

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS CORCORAN, Complainant,

vs.

**STATE OF WISCONSIN,
DEPARTMENT OF CORRECTIONS**, Respondents.

Case 680
No. 65137
PP(S)-362

Decision No. 31570-C

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainant.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondents.

ORDER DENYING MOTION TO DISMISS PETITION FOR REVIEW

On June 24, 2008, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above matter.

On July 14, 2008, Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking Commission review of the Examiner's decision. Complainant did not serve a copy of the petition on Respondent.

On July 14, 2008, the Commission established a schedule for the receipt of briefs as to the petition for review. The parties thereafter agreed to suspend the briefing schedule pending settlement discussions. Those discussions have thus far been unsuccessful.

On October 20, 2008, Respondent requested and received a copy of the petition for review from the Commission. On October 22, 2008, Respondent filed a motion with the Commission asserting that Complainant's failure to serve a copy of the petition on Respondent

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was contrary to the requirements of ERC 22.09 and 12.09 and that the petition should be dismissed. The parties then filed written argument in support of and in opposition to the motion-the last of which was received October 28, 2008.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

The motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of November, 2008.

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

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS)

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION
TO DISMISS PETITION FOR REVIEW**

Section 111.07 (5), Stats. (which is made applicable to this proceeding by Sec. 111.84 (4), Stats.) provides in pertinent part:

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.

ERC 12.09 (which is made applicable to this proceeding by ERC 22.09) provides in pertinent part:

(1) **RIGHT TO FILE PETITION, TIME TO FILE PETITION.** Within 20 days from the date a copy of the findings of fact, conclusions of law and order of an examiner was mailed to the last known address of the parties, any party dissatisfied with the findings of fact, conclusions of law and order may file a written petition with the commission as set forth in s. ERC 10.06 (1), and shall, at the same time, serve copies of the petition on the other parties . . .

(2) **DISPOSITION.** If a petition for commission review is timely filed, the commission shall promptly establish a schedule for the submission of written arguments The commission shall then review the record and issue to the parties its own findings of fact, conclusions of law and order in the matter.

ERC 20.01 provides in pertinent part:

The commission or examiner may waive the requirements of chs. ERC 20 to 28, 40, or 50 to serve the purposes and provisions of the State Employment Labor Relations Act, unless a party shows that it would be prejudiced by the waiver.

Respondent contends that: (1) the language and history of current ERC 12.09(1) clearly require that simultaneous service of a copy of the petition on other parties is needed to perfect the appeal; (2) a prior Commission decision holds that failure to follow ERC 12.09 (1) warrants dismissal of a petition for review and other Commission decisions are distinguishable; (3) if the Commission is not willing to enforce ERC 12.09 (1) it should so advise parties; (4) establishment of a briefing schedule did not waive Respondent's right to insist on enforcement of ERC 12.09 (1); (5) waiver of ERC 12.09 (1) is not appropriate; (6) Complainant's failure to follow ERC 12.09 (1) deprived Respondent of the knowledge relevant to any decision by Respondent as to whether to file its own petition for review; and (7) granting the motion to dismiss would be consistent with Wisconsin court's strict application of similar statutory service requirements.

We do not find Respondent's arguments persuasive and thus have denied the motion to dismiss.

In WEYAUWEGA JOINT SCHOOL DISTRICT NO. 2, DEC. NO. 14373-C (WERC, 7/77), the Commission held as follows:

On July 5, 1977, the commission received a copy of the Complainants' Petition for Review. The transmittal letter indicated that a copy had been sent to Counsel for the Respondents. On July 13, 1977, Counsel for the Respondents received their copy of the petition which had apparently been delayed in the mails due to missing postage. In the meantime, the Respondents objected to the Complainants' failure to comply with ERB 12.09(1), which requires simultaneous service of petitions for review on all parties to the proceeding 1/ and the Respondents have not withdrawn said objection. The requirement that a copy of any petition for review be simultaneously served on other parties is not jurisdictional. Section 111.07(5) Stats. merely requires that the petition be filed with the Commission within 20 days after the mailing of the Examiner's order and the Complainants have complied with that statutory requirement. The requirement in ERB 12.09(1) that all other parties be served with a copy of any petition for review is intended to give other parties of record notice that such a petition has been filed and to advise them as to the content of any such petition. The Respondents have not alleged that they were in any way prejudiced by the untimely receipt of a copy of the complainants' petition. When a petition for review is filed under Section 111.01(5), the Commission is obligated to review the evidence submitted in determining whether to affirm, reverse, set aside or modify the Examiner's findings or order. The Respondents are not bound by the findings or order of the Examiner any more than the Commission is bound by such findings or order. Therefore, the failure of the Respondents to file a petition, to the extent that such failure was attributable to lack of notice as to the Complainants' petition, has not in any way prejudiced the Respondents' rights.

1/ "ERB 12.09 Review of findings of fact, conclusions of law and order issued by single member or examiner. (1) RIGHT TO FILE, TIME. Within 20 days from the date that a copy of the findings of fact, conclusions of law and order of the single member or examiner was mailed to the last known address of the parties in interest, any party in interest, who is dissatisfied with such findings of fact, conclusions of law and order, may file a written petition with the commission, and at the same time cause copies thereof to be served upon the other parties, to review such findings of fact, conclusions of law and order. 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 of fact, conclusions of law and order, it may extend time another 20 days for filing the petition for review."

The MILWAUKEE BOARD OF SCHOOL DIRECTORS (HEM) case cited by Respondent (DEC. NO. 27698-C WERC, 4/96) is not inconsistent with WEYAUWEGA. The issue in MILWAUKEE was whether a petition for review could be served on the Commission by facsimile transmission-not whether failure to serve a copy of the petition on another party warranted dismissal of petition.

Thus, unless the most recent amendments to ERC 12.09 warrant reaching a different result, WEYAUWEGA disposes of the motion to dismiss. Simultaneous service of a copy of the petition is not jurisdictional. Lack of notice is not prejudicial as to an opposing parties' decision to file its own petition because all of the examiner decision is before the Commission for review whenever either party files a petition for review.

Respondent correctly points out that ERC 12.09 has been amended since the WEYAUWEGA decision was issued. The word "shall" was added and thus the phrase "and at the same time cause copies thereof to served upon the other parties . . . " became "and shall, at the same time, serve copies of the other parties . . . " We disagree with Respondent's assertion that this change was a substantive one. As noted in WEYAUWEGA, the Commission interpreted the then existing ERC 12.09 (1) as a "requirement"- but not a jurisdictional one. The addition of "shall" may clarify that service is a "requirement"- but it does not transform the "requirement" into a jurisdictional prerequisite. We also note that ERC 12.09(2) DISPOSITION specifies that if a petition is timely filed, the Commission will proceed to dispose of the matter. This portion of the rule does not reference providing copies of the petition and thus provides further support for the holding that, unlike the timely filing of a petition, providing copies is not a jurisdictional prerequisite.

Given all of the foregoing, we have denied Respondent's motion to dismiss. Contrary to Respondent's view, such a decision does not make the rule in question meaningless. Compliance with the rule does help expedite the review process. However, failure to comply does not oust the Commission of jurisdiction to decide the matter.

Dated at Madison, Wisconsin, this 4th day of November, 2008.

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

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