

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TRACY SOMERVILLE, Appellant,

vs.

Secretary, **WISCONSIN DEPARTMENT OF TRANSPORTATION**, Respondent.

Case 7
No. 64631
PA(der)-110

Decision No. 31685

Appearances:

Tracy Somerville, appearing on her own behalf.

Paul E. Nilsen, Assistant General Counsel, Department of Transportation, P.O. Box 7910, Madison, Wisconsin 53707-7910, appearing on behalf of the Respondents.

INTERIM DECISION AND ORDER

This matter is before the Commission as an appeal of a decision to deny the request to reclassify the Appellant's position. Respondents filed a motion to dismiss the appeal as untimely filed. The parties reached a stipulation of fact and filed written arguments on the motion. However the submissions raised additional factual questions so an evidentiary hearing was held on April 24, 2006, before Kurt M. Stege, as the designated Hearing Examiner. The parties made closing arguments at the end of the hearing and the record was closed. The hearing examiner issued a proposed decision on May 16, 2006. No objections were filed by the requisite due date of June 14, 2006. The Commission has adopted the Proposed Decision in its entirety except for former footnote 8 which was deleted because it was not necessary for the resolution of the issue before the Commission.

For the reasons set forth below, the Commission concludes that Respondents are equitably estopped from raising a timeliness objection decision.

The Commission makes the following

FINDINGS OF FACT¹

1. Tracy Somerville is employed by the Wisconsin Department of Transportation (DOT) as a Payroll and Benefits Specialist 2, and has held that position since March 1998.

¹ Substantial portions of the findings are based on the parties' stipulation of facts but the findings also reflect evidence presented at hearing.

2. Barbara Lund was Ms. Somerville's supervisor on October 6, 2004, when Ms. Lund submitted a request to reclassify Ms. Somerville's position from Payroll & Benefits Specialist 2 (PBS 2) to PBS 3. Ms. Somerville and Ms. Lund worked in the same DOT office located in Superior, Wisconsin, at desks located approximately 20 feet apart.

3. Jane HineLine is a DOT Human Resources Specialist Senior, whose job duties include deciding reclassification requests. She works in DOT's central office located in Madison. On December 7, 2004, Ms. HineLine denied the request to reclassify Ms. Somerville's position and completed various forms of documentation indicating the request had been denied. The same day, she sent copies of the documentation to Ms. Lund via interdepartmental mail. The documentation included the following:

A. Reclassification Request/Report form. The form included the following language under the heading of "Notification Required - Appeal Rights - See Wisconsin Administrative Code":

Whenever a position classification decision is made by the Secretary of the Department of Employment Relations² or his/her designated representative, the employee and/or the appointing authority shall have the right to appeal. Position classification actions are based upon the duties and responsibilities of the position. If you wish to appeal this action, you must submit a written request to the State Personnel Commission.³ The request should state the facts which form the basis of the appeal, the reason or reasons you feel the action is improper, and the relief sought. The appeal must be received by the State Personnel Commission within 30 days after the effective date of the action or within 30 days after you are notified of the action, whichever is later. If you have any questions on the procedural aspects of filing an appeal, including any filing fees, please contact your Agency Human Resource Officer or the State Personnel Commission. (Footnote added.)

B. Memorandum from Ms. HineLine to Ms. Lund relating to the Somerville position reclassification request. The memorandum included the following paragraph under the heading of "Appeal Rights":

If Ms. Somerville disagrees with this decision, she may appeal this action to the Wisconsin Employment Relations Commission, P. O. Box 7870, Madison, WI 53707. The appeal must be made in writing and must be received by

² The Department of Employment Relations was renamed the Office of State Employment Relations by 2003 Wis. Act 33, effective July 27, 2003.

³ The authority to hear appeals of reclassification denials was transferred from the Personnel Commission to the Wisconsin Employment Relations Commission by 2003 Wis. Act 33 as of July 27, 2003.

Wisconsin Employment Relations Commission within 30 calendar days from the effective date of the decision or the employee's notification of such decision, whichever is later. The employee should contact the Wisconsin Employment Relations Commission directly to receive information on the procedures for filing an appeal.

C. Employee Notification Form to acknowledge receipt of a reclassification or reallocation decision. The Notification Form included the following information under the heading of "Appeal Rights":

If the Reclassification, Reallocation, or denial decision was made by the agency and is a nondelegated action, the request for re-review must be received by the Office of State Employment Relations within 30 days.

If the Reclassification, Reallocation or denial decision was made as (1) a delegated action by the agency or (2) the Office of State Employment Relations, the appeal must be received, within 30 days by the Wisconsin Employment Relations Commission, P.O. Box 7870, Madison, WI 53707; phone (608-266-1381).

Employee: If you have any questions about where you should send your appeal, contact your agency Human Resources Director for this information. Note: see the top of the Reclassification or Reallocation Form to determine if the action is delegated or nondelegated. If the proper authority does not receive your appeal within the 30 days, you will lose your right to appeal this decision.

Ms. Hineline also informed Ms. Lund by telephone on December 8 that the reclass request had been denied.

4. On or about December 9, 2004, Ms. Lund told Ms. Somerville: "Tracy, I have some bad news. Your request was denied. We can discuss it later." Ms. Lund wanted to have an opportunity to review the materials before she discussed them with Ms. Somerville. Ms. Somerville understood that the request to reclassify her position had been denied but Ms. Lund did not provide her with any of the documentation that reflected the denial. Ms. Somerville and Ms. Lund did not discuss the reclass denial any further on that day.

5. By December 9, Ms. Lund had been notified that she and approximately 35 other employees in DOT's District Office in Superior would be laid off from their employment. Lund was at work on December 10, 13, 15 and 16. However, she was absent

from work on December 14 and from December 16 through January 17, 2005. During the period that is relevant to the question of the timeliness of Ms. Somerville's appeal, the Superior office was in a state of upheaval because of the pending layoffs and the number of staff served by the Appellant's position had increased from 85 to 185.

6. Ms. Somerville was not provided anything in writing that the reclassification had been denied until January 18, 2005. On that day, Ms. Lund placed the closed envelope containing the documentation denial on Ms. Somerville's desk and told her that she did not have to worry about the process for obtaining review of the decision until Ms. Lund actually sat down with her and went over the written materials. At the time of this conversation as well as for months afterward, Ms. Lund incorrectly understood that the time period for filing an appeal of a classification decision did not begin until the position incumbent had signed a document reflecting receipt of the denial materials. Ms. Somerville did not specifically question Ms. Lund about appeal rights, nor did Ms. Lund tell her that she should not open the packet. Ms. Somerville knew the envelope contained the results of her reclassification request. Appellant was present for every work day between January 18 and February 24.

7. Based upon Ms. Lund's statement to her on January 18, Ms. Somerville allowed the envelope to remain unopened on her desk until February 15, 2005. During this period, she relied on Ms. Lund's statement to her and reasonably believed that the time period for filing an appeal of the decision would not begin until she signed the paperwork that was part of the materials. She understood there was no need for her to review the materials in the interim.

8. Because of her impending layoff, Ms. Lund had difficulty focusing on her work. After she returned to work on January 18, 2005, Ms. Lund was in her office on January 19, 20, 24, 25 and 31, 2005.

9. Denise Foster is a DOT Human Resources Coordinator who had certain duties relating to the region of the State that included the DOT office in Superior. On February 15, 2005, Ms. Foster was in the Superior office on other business. By that date, Ms. Somerville had begun to wonder if Ms. Lund would, before the layoff became effective, actually return to her employment at DOT to discuss the reclassification documents in the envelope. Ms. Foster did not inform Ms. Somerville about the period for pursuing a formal review of the decision.

10. On March 1, 2005, Ms. Lund and Ms. Somerville reviewed the reclassification materials together and signed the Employee Notification Form that acknowledged Ms. Somerville had received the attached reclassification decision. Ms. Lund informed Ms. Somerville that she had a right to file an appeal of the decision within 30 days of March 1.

11. By letter dated March 14, 2005, that was received by the Commission on the same day, Ms. Somerville appealed the decision to deny reclassification of her position.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden of persuading the Commission that her appeal was timely filed.
2. The Respondents are estopped from raising a timeliness objection to this appeal.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondents' motion to dismiss the appeal as untimely filed is denied.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Department of Transportation and Office of State Employment Relations (Somerville)

MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER

The issue in this matter is whether Ms. Somerville complied with the time limit for filing a State classified service personnel appeal. That time limit is found in Sec. 230.44(3), Stats., which reads, in 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.

Ms. Somerville's appeal relates to a decision to deny a request to reclassify her position. She has the burden of establishing that her appeal was timely filed. UW & OSER (KLINE), DEC. No. 30818 (WERC, 3/04).

In our recent decision in OSER (ZENCHENKO), DEC. NO. 31614 (WERC, 2/06), the Commission noted that Sec. ER 3.04, Wis. Adm. Code,⁴ "has been consistently interpreted so that *written* notice of a classification decision commences the 30-day period for filing an appeal *but verbal notice does not.*" (Emphasis in original.) There is no dispute that Ms. Somerville was told on December 9, 2004, that the request to reclassify her position had been denied, but that Ms. Lund did not provide her with any written materials relating to the denial until January 18, 2005. On the latter date, Ms. Lund delivered a copy of the reclass denial to the Appellant by placing the envelope containing the materials on the corner of Appellant's desk and indicating that it contained the denial documents. The effective date of the decision, as reflected on the "Reclassification Request/Report," was October 17, 2004. Absent special circumstances, Ms. Somerville's appeal of the decision would only be considered timely if it was filed within 30 days of January 18. The Commission did not receive the appeal until March 14, 2005. March 14 was the final day within the 30-day period for a timely appeal of a transaction with a February 10 notification date.⁵

⁴ The provision reads:

Approvals or denials of reallocations or reclassifications shall be made to the appointing authority in writing. The appointing authority shall immediately notify the incumbent in writing.

⁵ Section 990.001, Stats., provides that where the 30th day for filing an appeal is a Saturday, Sunday or recognized holiday, the appeal is timely if filed on the next work day. UNIVERSITY OF WISCONSIN (ELMER), DEC. No. 30910 (WERC, 5/04). Because March 14, 2005, was a Monday, an appeal filed on that day would be timely even if Saturday, March 12 was the 30th day in a filing period.

Ms. Somerville's defense in this matter is that she believes Respondents should be equitably estopped from raising a timeliness objection. As explained in *AUSTIN-ERICKSON V. DHFS & DER*, CASE NO. 97-0113-PC (PERS. COMM. 2/25/98):

[U]nder certain circumstances a failure to comply with Sec. 230.44(3) will not be fatal to an employee's ability to pursue an appeal. The most common circumstance that leads to this result is when an agency responsible for the personnel transaction in question misleads the employee as to the nature of his or her appeal rights, and the employee, reasonably relying on this information, fails to file a timely appeal. This is called equitable estoppel. (Citation omitted.)

The relevant legal analysis was discussed at some length in *ADAMS V. DNR*, CASE No. 01-0088-PC-ER (PERS. COMM. 12/20/02):⁶

The level or standard of proof required with regard to the equitable estoppel issue, is that complainant must establish the elements of equitable estoppel by clear and convincing evidence. See, e.g. *YOCHERER V. FARMERS INSURANCE EXCHANGE*, 2002 WI 41, PARA 25, 252 WIS.2D 114, 643 N.W.2D 457 (defendant bears the burden of proving each element of equitable estoppel by clear and convincing evidence); *ST. PAUL RAMSEY MED. CENTER V. DHSS*, 186 WIS.2D 37, 47, 519 N.W.2D 681 (CT. APP. 1994). The latter case summarizes the test to be applied when a litigant attempts to establish equitable estoppel against a state agency:

The doctrine of equitable estoppel is not to be freely applied against government agencies. "Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position." The elements of estoppel are (1) action or inaction by the person against whom estoppel is asserted (2) upon which the person asserting estoppel reasonably relies (3) to that person's detriment.

⁶ The ADAMS matter was before the Personnel Commission as a claim of sex discrimination under the Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats. While the ADAMS ruling therefore refers to "complaint" and "complainant" rather than "appeal" and "appellant," the legal analysis of equitable estoppel is identical.

See also STACY v. DOC, CASE NO. 99-0024-PC (PERS. COMM. 8/25/99):

[U]nder certain circumstances the doctrine of equitable estoppel precludes an agency from arguing an appeal is untimely. See, e.g. KENYON v. DER, CASE NO. 95-0126-PC (PERS. COMM., 9/14/95:

According to GABRIEL v. GABRIEL, 57 WIS.2D 424, 429, 204 N.W.2D 494 (1973) the three . . . elements which are essential in order to apply equitable estoppel are: “(1) Action or nonaction which induces (2) reliance by another (3) to his detriment.” The doctrine “is not applied as freely against governmental agencies as it is in the case of private persons.” LIBBY, MCNEIL & LIBBY v. DEPT. OF TAXATION, 260 WIS. 551, 559, 51 N.W.2D 796 (1952), and in order for equitable estoppel to be applied against the state, “the acts of the state agency must be established by clear and distinct evidence and must amount to a fraud or manifest abuse of discretion.” SURETY SAVINGS & LOAN ASSOC. v. STATE, 54 WIS.2D 438, 445 195 N.W.2D 464 (1972). However, “the word fraud in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable.” STATE v. CITY OF GREEN BAY, 95 WIS.2D 195, 203, 291 N.W.2D 508 (1980). The Supreme Court has also offered the following description of the analysis to be used when a party seeks to invoke equitable estoppel against governmental agencies:

[W]e have recognized that estoppel may be available as a defense against the government if the government’s conduct would work a serious injustice and if the public’s interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied. DEPARTMENT OF REVENUE v. MOEBIUS PRINTING CO., 89 WIS. 2D 610, 638-39, 279 N.W.2D 213 (1979). (citation omitted)

See also DOR v. FAMILY HOSPITAL, 105 WIS.2D 250, 255, 313 N.W.2D 828 (1982) (“It is elementary, however, that the reliance on the words or conduct of the other must be reasonable and justifiable.” (Citations omitted)

Thus, complainant must establish by clear and convincing evidence the elements of equitable estoppel, including establishing that his reliance on Ms. Sauer's statement was reasonable and justifiable, and the Commission must conclude that it would work a serious injustice if the respondent was allowed to raise the affirmative defense of untimeliness, and the public interest would not be unduly harmed if the equitable estoppel doctrine were applied in this case. (Footnote omitted.)

Appellant premises her equitable estoppel argument on a statement made by her supervisor on January 18. On that day, Ms. Lund placed the envelope containing the reclass denial documentation on Appellant's desk and told Ms. Somerville that she did not have to worry about the process for obtaining review of the decision until the two of them had the opportunity to sit down and go over the materials. Ms. Somerville does not contend that her supervisor expressly referenced the 30-day filing period during the conversation.

Appellant testified that she understood the statement to mean that any period for filing a formal appeal of the decision would not begin until such time as Ms. Lund had an opportunity to discuss the materials and they signed the accompanying paperwork. While the Commission is unaware of precedent explicitly holding that written notice of a classification decision is obtained by placing an envelope containing a notice of the action on the employee's desk while telling the employee what is inside the envelope, that point has not been contested by the parties.

Ms. Lund had served as Appellant's manager for nearly 20 years and had been actively engaged in the effort to reclassify the Appellant's position. Appellant correctly understood that Lund believed the period for an incumbent to appeal a decision denying a reclassification request did not commence until the incumbent had signed a document verifying receipt of the denial. Ms. Somerville had no reason not to rely on Lund's statement as an accurate description of when she needed to begin to consider her appeal rights. Appellant had never been placed on notice that Ms. Lund's view was inconsistent with Respondents' practices.⁷ The reasonableness of Appellant's conduct must also be viewed in light of the nearly six-week delay between the date that Lund told Appellant that the reclassification had been denied and the date she placed the envelope containing the written documentation on Appellant's desk. The Commission believes it is appropriate to view the period from January 18 to February 10 in the context of the lengthy delay between December 9 and January 18.

⁷ Denise Foster, a DOT Human Resources Coordinator had a brief conversation with Appellant about the reclass denial on February 15, but Appellant's testimony showed the topic of the appeal period did not come up and they did not examine the denial materials at that time. Even if the evidence had shown that statements or actions by Ms. Foster provided notice to Appellant on February 15 that Ms. Lund's statement about the commencement of the filing period was in dispute, the appeal would be timely because it was filed within 30 days thereafter.

In addition to showing that her reliance on Ms. Lund's statement was reasonable, Appellant must establish that a decision not to apply the doctrine of equitable estoppel under these circumstances would work a serious injustice and that the public's interest would not be unduly harmed by the imposition of estoppel. The facts surrounding the Appellant's delay in filing her appeal with the Commission are of the precise nature tending to support application of the doctrine. There is no indication that Respondents have taken any action detrimental to the public's interest in reliance upon the Appellant's delay. In comparison, a failure to apply the doctrine would directly reward the Respondents for having, through Ms. Lund, misinformed the Appellant.

In support of their motion, Respondents have shown that the Appellant worked every day between January 18 and February 24, that the packet of documents remained within Appellant's easy reach on her desk and that no one had ever told Appellant not to open the packet and review the materials. However, merely having an opportunity to delve into the documents did not, given Ms. Lund's instruction, somehow place an obligation on the Appellant to do so. Ms. Lund did not place the materials on Appellant's desk and simply tell her what was in the packet. Lund explained that Somerville did not need to worry about the review process until the two of them had a chance to review the materials together and Appellant signed-off on receiving the documents. In addition, Appellant's testimony established that she was extremely busy during this time period because the number of staff she served increased from 85 to 185. She testified that because of her work load, she was relieved when she learned from Ms. Lund that the filing period would not begin until the two of them had the chance to review the materials together.

Respondents also cite *FLETCHER v. ECB*, CASE NO. 91-0134-PC (PERS. COMM. 12/23/91) in support of their contention that once Lund placed the denial materials on Appellant's desk, Ms. Somerville should have sought to "learn the reasons for the denial, and what she could or should do next." Respondents suggest that Appellant failed to exercise due diligence so that she is not entitled to rely upon the doctrine of equitable estoppel.⁸ In the case cited by Respondents, Mr. Fletcher had been told in January 1988 that his employer decided not to promote him from Radio Broadcast Technician 2 to 3 but he did not file an appeal of the denial until August 1991. Fletcher contended that it took him 3½ years to find out that the reason allegedly provided to him for the denial in 1988 was false. The Personnel Commission concluded that "a reasonably prudent employee, knowing of the right to appeal a non-selection decision and of the 30 day time limit for filing such an appeal, should either have investigated the personnel action and promptly filed an appeal or should be barred from filing such an appeal months, years or even decades later after learning that the decision may have been based upon other factors." The facts in *FLETCHER* are dramatically different from those

⁸ The right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence. *EMMERICH v. DER*, CASE NO. 00-0165-PC (PERS. COMM. 1/19/01).

before the Commission in the present dispute. By definition, Ms. Somerville was unaware of

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the 30-day time limit for filing an appeal of a reclass denial and she had been clearly informed that she did not need to be concerned about any time limit until Lund and Somerville could examine the documents together. Mr. Fletcher took more than three years to decide to file his appeal, while Appellant's appeal was delayed for only several weeks. Fletcher had also been given a similar rationale for previous adverse personnel actions taken in both 1983 and 1984, so that by the time he filed his 1991 appeal, he had known about the alleged basis for nearly a decade. Finally, Ms. Somerville had already waited nearly 6 weeks after she first learned of the denial before Ms. Lund placed the materials on her desk. This lengthy preliminary delay made a relatively modest additional delay appear even more reasonable. The Commission is satisfied that Ms. Somerville acted with due diligence from January 18 to February 10.

Because the Appellant reasonably relied on the incorrect information provided by Ms. Lund in terms of the commencement of any period for obtaining review of the reclass denial, Respondents are estopped from raising a timeliness objection in this matter.

The Commission's representative will contact the parties for the purpose of scheduling a pre-hearing conference.

Dated at Madison, Wisconsin, this 27th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judy Neumann /s/

Judy Neumann, Chairperson

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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