

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case CIV
No. 31816 DR(M)-317
Decision No. 21251-A

No. 21251-A

1/ (Continued)

Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the 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. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER
DISMISSING PETITION FOR DECLARATORY RULING

In its December 19, 1983 response to the Commission's Order to Show Cause, the City confirmed the relevant facts as regards to the agreed-upon filing arrangements for objections and petition for declaratory ruling, making unnecessary an evidentiary hearing to resolve factual disputes. Specifically, the City acknowledges therein that,

(t)he parties entered into a verbal agreement concerning the filing schedule. The parties agreed at Mr. Schoenfeld's suggestion, that the City's Petition was to be postmarked on or before September 19, 1983. Neither party inquired nor did Mr. Schoenfeld offer a definition or explanation of the term 'postmarked.'

ERB 31.12(3) states the following as the procedure which must be followed to file a petition for declaratory ruling after a party has raised an objection under ERB 31.11:

(3) WHEN TO FILE. Such a petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If such a petition or stipulation is filed after the investigator calls for final offers, such a petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects of bargaining.

ERB 10.20, however, provides, in pertinent part:

Waiver of procedures. The parties to any proceeding may agree to waive any one or more of the procedural steps or decisions which would otherwise precede the issuance of a final order or other final disposition issued by the commission or any authorized individual.

The City argues that the filing schedule proposed by Investigator Schoenfeld and accepted by both parties constitutes a waiver of the specific time requirements set forth in ERB 31.12(3) pursuant to ERB 10.20. We agree. Inasmuch as both parties agreed to a time schedule different from that set forth by ERB 31.11(3), the time requirements set forth in ERB 31.1(3) have been waived in this case.

However, the undisputed facts establish that the City failed to satisfy the specific time requirements proposed by Schoenfeld, to which the City and Union agreed. The City's petition for declaratory ruling, pursuant to this agreement, was to be "postmarked" by September 19, 1983.

The City argues that it understood the term "postmarked" to mean that its petition was to be deposited in the United States mail on or before September 19, 1983, (citing ERB 10.10(2), Wis. Adm. Code 2/) and that it did so. The City

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- 2/ (2) COMPLETION OF SERVICE. Service of any paper or process shall be regarded as completed when (a) delivered in person, (b) left at the principal office or place of business of the person served, (c) addressed to the last known address of the person served and deposited in the United States mail, (d) addressed to the last known address of the person served and deposited with a telegraph company, or (e) with regard to persons or parties located outside the state in the manner and at the time as provided in subsection 111.07(2)(a), Wis. Stats.

further argues that it also complied with the purpose of the parties' agreed upon filing deadline in that it placed the petition in the mails at a time that the City could reasonably expect the document to be postmarked the 19th, and that the document was inexplicably postmarked on the following day through no fault or neglect on the part of the City. In any event, the City argues, the Union would not be prejudiced by the Commission's treatment of the petition as timely filed whereas the City would be done a substantial injustice if its petition were dismissed on this highly technical basis.

The parties' agreement specified "postmarked," not "deposited in the mails." "Postmarked" has a well understood meaning in legal parlance, to wit, the "stamp or mark put on letters received at the post office for transmission through the mails." 3/ The Commission's Rule ERB 31.12(3) would have required receipt of the petition at the Commission office on or before the deadline date had the parties not agreed on their own filing arrangement. When the City agreed to a "postmarked on or before December 19, 1983" deadline and deposited the petition in the mails, it undertook the risk, small as one would reasonably presume it to be, that the document might not be postmarked forthwith and delivered in the normal course of the mails. As the City argues, the parties' agreement would surely be properly understood as requiring the petition to be postmarked on or before December 19, 1983, except if physically delivered to the Commission's office on or before that date. The verbal agreement does not reasonably support the further exceptions urged by the City for unanticipated delays in postmarking and mail handling. Those were the City's risks in agreeing to and using the mails. The City could have avoided those risks by hand-delivery of the document to the Commission, or by arranging for the Post Office to postmark the document in the presence of the City's agent. While we do not view the City's election not to take either of those precautions as neglect on its part, we must nonetheless conclude that the City did not file its petition in accordance with the agreed-upon deadline. Substantial compliance with such a deadline will simply not suffice, or the purpose served by a filing deadline would be undercut. Time requirements for filing a petition foster the prompt resolution of disputes and must be honored by all parties. 4/

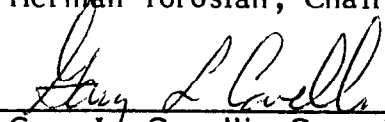
While there are significant consequences that flow from what can fairly be characterized as technical non-compliance with the filing arrangements, we nonetheless find merit in the Union's contention that the petition was not timely submitted within the meaning of the agreed-upon ground rules and hence that it is untimely and properly to be dismissed on that basis.

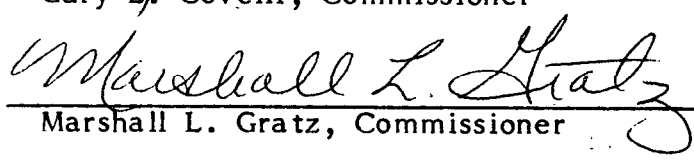
Dated at Madison, Wisconsin this 21st day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner

3/ Black's Law Dictionary (4 ed., 1951).

4/ City of Brookfield, Dec. No. 19735 (7/82).