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 GARY STEIN, \*  
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 Complainant, \*  
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 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
 \*  
 Respondent. \*  
 \*  
 Case No. 85-0152-PC-ER \*  
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INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission following the issuance of a "no probable cause" initial determination and the complainant's attempted appeal of that determination pursuant to §PC 4.03(3), Wis. Adm. Code. The initial determination was mailed to complainant on June 6, 1986. His letter of appeal was sent certified mail postmarked July 2, 1986, (Rhinelander) and received by the Commission on July 8, 1986.

Section PC 4.03(3), Wis. Adm. Code, provides in part, as follows:

"NO PROBABLE CAUSE DETERMINATIONS. When there is an initial determination of no probable cause to believe that discrimination has been or is being committed, notice thereof shall be served upon the parties ... within 30 calendar days after the date of such service, the complainant may petition the commission for a hearing on the issue of probable cause ..." (emphasis added)

Even though the appeal was not filed within 30 days<sup>1</sup> of the date of service of the initial determination, this may not be fatal to the appeal if

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<sup>1</sup>The thirtieth day would have been July 6, 1986. Since this was a Sunday, the operation of §801.15, Stats., would have extended the deadline to July 7, 1986.

it is determined that the 30 day provision of §PC 4.03(3) is directory rather than mandatory and there was good cause for failure of compliance. See 73 Am Jur Statutes §16:

"... a directory provision has been defined as one the observance of which is not necessary to the validity of the proceeding. However, directory provisions are not intended by the legislature to be disregarded.

Compliance with a mandatory provision of a statute is a condition precedent to the privilege conferred. In fact, a mandatory provision in a statute has been defined as one the omission to follow which render the proceeding to which it relates void ..."

The use of the word "may" in this provision is certainly consistent with a directory, as opposed to a mandatory, construction. Cf. Warner v. Department of Transportation, 102 Wis. 2d 232, 306 N.W. 2d 266 (Ct. App. 1981). Furthermore, the importance of the provision may be taken into consideration in its construction as mandatory or directory:

"... Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance are considered to be directory. This is true of statutory provisions for the expeditious, proper, or orderly conduct of business merely." 73 Am Jur 2d Statutes §19

This rule appears to fall into this category, id. §18:

"In many cases, statutory provisions as to the precise time when a thing is to be done are not regarded as of the essence, but are regarded as directory merely. This viewpoint, especially pertinent where a statute fixes a time simply for convenience or orderly procedure, applies to statutes which direct the doing of a thing within a certain time without any negative words restraining the doing of it afterward ..."

The thirtieth day for filing an appeal with the Commission was July 6, 1986. Since this was a Sunday, the operation of §801.15(1), Stats., would have extended the deadline to July 7, 1986. In the Commission's view, mailing the document from Rhinelander on July 2, 1986, should be considered

reasonable and prudent, and there is good cause for having missed the 30 day deadline. Therefore, this complaint should not be dismissed on the basis of failure of compliance with §PC 4.03(3), Wis. Adm. Code.

ORDER

This matter is to be scheduled for a prehearing conference on the question of probable cause.

Dated: August 20, 1986

STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner

AJT:jgf  
JGF003/2

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