

MICHAEL KAESKE,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 90-0382-PC

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to dismiss the appeal as untimely filed. The parties agreed to the following statement of issue:

Whether appellant filed his appeal of respondent's reallocation decision to the Commission with[in] the statutory time limitation.

The following findings are made solely for the purpose of ruling on the respondent's motion.

FINDINGS OF FACT

1. The appellant has worked as a health facilities surveyor for the Bureau of Quality Compliance, Department of Health and Social Services, in their Green Bay Northeastern Region office at 200 North Jefferson Street since 1985.

2. At all relevant times prior to September, 1990, the appellant's position was classified at the Social Worker 3 (SW3) level. Dan Moran was the only other person in the Green Bay office whose position was also classified as a SW3.

3. The appellant and Mr. Moran perform substantially identical duties.

4. Both the appellant and Mr. Moran are supervised by Lavern Woodford, who is the Field Operations Manager, or regional supervisor, in the Green Bay office.

5. During the relevant time period, the appellant was on flex time and worked 9 hour days, commencing at approximately 6:45 a.m.

6. The general responsibilities of the regional office are to conduct surveys of various long term care facilities in the Green Bay area to determine compliance with both state and federal requirements. The survey process includes an on-site review and may result in the issuance of written notices of violation, if appropriate. The facility responds by filing a plan of correction and surveyors subsequently visit the facility to verify compliance.

7. The appellant is required to travel extensively throughout the area.

8. The Green Bay office has been understaffed for a lengthy period and this situation was magnified in September of 1990 by medical leaves of absence taken by various professional staff members.

9. Most of the appellant's work time is spent at the long term care facilities being surveyed. Infrequently, the appellant has a scheduled office day. The appellant may be physically present at the Green Bay office on other days as well, but his responsibilities on those days are typically to prepare for an upcoming survey or visit. Scheduled office days afford surveyors the time to pick up and read their mail.

10. Unless mail is sent on to him at his home, the appellant's practice is not to check his mail in the Green Bay office except on his scheduled office days.

11. U. S. mail is usually delivered to the Green Bay office between 10:00 a.m. and 11:00 a.m. Clerical staff pick up the mail from the central mail box by 11:00 a.m. each working day. They open, date and deliver the mail to the staff's individual mail boxes by 2:00 p.m. each working day.

12. If the appellant has not been scheduled for an office day, his business mail is opened on that day by the office support staff. If the item is a plan of correction, a determination is made as to whether the appellant has a scheduled office day within 10 days. If the appellant is not scheduled for an office day within 10 days, the business mail may be sent on to his home address or he may be contacted by telephone at the particular facility where he is to be working that day. If the item is not business mail, the item is left unopened and is simply placed in the appellant's individual mail box.

13. In 1989, the appellant and Mr. Moran filed requests to have their positions reclassified from the Social Worker 3 level to the Social Services Specialist 2 classification. This request was processed by DHSS's Bureau of Personnel and Employment Relations which denied the request and reallocated

both the appellant's position and Mr. Moran's position to the Social Services Specialist 1 (SSS1) level. The appellant and Mr. Moran requested review of these decisions by respondent Department of Employment Relations (DER). Leanne White, a Personnel Specialist with DER conducted an interview with both the appellant and Mr. Moran on July 31, 1990. At the end of the interview, Ms. White stated that she would try to issue a written decision within one month's time.

14. In separate letters dated August 30, 1990, Ms. White wrote to the appellant and to Mr. Moran to inform them that she had determined the positions they occupied were appropriately classified at the SSS1 level.

15. Both letters were postmarked in Madison on September 4, 1990, were stamped "Confidential", and were stamped in the Green Bay office as being received on September 5, 1990.

16. On September 5, 1990, the appellant spent the first 1 to 2 hours at his office in preparation for a verification visit at Jefferson Manor. The appellant left the Green Bay office approximately 8:00 a.m., which was before the letter from Ms. White was placed in his mailbox.

17. On September 6th, the appellant again stopped by at his office in the morning for a period of approximately one hour in order to prepare for a second day at Jefferson Manor. While at his office, the appellant did not check his mailbox and did not receive the letter from Ms. White. After completing the visit to Jefferson Manor at approximately 5:00 p.m., the appellant did not return to his office.

18. The appellant spent his entire workday of Friday, September 7, 1990, at the Green Bay regional office, reviewing an extensive manual on the effect of the Omnibus Reconciliation Act of 1987 (OBRA) on the requirements for long term care facilities. Management required all of the surveyors to spend a full day reviewing the manual prior to a week-long training session which the appellant was scheduled to attend in Wausau from September 24 through 28. Even though he was in the office for the day, the appellant spent the time at a vacant desk in a far corner so that he would not be interrupted by telephone calls. He did not check his mail and did not receive the letter from Ms. White.

19. The appellant spent his entire work week from Monday, September 10th until Friday, September 14th at the Veterans Home at King, Wisconsin.

The appellant saw Mr. Moran briefly over the Thursday lunch hour. Mr. Moran mentioned that he had received a letter rejecting his reclassification request. That evening, Mr. Moran met with the appellant for approximately 15 minutes at the appellant's motel and stated he did not have the denial letter with him but there were several issues not addressed in the letter which he would use as a basis for an appeal. The appellant indicated that he had not received a rejection letter.

20. The appellant did not return to his office on September 14th and was on vacation for much of the next week. The appellant first returned to his office on Friday, September 21st. At that time, he reviewed his mail and first received Ms. White's letter. The envelope had remained unopened until that time. The letter stated in part:

If you wish to appeal this decision, you must file a written request within thirty (30) days of the receipt of this letter to the Personnel Commission, 2nd Floor, 121 East Wilson Street, Madison, Wisconsin 53702.

21. The appellant's only day scheduled as an office day during September was September 4th.

22. Mr. Moran received his denial letter from Ms. White on September 5, 1990, when he stopped by his office late that evening en route to visiting his father. Mr. Moran had spent his workday surveying a facility in Peshtigo.

23. Mr. Moran filed a letter of appeal with the Commission on October 3, 1990. In his letter, Mr. Moran stated that he had received Ms. White's letter on September 5th.

24. Appellant filed a letter of appeal with the Commission on Monday, October 15, 1990. His letter was identical to Mr. Moran's letter except that made no reference to the date on which the appellant had received Ms. White's letter.

25. The appellant was not notified of the respondent's decision to deny his request to reclassify his position to the SSS2 level and to reallocate his position to the SSS1 level until September 21, 1991.

CONCLUSIONS OF LAW

1. The appellant has the burden of establishing that his appeal was timely filed.
2. The appellant has met his burden.
3. The appeal letter filed by the appellant on October 15, 1990, was timely filed.

OPINION

The time limit for filing an appeal of a reclassification decision under §230.44(1)(c), Stats., is established in §230.44(3), Stats.:

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....

This 30 day time limit is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79. In a dispute as to jurisdiction, the burden of proof is on the party asserting jurisdiction. Allen v. DHSS & DMRS, 87-0148-PC, 8/10/88. Here, that party is the appellant.

The Secretary of the Department of Employment Relations has adopted the following administrative rule with respect to providing notice of reclassification and reallocation decisions:

ER 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.

In the present case, the respondent contends that the appellant actually received¹ Ms. White's letter some time on or before September 12th and that

¹The Commission notes that receipt of Ms. White's letter, rather than mere placement of the letter in the appellant's mail slot, effectuated notice of the decision to the appellant. This conclusion is consistent with Hotel Hay Corp. v. Milner Hotels, Inc., 255 Wis. 482, 486, 39 N.W. 2d 363 (1949), which quoted the following language from 46 C.J., Notice, 559:

In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service

because thirty days after September 12th was Friday, October 12th, the appeal filed on October 15th was untimely. Respondent also contends that the conversations between Mr. Moran and the appellant during the Veterans Home survey in King actually occurred on September 12th rather than on the 13th and provided the appellant with notice of the respondent's decision.

Receipt of Ms. White's letter

The respondent suggests that the appellant must have received Ms. White's letter when he was in his office in the morning of September 6th and all day on September 7th. Respondent argues that the appellant's contention that he did not open his denial letter until September 21st is "simply implausible and incredible." Even though not checking one's mailbox may be contrary to the practices of typical office employees, the appellant presented evidence establishing that he didn't check his mail unless he had to because it interfered with his ability to complete the survey or other task at hand. The appellant testified that there were many periods of 2 to 3 weeks in length when he does not check his mailbox. Mr. Moran testified that he did not worry at all about not checking his mail for a period of a couple of weeks. One reason for this practice is the nature of the work performed by the appellant and Mr. Moran. They spend most of their time outside of their offices, conducting surveys and verification visits at long term care facilities located throughout the Green Bay region. The appellant also testified that his office was severely understaffed, which made it very difficult to complete his responsibilities unless he was able to focus on the particular survey he had been assigned for that date. The employing agency has developed systems to get around the difficulties in contacting the appellant by sending certain business mail to the appellant's home and by contacting him by telephone when he is at a facility. The letter from Ms. White was not treated as an important business matter by the clerical staff in the Green Bay office because it came from another state agency and it was marked "confidential." The letter was simply placed in the appellant's mail slot where it waited until he picked it up. Consistent with his normal practice, the appellant didn't check his mail slot on September 6th during the hour he was in his office. Likewise, he did not check his mail on Friday, September 7th. That day he was in the Green Bay office but he was re-

is not effected until the notice comes into the hands of the one to be served, and he acquires knowledge of its contents....

viewing a manual on an extensive change in federal requirements affecting long term care facilities. The day-long review was required by management and was not a scheduled office day.² As noted above, the appellant explained that in order for him to get his work done, he was careful to keep his focus on a single task and he avoided any interruptions such as telephone calls or mail, which might interfere with his work. The appellant spent the entire week of September 10th at the Veterans Home at King.

Mr. Moran confirmed that the appellant had no knowledge of the letter from Ms. White before September 13th when Mr. Moran met with the appellant to discuss Mr. Moran's denial letter. After the discussion with Mr. Moran, the appellant did not return to his office in Green Bay until September 21st. The appellant's testimony is neither implausible nor incredible. Many office workers would be very uncomfortable checking their mail slot as infrequently as was testified to by the appellant. However, the combination of the type of duties assigned to the appellant, the shortage of staff, the procedures used in the Green Bay office for processing personal mail and the appellant's own work habits support the appellant's position. The Commission does not accept the respondent's contention that the appellant's version of events "lacks credibility and plausibility." The facts of the present case are not comparable to those in Black-Radloff v. DER, 90-0353-PC, 3/25/91, where the Commission dismissed an appeal as untimely where it bore a Commission date stamp of August 17, 1990, the 31st day after the appellant received written notification of the denial of her reclassification request. The appellant testified that she had placed her letter of appeal in an inter-departmental envelope during the morning of August 15th and that she called the Commission's offices during

²In its brief, the respondent argued that:

September 7 was a day "scheduled in the office." (Resp. Exh. 1 & 5). Since one of the purposes of being in the office was to read his mail, it does not make sense that Mr. Kaeske did not even check his mail slot on September 7.

Appellant's supervisor, Lavern Woodford, testified that during the month of September, the appellant was only scheduled for an office day, as that term is used in findings 9 and 12, on September 4th. The office schedule shows that the appellant was on an "inspection of care" on September 6th, and was to familiarize himself with the new long term care survey process on September 7th.

the afternoon of August 16th and was told that her appeal had arrived. In Black-Radloff, the Commission found there were defects in appellant's credibility and defects in the scenarios advanced by appellant to explain how the Commission could have erred in date-stamping the appeal.

In the present case, there is nothing comparable to an official date stamp tending to undermine the appellant's case. The appellant testified that he did not receive the reclassification denial notice until September 21st and that he did not check his mail earlier because it was not his normal practice to do so. There was no testimony offered by other witnesses tending to show that the appellant did, in fact, check his mail on a daily basis. The record does show that Mr. Moran also checks his mail on an infrequent basis and that the office has developed procedures to forward business mail to the homes of their employees due to their frequent absences from the office. That procedure was not followed here because the reclassification denial notice was not treated as business mail. Based on the record before it, the Commission must conclude that the appellant did not actually open the letter from Ms. White until he returned from his vacation on September 21, 1990.³

Verbal notice by Mr. Moran

The respondent also contends that the two meetings between Mr. Moran and the appellant while they were surveying the Veterans Home at King, Wisconsin, provided the appellant with actual notice of Ms. White's decision so as to commence the running of the 30 day filing period.

The Commission has previously held that verbal notice of a reclassification denial is not sufficient notice in light of the specific language of §ER 3.04, Wis. Adm. Code. In Piotrowski v. DER, 84-0010-PC, 3/16/84, the Commission interpreted the identical rule⁴ to mean that the thirty day period for filing an appeal under §230.44, Stats., "does not commence until an appellant has received written notice of a reclassification or reallocation decision." In that case, Ms. Piotrowski had acknowledged that sometime in October of 1983, she had been "at least verbally advised" of the reallocation decision but she did not

³There is no evidence that would support a finding that the appellant sought to avoid receipt of the reclass denial letter in order to delay the commencement of the 30 day period. The appellant picked up the letter the first day he returned to his office after learning that a letter was probably in his mailbox.

⁴At the time of the Piotrowski decision, the rule was found in ER-Pers. 3.04, Wis. Adm. Code.

receive written notice of the denial until on or after December 27, 1983 when she received a memo. She then filed a letter of appeal on January 11, 1984. The Commission reasoned that to rely on the October 1983 verbal notification "would permit the respondent to ignore his own administrative rule that establishes an important protection for civil service employees." The Commission reached a similar decision in Kriedeman v. UW & DER, 85-0048-PC, 10/23/85. In that case, a letter of appeal had been received by the Commission on April 9, 1985. On February 15th, the appellant had received an initial written notification of the decision to reclassify her position from PA4-Confidential to MIT 3 and of the right to appeal to the Commission. The appellant was then notified, in writing, that the payroll processing of her reclassification would be held up until the question of creating a MIT-Confidential series could be explored. The appellant was notified verbally on February 26th, but never in writing, that the new series would not be created and that payroll processing of her reclassification would proceed. The Commission concluded that because the appellant had never been provided with written notification of the final decision, her appeal had to be considered timely.

The respondent has failed to provide any basis serving to distinguish the precedent of Piotrowski and Kriedeman. Respondent contends that the facts in Piotrowski may be distinguished because in that case:

- a) there was no dispute as to when the Appellant received the notice "in hand";
- b) Appellant was given verbal notice of the adverse decision by agency management two months before a denial letter was dated and received by the Appellant;
- c) Respondent argued that verbal notice by management commenced the 30-day period. (Respondent's brief, page 7)

These distinctions are not central to the determination of the instant appeal. The fact that in Piotrowski, the verbal notice came from management does not mean that verbal notice, if given by a co-worker, must somehow be equated to the written notice required by rule.⁵ Respondent also argues that the only

⁵As noted below, Mr. Moran did not give the appellant verbal notice that the appellant's reclassification request had been denied. Mr. Moran gave the appellant verbal notice that Mr. Moran's reclassification request, which

purpose of §ER 3.04, Wis. Adm. Code, "is to establish a paper trail *versus* a verbal trail with respect to appealable personnel decisions."

The "trail" provides the potential appellant with sufficient, reliable notice of the personnel decision, so that he/she knows it is in fact a real personnel decision affecting him/her, not merely gossip, not a rumor. In short, the written notice requirement of ER 3.04, Wis. Adm. Code, is designed to make the employe aware of a substantial and significant personnel decision which affects that person--an event which will catch the attention of the potential appellant so that he/she can make an informed decision--appeal or not appeal.

It is difficult to determine how Mr. Moran could have provided the appellant with "sufficient, reliable notice of the personnel decision" to deny the reclassification of the appellant's position when there was nothing in the letter sent to Mr. Moran indicating that the decision also applied to the appellant's position. After speaking with Mr. Moran during the King survey, the appellant may have reasonably expected that the respondent had also denied his reclass request but he didn't know that the request had been denied until he received his letter on September 21st.

Even if the Commission were to accept the respondent's argument that the appellant received notice of the respondent's decision when he met with Mr. Moran in King, the Commission would have to find that the meeting occurred on September 12th rather than on the 13th, in order for the appellant's appeal, filed on Monday, October 15th, to be untimely.⁶ Respondent argues that "it is more plausible" that the meetings between the appellant and Mr. Moran occurred on September 12th rather than the 13th:

In a March 4, 1991 affidavit on file with the Commission, Mr. Kaeske stated that he first learned of Mr. Moran's adverse decision somewhere between September 13 and 14, 1990. Now, four months later, he somehow can be precise--it was September 13.

But Mr. Kaeske's testimony that the meeting took place on September 13 is simply not credible. Both men were at the same

involved the same classifications and was initiated at the same time, was denied.

⁶When the 30th day for filing an appeal is on a Saturday or Sunday, the appeal is timely when it is received the following Monday. §990.001(4), Stats. Starczynski & Mayfield v. DOA, 81-275, 276-PC, 12/3/81; Cirilli & Jones v. DP, 81-39-PC, 4/10/81.

location all day September 12 (Resp. Exh. 1 & 2). If the adverse decision was so important to both of them, why would Mr. Moran wait until September 13 to tell Mr. Kaeske? After all, the testimony of Mr. Kaeske and Mr. Moran was that the surveyors lunch as a group at the same restaurant. Why would not Mr. Moran, the bearer of such important information, tell Mr. Kaeske at the first opportunity--at lunch on September 12? That he did not do so is simply implausible.

The evidence does indicate that both the appellant and Mr. Moran were at the King facility on September 12th as well as the 13th and the appellant's testimony that "everybody eats at the King's Table" suggests that both the appellant and Mr. Moran ate at that restaurant on the 12th. However, this evidence is insufficient to generate a finding that the appellant spoke with Mr. Moran on the 12th about the reclassification decision where both the appellant and Mr. Moran testified that they first discussed the matter on the 13th and the appellant also testified that there were 2 or 3 teams of surveyors who would have been eating at different tables at the restaurant. The respondent did not offer testimony from any of the other surveyors who would have been present on the 12th and who might have been able to corroborate respondent's theory that the appellant and Mr. Moran had a conversation at the King's Table on the 12th.


For the reasons set out above,⁷ the appellant's letter of appeal was timely filed.

⁷The appellant did not raise an equitable estoppel argument based on the language of Ms. White's letter providing 30 days from receipt "of this letter" to file an appeal.

ORDER

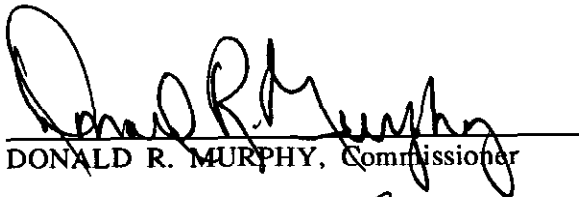
The respondent's motion to dismiss is denied. The parties will be contacted for the purpose of scheduling further proceedings.

Dated: November 14, 1991 STATE PERSONNEL COMMISSION

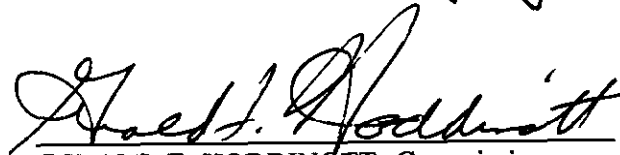


LAURIE R. MCCALLUM, Chairperson

KMS:kms



DONALD R. MURPHY, Commissioner



GERALD F. HODDINOTT, Commissioner