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THOMAS A BORNICK,  
                   Complainant,

v.

Secretary, DEPARTMENT OF  
 CORRECTIONS,  
                   Respondent.

Case No.      91-0084-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

Nature of the Case

This is an appeal pursuant to §230.45(1)(c), of a noncontractual grievance. Respondent DOC has moved to dismiss this appeal on the basis of untimely filing of the grievance at the first step. A hearing on this motion was held on January 10, 1992, before Laurie R McCallum, Chairperson

Findings of Fact

1. Appellant has been employed by respondent as an Officer in a supervisory position since 1982. At all times relevant to this matter, appellant has been assigned to Waupun Correctional Institution (WCI).
2. Beginning in the 1985-1987 compensation plan for classified employees, the following provision was included:

When supervisors included in C 2 a. (2) above whose positions are assigned to pay range 1-15 or lower are directed by their appointing authority to work overtime in order to supervise employees who are being paid in cash or compensatory time off for overtime hours, the following provisions shall apply:

(a) Employees in professional supervisory and professional confidential/supervisory positions shall be compensated on an hour-for-hour basis at no less than their regular rate of compensation in cash or equivalent time off.

(b) Employees in non-professional supervisory and non-professional confidential/supervisory positions shall be compensated at the premium rate or granted time off at 1-1/2 times the number of overtime hours

3. At all relevant times, appellant's position was a non-professional supervisory position to which paragraph (b) in Finding of Fact 2 would apply.

4. At all times relevant to this matter, the practice at WCI was for appellant to complete a time sheet for each two-week pay period which explained the purpose for which all overtime hours were worked (hours exceeding 85 per pay period) and to submit this time sheet to his supervisor, the Associate Warden for Security. This Associate Warden would then decide whether to request that the WCI Payroll Office award appellant premium pay for any of these overtime hours. From 1985 until September of 1991, appellant's supervisors requested premium pay only for overtime hours worked during emergencies such as lockdowns or shakedowns but not for overtime hours worked supervising emergency response unit (ERU) training of subordinate officers. During this entire period of time, appellant was aware that he was not receiving premium pay for overtime hours worked supervising ERU training. Appellant was concerned about this and expressed this concern to certain co-workers. Appellant did not discuss this specific concern with any of his supervisors or request from any of his supervisors any written information relating to this specific concern. Certain of appellant's co-workers were aware through rumors that employees in counterpart positions in other correctional institutions received premium pay for overtime hours worked supervising ERU training.

5. In April of 1987, an employee in a counterpart position to appellant's at Dodge Correctional Institution filed a noncontractual grievance relating to premium pay for overtime hours and certain of appellant's co-workers and supervisors were aware of this appeal. Some time in 1987 or 1988, appellant and certain of his co-workers discussed the possibility of retaining legal counsel to litigate or otherwise determine their right to premium pay for overtime hours.

6. Glenn Weeks was the Personnel Manager and Lorna Kamp a Payroll and Benefits Assistant at WCI at all times relevant to this matter. From 1988 through 1991, appellant had made inquiry of Ms. Kamp once or twice a year as to his eligibility for premium pay for overtime hours and she advised him that he needed to get approval from his supervisor in order to get such pay. Appellant did not present her with such approval for ERU training overtime

hours until September of 1991. The first time that appellant requested a copy of the compensation plan was in the spring of 1991 and, in response to such request, Ms. Kamp provided appellant with a copy of the plan. Prior to September of 1991, neither Mr. Weeks nor Ms. Kamp was presented with a request by a supervisor for premium pay for ERU training overtime hours for one of his subordinates. In July of 1986 and February of 1989, Mr. Weeks directed a memo to the WCI Superintendent, and the Assistant Superintendents for Security, Administration, and Treatment summarizing certain provisions of the compensation plan, including the provision cited in Finding of Fact 2, above.

7. Between 1985 and September of 1991, Lynn Oestreich was a co-worker or supervisor of appellant's. Some time in 1988 or 1989, Mr. Oestreich requested and received from Mr. Weeks a copy of the compensation plan.

8. On April 8, 1991, appellant filed a noncontractual grievance with respondent challenging the failure of respondent to provide him premium pay for overtime hours worked supervising ERU training since 1985. On the face of this grievance, appellant stated:

On 3-14-91, I was participating in a training program at the Waupun National Guard Armory. During that program, Lt. Craig Arndt, Dodge Correctional Inst., informed me that the payment of overtime to DCI Supervisors who were supervising subordinate officers on overtime was at the rate of time and a half their hourly rate. That was the first time I (grievant) became aware of such payment and the cause of this grievance.

Respondent denied this grievance at each step citing its position that the grievance was untimely. Appellant filed his fourth step grievance with the Commission on June 4, 1991.

#### Conclusions of Law

1. The appellant has the burden to show that he filed this noncontractual grievance on a timely basis.

2. Appellant has sustained this burden as to two overtime hours worked during the sixth pay period of 1991 but failed to sustain this burden as to any other overtime hours.

3. The appellant has the burden to show the the Commission has subject matter jurisdiction over this noncontractual grievance.

4. The appellant has failed to sustain this burden.

### Opinion

The time limit for filing a first step grievance is set forth in §46.06(1), Wis. Adm. Code, as follows:

All grievances shall be filed with the designated employer representative no later than 30 calendar days from the date the employe first became aware or should have become aware of the matter grieved.

It is clear from this language that the operable date from which the relevant period for the filing of a noncontractual grievance at the first step should be measured is the date that the injury is discovered by the grievant or with reasonable diligence should have been discovered by him.

Under the facts of this case, the injury claimed by appellant was the alleged failure of respondent to grant him premium pay for overtime hours worked supervising ERU training at various times between 1985 and 1991. Appellant was aware, each time between 1985 and 1991 that he received a pay-check for pay periods in which he worked such overtime hours, that he had not received premium pay. It is the dates that appellant received these pay-checks from which the 30-day filing period for the filing of a noncontractual grievance at the first step is measured, not the date upon which appellant obtained information which led him to believe that respondent's failure to award him premium pay was improper. See Wickman v. DP, Case No. 79-302-PC; Bong and Seaman v. DILHR & DP, Case No. 79-167-PC (11/8/79); Oestreich v. DHSS and DMRS, Case No. 98-0011-PC (9/8/89).

The Commission does not agree that a continuing violation theory is applicable here. Each of the instances in which appellant was not granted premium pay for working overtime hours represented a discrete and separable transaction.

In Flannery v. DOC, 91-0047-PC (2/20/92), the Commission concluded that the 30-day period for filing a noncontractual grievance at the first step is in the nature of a statute of limitations which is subject to waiver and equitable tolling. The appellant argues that the time limit applicable here should be equitably tolled due to misinformation provided to appellant by Mr. Weeks and by Mr. Weeks' failure to provide requested information to appellant. The

Commission does not need to reach the question whether the alleged action on Mr. Weeks' part or on the part of any other agent of respondent, if proved, would be sufficient to toll the applicable filing period since the record fails to show that Mr. Weeks or any other agent of respondent failed to provide requested information to appellant or provided incorrect information. There is a dispute in the record as to whether Mr. Weeks failed to respond to appellant's request for a copy of the compensation plan some time between 1985 and the spring of 1991. The record shows, however, that Mr. Weeks provided a copy of the compensation plan to one of appellant's co-workers/supervisors when he requested it some time during 1988 or 1989 and that Ms. Kamp provided appellant with a copy of the compensation plan upon his request in the spring of 1991. This demonstrates that neither Mr. Weeks nor his subordinate was reluctant to share the compensation plan with WCI employees and the Commission concludes on this basis that Mr. Weeks did not fail to respond to appellant's request for a copy of the compensation plan. Appellant acknowledges that he never specifically asked Mr. Weeks or any of his supervisors or other agents of respondent whether he was eligible for premium pay for overtime hours worked supervising ERU training so it is also not possible to conclude that Mr. Weeks or any other agent of respondent misled appellant in regard to the specific issue involved in this grievance.

It appears from the record that the only instance appellant failed to receive premium pay for overtime hours worked supervising ERU training which fell within the 30-day period prior to the date appellant's noncontractual grievance was filed at the first step, i.e., April 8, 1991, was two hours of overtime worked by appellant during the sixth pay period of 1991. The subject grievance would be considered timely filed, then, only in relation to this single incident.

Finally, the Commission notes that this grievance raises an issue of subject matter jurisdiction. Specifically, §ER 46.03(2)(k), Wis. Adm. Code, places limitations on the subject matter of noncontractual grievances as follows, in pertinent part:

[a]n employee may not use this chapter to grieve . . . (k) [a]ny matter related to wages, hours of work and fringe benefits.

Since this grievance clearly relates solely to premium pay for overtime hours which is an issue of wages or hours, it is a nongrievable subject pursuant to §ER 46.03(2)(k), and the Commission lacks subject matter jurisdiction over this appeal.


Order

Respondent's motion to dismiss is granted in part and denied in part in accordance with this decision. This appeal is dismissed for lack of subject matter jurisdiction.

Dated: April 1, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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