

STATE OF WISCONSIN

PERSONNEL COMMISSION

DEREK RAISANEN,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING ON
MOTION IN LIMINE**

Case No. 98-0052-PC-ER

NATURE OF THE CASE

This matter is before the Commission on respondent's motion in limine filed September 20, 1999. This motion seeks an order prohibiting complainant from calling witnesses or introducing exhibits at the hearing, on the basis of respondent's assertion that complainant failed to file and serve copies of his exhibits and his witness list in a manner that complied with §PC 4.02, Wis. Adm. Code. The parties' attorneys have filed briefs. The facts do not appear to be in dispute and are set forth in the following findings of fact. These findings are made for the sole purpose of resolving this motion.

FINDINGS OF FACT

1. The hearing in this case was scheduled for September 13 and 14, 1999.¹
2. Complainant transmitted by facsimile transmission (fax) to the Commission and respondent, a list of witness and 26 pages of copies of exhibits on September 8, 1999, beginning at 3:27 p. m. and ending at 3:43 p. m.
3. Complainant transmitted an electronic mail (email) to the Commission and respondent with an attachment of 34 pages of copies of exhibits on September 8, 1999, at 4:22 p. m.

¹ The parties agreed to postpone the hearing while submitting and briefing this motion in limine.

4. Respondent printed the attachment, which took 16 minutes.

5. The prehearing conference report dated May 6, 1999, included the following under the heading of "ADDITIONAL IMPORTANT INFORMATION:"

1. The parties are reminded that pursuant to §PC 4.02 . . . Wis. Admin. Code, copies of exhibits and names of witnesses must be exchanged at least 3 working days before the day established for hearing, or will be subject to exclusion. **This means the information must be exchanged at or before 4:30 p.m. on September 8, 1999.** A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline.

OPINION

Section PC 4.02, Wis. Adm. Code, provides as follows:

With the exception of rebuttal matter, names of witnesses and copies of exhibits must be filed and served at least 3 working days before the commencement of the hearing. For the purpose of this section only, service is complete on receipt rather than on mailing. If no good cause is shown for the failure to comply with this section, the hearing examiner or commission may exclude the evidence after consideration of the following factors:

- (1) The prejudice or surprise experienced by the party against whom the evidence is being offered;
- (2) The ability of that party to cure any prejudice;
- (3) The extent to which waiver of the requirement would disrupt the orderly and efficient hearing of the case;
- (4) Bad faith or willfulness in failing to comply with the requirements; and
- (5) Other factors relevant to the determination.

The Commission will first address the questions raised by the fax transmissions, and then (to the extent they are different) those raised by the email transmissions. The first question is whether the documents which were submitted by fax to the Commission should be considered as timely filed.

The Commission rules provide at §PC 1.01(12), Wis. Adm. Code, that "Filing" means the physical receipt of a document at the commission's office." There are at least two ways that a document can be physically received at the Commission's office. It could arrive by mail, via delivery by postal employees, or via personal

delivery by someone such as a process server. In either case, the end result is that the Commission receives the document at its office. When a document is faxed to the Commission, this process also results in the Commission receiving a document at its office. The facts of this case frame an issue of first impression² for this Commission which §PC 1.01(12) does not address directly—whether a document is considered “filed” when the Commission receives a copy of the original complaint by fax transmission rather than by mail or personal service. Before addressing this question, there are some general principles that apply to the decision of an issue of this nature.

It is a familiar axiom that proceedings before administrative agencies are not required to be conducted with all the formality of a trial or proceeding in court. *See Wisconsin Tel. Co. v. Public Service Commission*, 232 Wis. 274, 287 N. W. 122 (1939); *Gray Well Drilling Co. v. State Board of Health*, 263 Wis. 417, 419, 58 N. W. 64 (1953) (“Not only pleadings, but all proceedings before administrative agencies are generally simple and informal. The functions of administrative agencies and courts are so different that rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute.”); *Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30, 505 N. W. 2d 462 (Ct. App. 1993).

In *Verhaagh v. LIRC*, 204 Wis. 2d 154, 554 N. W. 2d 678 (Ct. App. 1996), the Court stated that it did not agree “that the civil law standards applied to courts in extending time to answer controls an administrative agency’s determination of whether to grant default judgment,” 204 Wis. 2d at 159. The Court went on to hold as follows:

Veerhagh [a workers compensation claimant] contends that the surprise, mistake or excusable neglect standard enunciated in *Hedtke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N. W. 2d 727 (1982), is the standard that must be applied by LIRC. *Heidtcke*, however, in enunciating the standard to be applied to courts was interpreting §801.01(2), STATS., which is contained within the rules of civil procedure. The rules of civil procedure apply to the courts of this state but are not applicable to administrative agency proceedings. . . .

² At the same time as the Commission decides this case, it also decides related issues in *Bare v. DOT*, 99-0119-PC-ER, and *Wyman v. UW-Madison*, 99-0078-PC-ER.

Because of the limited application of the rules of civil procedure to the administrative agencies of this state, we reject Veerhagh's contention that the appropriate legal standard to be applied by LIRC in determining whether to grant his motion for a default order is based upon a finding of surprise, mistake, or excusable neglect. Rather the agency is entitled to exercise its discretion based on its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness. (citations omitted) 204 Wis. 2d at 161.

In evaluating the agency action before it, the Court also considered another general principle:

The law does not look kindly at defaults., *Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N. W. 2d 865, 867 (1977), and the ability of all parties to assert their claim and defense before an appropriate tribunal will not lightly be discarded. 204 Wis. 2d at 162.

Returning to the specific issue before it, the Commission is aware of only one reported case in Wisconsin dealing with the question of filing by facsimile. In *Pratsch v. Pratsch*, 201 Wis. 2d 491, 548 N. W. 2d 852 (Ct. App. 1996), a notice of appeal was transmitted by fax transmission to the clerk of court's office on the last day for filing. The Court stated that this raised the issue of first impression of "whether a notice of appeal can be filed by facsimile transfer." 201 Wis. 2d at 494. The Court noted that the Supreme Court had dealt with this general area by enacting §801.16(2), Stats.:

2) For papers that do not require a filing fee:

(a) A court may adopt a local rule, if it is approved by the chief judge, that requires the use of a plain-paper facsimile machine and permits the filing of those papers by facsimile transmission to the clerk of circuit court.

(b) If no rule has been adopted under par. (a), a judge may permit a party or attorney in a specific matter to file those papers with the clerk of circuit court by facsimile transmission to a plain-paper facsimile machine.

(c) The party or attorney, by filing papers by facsimile transmission, certifies that permission of the judge or court for filing by facsimile transmission has been granted. Papers filed by facsimile transmission are considered filed when transmitted except that papers filed by facsimile transmission completed after regular business hours of the clerk of court's office are considered filed the next business day.

Although awkwardly constructed, s. 801.16(2), STATS., plainly means that only those papers that do not require a filing fee may be filed by facsimile transmission. The Judicial Council Note, 1991, confirms that interpretation: "Sub. (2) clarifies that papers (other than those requiring a filing fee) may be filed by facsimile transmission to the judge or clerk, if a local court rule, or the judge in a specific matter, so permits." A notice of appeal is a paper that requires the payment of a filing fee. RULE 809.25(2)(a)1, STATS. Therefore, s. 801.16(2), STATS., does not permit the filing of a notice of appeal by facsimile transmission.

We note that "filing under sec. 809.10 means physical delivery of the notice of appeal to and receipt by the clerk of the trial court." *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis.2d 813, 822, 284 N.W.2d 93, 97 (1979). *In one sense, the clerk of the trial court received the notice of appeal when the facsimile transmission occurred on January 4, 1996. However, we conclude that Boston Old Colony does not answer this issue because it predated facsimile technology and the creation of s. 801.16(2), STATS. Section 801.16(2) represents an explicit exception to the general rule set forth in Boston Old Colony.* (emphasis added) 201 Wis. 2d at 494-95.

This holding applies by its terms to proceedings in court. The principle embodied in this holding can not be applied automatically to Commission proceedings, but, consistent with the foregoing authorities, proceedings before administrative agencies are in general less formal than court proceedings. This suggests the Commission should not adopt any approach to this issue which is more stringent than the principle adopted in *Pratsch*.

In the emphasized language in *Pratsch*, the Court acknowledges that the clerk's office received a copy of the document when it received the fax transmission. The Court implies that there would have been compliance with the statutory filing requirement of "'physical delivery of the notice of appeal and receipt by the clerk of court,'" *id.*, but for the rule allowing fax filing only where the document in question was not required to be accompanied by a filing fee. This clearly leaves the door open to the conclusion that an effective filing occurs on the day the document is received by fax transmission when there is no rule limiting fax filing to particular types of documents. This of course is the case in the instant matter. *See Calabrese v. Springer Personnel of New York, Inc.* 141 Misc. 2d 566, 534 N. Y. S. 2d 83 (1988) ("Faxing patently satisfied the plain intent of the subdivision [which governs service of documents but did not address the use of fax].").

In the Commission's opinion, the Court's decision in *Pratsch*, along with the general principles of liberality and informality in applying rules in administrative proceedings, support the interpretation of §1.01(12), Wis. Adm. Code, that filing is complete when the Commission receives a fax copy of the documents, and the Commission so holds under the facts and circumstances of the instant case.

Turning next from the question of filing by fax to the issue of service by fax, while mail service is usually complete on mailing, §PC 1.05(2), Wis. Adm. Code, §PC 4.02 is an explicit exception and provides that both filing and service of exhibits and witness lists is complete on receipt. There does not appear to be any reason to hold that service by fax, as opposed to filing by fax, is not effective service, and the Commission concludes that the fax transmission in this case was effective service of complainant's exhibits and list of witnesses.

In reaching these conclusions, the Commission has considered the policy-oriented concerns respondent raises. Respondent argues that technical problems can occur with fax transmissions. However, a party who elects to rely on a fax transmission assumes the risk of a technical failure, just as a party who drops a letter in a mail box assumes the risk of a problem occurring in the postal delivery system.

Respondent also notes that fax transmissions shift the costs of reproduction of copies of the documents transmitted from the sender to the recipient. This is a legitimate concern, but in many cases, such as the instant one, there will not be a great number of pages involved. To the extent that both parties may utilize fax transmissions, the cost factor may be largely balanced out over a period of time. Also, an application of § PC 4.02, Wis. Adm. Code, to permit service and filing by fax should not prevent the Commission from addressing on a case by case basis any real abusive excesses that may occur.

The Commission also considers the policy factor raised by a recently enacted (1997 Act 212) law. Section 16.72(9), Stats., provides that “every agency include[] on all stationery utilized by the agency at least one telephone number where the agency may be contacted, at least one facsimile transmission number for the agency, if the agency has a number, and at least one electronic mail address for the agency, if the agency has such an address.” This reflects a legislative policy that encourages agency accessibility utilizing the technology that has become so widespread in recent years. Furthermore, the publication by agencies (such as the Commission and respondent) of their fax numbers on their stationery inevitably will have the effect of encouraging parties to communicate with agencies by fax, an outcome of which the legislature must have been aware.

The next question involves the issue of exhibits served and filed by email transmission. Many of the same considerations discussed above apply to this question. However, there are some differences. An email transmission does not generate a document unless the recipient is aware of the message and takes action to print the message. Also, in the Commission’s experience, an email transmission is more likely than a fax transmission to result in formatting problems which can degrade the usefulness of the transmission to the recipient. While the Supreme Court has approved filing by fax transmission under certain circumstance, as mentioned above, it has not provided such authorization for email transmissions.

Although the Commission does not interpret §PC 4.02, Wis. Adm. Code, to allow service and filing of exhibits by email transmission, that rule does not prohibit the consideration of exhibits which have not been timely filed and served. The rule does not provide for the exclusion of evidence unless no good cause is shown for the failure of compliance, and the Commission must also consider several factors in the exercise of its discretion whether to accept the evidence:

- (1) The prejudice or surprise experienced by the party against whom the evidence is being offered;
- (2) The ability of that party to cure any prejudice;
- (3) The extent to which waiver of the requirement would disrupt the orderly and efficient hearing of the case;
- (4) Bad faith or willfulness in failing to comply with the requirements; and
- (5) Other factors relevant to the determination.

In this case, it appears there has been a good faith effort to comply with the rule, and that there was no prejudice or surprise to the opposing party because respondent had notice of the content of the exhibits in question within the time frame for service under the rule. Therefore, the Commission concludes that under the circumstances the documents should not be excluded.

CONCLUSIONS OF LAW

1. This case is before the Commission pursuant to §§230.45(1)(b), Stats., and 111.375(2), Stats.
2. Complainant's service and filing of a list of witnesses and copies of exhibits by fax transmission on September 8, 1999, constituted compliance with §PC 4.02, Wis. Adm. Code.
3. Complainant's service and filing of copies of exhibits by email transmission on September 8, 1999, did not constitute compliance with §PC 4.02, Wis. Adm. Code, but, under the circumstances, exclusion of the documents is not warranted.

ORDER

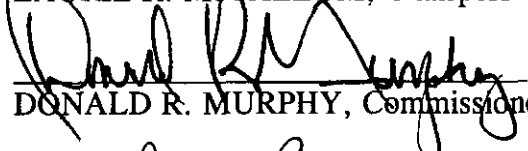
Respondent's motion in limine is denied.

Dated: January 25, 2000.

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STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner