

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, LOCAL UNION
NO. 3148, AFL-CIO,

Complainant,

vs.

SAUK COUNTY,

Respondent.

Case 74
No. 36408 MP-1813
Decision No. 23489-C

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison,
Wisconsin 53703, by Mr. Richard V. Graylow, on behalf of Complainant.
Hesslink Law Offices, S.C., 6200 Gisholt Drive, Madison, Wisconsin 53713, by
Mr. Robert M. Hesslink, Jr., on behalf of Respondent.

ORDER DENYING PETITION FOR REHEARING

Examiner David E. Shaw having, on October 7, 1987, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matter wherein the Respondent was found to have committed certain prohibited practices; and a copy of said decision having been mailed to the parties on October 7, 1987; and counsel for Complainant and Respondent having received a copy of the Examiner's decision on October 8 and October 9, 1987, respectively; and no intervening order by the Examiner or the Commission having been issued on or before October 27, 1987; and Respondent having on October 28, 1987, hand delivered a petition to the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.; and the Commission having on November 2, 1987, issued a Notice which specified that Respondent's petition for review was not filed within the 20 day review period and that by operation of Sec. 111.07(5) Stats., 1/ Examiner Shaw's Findings of Fact, Conclusions of Law and Order issued in the above-entitled matter on October 7, 1987 became the Commission's Findings of Fact, Conclusions of Law and Order on October 27, 1987; and Respondent having on November 23, 1987, filed a Petition for Rehearing with the Commission asserting that the Commission erred when it concluded that Respondent's petition for review was untimely filed; and Complainant having submitted a response to said petition on December 4, 1987; and the Commission having considered the matter and being satisfied that the petition should be denied;

NOW, THEREFORE, it is

ORDERED 2/

That the Petition for Rehearing is hereby denied.

Given under our hands and seal at the City of
Madison, Wisconsin this 22nd day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

1/ Section 111.07(5), Stats., provides:

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or 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 commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(Footnote 2 continued on Page 3)

(Footnote 2 Continued)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

SAUK COUNTY

MEMORANDUM ACCOMPANYING ORDER DENYING PETITION FOR REHEARING

The procedural background of this case has been previously recited herein. There are no factual disputes between the parties as to the date the Examiner's decision was mailed, the date the Respondent received a copy of said decision, or the date the Respondent's petition for review was received by the Commission.

POSITIONS OF THE PARTIES

The Respondent's argument that its petition was either timely filed, or that the Commission can nonetheless consider said argument, is based on four distinct contentions. First, the Respondent contends that its petition was timely filed due to the unambiguous language of ERB 10.08(2) which extends the review period by 3 days. 3/ Second, the Respondent contends that, even if its petition would not otherwise have been timely, the failure of the Examiner's decision to strictly comply with the requirements of Sec. 227.48(2), Stats. precludes the Commission's rejection of the Respondent's petition for review. Third, the Commission had discretion under Sec. 111.07(5), Stats., to accept the petition for review because of the additional time taken before the Examiner's decision reached the Respondent's counsel. Fourth, irrespective of whether the Commission appropriately rejected the petition for review, it may now consider, and should consider, the Respondent's argument on rehearing.

The Complainant asserts that the Petition for Rehearing should be denied because Respondent's petition for review was not timely filed. Complainant asserts that the Commission has previously addressed timeliness arguments such as that raised by Respondent herein and found them to be unpersuasive.

DISCUSSION

In Ozaukee County, Dec. 18384-C (WERC, 9/81), we discussed the argument raised herein by the Respondent as to the impact of ERB 10.08(2) on the timeliness of a petition for review. We stated:

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 ever (sic) 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," the specific rule established by Section ERB 12.09(1) must govern. 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.

3/ ERB 10.08(2) provides:

(2) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has a right 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.

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.

Since the application of the provisions of Section 111.08(5) (sic) involve a matter of the finality of Commission decision, 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 inconsistently in the mail service provided by the United States Post Office in this case. Nevertheless deadlines involving the finality of decisions must be adhered to in the interest of putting an end to litigation by establishing a date certain on which any appeal must be taken. (footnotes omitted).

Given our holding in Ozaukee County, we reject the argument made by Respondent herein as to the impact of ERB 10.08(2).

The County has also argued that the Commission has discretion under Sec. 111.07(5), Stats., to accept the petition for review as timely filed because the Examiner's decision reached Respondent's counsel one day after it reached Complainant's counsel and because a 2 day delivery lag was "exceptional." Section 111.07(5), Stats., establishes that the Commission may extend the 20 day period for receipt for a petition for review if it is satisfied that the party in interest has been prejudiced because of exceptional delay in receipt of a copy of the decision. As we are satisfied that the Complainant's counsel's receipt of a copy of the decision one day prior to Respondent's receipt thereof is irrelevant to this statutory exception, and as we are further satisfied that a two day period between the mailing of the decision and Respondent's receipt of same falls far short of "exceptional" delay, we do not find the County's argument in this regard to be persuasive.

Section 227.48(2), Stats., provides:

"(2) Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified under s. 227.53(1)(a) for filing a petition for judicial review or under any other section permitting administrative review of an agency decision begins to run until the agency has complied with this subsection."

Pursuant to Sec. 227.48(2), Stats., the Examiner's decision herein contained the following statement:

- 4/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or 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 commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

The County argues that the above-quoted footnote from the Examiner's decision does not constitute compliance with Sec. 227.48(2), Stats., and thus, pursuant to said statutory provision, the petition was timely filed. We are satisfied that the footnote in the Examiner's decision constitutes compliance with Sec. 227.48(2), Stats. The footnote quotes verbatim Sec. 111.07(5), Stats., which sets forth both a party's right to Commission review of an Examiner decision as well as the time allowed for the filing of such a petition. As Sec. 111.07(5), Stats., does not require that any specific party be named as a "Respondent," we conclude that this requirement of Sec. 227.48(2), Stats., is inapplicable herein. While Respondent has noted that ERB 12.09(1) states that a copy of the petition should be "served upon the other parties," non-compliance with that rule is not a basis for dismissal of a petition for review. 4/ Therefore, we do not believe that the absence of any reference to that requirement in the Examiner's footnote is a persuasive basis for finding Respondent's petition timely.

Lastly, the County argues that the Commission has discretion under Sec. 227.49, Stats., 5/ to review the Examiner's decision and that the Commission should exercise said discretion in this case because the Examiner's decision involved issues of first impression as to important matters of law as to which the Commission should bring its expertise to bear. Even assuming Respondent is correct as to the nature of our discretion under Sec. 227.49, Stats., after we have issued a Notice as we did herein, we had an opportunity pursuant to Secs. 111.07(5) and (6), Stats. to review the Examiner's decision during the 20 day review period. We elected not to exercise that discretion in this case and stand by that decision.

4/ Washington County, Dec. No. 23770-C (WERC, 7/87)

5/ (2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Given the foregoing, we are not persuaded that we should grant Respondent's Petition for Rehearing and have therefore denied same.

Dated at Madison, Wisconsin this 22nd day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner