

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JEAN A. STRONACH,

Appellant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION, and, Secretary,
DEPARTMENT OF EMPLOYMENT
RELATIONS,

Respondents.

Case No. 95-0177-PC

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RULING ON
RESPONDENTS'
MOTION TO
DISMISS

Respondents filed a motion to dismiss claiming the above-noted appeal was untimely filed. The parties filed written arguments, with the final argument filed on October 17, 1995.

BACKGROUND

1. The Commission received Ms. Stronach's appeal on August 28, 1995. Her appeal letter indicated she was appealing the denial of her request for reclassification of her positions from Program Assistant 2 (PA-2) to PA-3. The appeal was received in an envelope which bears a postal stamp date of August 25, 1995, "PM".
2. It is undisputed that on July 26, 1995, Ms. Stronach received written notice that her reclassification request was denied, by memo dated June 21, 1995. The memo was sent by Jim Davis, with the Bureau of Human Resource Services in the Department of Transportation (DOT).
3. The memo dated June 21, 1995, is six pages long. The following language appears on the final page of the memo.

Whenever a position classification decision is made by the Administrator of the Division of Classification and Compensation or his/her designated representative, the employe shall have the right to appeal. If Ms. Stronach wishes to appeal this action, she must submit a written request to the State Personnel Commission. This appeal should state the facts which form the basis of the appeal, the reasons she feels the decision is improper, and the relief sought. The appeal must be received by the State Personnel Commission within 30 days after receipt of this letter. Appeals

should be addressed to the State Personnel Commission, 2nd Floor¹, 131 W. Wilson St., Room 1004, Madison, WI 53702.

4. Ms. Stronach's written reply to respondents' motion is shown below in its entirety.

Due to the time constraint I had to file my appeal for the denial on my reclass from [PA-2] to [PA-3], I called the Personnel Commission's office on August 25, 1995, and asked if I could fax my appeal because it was due. The person who answered the phone told me that they did not have a fax machine and I should either put it in the mail or drop it off at the office. Knowing it would be difficult for me to drive downtown during rush hour traffic, I put my appeal in the mail so it would be postmarked that day. After taking some time to really think about my phone conversation, the woman I spoke with may have told me the appeal had to be in the office within the 30 days. I was considering 30 days as equivalent to one month making the due date August 26. Mailing my appeal on August 25 would allow for next day delivery putting it in your office on August 26.

Not being an attorney, I did not realize the absolute constraints of the 30 day deadline. I was also operating under the assumption that a postmark would suffice for having the appeal "filed" just as it does when filing income taxes. It would be beneficial to clarify the 30 days as 30 calendar days and state that a postmark date is not acceptable.

5. August 25, 1995, was a Friday. The Commission's office (like all state offices) is not open on Saturday or Sunday.
6. Ms. Stronach's appeal would be timely if filed within 30 days of July 26, 1995, the date she received written notice of the denial. This 30 day period expired on August 25, 1995, the day she mailed her letter.
7. Ms. Stronach should have known from the information provided in the reclassification denial letter (and likely from the information she received from the Commission on August 25, 1995) that her appeal needed to be received by the Commission on or before August 25, 1995.

¹ The Commission advises the DOT to remove "2d Floor" from future notices. The Commission's offices are located on the 10th floor, which already is denoted by room #1004. No delivery delay resulted in Ms. Stronach's case due to this error.

DISCUSSION

Ms. Stronach's reclassification denial is an appealable action under s. 230.44(1)(b), Stats., over which the Commission has subject-matter jurisdiction pursuant to s. 230.45(1), Stats. The time limit for filing her appeal is governed by s. 230.44(3), Stats., and PC 1.02(10), Wis. Admin. Code. Both texts are shown below (in relevant part).

s. 230.44(3), Stats.

(3) TIME LIMITS. Any appeal fund 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. . .

PC 1.02(1), Wis. Admin. Code

(10) "Filing" means the physical receipt of a document at the commission's office.

The Court of Appeals recently addressed the question of whether failure to comply with the 30 day time for appeal in s. 230.44(3), Stats., deprives the Commission of subject matter jurisdiction over the appeal. The Court stated that failure to comply with this time limit does not deprive the Commission of subject matter jurisdiction, but rather its "competency to proceed." Association of Career Employees (ACE) v. Klauser, 195 Wis. 2d 602, 608-609, n. 7, ___ N.W. 2d ___ (Ct. App. 1995).² However, this distinction does not affect the outcome of this case.

A statute providing a time limit for some act, such as s. 230.44(3), Stats., can be characterized as either mandatory or directory. The general rule is that failure to comply with a mandatory provision is of more significance than failure to comply with a directory provision:

Whether an act, instrument, or proceeding in violation of law is void, depends upon the legislative intent. A directory provision has been defined as one the observance of which is not necessary to the validity of the proceeding. However, directory provisions are not intended by the legislature to be disregarded.

Compliance with a mandatory provision of a statute is a condition precedent to the privilege conferred. In fact, a mandatory provision in a statute has been defined as one the

² The Commission was not a party in the ACE case, but the court's decision is binding precedent.

omission to follow which renders the proceeding to which it relates illegal and void.

73 Am. Jur. 2d, Statutes, s. 16. (Footnotes omitted.)

The Court of Appeals' discussion of this distinction in Midwest Mut. Ins. Co. v. Nicolozzi, 138 Wis. 2d 192, 198, 405 N.W. 2d 732 (Ct. App. 1987), includes the following quote from 2A N. Singer, Sutherland Statutory Construction, s. 47.26 (rev. 4th Ed. 1984): "If the provision is essential it is mandatory. A departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of it. As a matter of terminology, mandatory statutes are usually said to be imperative and directory statutes permissive."

There are a number of factors to be considered in determining whether a statute is mandatory or directory. One of the most significant is "whether a penalty is imposed for its violation." Id. (Citation omitted.)

Generally, where a legislative provision is accompanied by a penalty for a failure to observe it, the provision is held to be mandatory. Here, a penalty is clearly visited upon an insurer who fails to comply with the statute -- estoppel against the coverage defense.

'One of the strongest indications of what construction should be given a statutory provision may be found in the use of negative, prohibitory, or exclusionary words.' That 'estoppel' is such a word cannot be denied. Id., at 199 (Citations omitted.)

The Commission has consistently held that the time limit in s. 230.44(3), Stats., is mandatory, relying to a large extent on the provision in that subsection that an appeal not filed within 30 days "may not be heard." (Emphasis added.) Richter v. Div. of Personnel, 78-261-PC (1/30/79); Acharya v. DHSS, 81-296-PC (10/1/81). Another significant factor is that the provision is directed to a private person rather than a public officer:

[A]s to private persons, it frequently occurs that the individual's own rights depend upon his own compliance with statutory directions, so that there is no one to blame but himself for the loss of those rights by a failure to comply; such a statute is more likely to be construed as mandatory. Midwest Mut. Ins. Co. v. Nicolozzi, 138 Wis. 2d at 200 (Citations omitted.)

Since Ms. Stronach failed to comply with the mandatory timeliness provision of s. 230.44(3), Stats., and the Commission lacks competency to proceed with respect to this appeal, it must be dismissed.

ORDER

Respondent's motion is granted and this appeal is dismissed.

Dated December 7, 1995.



LAURIE R. MCCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

JMR

Parties:

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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