

DAWN M. BERNECKER,
Appellant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,**
Respondents.

**RULING
ON
TIMELINESS
OF FILING FEE**

Case No. 00-0128-PC

This matter arises from the decision to reallocate the appellant's position to the classification of Fisheries Technician. The appellant submitted a cashier's check to the Commission for payment of her filing fee. The question raised is whether the check was filed within the applicable time limits. The parties had an opportunity to file written arguments. The following findings are undisputed unless otherwise noted.

FINDINGS OF FACT

1 Appellant is employed as Assistant Hatchery Foreman at Governor Thompson State Fish Hatchery in Spooner

2. On or about June 15, 2000, appellant was notified that her position had been reallocated to the classification of Fisheries Technician.

3. On July 10, 2000, appellant filed a letter of appeal with the Commission. The letter is dated July 7 and its envelope bears a postmark of July 7

4. By letter dated July 13, the Commission acknowledged receipt of the appeal and directed appellant to submit a filing fee:

The Commission received your appeal of the reallocation decision pertaining to your position, but it failed to include the filing fee or hardship affidavit required by §230.45 (3), Stats., and by §PC 3.02, Wis. Adm. Code. A copy of the rule is attached for information purposes. A copy of your appeal is being sent with respondent's copy of this letter

The Commission must receive within 30 calendar days from the date of this letter (by 4:30 p.m. on August 14, 2000) either the filing fee of \$50.00, or an executed hardship affidavit. Failure to meet this requirement will result in dismissal of this appeal. (Emphasis in original.)

5. Appellant mailed a \$50 certified check to the Commission, using the Commission's correct address in zip code 53703. The check was enclosed with a letter dated August 8, but the envelope bears a postmark of August 10, 2000. It was sent as a certified letter, return receipt requested.

6. Also on August 10th, appellant sent a second certified letter to another address in Madison, in zip code 53717. That letter was signed for by the recipient on August 14th.

7. On August 14, 2000, the appellant telephoned the Commission and spoke with a member of the Commission's staff. That conversation resulted in the following letter from the staff member to the appellant dated August 15:

Pursuant to your directive, I am returning to you the cashier's check the Commission received from you earlier today.

You had called me yesterday, August 14, 2000, and asked if the Commission had received your certified letter containing the check. I told you that we had not received the letter as of that date. You then told me that if the check did not arrive later on the 14th, you wanted it returned to you. The check arrived on August 15th.

I will have your case placed on the agenda for the Commission's next meeting and will recommend that it be dismissed due to the absence of a filing fee.

Please feel free to contact me if you have any questions or if this letter is inaccurate in any way.

8. The envelope and other materials submitted with the appellant's filing fee all bear stamps as received at the Personnel Commission on August 15, 2000.

9. Appellant later submitted a second cashier's check to the Commission as her filing fee and asked that it be deposited so that she could continue with her appeal process. The Commission received the second cashier's check on August 21, 2000.

OPINION

Filing fee requirements for certain appeals are described in §PC 3.02, Wis. Adm. Code. The rule provides (§3.02(6), Wis. Adm. Code) that the Commission “shall dismiss” the appeal “of any appellant who has failed to submit the required fee payment within the time limits under sub. (5).” Those time limits accept as “timely paid” a filing fee “received by the commission within 30 days of the date appearing on the commission’s letter ”

In *Runde v. DMRS*, 97-0088-PC, 12/17/97, the Commission held that the 30-day time limit for receipt of the filing fee is mandatory rather than directory. The filing fee in that case was due by October 13, 1997, and the appellant had sent the check via Express Mail, next day delivery, from Maryland on October 10th. The post office attempted delivery on Saturday, October 11th, but the Commission's offices were not open for business. Because of its Express Mail status, the envelope should have been delivered to the Commission the following Monday which was Columbus Day, a federal holiday. However the post office failed to attempt delivery on that day so the filing fee was not received until October 14th, one day after the 30-day period had ended.

The Commission held that it lacked competency to proceed with consideration of the appeal “regardless of the nature or extent of appellant’s actions related to the Commission’s late receipt of his filing fee.” *Runde, supra*. The Commission noted that the only exception is when the Commission's agent, rather than the appellant's agent, is at fault for the late receipt, citing *Bouche v. UW-Milwaukee & DER*, 96-0095-PC, 10/29/96; reconsideration denied 12/20/96.

In *Bouche* the Commission was using an address with a 53702 zip code. United States mail addressed to the Commission at the 53702 zip code was not delivered by the US Postal Service directly to the Commission. It was delivered to the Department of Administration (DOA) which, in turn, delivered it to the Commission. The Commission concluded that the delay in delivering the filing fee to the Commission's street address was attributable to staffing shortages in the mailroom at the DOA. The mailroom

staff failed to process any incoming mail with the Commission's address on both Friday, August 9th and Monday, August 12th. The fee was due on August 12th but it wasn't received in the Commission's offices until August 13th. The Commission concluded that it "would have received the filing fee in a timely manner but for DOA's failure to have processed its mail on August 9 and 12, 1996," and that "the delivery of the filing fee to DOA was, under these circumstances, equivalent to delivery to the Commission." *Bouche, supra*.

In the present case, the appellant suggests that her check would have been delivered on August 14th except no one was available at the Commission to receive it:

On July 14, 2000 I received a letter from the Personnel Commission regarding this matter and was told that either the Hardship Affidavit or the \$50.00 fee was to be received in the office by August 14, 2000 at 4:30 P.M. August 10, 2000 I sent the certified bank check for \$50.00 along with a letter justifying my appeal from the Spooner Post Office by Certified Mail to the Personnel Commission. On the same day, I sent a copy of all the information regarding my appeal by Certified Mail to Marty Beil who also has a Madison address.

August 17, 2000, after returning from the 2001 Production meeting at Bayfield, the two return cards that accompanied my two Certified Letters had been returned to me. The Date of Delivery to Marty Beil was August 14, 2000 however, the Date of Delivery to the Personnel Commission was August 15, 2000. If my Certified Letter to Mr. Beil had not been received on August 14, 2000 then I would have missed the filing deadline. However because Mr. Beil signed for and received my letter on August 14, 2000 before 4:30 P.M., *I know the Certified Letter I sent to the Personnel Commission would also have been received before the 4:30 P.M. deadline except no one in the Personnel Commission office was available to sign for it.* (Emphasis added.)

There is an insufficient basis on which to conclude that there was no one in the Commission's office on August 14th to sign for appellant's certified letter. The fact that appellant sent two certified letters on August 10th, and that the second one was delivered on August 14th, does not establish that "no one in the Personnel Commission office was available to sign" for the certified letter on the 14th. The two certified letters were sent to two different addresses. Even though they were both Madison addresses, they were

in different zip codes. The telephone conversation between the appellant and a member of the Commission's staff on August 14th indicates the Commission's office was staffed on the 14th so that, had delivery been attempted by the US Postal Service on that date, someone was in the Commission's office to sign for the letter. Appellant's letter and check did not reach the Commission until the next day, August 15th, which was one day late.

ORDER

This case is dismissed without prejudice for failing to timely tender the filing fee required under §PC 3.02, Wis. Adm. Code.

Dated: October 4, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS: 000128Arul1


JUDY M. ROGERS, Commissioner

Parties:

Dawn M. Bernecker	George E. Meyer	Peter Fox
Gov. Thompson Fish Hatchery	Secretary, DNR	Secretary, DER
810 West Maple Street	P.O. Box 7921	P.O. Box 7855
Spooner, WI 54801	Madison, WI 53707-7921	Madison, WI 53707-7855

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