

**SHRI KRISHAN,**  
*Complainant,*

v.

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

**RULING  
ON ISSUE  
FOR HEARING**

Case No. 99-0171-PC-ER

This matter is before the Commission on a dispute as to the appropriate issue for hearing. During a prehearing conference held on November 6, 2001, the respondent agreed to the following statement of the issue for hearing:

Whether the respondent discriminated against complainant on the basis of age, color/race, creed or national origin/ancestry with respect to the denial by Thomas Haack in October of 1999 of complainant's 6 requests for compensatory time for tutoring.

Complainant seeks to modify this issue to include prior instances in which respondent allegedly denied his requests for compensatory time. The parties filed written arguments.

Complainant filed a charge of discrimination with the Personnel Commission on October 21, 1999, alleging respondent, Department of Corrections, discriminated against him in the terms and/or conditions of his employment and harassed him because of his age, color/race, creed, and national origin or ancestry; all in violation of the Fair Employment Act. One of the Commission's investigators issued an Initial Determination on August 29, 2001, that reached the following conclusions:

1. Because complainant did not file a timely charge of discrimination, the Personnel Commission cannot address whether age, color/race, creed and national origin or ancestry discrimination occurred in the following term and/or condition of complainant's employment:
  - a) In April 1998, Kathy Alderman denied complainant's request for compensatory time, but makes a non-substantive no probable cause determination.

2. There is No Probable Cause to believe that complainant was discriminated against on the basis of age, color/race, creed and national origin or ancestry when

b) In Spring 1999, Thomas Haack denied complainant's request for compensatory time to be a substitute teacher for the Alcoholics Anonymous program,

c) On about June 4, 1999, Thomas Haack required complainant to follow a specific procedure for removing disruptive students from his class in Andrews cottage,

d) On September 23, 1999, Thomas Haack denied complainant's request for compensatory time to be a substitute teacher for the Alcoholics Anonymous program, and

e) In October 1999, Thomas Haack denied complainant's request for compensatory time for after hours Media Center supervision.

3. There is Probable Cause to believe that complainant was discriminated against on the basis of age, color/race, creed and national origin or ancestry with respect to the following:

f) In October 1999, Thomas Haack denied complainant's 6 requests for compensatory time for tutoring.

4. There is No Probable Cause to believe that complainant was harassed by respondent based on his age, color/race, creed and national origin or ancestry in 1998-99.

The Initial Determination cover letter to the parties was dated August 29, 2001, explained that complainant had 30 days to appeal the "no probable cause" findings, cited §PC 2.07(3), Wis. Adm. Code, and explained the consequences of failing to file a timely appeal of those findings:

If the complainant does not submit a written request for hearing to the Commission within 30 calendar days, that aspect of the case will be dismissed.

Complainant did not appeal the "no probable cause" findings in the Initial Determination. He has subsequently offered two explanations for this decision. In letters dated October 31, 2001,<sup>1</sup> and November 29, 2001, he said he "did not want to open up the old wounds" by appealing the initial determination, suggesting it would jeopardize

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<sup>1</sup> The stated purpose of complainant's October 31<sup>st</sup> letter, which was submitted prior to the pre-hearing conference on November 6<sup>th</sup>, was to "explain why I did not file an appeal against 'No Probable Cause' finding[s] by the investigator."

his relationship with his present supervisor. Then, in his submission dated December 21, 2001, complainant also offered the following reason:

If it has any merit, I did not have 4 weeks to digest and make a decision on the initial determination. There was a mix up in the mail with other two residents of the apartment that I share. I got the initial determination only a few days before Sept. 28, 2001. I forgot all about it, to mention it in my earlier correspondence. It is only when the respondent emphasized the importance of Sept. 28 in his letter of Dec. 13, 2001, that I recalled receiving the initial determination so late.

The Commission has issued a number of decisions addressing disputes regarding the failure to file an appeal of a "no probable cause" initial determination within 30 days. In *Allen v. DOC*, 95-0034-PC-ER, etc., 11/7/97, the Commission summarized its approach as follows:

Appeals of NPC portions of IDs must be received by the Commission within 30 days of the date the ID was mailed to the parties. §§PC 2.07(3), PC 1.02 (10) and PC 1.05(2), Wis. Adm. Code. This 30-day time limit is directory rather than mandatory. *Dugas v. DHSS*, 86-0073-PC-ER, 7/14/88. Because the time limit is not mandatory, the Commission will accept a late filing if the complainant shows good cause as to why the appeal was filed late.

Good cause, generally speaking, is established when the complainant shows that the filing was late for a reason beyond complainant's control. For example, an error made by the Commission in failing to inform the parties of its new mailing address was considered as good cause in *Amaya v. DOC*, 93-0104-PC-ER, 1/11/94. The death of a family member during the appeal period was considered as good cause in *Dugas v. DHSS*, 86-0073-PC-ER & 87-0143-PC-ER, 7/14/88. Good cause also could include unreasonable delays by the post office such as occurred in *Jazdzewski v. UW-Madison*, 92-0179-PC-ER, 11/29/93, where the complainant sent his appeal by Express Mail Next Day Service specifying that delivery occur prior to 3 p.m., yet the post office did not deliver within the specified parameters. However, the Commission has not accepted as good cause reasons which were within the complainant's control such as complainant's own failure to keep the Commission advised of a current mailing address as occurred in *Shelton v. DNR & WCC*, 85-0123-PC-ER, 7/13/88; or such as waiting too long to mail the appeal as occurred in *Krueger v. DHSS*, 92-0065-PC-ER, 7/8/92.

Complainant has not established good cause for his failure to timely appeal the “no probable cause” aspects of the Initial Determination in the present case. The Initial Determination was issued on August 29<sup>th</sup>. His appeal was due on September 28<sup>th</sup>. Complainant did not contend the “no probable cause” findings were in error until November 6<sup>th</sup>, which was more than 40 days too late. Then he stated that his failure to appeal was a conscious decision, rather than something that was beyond his control. It wasn’t until his December 21<sup>st</sup> letter that complainant first suggested that he hadn’t received the Initial Determination until “a few days” before the September 28<sup>th</sup> due date for the appeal, because of a “mail mix up” in his apartment. Even if this statement accurately reflects what occurred, complainant still had “a few days” to file a timely appeal with the Commission. He waited until November 6<sup>th</sup> before he initially stated that he wanted to obtain review of the “no probable cause” findings. Complainant’s conduct is inconsistent with a standard of “good cause” for filing a late appeal and he has failed to meet his burden of establishing that he timely appealed from the “no probable cause” findings.<sup>2</sup>

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<sup>2</sup> Complainant also offered various arguments in terms of why he feels it is important for the Commission to examine, at hearing, all of the allegations that he initially raised in his complaint of discrimination. Those arguments fail to address the question of whether there was just cause for a late appeal. One such argument is that the investigator failed to interview key individuals named in his complaint, which is inconsistent with prior practice of the Commission. The Commission acknowledges that in the 1980’s and earlier, it conducted interviews in most of its investigations. However, due to increased workload, interviews have *not* been part of the Commission’s standard investigation procedure for approximately 10 years.

ORDER

The complainant's request to expand the statement of issue for hearing to include no probable cause findings in the Initial Determination, and which he did not timely appeal, is denied. The following shall serve as the statement of issue for hearing in this matter:

Whether the respondent discriminated against complainant on the basis of age, color/race, creed or national origin/ancestry with respect to the denial by Thomas Haack in October of 1999 of complainant's 6 requests for compensatory time for tutoring.

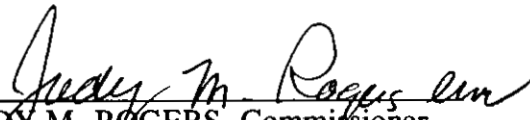
A hearing date has already been established.

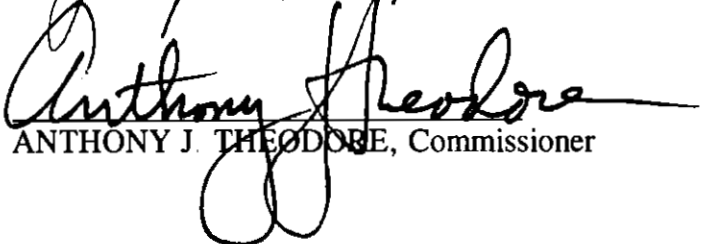
Dated: January 9, 2002

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

KMS:990171Cru11

  
JUDY M. ROGERS, Commissioner

  
ANTHONY J. THEODORE, Commissioner