

DENNIS A. ALLEN,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

Case Nos. 95-0034-PC-ER, 95-0057-PC-ER,
95-0071-PC-ER, 95-0110-PC-ER,
95-0118-PC-ER, 95-0125-PC-ER,
96-0001-PC-ER, 96-0007-PC-ER,
& 96-0036-PC-ER

**RULING ON
COMPLAINANT'S
APPEAL OF THE NO
PROBABLE CAUSE
PORTIONS OF THE
INITIAL
DETERMINATION**

All the above-noted cases were combined for discussion in one Initial Determination (ID) mailed to the parties on August 26, 1997. The complainant failed to file a timely appeal of the No Probable Cause (NPC) portions of the ID. The parties filed written arguments as to whether complainant should be allowed to proceed to hearing on the NPC portions of the ID, with the final argument received on October 8, 1997.

FINDINGS OF FACT

1. The ID was mailed to the parties on August 26, 1997, with cover letters warning that an appeal of the NPC portions of the ID must be filed in writing "within 30 days of the date of this letter" as measured by the Commission's receipt of the written appeal. Accordingly, complainant's written appeal was due at the Commission's office by 4:30 p.m. on September 26, 1997. The Commission did not receive complainant's appeal until September 29, 1997.

2. Complainant's appeal letter was dated September 25, 1997, one day prior to the due date. The envelope in which the appeal was mailed contained a postmark of September 25, 1997, indicating the letter was mailed from Green Bay where complainant lives. Complainant has presented no evidence to show it is reasonable to mail a letter from Green Bay and to expect delivery in Madison the following day.

3. Complainant's explanation of why he felt entitled to proceed with the NPC portion of his cases even though his appeal was filed late was included in his letter of October 4, 1997, as shown below with emphasis as it appears in the original document:

a. At no time has . . . DOC been forced with ANY time limit or restrictions or made to comply with ANY procedures. Denying me would be a show of favoritism. I requested that the Personnel Commission **MUST** declare a **DEFAULT JUDGMENT** for their failure to answer timely. Nothing was done and one complaint was a year late.

b. On numerous occasions the Personnel Commission has made mistakes and been late in their procedure. To deny me will be a show of prejudice.

c. It has taken three and more years to hear my first complaint. Why is a couple of days **NOW** going to make a difference?

d. (DOC) states that I am a total incompetent and crazy. Doesn't a handicapped person have any special concern. The Personnel Commission also agrees in part with (DOC).

e. I have been very sick lately **AS A RESULT OF THE ACTIONS OF DOC . . .** and I have been suffering depression and migraine headaches where I cannot see to do any work. If you look at my letters you see a lot of mistakes don't you? Didn't their own employe stat (sic) that I was just fine until DOC started to harass and threaten me?

f. I have been very busy trying to find employment and now I have to fight with a number of employers. Example: I have had my name in with DOC for any opening. I have **NEVER** received any notices !!! DOC has been interfering with my seeking employment.

g. Don't I have several days under FRCP to allow for mail delivery? I have no control over the mails.

4. The chart below contains a summary of the ID findings. Abbreviations used in the second column (entitled "Allegation") include: "Lawful prod" to describe use or nonuse of a lawful product under §111.35, Stats.; "Hdcp" to describe handicap cases under §111.34, Stats.; "WB" to describe whistleblower cases under §230.80, et. seq., Stats; "FMLA" to describe Family and Medical Leave Act cases under §103.10, Stats.; and "FEA retal" to describe retaliation cases under the Fair Employment Act (FEA) (§111.31, et. seq.). Abbreviations used in the third column (entitled "Conclusion") include "NPC" (as previously defined) and "PC" for Probable Cause.

Also, the alphabetic references in the third column correspond to the same references used in the ID.

Case Number	Allegation	Conclusion
95-0034-PC-ER	Age/1995-6	NPC
	Lawful prod/1995-6	NPC
	Hdcp/1995-6	NPC
	WB/1995-6	NPC
95-0057-PC-ER	Age/1995-6	NPC
	Lawful prod/1995-6	NPC
	WB/1995-6	NPC
	FEA retal/1995-6	PC
95-0071-PC-ER	Age/1995-6	NPC
	Lawful prod/1995-6	NPC
	Hdcp/1995-6	NPC as to allegations h-m
	Hdcp/1995-6	PC as to allegation "n"
	WB/1995-6	NPC
95-0110-PC-ER	Age/1995-6	NPC
	FMLA/1995	NPC
	Hdcp/1995-6	NPC as to allegation "r"
	Hdcp/1995-6	PC as to allegation o-q
	WB/1995-6	NPC
	FEA retal/1995-6	PC
95-0118-PC-ER	Sex/1995	NPC
95-0125-PC-ER	Age/1995-6	NPC
	Hdcp/1995-6	NPC as to allegations s-u
	Hdcp/1995-6	PC as to allegation "v"
	WB/1995-6	NPC
	FEA retal/1995-6	PC
96-0001-PC-ER	Age/1995-6	NPC
	Lawful prod/1995-6	NPC
	Hdcp/1995-96	PC
	WB/1995-96	NPC as to allegations w-y
	WB/1995-96	PC as to allegations z-aa
	FEA retal/1995-6	PC
96-0007-PC-ER	Age/1995-6	NPC
	Lawful prod/1995-6	NPC
	Hdcp/1995-6	PC
	WB/1995-6	PC
	FEA real/1995-6	PC
96-0036-PC-ER	Age/1995-6	NPC
	Lawful prod/1995-6	NPC
	Hdcp/1995-6	NPC
	WB/1995-6	NPC
	FEA retal/1996	NPC

letter of August 26, 1997, what the requirements were for proceedings at the Commission.

Complainant contends, without providing details, that DOC has not been held to time limits so neither should he. The Commission believes complainant is referring to extensions of time, which were requested by DOC and granted by the Commission, for filing certain documents. The distinction, however, is that a stricter legal standard applies to complainant's failure to file a timely appeal of the NPC portions of the ID than to the other circumstances to which he alludes. Again, the strictness of the standard in his situation was stated clearly in the Commission letter dated August 26, 1997.

Complainant further states he has been busy trying to find employment and this attributed to the late filing of his appeal. An individual's busy schedule even for understandable and valid reasons, however, does not constitute good cause for failing to file an appeal on a timely basis. The appeal period is generous to enable individuals to arrange the time demands in their lives so the individual is able to meet the appeal deadline. Complainant has not met his burden of proof to show that his busy schedule constituted good cause for filing a late appeal.

Complainant further indicates he suffers from various illnesses which contributed to the late filing of his appeal. Illness is a reason which could result in a finding that an appeal was filed late for good cause. The complainant, however, does not indicate whether his illness resulted in days of incapacitation during the appeal period and, if so, which days. In short, while his illnesses may be considered as a reason beyond his control, he has not established that his illnesses were the reason why his appeal was filed late.

Complainant contends without providing details that the Commission agrees in part with DOC's opinion that complainant is "a total incompetent and crazy." The Commission has never made a conclusion about complainant's mental health. References to his mental health were made as necessary in the ID by referring to his treating physician's opinions (p. 56, for example where his treating physician's opinion is cited that the physician was unable to say whether complainant's mental status might interfere with his ability to work.) Citing his physician's opinion as evidence does not mean the Commission has formed a separate opinion about complainant's mental status.

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Based on the foregoing, the NPC portions of the ID are dismissed due to the lack of good cause shown for filing an untimely appeal which results in issuance of a final order and an interim order. The notice of appeal rights following the signatures in this ruling applies only to matters addressed in the final order.

FINAL ORDER

The following cases are dismissed in full: 95-0034-PC-ER, 95-0118-PC-ER and 96-0036-PC-ER.

INTERIM ORDER

The NPC portions of the following cases are dismissed: 95-0057-PC-ER, 95-0071-PC-ER, 95-0110-PC-ER, 95-0125-PC-ER, 96-0001-PC-ER and 96-0007-PC-ER. The PC portions of the ID will proceed through the hearing process, first with the scheduling of a prehearing conference of which the parties will receive notice in a separate mailing.

Dated: November 7, 1997.

JMR
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STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Dennis A. Allen
1546 Crooks Street
Green Bay, WI 54302

Michael J. Sullivan
Secretary, DOC
149 E. Wilson St., 3rd Fl.
P. O. Box 7925
Madison, WI 53707-7925

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95