

STATE OF WISCONSIN

PERSONNEL COMMISSION

JOHN TOBORG,
Complainant,

v.

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

**RULING
ON
LACK OF
PROSECUTION**

Case No. 00-0151-PC-ER

This matter was filed with the Commission on November 20, 2000, and perfected on December 4, 2000. Complainant alleges he was discriminated against based on his race when respondent terminated his limited term employment, in violation of the Fair Employment Act, subch. II, ch. 111, Wis. Stats. The case is currently before the Commission on a question of whether the complainant timely responded to a request for information. The following findings are based on materials in the case file.

FINDINGS OF FACT

1. Certain correspondence in this matter was transmitted via e-mail rather than by other means.
2. Complainant sent e-mail messages to Rita Ruona, a member of the Commission's Equal Rights staff, on December 5, December 27, 2000, February 16, May 6, and May 7, 2001.
3. Respondent filed its answer to the complaint on February 12, 2000.
4. By letter dated March 5, 2001, complainant was directed to respond to the answer no later than April 18, 2001. He was notified that the failure to respond to a request for information from the Personnel Commission could result in the imposition of sanctions.
5. Complainant did not respond to the March 5th letter.

6. By certified letter dated May 3, 2000, a member of the Commission's staff wrote complainant:

The Personnel Commission previously wrote to you on March 5, 2001, and asked you to provide information regarding the above discrimination/retaliation complaint. To date, we have received no response.

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence. Your written response must be **received** by the Commission within 20 calendar days (on or by *May 23, 2001*) of the date of this certified letter. If you do not file your response with the Commission 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.

If you have any questions, please feel free to call me.

7 Complainant telephoned the Commission during the afternoon of May 23, 2001, asked for the e-mail address of Ms. Ruona, and stated he would send in his response by e-mail as well as by regular mail.

8. Ms. Ruona received an e-mail response from complainant at 12:29 a.m., on May 25, 2001. The transmission information at the top of the e-mail indicated it had been sent on Wednesday, May 23, 2001, at 2:30 p.m., to rita.rouna@pcm.state.wi.us rather than to rita.ruona@pcm.state.wi.us.

OPINION

The question of whether complainant adequately prosecuted his complaint of discrimination is resolved by relying on §111.39(3), Stats., set forth in Finding 6. The 20-day period for responding to a certified letter under this provision commences on the date of the Commission's letter. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99. The

certified letter specified that the response period began on the date of the letter, or May 3, 2000. As noted in that letter, complainant's response had to be received by May 23, 2000. Complainant incorrectly addressed his responsive e-mail¹ to Ms. Ruona by misspelling her name in the address. In his written argument (filed via e-mail on June 15, 2001) complainant described the error in Ms. Ruona's e-mail address as a "typo." The e-mail did not reach the Commission and Ms. Ruona until May 25th, 2 days late. Therefore, the Commission must dismiss the complaint pursuant to the language of §111.39(3), Stats.²

The Commission notes that its conclusion in this matter is not a function of the fact that the complainant relied on electronic mail for his response. The Commission would reach the same conclusion if complainant had made an error in the address on the envelope for a standard letter sent to the Commission, if that error had caused a delay in delivery and resulted in a failure to comply with the requirements of §111.39(3), Stats.

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² The Commission has previously held that certain telephone contacts with the Commission did not satisfy the statutory requirement. *Ganther v. DOR*, 99-0175-PC-ER, 10/3/2000; *Johann v. OMCD*, 97-0045-PC-ER, 10/9/97.


ORDER

This matter is dismissed for lack of prosecution.

Dated: June 28, 2001 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:000151Cru12


JUDY M. ROGERS, Commissioner

Parties:

John Toborg
3218 Forest Run Court
Madison, WI 573704

Jon Litscher
Secretary, DOC
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