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CHARLES N. BEHNKE,

Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN - MADISON,

Respondent.

Case Nos. 89-0135-PC-ER, 90-0003,  
0017-PC-ER

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RULING  
ON  
PETITION  
FOR REHEARING

These matters are before the Commission on the complainant's petition for rehearing, filed on July 27, 1994. On July 8, 1994, the Commission issued a decision dismissing these cases for lack of prosecution. The complainant's claim of age discrimination in Case No. 90-0003-PC-ER was dismissed for failure to comply with the requirements of §111.39(3), Stats. The remaining whistleblower claims were all dismissed because of circumstances which the Commission summarized as follows:

Under these circumstances, where, over the course of more than 16 months, the complainant has failed to provide the Commission with dates when he is available for a prehearing conference, despite four written requests, there are clear grounds for dismissal. This conclusion is based upon the length of delay and the absence of any reason sufficient to justify the delay. The Commission recognizes that the complainant has moved during this period, and the complainant has indicated that he has had difficulty in locating an attorney to represent him. However, these reasons are insufficient to account for the months of delays encountered in this case. The complainant's delays in responding to the Commission's requests for information are documented back to the investigative stage of these matters. Complainant has failed to fulfill his responsibility to pursue these cases.

In his petition, complainant contends that "the circumstances surrounding the lack of prosecution in this case were, to a large degree, based on circumstances beyond the control of the Complainant or occurred because of complacency on the part of Complainant based upon prior Commission action or lack

of action." The Commission does not accept this statement as accurately characterizing the history of this proceeding.

The Commission's July 7, 1994 decision sets forth numerous facts relevant to the rationale relied upon at that time. That recitation shows that, contrary to the contention on page 2 of the petition, the May 10th letter to the complainant did delineate that *receipt* was to be within 20 days. The May 10th letter clearly stated that "[y]our response must be received by the Commission within 20 days of the date of this certified letter."

Complainant also quotes §PC1.05(2), Wis. Adm. Code for the proposition that he only had to mail his response to the Commission, rather than to have it received by the Commission, in order for it to be considered timely. The relevant portions of the Commission's rule read as follows:

(1) With the exception of the initial complaint and the initial appeal... 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.* (emphasis added)

The Commission's rule distinguishes between *filing* with Commission, and *serving* a copy of the paper on the other parties. The rule, in sub. (2), clearly provides that filing is complete on receipt, rather than on mailing. In the present case, the complainant did not file his response to the May 10th letter until after the deadline specifically identified in the letter.

Complainant, in his affidavit, provides a list of various attorneys and one law student he contacted in an effort to obtain legal representation in these cases. Six of the listings identify an approximate date of contact of June 1994, and another identifies the date of contact as June 24, 1994. This last contact was with Attorney Stix who filed a Notice of Appearance with the Commission on July 7th, after the Commission had made its final decision.

After the complainant filed his response on June 1, 1994, to the 20 day letter dated May 10, 1994, a member of the Commission's staff wrote complainant as follows:

By certified letter dated May 10, 1994, you were directed to file a response as to whether or not you wanted to proceed with your case within 20 calendar days of the date of the letter, pursuant to §111.39(3), Stat. Your written response was dated May 25, 1994 and was received by the Commission on June 1st. *Because it does not appear that your response complied with the 20 day requirement set out in §111.39(3), Stats., you are being provided a period of 15 days from the date of this letter to file any arguments you may have as to why the Commission should not dismiss your complaint. The respondent will then have 7 days to file any response. (emphasis added)*

Complainant hand-delivered a response on June 20th.

These complaints were originally filed with the Commission between November of 1989 and February of 1990. The Commission had been waiting since December of 1992 to schedule a prehearing conference. A substantial percentage of complainant's efforts to retain counsel did not occur until June of 1994. At least one and possibly all of those efforts in June occurred after he learned that he had not responded timely to correspondence from the Commission. The complainant had ample opportunity to prosecute his case in the months since he appealed from the initial determination in 1992, but did not do so.

The complainant also points to a letter prepared by the psychologist who treated him from July of 1992 to April of 1993. This letter indicates that the complainant's previous employment experience with respondent preoccupied him and caused him much distress. However, there is nothing in this letter which indicates that, during this period, the complainant was unable to pursue litigation regarding that experience. The letter also does not even address the subsequent period, from April of 1993 until the Commission's July 7, 1994 decision.

The complainant also contends that "on numerous prior occasions the Commission did not enforce the 20 day rule, leaving the impression, apparently improperly, that the Commission would, once again, allow some leeway in its application of the 20 day rule." (Reply Brief) The only previous instance in which a 20 day certified letter was mailed to the complainant and he did not file any response within the 20 day period occurred during the period of the investigation of complainant's three whistleblower claims, early in 1992. The response was one day late. Respondent moved to dismiss the com-

plaint, citing the language of §111.39(3), Stats. The motion was responded to in the initial determination, issued on November 9, 1992, as follows:

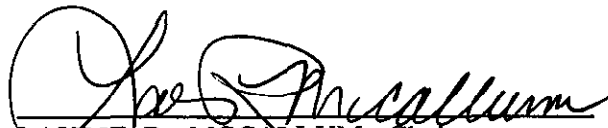
As a preliminary matter, respondent moved to dismiss complainant's charges of discrimination because he failed to respond timely to Personnel Commission requests for additional information under the "20 day rule," in violation of §111.39(3) of Wisconsin's Fair Employment Act (FEA). Complainant's three charges of discrimination were not filed under the FEA (§§111.31, et. seq., Wis. Stats), but instead were filed under the whistleblower retaliation law (§§230.80, et. seq., Wis. Stats.). There is no similar 20 day provision under the whistleblower retaliation law and therefore the Personnel Commission probably can exercise more discretion than under the FEA. In complainant's case, the Personnel Commission exercised its discretion and permitted complainant's untimely submission under the whistleblower retaliation law. Therefore, respondent's motion to dismiss cannot be granted at the investigatory phase of these proceedings.

Much time has passed and many delays have occurred since the initial determination was issued in 1992. The extensive additional delays provide substantial justification for the July 7, 1994, decision to dismiss the complainant's whistleblower claims for lack of prosecution. Complainant had no reasonable basis on which to conclude that, because of the language in the 1992 initial determination, he could decline, for period of more than 16 months, to provide dates for a prehearing conference.

ORDER

Complainant's petition for rehearing is denied.

Dated: August 18, 1994 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
K:D:temp-9/94 Behnke

  
JUDY M. ROGERS, Commissioner

Parties:

Charles Behnke  
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NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's 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. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)