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RON PAUL,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.
 Case No. 91-0074-PC-ER

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DECISION
 AND
 ORDER

Respondent moved for dismissal in the above-noted case contending the complaint was untimely filed. A hearing on the motion was held on June 16, 1993, with Judy M. Rogers presiding. Complainant appeared in person and by his attorney, Richard V. Graylow. Respondent appeared by its attorney, David C. Whitcomb. The parties agreed the Commission could take "administrative notice" of information contained in Commission files.

The record was held open until July 16, 1993, to provide complainant and his counsel an additional opportunity to search their files for documentary evidence. Both responded prior to the deadline, as follows: a) Attorney Graylow's response was received by the Commission on June 18, 1993, and marked by the examiner as Complainant's Exhibit 1; and b) Complainant's response (through his attorney) was received by the Commission on July 14, 1993, and marked by the examiner as Complainant's Exhibit 2.

The issue presented is shown below:

Whether complainant timely filed his complaint which alleged discrimination under the Fair Employment Act in regard to respondent's decision on November 14, 1984, not to select him for a promotion as Institution Security Director 1 at Taycheedah Correctional Institution.

FINDINGS OF FACT

1. Complainant has a copy of a complaint, with attachments, which relate to respondent's decision on November 14, 1984, not to select him for a promotion as Institution Security Director 1 at Taycheedah Correctional

Institution. (Joint Exhibit B, pp. B-1 through B-12) The letter attached to the complaint is dated November 26, 1984. The complainant's signature appears on the complaint form with the notary date of November 28, 1984. This complaint is hereafter referred to as the "Taycheedah Complaint".

2. Complainant alleged that he mailed the Taycheedah Complaint to the Commission and his attorney by registered mail on November 28, 1984, on his way home from work. He was unable, however, to produce a copy of his portion of the registered-mail stubs or of the return-receipt stubs. He said he received a return-receipt stub from the mailing to his attorney, but not from the mailing to the Commission. He never followed-up with the post office to determine whether Commission delivery occurred or where the return-receipt stub was for delivery to the Commission until 1991, at which time the post office informed him they have not retained records back to 1984. He further stated that his efforts to find a copy of the stubs was hampered by water damage to his box of case-related documents.

3. Complainant's attorney searched for his office's copy of the Taycheedah Complaint and produced the cover letter of the same. (Appellant's Exhibit 1) The cover letter has no date-stamp to evidence date of receipt by complainant's attorney.

4. Complainant alleged that he later hand-delivered a copy of the Taycheedah Complaint to the Commission.

5. Joint Exhibit B, p. B-13, is a handwritten note by complainant dated December 9, 1984, which states as follows:

It appears there is something amiss. Mailed TCI [Taycheedah Correctional Institution] complaint on Nov. 28 on the way home from work. As of today, still no return remit. Delivered complaint to Madison and tried to deliver it to Jane Ford [who worked at the Personnel Commission at the time]. The person at the desk (He) stated it would be taken care of.

6. Joint Exhibit B, p. B-14, is a statement bearing the typed date of December 9, 1984, which is the same handwritten date appearing with

complainant's signature at the end of the statement. The full text is shown below. The underlined items were handwritten by complainant.

December 9, 1994. I, Ronald L. Paul certify the delivery of the discrimination complaint against Nona Sitala and the Taycheedah Correctional Institution to the Wisconsin Personnel Commission on the 9th day of Dec, 1984 at 11:40 o'clock am. Delivered by Ronald L. Paul, Captain, Rt. 1 Fox Lake, WI 53933.

7. Complainant said it did not occur to him to have the male Commission staff person sign the statement in paragraph 6 above as evidence of Commission receipt of his Taycheedah Complaint.
8. Complainant's hearing testimony differed with the details in the written documents quoted in paragraphs 5 and 6 above. Specifically, complainant checked his work record for December 9, 1984, and realized he could not have delivered the Taycheedah Complaint to the Commission on December 9, 1984, because he worked at Kettle Moraine that day. Therefore, his hearing testimony was that he prepared the typed document referenced in paragraph 6 above at work on December 9, 1984, and completed the handwritten items on December 10, 1984, after personally delivering the Taycheedah Complaint to the Commission. His testimony regarding the handwritten document referenced in paragraph 5 above, changed similarly. He testified that he wrote the document on December 10, 1984, when he returned home from delivering the Taycheedah Complaint to the Commission.
9. Complainant (or his attorney) checked with the Commission on the status of the Taycheedah Complaint in 1991, at which time the Commission informed him that the Commission had no record of it. Complainant (or his attorney) then submitted a copy of the Taycheedah Complaint materials which were received by the Commission on March 7, 1991, and which were assigned the case number of 91-0074-PC-ER.
10. The Commission undertook a search for evidence that the Taycheedah Complaint was filed as alleged. (Joint Exhibit A) The search included a review of all recorded files open, a physical check of the files of possible

appeals/complaints, miscellaneous correspondence and all case files pertaining to other actions filed by complainant, whether closed or open. Complaints filed with the Commission under the Fair Employment Act are cross-filed by the Commission with the Equal Employment Opportunity Commission (EEOC) in Milwaukee. The Commission checked with the EEOC office and was informed that no cross-filing was received. In short, the Commission could not verify the filing of a timely complaint.

11. Complainant offered Joint Exhibit C as support of his alleged timely-filed Taycheedah Complaint. He was confident the exhibit supported his position because he recalled filing only one complaint in 1984. Joint Exhibit C does mention a 1984 case numbered 84-0158-PC, but the case could not be related to the Taycheedah Complaint. Joint Exhibit C is a decision dated October 11, 1984, which recites a history of the 1984 case being filed on August 2, 1984 (three months before complainant allegedly mailed the Taycheedah Complaint). Furthermore, the Commission assigns case numbers for complaints filed under the Fair Employment Act as ending with the initials "PC-ER" (which stand for Personnel Commission - Equal Rights), and appeals filed under the Civil Service Code as ending with the initials "PC". Therefore, the case number 84-0158-PC, is further evidence that the subject matter was something other than the alleged discriminatory decision of respondent not to select complainant for the promotional position at Taycheedah.

12. The only other action complainant could recall on the Taycheedah Complaint from the alleged 1984 filing, up to 1991; was inclusion of the case in a Commission conference in 1986, which also discussed a case he filed in 1982 (Case No. 82-0069-PC-ER, referred to by complainant as "the Warren Young case"). However, complainant did not produce a copy of any written conference report or other document to support his recollection.

13. Complainant is mistaken. He did not file a timely complaint with the Commission.

Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to s. 230.45(1)(b), Stats.
2. The complaint alleging discrimination in regard to respondent's decision on November 14, 1984, not to select him for the promotion as Institution Security Director 1 at Taycheedah Correctional Institution was filed with the Commission on March 7, 1991, which was untimely pursuant to the 300-day filing requirements of s. 111.39(1), Stats.
3. The complaint in case number 91-0074-PC-ER is dismissed.

Discussion

The examiner wishes to note she did not have the impression that complainant was attempting to deliberately mislead the parties or the Commission. Rather, the examiner concluded complainant was genuinely mistaken.

Commission and post office staff, like any individual, can make errors. However, the likelihood that the Taycheedah Complaint was lost twice (once by the post office and once by the Commission) seems remote. Furthermore, the lack of registered-mail and return-receipt stubs as evidence supported the conclusion that the Taycheedah Complaint was not mailed as complainant recalled. Also, the statements presented as support of hand-delivery did not meet complainant's burden of persuasion because the crux of those documents (delivery date) proved unreliable based on complainant's own testimony as described in paragraph 8 of the FINDINGS OF FACT.

As noted on p. B-13 of Joint Exhibit B, complainant is aware that the Commission routinely sends an acknowledgement letter upon receiving a complaint. (See paragraph 5 of the FINDINGS OF FACT, wherein complainant references the acknowledgement letter as a "return remit"). According to complainant, it was the lack of the acknowledgement letter after he thought he mailed the complaint which made him suspect the Commission did not receive the mailing. It is logical that complainant also should have been

suspicious when he did not receive an acknowledgement letter from the Commission after his alleged hand-delivery of the complaint. (That he also did not receive an acknowledgement letter after the alleged hand-delivery can be inferred from the fact that neither complainant, his attorney nor the Commission can locate a copy.) This information supports the examiner's conclusion that the complaint was not hand-delivered to the Commission. The examiner concludes from the same information that complainant should have followed-up sooner than he did to verify Commission receipt of the alleged hand-delivered complaint.

The examiner wishes to note that her decision would be the same even if the information in the prior paragraph did not exist.

ORDER

The complainant failed to file a timely complaint and, accordingly, his complaint is dismissed.

Dated: August 23, 1993 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner

JMR


JUDY M. ROGERS, Commissioner

Parties:

Ron Paul
Route 1
Fox Lake, WI 53933

Patrick Fiedler
Secretary, DOC
P.O. Box 7925
Madison, Wi 53707

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