

postmarked in Milwaukee on May 9th and was returned to the Commission on May 11, 1988.

On June 9, 1988, the Commission received a letter from the complainant dated June 7th in which he wrote:

Please be advised that this is my formal appeal to the findings of EEOC, in my complaint issued 09-18, 1982, I request the right to pursue this matter further. I request a scheduling of the appeal hearing on my behalf.

My address has changed (as noted above). In conclusion, I will be awaiting your prompt response.

By letter dated June 10, 1988, a representative of the Commission identified a potential timeliness issue to complainant's June 7th letter.

Complainant responded by writing:

I respectfully request that you take my appeal and process it for a hearing. I received your letter regarding the hearing request on June 7th, 1988. The letter in which you sent was not delivered to my current address, your records will verify the change of address by the last letter you received from me. If you need additional verification I will be willing to submit it to you upon request. Due to these facts I must protest the dismissal of the hearing and again request a hearing be set for me in all fairness. Please note that once I had received your letter, I did respond with urgency in sending a response to you by Emery Air Freight. I feel due to my speedy response after receiving your letter as late as I did, the amount of response time should be extended on my behalf.

The Commission rules regarding the issue of the period for appealing an initial determination of no probable cause have recently been revised. In Vesperman v. UW-Madison, 81-PC-ER-66, 6/4/82, the Commission held that under the rules in effect at the time, the 30 day period did not commence until the initial determination was actually received, as opposed to the date of mailing. The underlying rule that was interpreted in Vesperman read:

"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.... Within 30 days after the date of such service, the complainant may petition the commission for

a hearing on the issue of probable cause...." §PC 4.03(3), Wis. Adm. Code. (emphasis supplied)

The Commission construed the rule as follows:

The manner of service referred to in [§PC 4.03(3)] 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 Corps. v. Milner Hotels, Inc., 255 Wis. 482, 39 NW 2d 363 (1949).

In the recent case of In re Proposed Incorporation of Pewaukee, 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." 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 interpretative 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 same rules were interpreted similarly in Bender v. DOR, 87-0032-PC-ER, 3/22/88.

In August of 1987, the Commission revised its rules. The current rule setting forth the time limit for appealing the initial determination is s. PC 2.07(3), Wis. Adm. Code, which provides:

PC 2.07 Initial determination. (1) WHEN ISSUED. At the conclusion of each investigation and absent a settlement between the parties or other final disposition of the complaint, the commission shall make an initial determination as to whether probable cause exists as to each claim raised in a complaint. The initial determination shall be in writing and shall be served on the parties along with an explanation of any time limits for obtaining review of the initial determination.

* * *

(3) NO PROBABLE CAUSE DETERMINATIONS. Within 30 days after the service of an initial determination of no probable cause as to any claim raised in a complaint, a complainant may file, with the commission, a written request for hearing on the issue of probable cause as to that claim. If, after a hearing, the commission finds probable cause as to the claim and reverses the initial determination, the complaint shall be processed under sub. (2). (emphasis supplied)

This rule must be interpreted consistently with s. PC 1.05, Wis. Adm. Code, which provides:

PC 1.05 Filing and service of papers. (1) With the exception of the initial complaint and the initial appeal which will be served by the commission pursuant to ss. PC 2.03 and 3.03, and papers that are filed as part of an investigation, all papers filed by a party with the commission shall also be served by that party on all other parties to the case.

(2) Papers may be served either personally or by mail. Service by mail is complete upon mailing. That is, for purposes of service, the effective date is the date of mailing, not receipt. Filing is complete on receipt.

(3) The filing of any paper required to be served constitutes a certification that a copy of the paper has been timely served on all parties required to be served unless the person filing the paper states otherwise in writing. No affidavit, certificate, or admission of service need be filed with the commission.

(4) When a party is represented by a representative, service shall be made upon that representative. For purposes of service, where more than one petitioner has filed the case, the first-named petitioner shall be considered the sole petitioner, unless another petitioner is specifically identified as the agent for service.

In addition, s. PC 1.02(10), Wis. Adm. Code, offers the following definition:

(10) "Filing" means the physical receipt of a document at the commission's office.

In Vesperman, the Commission concluded the rule providing that service by mail was complete on mailing only applied to the service of papers by a party and not to papers served on a party by the Commission. The current rule (s. PC 1.05, Wis. Adm. Code) applies to the service of all papers, irrespective of whether they are served by the Commission or by a party. This is made clear by the reference in s. PC 1.05 (1), Wis. Adm. Code, to

"all papers filed by a party," and the absence of a similar reference in subsection (2). This distinction indicates that there is no limitation which would exclude papers served by the Commission from the language of subsection (2). If the Commission had intended that all of s. PC 1.05, Wis. Adm. Code, only apply to papers served by the parties, that qualifying language would have been placed in introductory language to that section or in the title, rather than placing a specific reference to papers served by the parties in only one of the four subsections.

When read together, ss. PC 1.05(2) and 2.07(3), Wis. Adm. Code, provide that the 30 day period for filing a request for hearing on the issue of probable cause commences with the mailing of the initial determination. In addition, pursuant to s. PC 1.02(10), 1.05(2) and 2.07(3), Wis. Adm. Code, the request for hearing is not perfected until it has been physically received by the Commission.

This construction of the applicable rules is the same as the information provided to the complainant and to his attorney of record in the May 6th letter explaining the adoption of the EEOC's findings.

In his June 7th letter, complainant noted that his address had changed prior to the issuance of the May 6th letter. The Commission is only able to mail correspondence to a party's last known address and must rely upon the party to notify the Commission of any change of address. S. PC 1.03(1), Wis. Adm. Code. Also see s. 111.39(3), Stats. It should also be noted that the May 6th letter was sent to both the complainant and to his attorney of record in this matter.

Because the complainant failed to file his written request for hearing within 30 days of the May 6th letter, the Commission issues the following

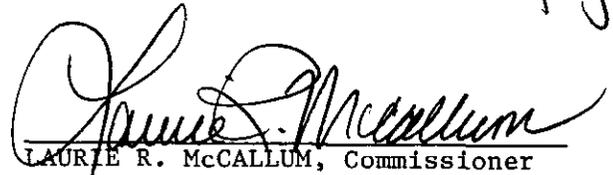
ORDER

This matter is dismissed due to the failure to receive a timely appeal from findings of no reasonable cause adopted by the Personnel Commission.

Dated: July 13, 1988 STATE PERSONNEL COMMISSION

KMS:rcr
DPM/2


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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