his right to request one, as well as of his right to appeal the removal, there would seem to be little question but that appellant's time for appeal would run from the date he received that letter. However, where appellant was given one reason for the removal in the initial letter, and only subsequently given a different, additional reason (with which he took issue), it would be inequitable to permit respondent to argue the period of limitations should run from the date of receipt of the first letter. Appellant obviously relied on the information contained in the first letter to his detriment, as there not only was nothing in that letter which indicated his removal from the register had been caused by a poor reference,

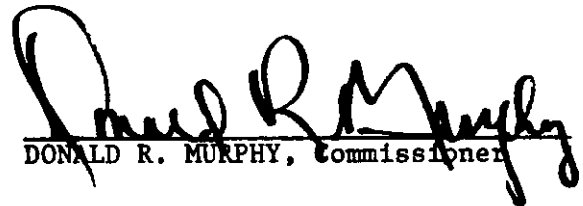
but also a different reason was cited. Given the nature of appellant's appeal, there was no reason for him to have pursued an appeal after he got the first letter. At the time he received the second letter and was first informed of respondent's reliance on the employment reference, the time for appeal based on the first letter probably had nearly or completely expired, although the exact dates are not apparent from this record. Under all of these circumstances, the requirements for equitable estoppel as set forth in Porter v. Pers. Commn., are present, and respondent is estopped from raising a timeliness defense.

ORDER

Respondent's timeliness objection is overruled.

Dated: August 5, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

AJT:jmf
JMF04/2

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