

JAY H. C. VEST,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Green Bay),**
Respondent.

**RULING ON
MOTION TO
DISMISS**

Case No. 97-0042-PC-ER

This matter is before the Commission on respondent's motion to dismiss for failing to respond to the Commission within 20 days as provided in §111.39(3), Stats.

The following findings are derived from information in the file provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

1. On April 9, 1997, the Commission received complainant's discrimination complaint against respondent, which had been forwarded from the Equal Rights Division.

2. The complaint was perfected when complainant filed a complaint with the Commission on April 28, 1997, as provided in §PC 2.02(2), Wis. Adm. Code.

3. The Commission provided respondent with a copy of the complaint, and as required, respondent filed a timely answer.

4. By letter dated July 22, 1997, the Commission requested complainant to file any rebuttal to respondent's answer with the Commission no later than August 22, 1997.

5. Complainant failed to comply with the August 22, 1997, deadline and was granted an extension to September 22, 1997, which also passed without any rebuttal from complainant.

6. Several subsequent extensions were granted to complainant but he did not meet any of these extended deadlines.

7. By certified letter dated January 12, 1998, the Commission stated as follows:

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence. Your response must be received by the Commission within 20 calendar days (by February 2, 1998) of the date of this certified letter. If you fail to respond within the 20 day time period, I will recommend that your case be dismissed for lack of prosecution.

Pursuant to §111.39(3), 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 any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

8. Respondent filed this motion to dismiss on March 4, 1998.

DISCUSSION

Complainant's arguments supporting further processing of his complaint are as follows:

There are several reasons for my filing delay which was unavoidable under the circumstances. The preparation of my rebuttal statement was in part delayed due to a work overload due to my teaching an extra course during this academic quarter – that is a total of five courses comprising seventeen quarter hours. . . . I was further delayed due to the essential need for legal research resources. Moreover, the nearest law library to Mankato is over one hundred miles distant in Minneapolis and because of my more than full-time employment, the only time when I can accomplish such research is on Saturdays. As I began preparing my rebuttal statement, I found that while working on the first Saturday following the January 12th notice, I needed additional research in a law library. As a result of this initial effort crafting the response, I had lost one [sic] the three available Saturdays. . . . I intended to go to the University of Minnesota law library on January 24th in order to conclude my essential research. However, on Friday, the 23rd, I was taken ill with the flu . . . Consequently, I could only complete my legal research on January 31, 1998 which delayed my mailing of the rebuttal until 2

February 1998. . . . Accordingly, in using certified priority mail postmarked 2 February 1998 (the day of the deadline), I submitted my rebuttal statement.

Respondent gives the following reasons for dismissal:

Complainant failed to comply with the 20 day requirement of §111.39(3), Stats., as noticed in the January 12, 1998, letter of the Commission. *Schilling v. Walworth County LIRC* (05/10/84) and *Block v. U.W. Madison Extension*, 88-052-PC-ER, 7/27/89 suggest mandatory dismissal of a complaint when a complainant is in non-compliance with §111.39(3), Stats. Complainant's arguments for not filing within the 20 day period are weak and unsubstantiated. The original response was due August 22, 1997; almost six months before the February 2, 1998, deadline.

Section 111.39(3), Stats., provides:

The [Commission] shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the [Commission] concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person. (emphasis added)

Here, the facts are undisputed. The Commission sent complainant a certified letter dated January 12, 1998, directing him to provide information regarding his discrimination complaint by a certain date and advising him of the possible consequence of his failure to comply. The Commission did not receive complainant's response until February 4, 1998. Complainant's rejoinder is that he "could only complete [his] legal research on January 31, 1998 (a weekend)" and one day service was not available, but his rebuttal was postmarked on the due date.

In *Billingsley v. DOR*, 87-0132-PC-ER, 7/13/88, the Commission interpreted and applied the 20-day requirement in §111.39(3), Stats. That case involved a complaint of race discrimination and, as here, complainant was sent a certified 20-day letter under §111.39(3), Stats. On the twenty-first day after the letter was mailed, complainant telephoned the Commission and said she was placing a response into the mail. Complainant's response arrived at the Commission the following day. The complaint was dismissed because complainant's response was not filed with the

Commission within the statutory time limit. In its decision dismissing the complaint, the Commission said:

[Section] 111.39(3), Stats., provides that the Commission shall dismiss the complaint if no timely response is received . . . Because the response was not received by the Commission within the statutory time period, the Commission enters the following [order].

Accordingly, based on the record and the law, the following order is entered.

ORDER

The complaint is dismissed.

Dated: March 20, 1998.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rjb
970042Cru12.2


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Jay H.C. Vest
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Mankato MN 56001

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Drive
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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 (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