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CHARLES N. BEHNKE,
 Complainant,

v.

Chancellor, UNIVERSITY OF
 WISCONSIN - MADISON,
 Respondent.

Case Nos. 89-0135-PC-ER, 90-0003,
 0017-PC-ER

* * * * *

DECISION
 AND
 ORDER

These matters are before the Commission as a consequence of a 20 day letter issued to the complainant pursuant to §111.39(3), Stats. A review of the case files indicate the following:

1. On November 8, 1989, complainant filed a charge of discrimination (Case No. 89-0135-PC-ER) with the Commission alleging respondent treated him differently in the terms and/or conditions of his employment and suspended him in retaliation for engaging in activities protected under the whistleblower law, §§230.80, et. seq., Stats.

2. On January 2, 1990, complainant filed a charge of discrimination (Case No. 90-0003-PC-ER) alleging respondent terminated his employment because of his age, in violation of the Fair Employment Act, subch. II, ch. 111, Stats., and in retaliation for whistleblower activities.

3. On February 5, 1990, complainant filed a third charge with the Commission (Case No. 93-0017-PC-ER), alleging respondent retaliated against him for engaging in whistleblower activities by not properly addressing certain grievances.

4. By letter dated September 26, 1991, the Commission adopted the Determination issued by the Equal Employment Opportunity Commission which concluded that there was no violation of the federal age discrimination law in regard to Case No. 90-0003-PC-ER. Complainant appealed the Personnel Commission's determination and that appeal was held in abeyance pending the outcome of the remainder of complainant's charges.

5. In the course of investigating the whistleblower claims, complainant was asked to supply certain information and documents to clarify his charge. When complainant did not respond to the request, he was sent a certified letter dated February 4, 1992, directing him to respond within 20 days of the date of this certified letter. The letter also set forth the following language from §111.93(3), Stats.:

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.

Complainant's response, received by the Commission on February 26, 1992, asked that he be provided until the end of March to obtain the requested documentation. Complainant filed the information on April 10, 1992.

6. An initial determination of "no probable cause" was issued regarding complainant's three whistleblower claims on November 9, 1992. The initial determination included the following language:

As a preliminary matter, respondent moved to dismiss complainant's charges of discrimination because he failed to respond timely to Personnel Commission requests for additional information under the "20 day rule," in violation of §111.39(3) of Wisconsin's Fair Employment Act (FEA). Complainant's three charges of discrimination were not filed under the FEA (§§111.31, et. seq., Wis. Stats), but instead were filed under the whistleblower retaliation law (§§230.80, et. seq., Wis. Stats.). There is no similar 20 day provision under the whistleblower retaliation law and therefore the Personnel Commission probably can exercise more discretion than under the FEA. In complainant's case, the Personnel Commission exercised its discretion and permitted complainant's untimely submission under the whistleblower retaliation law. Therefore, respondent's motion to dismiss cannot be granted at the investigatory phase of these proceedings.

The complainant appealed from the "no probable cause" determination to the Commission. In his December 5, 1992, letter to the Commission, complainant stated, in part: "I'll be out of the State until sometime after March 1993 and ask that we schedule a hearing after that."

7. The Commission sent letters to the appellant on both February 8, 1993, and April 26, 1993, asking him to indicate his availability so that a pre-

hearing conference could be scheduled. Complainant did not respond to either letter. By certified letter dated June 17, 1993, a member of the Commission's staff advised complainant as follows:

To date we have not received a response from you. If you wish to proceed with your complaints, you must send the Commission a letter explaining that you wish to pursue the matters and enclose the information requested in the February 8, 1993 and April 26, 1993, letters (copies attached). Your response must be received by the Commission within 20 days of the date of this certified letter. If you fail to respond within the 20 day time period, I will recommend that your cases 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. Complainant responded by letter dated June 28, 1993, which provided his new address and included the following:

Thank you for your letter of 17 June. My apologies for the delay, but I've been relocating as well as dealing with a death in the family. I'm arranging for legal representation at a hearing before the Commission, and will inform you as soon as I can be sure of possible dates for scheduling.

9. By certified letter dated May 10, 1994, a member of the Commission's staff referenced complainant's previous letter and advised complainant as follows:

To date, we have not received a response from you. If you wish to proceed with your complaint, you must send the Commission a letter explaining that you wish to pursue the matters and provide the Commission with dates for scheduling a prehearing conference. Your response must be received by the Commission within 20 days of the date of this certified letter. If you fail to respond within the 20 day time period, I will recommend that your cases 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.

10. In a letter dated May 25, 1994, and received by the Commission on June 1, 1994, complainant confirmed that he wished to proceed with his complaints, provided his current address to the Commission and wrote:

Relocations have contributed to unexpected difficulty in finalizing formal arrangements with an attorney, but I expect to be able to inform you of possible scheduling of a prehearing conference soon.

DISCUSSION

The May 10, 1994, letter from the Commission directed the complainant, if he wished to pursue his claims, to explain that he wished to pursue the matters *and provide the Commission with dates for scheduling a prehearing conference* within 20 days, or it would be recommended that his complaint be dismissed for lack of prosecution. Twenty days after May 10th, was May 30th, a day the Commission's offices were closed pursuant to §230.35(4)(a), Stats. Therefore, the complainant's response was due on Tuesday, May 31st. The complainant's response was not received¹ until the following day, and did not provide any dates for scheduling the conference.

The Commission has previously dismissed claims when a response to a 20 day letter under §111.39(3), was received a day late. In King v. DHSS, 88-0007-PC-ER, 5/29/91, the complaint was dismissed for lack of prosecution where the response to the certified letter was received 21 days after the date the Commission mailed its letter. In Billingsley v. DOR, 87-0132-PC-ER, 7/13/88, the complaint was dismissed where complainant telephoned the Commission on the 21st day after the certified letter was mailed and then filed a response on the 22nd day.

¹According to the complainant, he doesn't "recall the specifics of my mailing that letter, but assume it was postmarked and left Kenosha no later than 26 May.

Because the complainant did not file a response within the specified 20 day period, his claim of age discrimination in Case No. 90-0003-PC-ER, must be dismissed.

Even without the specific statutory language available in §111.39(3), Stats., (which, as explained in the initial determination only applies to FEA claims), all of the claims raised by the complainant should be dismissed for lack of prosecution.

Ever since the complainant appealed on December 5, 1992, from the initial determination, the Commission has waited for the complainant to provide dates on which he would be available for a prehearing conference. In his December 5th letter, complainant asked for a hearing "after March 1993"

The Commission sent a letter to the appellant on February 8, 1993, asking him to provide a date for a prehearing conference that would be convenient for him. Complainant did not respond. The Commission sent complainant a letter on April 26, 1993, asking him to "inform us of your availability, either by telephone or in writing so that we can proceed to schedule a prehearing conference." Complainant did not respond. On June 17th, the Commission sent complainant a certified letter directing him to respond to the February 8th and April 26th letters. Complainant's response, received on July 1, 1993, did not provide any dates for a prehearing conference, but simply stated that he would inform the the Commission "as soon as I can be sure of possible dates for scheduling."

More than 10 months later, having not heard anything from the complainant, the Commission sent another certified letter which again asked for "dates for scheduling a prehearing conference." The response was received after the time period that was very clearly specified in the letter. In addition, the response again failed to indicate the complainant's availability for a prehearing conference.

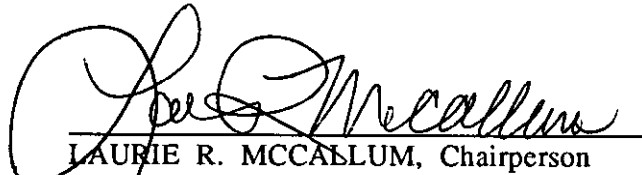
Under these circumstances, where, over the course of more than 16 months, the complainant has failed to provide the Commission with dates when he is available for a prehearing conference, despite four written requests, there are clear grounds for dismissal. This conclusion is based upon the length of delay and the absence of any reason sufficient to justify the delay. The Commission recognizes that the complainant has moved during this period, and the complainant has indicated that he has had difficulty in locating

an attorney to represent him. However, these reasons are insufficient to account for the months of delays encountered in this case. The complainant's delays in responding to the Commission's requests for information are documented back to the investigative stage of these matters. Complainant has failed to fulfill his responsibility to pursue these cases.

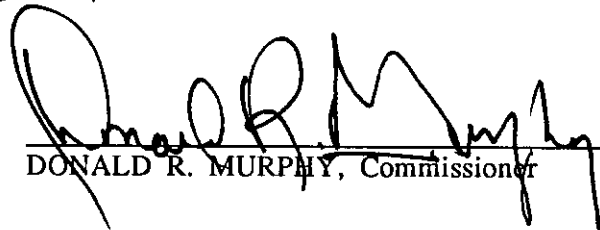
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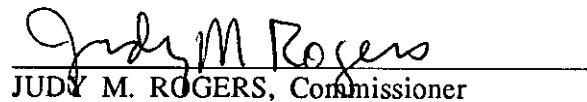
These matters are dismissed for lack of prosecution.

Dated: July 7, 1994 STATE PERSONNEL COMMISSION


LAURIE R. MCCABLUM, Chairperson

KMS:kms
K:D:temp-8/94 Behnke


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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Kenosha, WI 53143

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158 Bascom Hall
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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 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.)