

STATE OF WISCONSIN

PERSONNEL COMMISSION

CARLO ESQUEDA

Appellant,

v.

**Secretary, DEPARTMENT OF
WORKFORCE DEVELOPMENT,**

Respondent.

Case No. 99-0027-PC

**RULING ON MOTION
TO DISMISS**

This is an appeal of a post-certification action related to the hiring process. On May 24, 1999, respondent filed a motion to dismiss for untimely filing. The parties were permitted to brief the motion and the briefing schedule was completed on July 26, 1999. The following findings of fact are based on information provided by parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. On March 10, 1999, appellant filed an equal rights complaint alleging that he had been discriminated against on the basis of color, race, and sex in regard to respondent's failure to appoint him to the position of Deputy Director, Bureau of Child Support.

2. In this complaint, appellant alleged as follows in part:

An important aside here is that Ch. 230.25(2)(b) Wis Stats. states the following:

Appointments shall be made within 60 days after the date of certification unless an exception is made by the administrator. If an appointing authority does not make an appointment within 60 days after certification, he or she shall immediately report in writing the reasons therefor. If the administrator determines that the failure to make an appointment is not justified under the merit

system, the administrator shall issue an order directing that an appointment be made.

Exhibit 1, in which I was informed that my name was "certified," should provide the date the clock began running with regard to the cited statutory provision. No appointment had been made by September 27, 1998. I do not believe that DWD formally requested and justified this delay to the Department of Employment Relations. The Commission may wish to look into this matter as an adjunct to this discrimination complaint.

3. In a letter to appellant dated March 15, 1999, one of the Commission's Equal Rights Officers stated as follows, in pertinent part:

In your [complaint], you stated that the Personnel Commission may also "wish to look into" whether the Department of Workforce Development complied with §230.25(2)(b), Stats. The Commission does have the authority to review post-certification decisions related to the hiring process, pertinent to §230.44(1)(d), Stats. However, this authority requires the filing of a written appeal document. If you wish to initiate an appeal, you should so inform the Commission within 14 days of the date of this letter.

4. Appellant filed a letter with the Commission on March 23, 1999, indicating that he wished to pursue his contention relating to §230.25(2)(b), Stats., as an appeal pursuant to §230.44(1)(d), Stats.

4. The certification for the subject vacancy was generated on or before July 27, 1998. Appellant received notice of this certification on July 27, 1998.

5. In a letter to appellant dated February 5, 1999, J. Jean Rogers, Administrator of respondent's Division of Economic Support, stated as follows, in relevant part:

This letter is to inform you that the Deputy Director position in the Bureau of Child Support (BCS) which you interviewed for will not be filled at this time. A staff person from the Secretary's office has been temporarily assigned to this position. The certification list used for the BCS deputy may be used at a future date. If the status of this position changes we will contact you.

Section 230.44(3), Stats., requires that an appeal pursuant to §230.44(1)(d), be 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 date of filing of this appeal would relate back to the date that the companion equal rights case was filed, i.e., March 10, 1999. (*See, Van Rooy v. DILHR*, 84-0253-PC, 4/12/85).

Here, appellant is contending that respondent’s failure to make an appointment to the subject position within 60 days of the date of the certification was illegal. The cause of action here accrued when a period of 60 days had elapsed after the certification was generated and appellant was notified of the certification. This occurred around the end of September of 1998 since the certification was generated on or before July 27, 1998, and appellant received notice of this certification on July 27, 1998. As a result, an appeal filed on March 10, 1999, would not have been filed within the statutory 30-day filing period and would not, as a result, have been timely filed. A continuing violation theory would not be applicable here since the subject action related to the failure to meet a deadline which is a discrete, completed action which is more appropriately viewed as an individual violation, not a continuing one.

Appellant argues in this regard that his appeal was timely filed since it was filed within the 14-day time period established by the Commission’s Equal Rights Officer (See Finding of Fact 3, above). First of all, the Equal Rights Officer, in her letter, did not represent that any appeal appellant may file in response to her letter would be timely filed or would meet any other statutory filing requirements. Her sole purpose, as obvious from the language of her letter, was to advise appellant of the proper procedure to follow in filing an appeal pursuant to §230.44(1)(d), Stats. Moreover, there is no authority for concluding that statutory filing requirements may be preempted or replaced by deadlines established by a quasi-judicial administrative body such as the Commission. Finally, appellant appears to be arguing by implication that the application of an equitable estoppel theory is appropriate here. There are at least three reasons why this argument is not persuasive. First, the letter from the Equal

Rights Officer did not mislead appellant, i.e., this letter did not indicate that any appeal taken by appellant in response to the letter would be timely filed. Second, the letter could not have worked to appellant's detriment, i.e., the deadline for filing an appeal had already passed by the time the appellant had filed his complaint so information contained in the letter could not have resulted in the untimely filing of this appeal. Third, any action of the Commission would not be attributable to the respondent who is the moving party here, i.e., the respondent should not be estopped from asserting a timeliness objection based on actions taken by the Commission. *See, Austin-Erickson v. DHFS & DER, 97-0113-PC, 2/25/98; Hallman v. WCC & DOA, 96-0146-PC, 2/12/97; Brady v. DER, 91-0085-PC, 9/19/91.*

Respondent argues this motion as if appellant were also contending in the instant appeal that respondent's failure to appoint him to the subject position was an abuse of discretion. However, appellant appears to have narrowly tailored this appeal to address solely the issue of whether respondent's actions violated the 60-day requirement of §230.25(2)(b), Stats. As a result, respondent's arguments in this regard need be considered no further here.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(d), Stats.
2. Appellant has the burden to show that this appeal was timely filed.
3. Appellant has failed to sustain this burden.

ORDER

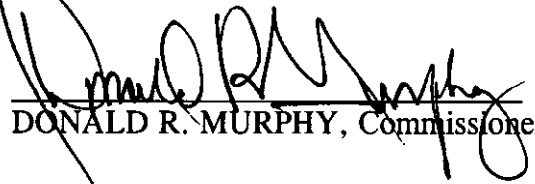
This appeal is dismissed for untimely filing.

Dated: August 25, 1999

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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.)

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