

STATE OF WISCONSIN

PERSONNEL COMMISSION

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DANIEL P. KING,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES [DOC],

Respondent.

Case No. 88-0007-PC-ER

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DECISION
AND
ORDER

On April 16, 1991, John L. Haskell, an Equal Rights Officer employed by the Commission sent the following letter to complainant by certified mail:

On April 21, 1990, you advised me that you would be meeting with an attorney and asked to hold your case in abeyance until I heard from him. However, I was not contacted and on August 28, 1990, I sent a certified letter advising you that if I did not hear from someone representing you within 20 days that I would recommend your case be dismissed. On September 4, 1990, you responded that you needed additional time to secure a law firm because the one you had been working with had lost your case file. On February 15, 1991, I wrote you again asking you to tell me what progress you had made in securing a representative, but to date have not heard from you.

I am once again asking you to give me some indication whether or not you wish to proceed with your complaint. I must receive your response within 20 days of the date of this certified letter. If you fail to respond within the 20 day time period, I will recommend that the case be dismissed for lack of prosecution. Pursuant to §111.39(3), Wis. Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

If you wish to withdraw your case, simply write the Commission a short letter stating you would like your complaint withdrawn.

Complainant signed the certified receipt for this letter on April 17, 1991.

In response, complainant submitted a letter advising that he wished to proceed with his complaint. This letter was dated May 3, 1991, postmarked May 4, 1991, and received by the Commission on May 7, 1991. After the Commission advised complainant that his response appeared to be untimely, complainant replied by letter dated May 15, 1991, as follows (as relevant):

In reply to your letter of May 7, I request the Commission not to dismiss my complaint.

Your letter dated April 16 was received by me on April 17. Due to extensive traveling during the following ten days, I was not able to reply until May 3 (sixteen [16] days later). You indicate that this letter was received on May 7. May 7 is exactly twenty (20) days from the time I received your letter.

I am sorry for the delay in proceeding with this matter, but as I have indicated in previous letters, my file has been lost or misplaced by the law firm to which it had been sent by my previous attorney. Both attorneys deny having possession of the file and this has presented an obstacle to obtaining new representation.

The third attorney to whom I referred in my May 3 letter is not accepting new cases. I have now contacted a fourth attorney in an effort to secure representation.

Section 111.39(3), stats., provides that a complaint shall be dismissed if the complainant fails to respond within 20 days to correspondence sent by certified mail to the complainant's last known address. In the case before the Commission, complainant's response to the Commission's correspondence was received 21 days after the date the Commission letter of April 16, 1991, was mailed. The Commission has held that this 20 day period begins to run on the date the Commission's letter is mailed. Jackson v. DHSS, 87-0149-PC-ER (3/10/88); Billingsley v. DOR, 87-0132-PC-ER (7/13/88); Block v. UW-Madison Extension, 88-0052-PC-ER (7/27/89). The Commission noted in Block that if §111.39(3) were interpreted as requiring actual receipt by the complainant before the 20 day period began to run, this would negate the whole purpose of the law as it would prevent the Commission from dismissing a complaint filed by a person who had moved without providing a forwarding address, since such a person would never receive the correspondence.

In Billingsley, the Commission held that to be timely under §111.39(3), stats., a response must be received by the Commission within the 20 day period.

This is consistent with the definition of "respond" found in BLACK'S LAW DICTIONARY 1475 (4th ed. 1968): "[t]o make or file an answer." (emphasis supplied) If the legislature had intended that mailing a response, such as complainant did here, was sufficient to toll the running of the 20 day period, it would have said so in the statute, particularly when one considers the number of ways someone can initiate a response besides the mail — UPS, Federal Express, interdepartmental mail, etc. Also, a construction that permitted someone to satisfy the 20 day limit for response by initiating delivery by some means, such as mailing, would promote uncertainty due to difficulty in determining when something is mailed. For example, if the last day for responding is a Friday and someone on Friday deposits an envelope in a mailbox at 2:00 p.m. when the last mail was picked up at 1:00 p.m., the letter would have been mailed on Friday but not postmarked until Saturday.¹


In conclusion, the Commission notes that the investigator's letter of April 16, 1991, explicitly advised complainant that "I must receive your response within 20 days of the date of this certified letter [or] I will recommend that the case be dismissed for lack of prosecution."

¹ This problem could be alleviated by a provision that the postmark governs; this illustrates why, if the legislature had intended that something other than actual receipt would satisfy the requirement of §111.39(3), it would have so specified.


ORDER

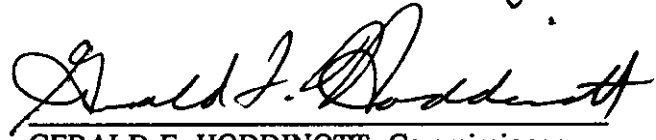
This complaint is dismissed for failure of prosecution.

Dated: May 29, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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*Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position(s) that is the subject of this proceeding is now held by the Secretary of the Department of Corrections.