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CAROL STONE,

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 92-0789-PC

\* \* \* \* \*

INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission on the respondent's motion to dismiss as untimely filed. The parties agreed to submit the matter on briefs. The following findings appear to be undisputed.

1. Since October of 1989, the appellant has been employed as a limited term employe by the respondent's Northern Wisconsin Center.
2. In the Fall of 1992, the appellant competed for a permanent position as a Resident Care Technician (RCT) at Northern Center.
3. In a letter dated September 8, 1992, from Northern Center's Employee Services Manager, the appellant was advised as follows:

Last week, you talked with me about the recent Resident Care Technician (RCT) hiring process and results. You expressed concern that the interview was biased against you because of a previous interaction you had with one of the interviewers.

\* \* \*

You have the right to further express your concern to the Personnel Commission by writing to the following address within 30 days of the date you were informed in writing of the interview outcome:

The State Personnel Commission  
121 East Wilson  
Second Floor  
Madison, WI 53702

Any correspondence to the Sate (sic) Personnel Commission should give the facts of the situation and the reason you are writing, including what relief you are seeking.

4. In her letter of appeal dated and postmarked September 18, 1992, and received in the Commission's offices on September 22, 1992, the appellant wrote, in part:

I am writing in regards to an interview with the Northern Center on August 6, 1992. I received a letter on August 21, 1992, to let me know I was turned down for one of those positions.

5. On November 10th, the respondent filed a motion to dismiss the appeal as untimely filed. A conference was held with the parties on November 19, 1992 and the conference report reflects the following:

During the course of the discussions regarding respondent's motion, the appellant stated that based upon a letter she received from the respondent on September 9, 1992, it was her understanding that her appeal had to be mailed within the 30 day period, not that it had to be filed within that period.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this appeal pursuant to §230.44(1)(b), Stats.

2. Appellant has the burden of proof as to all issues, including the establishment of equitable estoppel.

3. Appellant has sustained his burden of establishing that respondent is equitably estopped from arguing that this appeal was untimely filed.

#### OPINION

The time limit for filing appeals is established by §230.44(3), Stats., which provides in part:

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....

The word "filed" has previously been interpreted by the Commission as requiring physical receipt by the Commission within the 30 day period. Richter v. DP, 78-261-PC, 1/30/79.

The subject matter of this appeal is a decision not to select the appellant for a vacant RCT position. The effective date of that decision was no later than

the date the appellant was notified of the decision. See Cozzens-Ellis v. UW, 87-085-PC, 9/26/88; affirmed by Dane County Circuit Court, Cozzens-Ellis v. Wis. Pers. Comm., 88 CV 5743, 4/17/89; affirmed, 155 Wis. 2d 271, 455 N.W. 2d 246, (Court of Appeals, 1990). In her letter of appeal, the appellant stated that she received the written notice of her non-selection on August 21, 1992. In her brief of respondent's motion, the appellant indicated that the initial letter was dated August 21st but was not received by her until Saturday, August 22nd. Even accepting this later date, the 30th day thereafter was Monday, September 21st and the appellant's letter of appeal did not reach the Commission until September 22nd. Therefore, the appeal would be considered untimely unless respondent is equitably estopped from making this contention.

The elements of equitable estoppel were described in Mergen v. UW & DER, Case No 91-0247-PC (11/13/92), as follows:

In Porter v. DOT, 78-0154-PC (5/14/79); affirmed, DOT v. Pers. Commn., Dane Co. Cir. Ct. 79CV3420 (3/24/80); the Commission discussed the legal principle of "equitable estoppel" as follows:

Equitable estoppel may be defined as the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. The person who in good faith relied on that conduct acquires some corresponding right, either of contract or remedy (citations omitted)

The elements of equitable estoppel against a state agency are: "reasonable reliance by an employee to his or her detriment on conduct by the agency or its agents which amount to fraud or a manifest abuse of discretion" (citations omitted) Warda v. UW-Milwaukee & DER, 87-0071-PC (6/2/88).

In Porter, the Commission explained the requirement of a "fraud or a manifest abuse of discretion" by quoting 28 Am. Jur 2d, Estoppel §43 as expanding the term fraud to include "conduct. such as might reasonably be expected to influence the conduct of the other party, and which have so misled him to his prejudice that it would work a fraud to allow the true state of facts to be proved" In Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 638-39, 279 N.W. 2d 213 (1979), the Court explained the analysis in a case involving equitable estoppel against the state:

[W]e have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied.

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. (footnote and citations omitted)


Here, the respondent does not dispute the appellant's statement that, based upon the language of the September 8th letter from Ms. Thompson, appellant understood that her appeal had to be mailed within a 30 day period, rather than that it had to be filed within that period. The language of the letter ("You have the right to further express your concern to the Personnel Commission by writing to the following address within 30 days of the date you were informed in writing of the interview outcome.") clearly states that the appellant needed to write to the Commission within 30 days if she wanted to pursue the matter. It was reasonable for the appellant to have relied on the letter because it was prepared by Northern Center's Employee Services Manager. The failure to apply estoppel against the respondent would cause a serious injustice to the appellant because she would lose her right to appeal the decision not to select her for the vacant RCT position based upon a written direction which could reasonably be expected to influence the conduct of the appellant and which caused her to file her appeal after the statutory period for doing so had elapsed. Applying estoppel does not interfere with the state's exercise of "the police power for the protection of the public health, safety or general welfare."

Respondent contends that the the September 8th letter should be interpreted "as informing the appellant that time was of the essence." However, the letter said something else when it laid out a procedure and time limit for the appellant to perfect an appeal

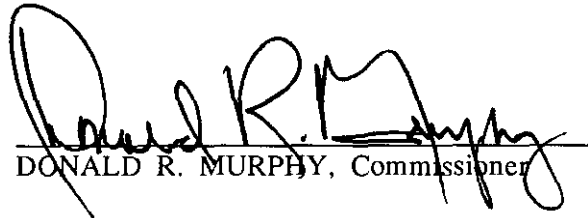
ORDER

Respondent's motion to dismiss is denied. The Commission will schedule a second prehearing conference.

Dated: December 29, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
K:D:temp 1/92 Stone

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner