

**State of Wisconsin**



**Labor and Industry Review Commission**

**Jafar M. Banda**  
Complainant

**Wisconsin Jobs Now**  
Respondent

ERD Case No. CR201604781  
EEOC Case No. 26G201700304C

**Fair Employment Decision<sup>1</sup>**

**Dated and Mailed:**

March 13, 2018

A petition for commission review must be received within 21 days after the administrative law judge's decision was mailed to the party's last-known address. The petition in this matter was filed late and is therefore **dismissed**. The administrative law judge's decision remains in effect.

By the Commission:

/s/

Georgia E. Maxwell, Chairperson

/s/

Laurie R. McCallum, Commissioner

/s/

David B. Falstad, Commissioner

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<sup>1</sup> **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

### **Memorandum Opinion**

An administrative law judge for the Equal Rights Division (hereinafter "ERD") of the Department of Workforce Development issued a decision in this matter dismissing the complaint based upon the complainant's failure to appear at a hearing. The complainant filed a petition for commission review of that decision. The issue to be decided is whether the complainant's petition for review was timely filed and, if not, whether there is any circumstance under which the petition could be accepted.

The applicable statutes provide that a party who is dissatisfied with the findings and order of the examiner may file a written petition with the department for review by the commission of the findings and order, that if no petition is filed within 21 days from the date that a copy of the findings and order of the examiner is mailed to the parties the findings and order shall be considered final, and that if the commission is satisfied that a petitioner has been prejudiced because of exceptional delay in the receipt of a copy of any findings and order it may extend the time another 21 days for filing the petition with the department. Wis. Stat. § 111.39(5), Wis. Stat. §106.52(4)(b).

Wisconsin Admin. Code § LIRC 1.02 provides, in relevant part, as follows:

All petitions for commission review shall be filed within 21 days from the date of mailing of the findings and decision or order . . .

Wisconsin Admin. Code § LIRC 1.025 provides, in relevant part, as follows:

- (1) Petitions for review may be filed by mail or personal delivery. A petition for review filed by mail or personal delivery is deemed filed only when it is actually received by the commission or by the division of the department to which the petition is mailed, except that petitions for review in unemployment insurance cases under s. 108.09 or 108.10, Stats. which are filed by mail or personal delivery are deemed filed when received or postmarked as provided for in s. LIRC 2.015.
- (2) Except as provided for in subs. (3) and (4), petitions for review may not be filed by e-mail or by any other method of electronic data transmission.<sup>2</sup>

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<sup>2</sup> Subsection (3) provides that petitions may be filed by facsimile transmission (FAX), and sub. (4) provides that petitions for review of certain types of cases (not including fair employment) may be filed electronically through the commission's internet website.

The administrative law judge's decision having been dated and mailed on December 8, 2017, the last day on which a timely petition for review could have been filed was December 29, 2017.

The complainant attempted to file a petition for review by e-mail on December 8, 2017. He was notified the same day that an appeal could not be filed by e-mail and was directed to refer to the Notice of Appeal Rights that accompanied the administrative law judge's decision for instructions on how to file an appeal. The Notice of Appeal Rights, which was sent to the complainant on December 8, 2017, explained that a petition for review could be mailed, faxed or brought in person to the Equal Rights Division and that it must be received within 21 days from the date of the decision.

On January 3, 2018, the complainant hand delivered a petition for commission review to an ERD office. His petition is deemed to have been filed on that day.<sup>3</sup>

In his petition the complainant stated, in relevant part:

“. . . My appeal was due December 29<sup>th</sup> 2017. I tried to appeal December 8<sup>th</sup> 2017 to the judge. However, I was busy getting a 3.65 G.P.A. so I can graduate at UW-Milwaukee in May 2018. The holidays and my work schedule caused me to respond today. When the indication was 21 days to appeal I thought that holidays at least was not included. I thought it was more about business days. . .”

These arguments fail. The Notice of Appeal Rights stated that the petition must be received by the ERD within 21 days from the date of the decision. The Notice did not state that the complainant had 21 “business days” in which to file or that holidays would be excluded, and the complainant had no reason to assume that was the case. Further, the complainant's statement that his appeal was due December 29, 2017, but that he was too busy to file a petition prior to January 3, 2018, casts doubt on his explanation that he believed he had 21 business days in which to do so. In any event, the Act contains no provision allowing the commission to accept late petitions for review, even if the complainant could establish good cause for the untimeliness. The only exception in the statute covers situations where the petition is late due to an exceptional delay in the receipt of the decision, a circumstance not present in this case.

Given the above, the commission finds that the petition for commission review was not timely filed, and that the complainant was not prejudiced because of exceptional

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<sup>3</sup> A letter sent by the ERD to the respondent on January 4, 2018, erroneously indicates that the complainant's petition was filed on January 2, 2018. However, it is clear from the file that the complainant's petition was not filed until January 3, 2018. That error has no effect on this decision, however, since the complainant's petition was untimely filed even using the earlier date.

delay in the receipt of a copy of the decision, within the meaning of the applicable statutes. The petition for review is, therefore, dismissed.