

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 BRIAN FLIEHR,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 ADMINISTRATION,
 Respondent.
 Case No. 85-0155-PC-ER
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter was filed as a complaint of occupational safety and health retaliation. Respondent moved to dismiss, alleging untimely filing. The parties were provided an opportunity to file arguments. The following facts appear to be undisputed.

FINDINGS OF FACT

1. Complainant was employed by respondent DOA in its office building in Eau Claire as a Facilities Repair Worker 3.
2. In a letter dated October 10, 1985, the complainant was advised that the respondent had decided to terminate his employment during his probationary period. The letter was mailed to complainant at his home in Chippewa Falls. Complainant's wife received the letter on October 11, 1985.
3. Complainant was out of town and did not receive actual notice of the termination until October 14, 1985.
4. On November 13, 1985, complainant contacted the Personnel Commission by telephone and as a consequence of the telephone conversation and at the request of the complainant, a Commission staff member filled out a

complaint form on that date. The complaint form was complete except for the complainant's notarized signature which was supplied along with additional factual allegations on November 21, 1985.

5. During a prehearing conference held on December 5, 1985, respondent moved for dismissal of the complaint, alleging that it was not filed within 30 days of when the complainant received knowledge of his termination as required by §111.055(8)(b), Stats. In a letter from the Commission dated December 6, 1985, the parties were advised that they had "until Friday, December 13, 1985, in which to file arguments regarding respondent's motions. As used in this letter, "filing" means actually received by the Commission." The parties were also advised of the time limit by telephone.

6. Respondent filed its arguments on December 12, 1985. Complainant's arguments were dated December 9, 1985, postmarked December 11, 1985 and actually received by the Commission on December 16th.

CONCLUSIONS OF LAW

1. The Commission may consider complainant's arguments filed on December 16, 1985.

2. As it existed on November 13, 1985, the complaint form in this matter constituted a complaint of illegal retaliation that was timely filed with the Commission.

3. The complainant's filing of the notarized complaint form on November 21, 1985 corrected any technical deficiencies in, and related back to, the November 13th document.

OPINION

There are three distinct issues raised in this case: 1) Whether the Commission should consider complainant's arguments that were received on

December 16th; 2) Whether the complainant received notice of his probationary termination on October 11th or on or after October 14th; 3) Whether the November 13th complaint form was sufficient to toll the running of the filing period.

Timeliness of Argument

Respondent objects to any consideration of the arguments raised in complainant's letter dated December 9th and received December 16th. Respondent argues that the letter fails to comply with the time restrictions recited in the Commission's scheduling letter dated December 6, 1985. While it is true that the complainant's letter was not received by the date set, the Commission must note that the letter was postmarked two days prior to the due date. Due to time limitations imposed by §101.055(8)(c), Stats., the schedule for filing arguments was extremely brief.

If the complainant had to allow three if not four days for mail delivery of his arguments to Madison, the period available to him for drafting his arguments would have been just four or even three days.

Therefore, given the very short duration of the period scheduled and the complainant's clear effort to comply with that schedule based upon the date of the postmark on his arguments, the Commission will consider his arguments even though they were received on the work day immediately following the deadline.

Date of Notification.

A copy of the certified mail receipt has established that the complainant's wife received the termination letter on October 11, 1985. In his brief, complainant states:

I do agree [that] my wife did sign for the letter on October 12th but I was out of town that weekend and did not look at it till Monday 15 when I return home.

An examination of a calendar for October of 1985 shows that the 11th was a Friday and that the following Monday was October 14th. The Commission makes that correction in complainant's statement but otherwise construes the statement as indicating he first received notice of his probationary termination on Monday, October 14, 1985.

The time limit for filing complaints alleging occupational safety and health retaliation is established in §101.055(8)(b), Stats., which provides:

A state employe who believes that he ... has been discharged ... by a public employer in violation of par. (a) may file a complaint with the personnel commission... within 30 days after the employe received knowledge of the ... discharge.

Here, based on the available materials, the complainant first "received knowledge" of his probationary termination on October 14, 1985. Thirty days thereafter was November 13, 1985, the day that the complainant contacted the Commission and the complaint form was filled out by the Commission's staff member.

This result is consistent with the Commission's decision in Grimmenga v. DOR, 83-0007-PC-ER (8/10/83). There, the Commission denied respondent's motion to dismiss for untimely filing where the termination was delivered by certified mail on March 23rd to complainant's daughter, who then delivered the letter to her mother on March 25th. Complainant had been temporarily residing in another city. The Commission held that the 300 day time limit for filing a discrimination complaint under the Fair Employment Act did not begin until actual receipt by the complainant of the notice of discharge on March 25th. The Commission declined to impute constructive receipt under the circumstances.

Adequacy of Unsigned Complaint

Nothing in §101.055, Stats., establishes any technical requirements for a complaint filed under that section. The respondent points to §PC 4.02(1), Wis. Adm. Code, as setting certain technical standards for complaints filed under the Fair Employment Act:

Complaints shall be in writing, shall be signed and notarized and shall contain the following information:

* * *

(f) Notarized signature.

This rule was interpreted as discretionary rather than mandatory in Goodhue v. UW, 82-PC-ER-24 (11/9/83). In Goodhue, the initial letter to the Commission "did not indicate the complainant's address or specify the relief or remedy requested, nor was the letter notarized." Yet the letter was still a complaint, even though it included these technical deficiencies which were corrected by a subsequent filing of a completed complaint form. The subsequent filing was held to have related back to the complainant's original letter.

The facts in Goodhue are consistent with those in the present case. Here, the November 13th document was complete except for a notarized complaint. To the extent any technical deficiencies existed in the November 13th document, the November 21st complaint form corrected them.

It should be noted that this interim decision is based upon limited information. If the investigation in this matter uncovers additional facts that might lead to an opposite result, the respondent may wish to reassert its motion.

ORDER

Based upon the facts before it, the respondent's motion to dismiss is denied.

Dated: December 17, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

KMS:jmf
ID6/1


DONALD R. MURPHY, Commissioner

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