

* * * * *

ROBERT J. MEISENHEIMER, *

Appellant, *

v. *

Secretary, DEPARTMENT OF INDUSTRY *
 LABOR & HUMAN RELATIONS, and *
 Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *

Respondents. *

Case No. 94-0829-PC *

* * * * *

DECISION
 AND
 ORDER

At a prehearing conference convened by the Commission on March 8, 1995, the hearing examiner proposed the following issues:

1. Whether the decision by respondent to reallocate appellant's position to Plumbing Consultant 1 rather than Plumbing Consultant 2 was correct.
2. (a) Whether the removal of responsibility for plan review from appellant's position in 1991 constituted a demotion within the meaning of §230.44(1)(c), Stats.
- (b) If so, was there just cause for this demotion.

Also at this prehearing conference, respondent filed a Motion to Dismiss for untimely filing. A briefing schedule on the motion was established and the final brief was received by the Commission on April 17, 1995. The following findings are based on information supplied by the parties and appear to be undisputed.

1. Some time in 1991, plan review responsibilities were removed from appellant's position description. The position description incorporating this change was prepared by appellant's supervisor Duane Strassman and signed by Mr. Strassman on June 28, 1991. On line 17 of this position description, which is designated as the space on which the position incumbent is to sign, Mr. Strassman signed appellant's name on September 11, 1992.

2. The Annual Employee Performance Review report prepared by Mr. Strassman in relation to appellant's work performance for the period of July 1, 1992 through June 30, 1993, included a complete list of worker activities for appellant's position. Responsibility for plan review was not included in this listing. Appellant signed this report on September 2, 1993.

3. Some time after September of 1991, appellant requested the reclassification of his position. This request was denied by respondent on or around August 23, 1993. Appellant filed a timely appeal of this denial with the Commission. (Oremus et al. v. DER, Case No. 93-0176-PC).

4. At all times relevant to this matter prior to May 15, 1994, appellant's position was classified as a Plumbing Consultant 2. At all times relevant to this matter, appellant was been employed by respondent Department of Industry, Labor and Human Relations (DILHR).

5. On or around April 26, 1994, Mr. Strassman contacted appellant and told him that, as the result of the personnel management survey being conducted at that time by respondent DER, Plumbing Consultant positions were being placed in the technical bargaining unit and appellant's pay rate would be increasing from \$18.377 an hour to \$23.65 per hour on or around August 21, 1994.

6. Effective May 15, 1994, respondent DER implemented a personnel management survey of certain positions, including appellant's. To communicate the results of this survey to its affected employees, respondent DILHR included the following two documents with the paychecks of these employees:

a. a reallocation notice which included, among other information, the employee's name and social security number, classification as the result of the reallocation, effective date of the reallocation, and old and new pay rate and range; and

b. a notice which stated as follows:

**IMPLEMENTATION OF SURVEY
NOTIFICATION DATE: MAY 25, 1994**

The survey conducted by the Department of Employment Relations, affecting your position, has been implemented, effective May 15, 1994. Your position was reviewed and

reallocated to the classification which was determined most appropriate based on the newly created classification specifications which were developed by the Department of Employment Relations. You are receiving a notice indicating your new Classification, your previous salary and pay range, your new salary and pay range effective May 15, 1994, and the amount of any increase, if applicable. You are also receiving a statement which explains your right to appeal this classification decision to the Personnel Commission. Please note that if you decide to appeal the decision, you must do so in writing to the Personnel Commission within 30 days of your notification. Your notification will be considered effective the date of this notice.

6. A notice consistent with 5. a., above, was prepared for appellant's position. This notice stated as follows, in pertinent part:

Survey Reallocation-----		Effective Date	5-15-94
Meisenheimer, Robert J	398-22-4114	Old Range	New Range
Plumbing Consultant 1		05-13	06-15
Previous Base Salary	Increase	5-15-94 Base Salary	
18.377	0.00	18.377	

Appellant does not recall seeing this notice.

7. Effective July 7, 1994, appellant entered into a settlement agreement with respondent DER in relation to Case No. 93-0176-PC. In this settlement agreement, the parties agreed that appellant would withdraw the appeal in exchange for \$2,639.47 plus attorney's fees. The settlement agreement also stated as follows, in pertinent part:

2. As respects the recent survey (implemented on May 15, 1994), I recognize that I have certain appeal rights except that I agree that I will not appeal and do hereby waive any right to appeal my reallocation in that survey based on a contention that my position should have been allocated to an engineering classification series;

* * * * *

7. I am represented by legal counsel who has approved this Settlement and with whom I have consulted. I am entering in this Settlement and Release with a full and complete understanding of its content and effect and with the benefit of the advice of legal counsel.

This settlement agreement was signed by appellant and his signature was witnessed on July 7, 1994.

8. On or around September 26, 1994, appellant contacted DILHR's personnel unit to ask why he had not received \$23.65 per hour in the paycheck he had received on September 15, 1994.

9. The specifications developed for the Plumbing Consultant classification as the result of the 1994 survey require that a position, in order to qualify for classification at the Plumbing Consultant 2 level, must have successfully provided training programs and performed plumbing plan review work for six months, and these two combined goals must account for at least 15% of a position's time.

10. Appellant filed the instant appeal on November 30, 1994.

The time limit for filing an appeal such as the instant one is governed by §230.44(3), Stats., which states as follows, in pertinent 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 . . .

This 30 day time limit is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC (1/30/79).

Appellant first contends that he was "demoted" as the result of the removal of plan review duties from his position description in 1991. In addressing respondent's argument that a 1994 appeal of this "demotion" would be untimely since an appeal of such an action must be filed within the 30-day period required by §230.44(3), Stats., appellant contends further that, since he did not sign the 1991 position description, he never received notice of this change in assigned duties. However, this representation on appellant's part appears disingenuous. Although §230.09(2)(c), Stats., would appear to require written notice of this change in assigned duties, the information provided by appellant himself shows that the written performance evaluation report he received in 1993 clearly and completely lists his assigned duties and this listing does not include plan review duties. It appears from the information provided by appellant that he was aware of the fact that he was not assigned plan review duties prior to 1994, but it was not until he learned of the

reallocation of his position to the Plumbing Consultant 1 classification as the result of the survey and that this reallocation was based at least in part on the absence of plan review or training duties from his position description that he realized the impact on his classification of the lack of this assignment. It is well-settled that it is the date that notice of the action is received or the effective date of the action, not the date that an affected employee realizes what the consequences of this action will be, that determines the date from which the 30 day time limit will be measured. See, e.g., Oestreich v. DHSS & DMRS, Case No. 89-0011-PC (9/8/89). Under the facts presented here, appellant received written notice no later than September 2, 1993, that he was not assigned plan review duties; more than 30 days elapsed between September 2, 1993, and November 30, 1994; and, as a result, appellant's appeal of the removal of plan review duties from his position is untimely.

The second prong of appellant's appeal relates to the reallocation of his position pursuant to the 1994 survey. First of all, it should be noted here that appellant does not contend that he did not receive his reallocation notice or that such a notice was not provided to him by respondents in his paycheck, but only that he "does not recall seeing such a payroll reallocation notice." It should also be noted that, as early as April 26, 1994, in his conversation with his supervisor, appellant was aware that a personnel management survey was being conducted and that the results of this survey would affect his position; that the settlement agreement appellant signed on July 7, 1994, refers to this personnel management survey, the effective date of this survey, and to the fact that appellant's position was reallocated pursuant to this survey; and that appellant acknowledges that, as of September 26, 1994, he was aware that he had not received the pay increase pursuant to the survey that he had been expecting due to his "demotion" from Plumbing Consultant 2 to Plumbing Consultant 1.

Given the information provided by the parties, it appears more likely that appellant relied on the information given to him by Mr. Strassman in their April 26, 1994, conversation to the exclusion of other information provided to appellant by respondents in the written reallocation notices and through the provisions of the settlement agreement; and, only when his rate of pay did not correspond with the information provided by Mr. Strassman, did appellant attend to the matter of his reallocation. No matter what date is



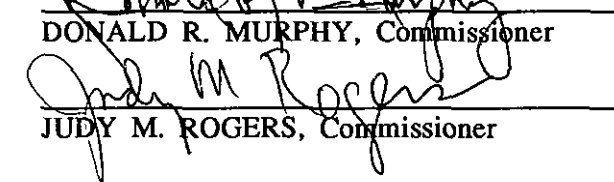
chosen as the date from which the 30 days should be measured, i.e., May 25, 1994--the date of the written reallocation notices; July 7, 1994--the date appellant signed the settlement agreement; or September 26, 1994--the date appellant acknowledges he was aware of the impact of the survey on his position, the filing of this appeal on November 30 1994, is not timely.

The facts here show that it is likely that appellant relied to his detriment on information provided him by his supervisor. However, equitable estoppel would not be applicable in view of the fact that appellant's reliance does not appear to be reasonable, i.e., appellant chose to ignore the information provided by those with the authority to effectuate the reallocation of his position in favor of the information provided by his first-line supervisor who had no such authority.

Order

Respondent's Motion to Dismiss is granted and this appeal is dismissed.

Dated: April 28, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:lrn

Parties:

Robert J. Meinsenheimer Carol Skornicka
Rt. 1, W826, Hwy. 106 Secretary, DILHR
Palmyra, WI 53156-9727 PO Box 7946
Madison, WI 53707

Jon Litscher
Secretary, DER
PO Box 7855
Madison, WI 53707

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on

the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95