

**JAMIE TUKIENDORF**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
AGRICULTURE, TRADE AND  
CONSUMER PROTECTION, and  
Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,**  
*Respondents.*

**RULING ON  
RESPONDENT'S  
MOTION TO DISMISS**

Case No. 96-0165-PC

Ms. Tukiendorf filed an appeal of respondents' decision denying her request for position reclassification. By letter dated December 18, 1996, the Commission notified the parties that a prehearing conference would be held on January 22, 1997. Respondents filed a letter on December 27, 1996, which alleged that the appeal was filed late. The parties submitted briefs on the timeliness issue, with the final brief received by the Commission on January 24, 1997.

The facts recited below appear to be undisputed by the parties, unless specifically noted to the contrary.

#### FINDINGS OF FACT

1. The appellant requested that her position be reclassified from Program Assistant 2 to Program Assistant 3. Respondents denied such request by letter dated November 13, 1996. Appellant received her copy of the denial letter on November 14, 1996.

2. The letter of appeal was sent by first class mail. The envelope bears a postal stamp date of (Thursday) December 12, 1996, and shows it was mailed in Madison in the "PM", to the Commission's correct mailing address.<sup>1</sup>

3. Appellant's appeal was received by the Commission on December 17, 1996.

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<sup>1</sup> Appellant mailed her appeal letter to the Commission using the zip code of 53702. The Commission has taken steps to change its zip code to 53703. Frequent practitioners before the Commission already had been informed of the change prior to this appeal, as had all state agencies. The Commission concludes that Ms. Tukiendorf used the "correct mailing address" as noted in par. 2 of the Findings of Fact, because the zip code change has not been published yet in the Register for the Administrative Code.

4. Ms. Tukiendorf argued that her appeal should be accepted by the Commission even though the Commission did not receive her appeal prior to the expiration of the 30-day appeal period. Her argument is shown below:

I do not believe that my appeal was untimely filed, and therefore request that the Commission accept it and proceed with the prehearing . . .

I do not contest the fact that I signed the receipt of the denial letter on November 14, 1996, nor that the thirty day deadline for filing the appeal ended on December 16, 1996. What I do object to is the allegation that the appeal was not received until December 17, 1996.

As decided in Personnel Commission Case No. 96-0095-PC (*Bouche v. University of Wisconsin-Milwaukee*), the Commission's decision to use a Department of Administration (DOA) mailing address (a 53702 zip code) requires that the date of receipt be designated as the date received by DOA, not the Commission. Mail sent to the 53702 zip code is not delivered to the Commission, but to DOA which in turn delivers it to the Commission. In electing to use the 53702 zip code, the Commission is designating DOA as its agent, and therefore the date of receipt of this appeal becomes the date received by DOA rather than the Commission.

I contend that this appeal was received by DOA on or before December 16, 1996, and should be acted on accordingly.

#### OPINION

Ms. Tukiendorf's reclassification denial is an appealable action under §230.44(1)(b), Stats., over which the Commission has subject-matter jurisdiction pursuant to §230.45(1), Stats. The time limit for filing an appeal is found in §230.44(3), Stats., shown below in relevant part (emphasis added).

(3) TIME LIMITS. 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 term "filed" means "the physical receipt of a document at the Commission's office." § PC 1.02(10), Wis. Adm. Code.

The 30-day period after Ms. Tukiendorf received the denial letter (received on November 14, 1996) ended on December 14, 1996, a Saturday. Accordingly, the filing deadline is extended to the following business day of Monday, December 16, 1996, pursuant to §PC 1.07, Wis. Adm. Code. The Commission received her appeal on December 17, 1996, after the 30-day period expired.

It is Ms. Tukiendorf's burden to show that her appeal was filed timely. *See, e.g., Lawrence & Wermuth v. DER*, 94-0443-PC, 1/20/95, p. 2. The Commission lacks competency to proceed in a review of her appeal if she fails to meet her burden of proof on the timeliness issue. *Stronach v. DOT & DER*, 95-0177-PC, 12/7/95, citing *Association of Career Employees (ACE) v. Klauser*, 195 Wis. 2d 602, 608-609, n. 7, 536 N.W.2d 478 (Ct. App. 1995). Ms. Tukiendorf did not meet her burden of proof as explained in the following paragraphs.

There are many potential reasons why documents may be filed late. One reason is that the appellant waits until too close to the filing deadline to mail an appeal. *See, for e.g., Richter v. Div. Of Pers.*, 78-261-PC, 1/30/79, and *Stronach, Id.* A second is postal delivery error as was the situation in *Van Rooy v. DMRS & DILHR*, 84-0062-PC, 7/19/84, where the post office mistakenly delivered a certified letter to the Department of Transportation and the filing period had expired by the time it was received by the Commission. The Commission rejected the *Van Rooy* appeal as untimely filed, stating on pp. 2-3 of its decision as shown below (in pertinent part):

In the case at hand, the appellant made a good faith effort to file her appeal in a timely fashion. She not only addressed the letter correctly, she went so far as to send it by certified mail. Through no fault of her own, her letter was misdelivered and did not reach the Commission until after the 30 day period had run. While the Commission believes it is an unfortunate result, it is of the opinion that on the basis of the foregoing facts and the above-cited authorities it has no choice but to dismiss this appeal . . .

A third potential reason why documents may be filed late is delay in postal delivery, as was the situation in *Krahling v. DER*, 90-0315-PC, 1/11/91; petition for rehearing denied, 2/26/91. In *Krahling*, the appeal was mailed on a Thursday and was not received by the Commission until the following Tuesday – a day after the appeal period expired. The Commission noted in the petition for rehearing that “[i]t is common knowledge that mail can sometimes be inexplicably delayed so that it arrives later than is customary and routine.” *Krahling, Id.*, petition for rehearing, p. 2. The Commission ruled, however, that Mr. Krahling bore the consequences of such delay. These cases illustrate that the Commission has been consistent in attributing to appellants the delays associated with the system each appellant elects to use to effectuate the filing of an appeal.

A fourth potential reason why documents may be filed late at the Commission was identified for the first time in a recent Commission case, *Bouche v. UW & DER*,

96-0095-PC, 10/29/96. Mr. Bouche filed a timely appeal and, thereafter, was required to tender the related filing fee. He had mailed his filing fee by first class mail using the Commission's then-current address including a zip code of 53702, which the post office routes to the Department Of Administration (DOA) mailroom for delivery twice daily to the Commission. There was information obtained in *Bouche* that the DOA mailroom was short-staffed and, accordingly, did not process or deliver mail to the Commission for two working days which lead the Commission to conclude it was more likely than not that the Commission's late receipt of Mr. Bouche's filing fee was due to the DOA mailroom and not to the post office. Under these circumstances and based on agency principles, the Commission accepted Mr. Bouche's filing fee as timely filed.

The facts of Ms. Tukiendorf's case are insufficient to conclude that the delay was caused by the DOA mailroom rather than by the post office. It is common knowledge that the demands placed on the post office each December are high due to holiday mail and that postal customers should allow extra time for delivery. Also, there is no evidence that DOA had Ms. Tukiendorf's appeal letter prior to December 17, 1996. Nor is there any evidence that the DOA mailroom failed to process the Commission's mail pursuant to the normal twice daily schedule for delivery to the Commission. In fact the contrary appears true according to the brief filed by respondents, as noted below:

In the *Bouche* case, DOA advised the Commission that due to staffing shortages, the DOA mail room did not process any incoming mail addressed to the 53702 zip code . . . In this case, Mr. Tim Smith of DOA advised<sup>2</sup> that DOA mail room processed incoming mail addressed to the 53702 zip code on both Friday, December 13, 1996, and Monday, December 16, 1996. Mr. Smith advised that he was not aware of any delayed deliveries on either Friday, December 13, 1996, or Monday, December 16, 1996.

The Commission concludes that Ms. Tukiendorf's appeal was filed late most likely due to a combination of her waiting until close to the end of the appeal period to mail her appeal and of post office delays. Under these circumstances, Ms. Tukiendorf shoulders the consequence of the Commission's late receipt of her appeal.

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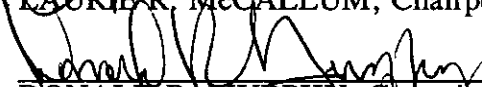
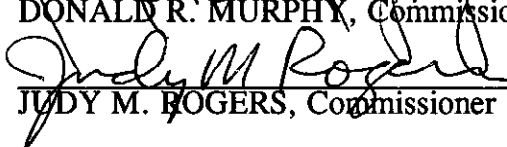
<sup>2</sup> The Commission made no inquires of DOA in relation to Ms. Tukiendorf's case. Accordingly, the reference in respondents' brief must refer to respondents' own inquiry of DOA.

ORDER

That this case be dismissed as untimely filed.

Dated: February 12, 1997.

STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson  
  
DONALD R. MURPHY, Commissioner  
  
JUDY M. ROGERS, Commissioner

JMR  
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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