STATE OF WISCONSIN

LARRY G. VESPERMAN,

Complainant,

v. ,

Chancellor, UNIVERSITY OF WISCONSIN-MADISON (Hospital),

Respondent.

Case No. 81-PC-ER-66

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INTERIM DECISION AND ORDER

This matter is before the Commission on complainant's petition for rehearing. The petition was filed as a consequence of an Order issued by the Commission on April 29, 1982, dismissing the matter. The Order was based upon a failure to timely file a request for hearing after the issuance of an initial determination of no probable cause. Both parties have had the opportunity to file arguments.

The majority of the relevant facts are set out in the April 29th Order, a copy of which is attached hereto. In addition, the complainant has stated that he actually received his copy of the initial determination on March 26, 1982.

On March 23, 1982, Equal Rights Officer Robert E. Gregg issued an initial determination in the above matter that there was no probable cause to believe that discrimination had occurred. In the cover letter to the initial determination, the complainant was advised, in part, as follows:

If you feel that this "no probable cause" determination is in error you may, within 30 days, appeal to the Commission for a hearing. Under Section Ind. 88.035(1), Wis. Adm. Code, the request must be in writing and state specifically the grounds upon which it is based. . . .

If a written request for review is not received within 30 calendar days, I will recommend to the Commission that your case be dismissed.

The complainant subsequently requested a hearing. Complainant's letter was dated April 22, 1982, was placed in a mail box on April 23, 1982, was

postmarked April 25, 1982, and was actually received by the Commission on April 27, 1982. A member of the Commission's staff had telephoned the complainant on April 22, 1982, to remind him that the 30 day period for appealing the initial determination was about to run out. The resolution of complainant's request rests on an analysis of §PC 4.03(3), Wis. Adm. Code, which provides in part:

(3) NO PROBABLE CAUSE DETERMINATIONS. When there is an initial determination of no probable cause to believe that discrimination has been or is being committed, notice thereof shall be served upon the parties, together with copies of the complaint and the initial determination. Within 30 calendar days after the date of such service, the complainant may petition the commission for a hearing on the issue of probable cause wherein the commission may affirm or reverse the initial determination.

The manner of service referred to in this provision is not specified within the terms of the Commission rules. There is a statement within §PC 1.08, Wis. Adm. Code, that "[s]ervice by mail is complete upon mailing." However, this provision relates to service of papers by a party and there is nothing within its terms suggesting that it should be applied to initial determinations issued by the Commission's equal rights officers.

Wisconsin case law indicates that in the absence of a statute (or, presumably, an administrative rule) to the contrary, service of a notice does not become effective until the party receives it. Boeck v. State Highway Commission, 36 Wis. 2d 440, 444, 153 NW. 2d 610 (1967); Hotel Hay Corp. v. Milner Hotels; Inc., 255 Wis. 482, 39 NW 2d 363 (1949).

In the recent case of <u>In re Proposed Incorporation of Pewaukee</u>, 72 Wis. 2d 593, 241 N.W. 2d 603 (1976), the Court was faced with interpreting §227.16(1), Wis. Stats., which provides for filing a petition for judicial review "within 30 days after the service of the decision of the agency on all parties."

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The Court relied on a clear statutory provision (§227.14, Wis. Stats.) in concluding that service was complete on mailing.

In the present case, given the absence of any interpretive or qualifying administrative rule, the 30 day period referred to in §PC 4.03(3), Wis. Adm. Code, commences on the date that notice of the initial determination was received by the parties. There is no clear language defining "service" that would permit the opposite result.

The complainant has stated he received the initial determination on March 26, 1982. Thirty calendar days from March 26th is April 25, 1982. However, pursuant to §PC 1.09, Wis. Adm. Code, and §801.15(1), Wis. Stats., where the last day in the time period is a Sunday, it is not to be included in the computation. Therefore, complainant had until April 26, 1982, in which to "petition" the Commission for a hearing.

It is undisputed that the complainant wrote his request for hearing on April 22nd and placed it in a mailbox on April 23rd. The letter bears a postmark of April 25th and the Commission received it on April 27, 1982. The second issue in this matter therefore becomes one of determining which of these steps constitutes petitioning the Commission.

The Commission's rules do not define the verb "petition" as that term is used to describe the conduct that tolls the 30 day limit. There is also an absence of case law defining "petition" as a verb. Given the lack of any other aids to construction, the Commission relies on §111.31(3), Wis. Stats. (1979), which provides:

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardVesperman v. UW Case No. 81-PC-ER-66 Page Four

less of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose.

A liberal construction of the verb "petition" in this instance requires the conclusion that complainant's letter requesting a hearing was timely where the letter was drafted, mailed and postmarked before the running of the 30 day period. Only by strictly construing this term could the Commission reach an opposite result and conclude that actual receipt of the petition within the 30 day period is necessary.

This result is readily distinguishable from the various decisions by the Commission interpreting §230.44(3), Wis. Stats. Richter v. DP, 78-261-PC (1-30-79). That provision states that an appeal filed under §230.44, Wis. Stats., "may not be heard unless the appeal is filed within 30 days." The term "filed" has frequently been construed as requiring actual receipt by the Commission.

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ORDER

Complainant's petition for rehearing is granted, the Commission's

Order dated April 29, 1982, is hereby withdrawn, and this matter may proceed
to a hearing on the probable cause issue. The parties will be contacted to
set a date for a prehearing conference.

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Dated:	Jean 4	,1982	STATE PERSONNEL	COMMISSION

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LAURIE R. McCALLUM, Commissioner

KMS:jmf

JAMES W. PHILLIPS, Commissioner

Parties:

Larry G. Vesperman 2500A South 12th Street Milwaukee, WI 53215 Chancellor Irving Shain UW-Madison 158 Bascom Hall Madison, WI 53706