

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OZAUKEE COUNTY LAW ENFORCEMENT
EMPLOYEES, LOCAL 540, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO,

Complainant,

vs.

OZAUKEE COUNTY BOARD OF SUPERVISORS,
PERSONNEL COMMITTEE,

Respondent.

Case X
No. 27280 MP-1181
Decision No. 18384-C

ORDER DENYING REQUEST TO SET ASIDE
NOTICE OF COMMISSION'S FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Wisconsin Employment Relations Commission having, on August 12, 1981 issued a notice wherein it noted that no petition for review of the Examiner's Findings of Fact, Conclusion of Law and Order which had been issued on July 22, 1981, had been filed within the twenty day statutory period set forth in Section 111.07(5) Stats. and that no intervening order had been issued by the Examiner or Commission within said statutory period, and that therefore the Examiner's Findings of Fact, Conclusion of Law and Order issued in the above entitled matter became the Commission's Findings of Fact, Conclusion of Law and Order on August 11, 1981; and on the same date the Commission having received a petition for Commission review of the Examiner's decision via the United States mail, which was filed by Ozaukee County; and thereafter, on August 17, 1981, Ozaukee County having filed a request, and an argument in support thereof, that the Commission set aside its notice issued on August 12, 1981; and Ozaukee County Law Enforcement Employees, Local 540, American Federation of State County and Municipal Employees, AFL-CIO having, on September 9, 1981, filed a statement in opposition to said request; and the Commission having reviewed said request and the arguments of the parties and being satisfied that said request ought to be denied;

NOW, THEREFORE, it is

ORDERED

That the request of Ozaukee County that the Commission set aside its Notice of Commission's Findings of Fact, Conclusion of Law and Order in the above entitled matter be, and the same hereby is, denied.


Given under our hands and seal at the
City of Madison, Wisconsin this 15th
day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

No. 18384-C

MEMORANDUM ACCOMPANYING ORDER DENYING REQUEST
TO SET ASIDE NOTICE OF COMMISSION'S FINDINGS
OF FACT, CONCLUSION OF LAW AND ORDER

The Examiner rendered his decision in this case on July 22, 1981. Pursuant to Commission practice, a copy was served on the parties by mail on the same date. A return receipt, signed by an individual on behalf of the County's attorney, reflects that the County's copy was received on the following day.

Section 111.07(5) states in relevant part "If no petition is filed within 20 days from the date that a copy of the findings or order of the examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the Commission as a body, unless set aside, reversed or modified by such . . . examiner within such time." Section 111.07(6) provides, in part, that the Commission "may on its own motion, set aside, modify or change any order, findings or award . . . at any time within 20 days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence." It is undisputed that neither the Examiner nor the Commission took any action to set aside, reverse, modify, or change the decision on or before August 11, 1981, which was the 20th day after the Examiner's decision was mailed to the parties.

The County did file a petition for review of the Examiner's decision by certified mail, return receipt requested. The letter of transmittal indicates that it was written on August 10, 1981, and the envelope in which the petition was mailed has a postage label attached which reflects that it was printed by a postage meter on August 10, 1981. However, the return receipt ^{1/} reflects that it was not received at the Madison post office or by David Kelm, a mail clerk employed by the Wisconsin Department of Administration until August 12, 1981. It was delivered by that department, later the same day, to the Commission's office in Madison. Thus, even if it is assumed that receipt by Kelm constitutes receipt by the Commission, we are satisfied that, the County's attorney mailed the petition to the Commission the day before it was due to be filed (even though it was not received by the Commission until a day after it was due to be filed). This conclusion is further buttressed by the undisputed fact that Counsel for the Union received his copy of the County's petition on August 11, 1981, as reflected on the return receipt executed by Valarie Schaefer on behalf of the Union's counsel. Also on the latter date the Union's attorney wrote a letter to the Commission indicating that he had received a copy.

The County alleges that there is an "apparent irregularity" in the fact that the copy of its petition, which was sent from Milwaukee to the Union's attorney in Madison by certified mail, was received on August 11, 1981, but that the original of the petition, which was also sent from

^{1/} The County included a photostatic copy of the stamped and signed receipt with its argument. It is postmarked "received" at Madison on August 12, 1981 and shows a "date of delivery" stamp of "August 12, 1981," under Kelm's signature.

Milwaukee to the Commission's post office box in Madison, was not received until August 12, 1981. The County contends that under Section ERB 10.08(2) Wis. Adm. Code 2/ three days should be added to the prescribed 20 day period since the Examiner's decision was served by mail and that therefore its petition should be deemed timely filed. The County points out that under Section 111.09 Wis. Stats. [sic] 3/ the Commission is permitted to adopt reasonable and proper rules "relative to the exercise of its powers and authority", to "govern its proceeding's" and to "regulate the conduct of all elections and hearings". It argues that such extension of the three days in question is reasonable, as evidenced by the similar provisions of Section 801.15(5) Stats. dealing with the commencement of actions and venue in civil proceedings in court. In the event that the Commission finds that the provisions of Section ERB 10.08(2) are inapplicable, the County asks that the Commission find that "good cause" exists warranting a waiver under Section ERB 10.08(4) Wis. Adm. Code 4/ of the time period for filing because of the "irregularity" noted above and that the petition be deemed filed as of the date it was placed in the mail, i.e. August 10, 1981.

While the Union does not dispute the County's claim that it received its copy of the Petition on the 11th, it contends that there is no "irregularity" in the proceeding. According to the Union the requirements of section 111.07(5) are clear and unambiguous and jurisdictional. In this regard, the Union relies on the Commission's decision in Stanley Boyd Area Schools (12504-C 4/6/76), where we concluded that we were without jurisdiction to entertain a petition to review an Examiner's decision which was received 22 days after the Examiner's decision was mailed to the parties. According to the Union, the untimeliness of the petition was not due to any irregularity, but rather to the County's decision to wait until the end of the 20 day period and accept the known risk that by mailing its petition rather than hand delivering it, it might not be received (filed) within the 20 days allowed. The Union also cites a number of court decisions, which hold that the service requirements under Chapter 227 court review procedures are jurisdictional, as supportive of its position. Finally the Union argues that the County's reliance on the general rules of the Commission is misplaced since those rules do not apply to statutory requirements and cannot create an exception to the clear and unambiguous statutory requirements.

2/ ERB 10.08 Time for filing papers other than letters.

. . .

(2) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has a right to or is required to do some act within an initially prescribed period after service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period, provided, however, that such additional time shall not be added if the initial period has been extended, and further provided that a specific date has not been designated upon which the right is to be exercised or the act is to be performed.

3/ Reference here probably should be to the Commission's similar rule-making authority under MERA, Section 111.71 Stats.

The rules relied upon by the County appear in Chapter ERB 10, Wis. Adm. Code and govern the general procedure to be followed in Commission proceedings under MERA. Section ERB 10.04 states that "In any conflict between a general rule in Chapter ERB 10 and a special rule in another chapter applicable to a particular type of proceeding, the special rule shall govern." Therefore even assuming that Section ERB 10.08(2) could be interpreted to cover time periods established by statute, as opposed to those "prescribed by these rules or by order", ^{5/} the specific rule established by Section ERB 12.09(1) must govern. ^{6/} That rule states in pertinent part that "Within 20 days from the date that a copy of the findings of fact, conclusions of law and order . . . was mailed to the last known address of the parties in interest, any party in interest . . . may file a written petition with the Commission . . ." This specific rule tracks with the language of Section 111.07(5) Stats. which was intended to establish a day certain on which the decision of an Examiner is deemed final. Further, even if the provisions of ERB 10.08(2) were deemed applicable to the facts in this case, there would be a serious question as to the validity of such application since such application would appear to be in conflict with the unambiguous intent of Section 111.07(5). In this regard we note that the legislature did see fit to establish a narrow exception to the 20 day rule, not applicable to the facts in this case, whereby the Commission may extend the 20 day period for another 20 days if it is satisfied that a party in interest has been prejudiced because of an exceptional delay in receipt of a copy of any findings. ^{7/}

Since the application of the provisions of Section 111.08(5) involve a matter of the finality of Commission decisions, they affect the Commission's jurisdiction and therefore we do not believe that the requirements of that section, or the parallel rule (ERB 12.09(1), Wis. Adm. Code), can be "waived" by the Commission either under the rule cited by the County, Section ERB 10.08(4) Wis. Adm. Code, or under the general rule dealing with Commission waiver of its rules, Section ERB 10.01, Wis. Adm. Code. We agree with the County that there is an "apparent irregularity", or at least inconsistency in the mail service provided by the United States Post Office in this case. ^{8/} Nevertheless deadlines involving the finality of decisions must be adhered to in the interest of putting an end to

^{5/} See ERB 10.08(1).

^{6/} See Sinclair Refining Company (8526-B) 3/69; Albert J. Janich (8165-B) 1/68.

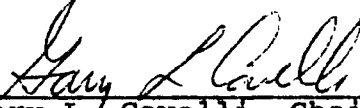
^{7/} See the last sentence of Section 111.07(5) Stats. Other statutory "exceptions", not applicable to the facts in this case, are found at Section 990.001 Stats. dealing with the situation when the 20th day falls on a Saturday, Sunday or legal holiday.


^{8/} The record does not establish why the delivery of the original copy of the petition was delayed in this case. We do note however that the return receipt prepared by the County and signed by Kelm erroneously bears the same certified number as the return receipt for the copy which was sent to the Union's attorney.

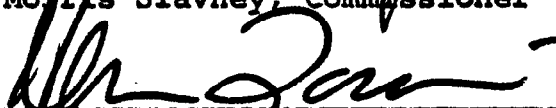
litigation by establishing a date certain on which any appeal must be taken. 9/

Dated at Madison, Wisconsin this 15th day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

9/ It should be noted that the County has filed an appeal in circuit court from the decision in this case, which was served on August 31, 1981 and received by the Commission on September 1, 1981.