

State of Wisconsin



Labor and Industry Review Commission

<p><b>Sergio Nute</b>, Complainant</p> <p><b>CESA #5</b>, Respondent</p> <p>ERD Case No. CR202202143 EEOC Case No. 26B202200037</p>	<p><b>Fair Employment Decision</b></p> <p><b>Dated and Mailed:</b></p> <p>August 29, 2023</p> <hr/> <p>nutese_rsd.doc:164</p>
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The decision of the administrative law judge is **set aside**, and the matter is **remanded** to the Division for a hearing on the timeliness of the complainant's appeal and for further proceedings consistent with this decision.

By the Commission:

/s/

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Michael H. Gillick, Chairperson

/s/

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Georgia E. Maxwell, Commissioner

/s/

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Marilyn Townsend, Commissioner

### **Procedural History**

The complainant filed a complaint with the Equal Rights Division (hereinafter “Division”) of the Department of Workforce Development, in which he alleged that the respondent discriminated against him based upon his age, in violation of the Wisconsin Fair Employment Act. An equal rights officer for the Division conducted an investigation, and an initial determination finding no probable cause to believe discrimination occurred was issued on February 21, 2023. By law, the complainant had 30 days in which to file an appeal. On March 23, 2023, at which point no appeal had been filed, the Division notified the complainant by mail that it was closing his case.

On April 3, 2023, the complainant contacted the Division and left a voice mail for the equal rights officer who had investigated his case stating that he never received a copy of the initial determination and asking when it would come. In a return call on April 5, the equal rights explained that the initial determination had been mailed to the complainant on February 21, 2023 and confirmed that it was sent to the correct address. The equal rights officer emailed the complainant a copy of the initial determination, and the complainant responded that he would like to appeal. On April 10, 2023, the Division received a letter from the complainant, dated and postmarked on April 5, indicating that he had never received the initial determination and wanted an opportunity to appeal.

The matter was referred to an administrative law judge for resolution and, on April 24, 2023, the administrative law judge issued a decision dismissing the appeal on the basis of timeliness. The administrative law judge did so without holding a hearing, based solely on the information contained in the late appeal. She reasoned that the initial determination was mailed to the complainant at his last address and that he had supplied no information or explanation as to why he did not receive it. Further, the administrative law judge noted that, even if the complainant did not receive the initial determination, it was not established that the Division was responsible for that failure.

The complainant has filed a timely petition for commission review of the administrative law judge’s decision.

### **Memorandum Opinion**

The rule governing the filing of appeals of initial determinations of no probable cause is Wis. Admin. Code § DWD 218.08, which provides, in relevant part:

- (1) WHEN FILED. Within 30 days after the date of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause...

(2) DISMISSAL FINAL IF NO APPEAL FILED. If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the department.

The Division's rule, cited above, requires dismissal of the complaint if no appeal is filed within the time limit specified. While the rule does not contain any exception for appeals that are filed late for good cause or due to compelling personal circumstances, it contemplates that the complainant must be given a reasonable opportunity to receive the determination or to otherwise become aware of its existence in order for the appeal period to run. *See, Phelan v. Alter Trading Corp.*, ERD Case No. CR201604412 (LIRC Nov. 30, 2018), citing *Carlson v. SPF North America*, ERD Case No. CR200601472 (LIRC April 27, 2007).

Here, the complainant has contended, without further detail, that he did not receive the initial determination in time to file a timely appeal. As the administrative law judge observed in her decision dismissing the late appeal, the initial determination was sent to the complainant at his correct address, and the mailing of a letter creates a rebuttable presumption that the letter was received. *Deering v. Beverly Enterprises-Wisconsin Inc.*, ERD Case No. CR200504591 (LIRC June 20, 2008), citing *State ex rel. Flores v. State*, 183 Wis. 2d 587, 612-613, 516 N.W.2d 362 (1994). The presumption of receipt having been established, the burden then shifts to the challenging party to present credible evidence of non-receipt. *Id.* However, the complainant in this case was not given an opportunity to present that evidence.

The commission has held that a plausible assertion of non-receipt of a decision should not be rejected, consistent with due process, without providing an opportunity for a hearing to prove non-receipt. *See, Marrero v. Bullseye Inc.*, ERD Case No. CR201402243 (LIRC Aug. 31, 2015); *Mullen et al. v. Braatz*, 179 Wis. 2d 749, 508 N.W.2d 446 (Ct. App., 1993)(The presumption of receipt cannot be given conclusive effect without violating the due process clause). At the hearing, the complainant can rebut the presumption of receipt of the initial determination by offering credible testimony of non-receipt. *Brunette v. Cardinal Ridge Residential Care, LLC*, ERD Case No. CR201403684 (LIRC Sept. 30, 2016). The complainant must also establish that the non-receipt was unrelated to his own actions, *Hernandez v. Starline Trucking Corp.*, ERD Case No. CR201002662 (LIRC Feb. 29, 2012), such as by moving without arranging to have his mail forwarded, *Phelan v. Alter Trading Corp.*, ERD Case No. CR201604412 (LIRC Nov. 30, 2018), or by leaving town temporarily and not making provisions for the monitoring of his mail during his absence, *Sipprell v. Kenosha Unified School District*, ERD Case No. CR201104269 (LIRC Jan. 15, 2015).

Because in this case the complainant was not given an opportunity to present evidence of non-receipt, the matter is remanded to the Division to allow the complainant to prove that he did not receive the initial determination in time to file a timely appeal. If, after considering the evidence introduced on the issue of whether

the complainant received notice of the adverse initial determination in time to file a timely appeal, the administrative law judge concludes that the complainant did not receive such notice through no fault of his own, the administrative law judge shall accept the late appeal and schedule a hearing on the issue of probable cause. If, on the other hand, the administrative law judge finds that the complainant failed to establish he did not receive timely notice of the initial determination, or that the failure was due to his own fault, the administrative law judge shall issue an order of dismissal.

cc: Attorney Ronald Stadler