

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIE E. GARRETTE,

Complainant,

v.

Secretary, DEPARTMENT OF
REGULATION & LICENSING, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS

Respondents.

Case No. 90-0092-PC-ER

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DALE NASH, WILLIE E. GARRETTE, &
JAMES HARDEN, JR.,

Complainants,

v.

Secretary, DEPARTMENT OF
REGULATION & LICENSING, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS

Respondents.

Case No. 91-0184-PC-ER

* * * * *

Mr. Garrette filed a charge of discrimination with the Commission on June 8, 1990 (Case No. 90-0092-PC-ER)¹, and filed a second charge on May 21, 1991 (Case No. 91-0184-PC-ER)². An Initial Determination (ID) was issued in May, 1995, which found No Probable Cause (NPC) to believe that the alleged

¹ Mr. Garrette's 1990 case was combined for investigation with complaints filed against the same respondents by Harden (Case #90-0106-PC-ER) and Nash (Case #90-0107-PC-ER.) All three individuals were represented by the same attorney.

² The 1991 case included claims of FEA retaliation filed by Mr. Garrette, Mr. Harden and Mr. Nash. The attorney who represented them in their 1990 cases, also represented them in this 1991 case.

discrimination occurred.³ Mr. Garrette's appeal of the NPC ID was received by the Commission on June 29, 1995.⁴

Each respondent filed written arguments requesting dismissal on the grounds that Mr. Garrette's appeal was untimely filed. Mr. Garrette's opposing arguments were received by the Commission on July 24, 1995. The material facts are undisputed and are included in the BACKGROUND section below.

BACKGROUND

1. The ID initially was mailed to all parties on May 23, 1995. Mr. Garrette's attorney received the decision with a cover letter which contained the following text:

If you feel that this [NPC] determination is in error and if you wish to have a hearing on the issue of probable cause, then you must, within 30 days of the date of this letter, file a letter of appeal with the Commission. The appeal must be in writing. . . The appeal must be actually received by the Commission within the 30 calendar day period rather than merely having been mailed within that period. s. PC 2.07(3), Wis. Admin. Code.

2. The letter to Mr. Garrette's attorney (mentioned in the prior paragraph) indicated that a courtesy copy was being sent to Mr. Garrette. The Commission sent Mr. Garrette's copy to the most recent address he provided to the Commission, as shown below:

Mr. Willie Garrette, 1020 Spaight St. #1, Madison, WI 53703

3. The mailing to Mr. Garrette (described in the prior paragraph) was returned to the Commission by the post office on May 25, 1995, with a postal stamp indicating that Mr. Garrette's "forwarding order expired." The copy previously mailed to his attorney was received by his attorney.

4. On May 31, 1995, a Commission staff person telephoned Mr. Garrette's attorney's office and obtained Mr. Garrette's new address: 1106 N. Thompson Drive, Madison, WI 53704. The Commission mailed a second copy of the ID to Mr. Garrette the same day.

³ The ID covered all of the cases mentioned in the prior two footnotes.

⁴ Timely appeals were filed on behalf of Mr. Harden and Mr. Nash.

5. The Commission received an appeal from Mr. Garrette on June 29, 1995, by letter dated June 28, 1995. His appeal letter contains the following statement:

I note that I was given a specific time-frame (30 days) to appeal the decision. This is advise you that I would like to appeal the decision. Since the filing of the above-referenced complaints, I have moved two times. This caused me to receive the decision untimely and I was not able to notify you of my decision regarding these matters in the specified time-frame. Again, I would like to appeal this matter and request a hearing. Also, my new address and phone number are: [same as in par. 4 above.]

Please notify me and my attorney . . . of your decision regarding if I will be allowed to appeal these matters. . .

DISCUSSION

An appeal of an NPC ID would be considered timely if received by the Commission within 30 days after the date upon which the NPC ID was mailed to Mr. Garrette's attorney. See, PC 2.07(3), Wis. Admin. Code [establishes the 30-day appeal period], PC 1.02(10), Wis. Admin. Code [defines "filing" as Commission receipt of the document], PC 1.05(2), Wis. Admin. Code [defines "service" as mailing date], and PC 1.05(4), Wis. Admin. Code [mandates service upon a party's representative].

The NPC ID was mailed to Mr. Garrette's attorney on May 23, 1995. Accordingly, Mr. Garrette's appeal would be considered timely filed if his appeal was received by the Commission by June 22, 1995. His appeal was filed late because it was not received by the Commission until June 29, 1995.

Mr. Garrette argued that good cause exists for the late filing of his appeal because he did not receive his copy of the NPC ID until June 1, 1995, at the earliest. The Commission first notes that the 30-day appeal period commences with the date on the cover letter mailed with the ID and that such information was contained in the cover letter mailed with Mr. Garrette's ID.

It is true that the Commission will consider whether good cause exists for filing a late appeal of a NPC ID, because the 30-day period is directory, not mandatory. See, for example, Rogers v. DOA Ethics Bd., 87-0010-PC-ER (12/22/89), rehrq. denied 2/12/90, Dugas v. DHSS, 86-0073-PC-ER, 87-0143-PC-ER (7/14/88). However, the Commission cannot find good cause under the circumstances of Mr. Garrette's case.

The Commission followed the procedure published in the administrative rules. Mr. Garrette's delay of receiving his courtesy copy when initially mailed was not due to Commission error, and would have been avoided if he had kept the Commission informed of his address changes, as is his duty under PC 1.03(1), Wis. Admin. Code.

Furthermore, the text of Mr. Garrette's appeal letter demonstrates that he knew a potential timeliness issue existed. He may not have received the second-mailed copy of the NPC ID until June 1 or 2, 1995. However, such receipt would have given him sufficient time (about 20 days) to file a timely appeal, yet he delayed filing until after such time as he should have known would be too late.

ORDER


The respondents' motion to dismiss is granted. Accordingly, Case No. 90-0092-PC-ER is dismissed and, further, Mr. Garrette is dismissed as a party to Case No. 91-0184-PC-ER.


Dated August 4, 1995

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

JMR


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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 (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