

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Robert E. Butler 605 Harvey Road Madison, WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Research Products 1015 East Washington Avenue Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p>Case No. 22031</p>
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BACKGROUND

On January 5, 1994, the Complainant, Robert Butler, filed a complaint of discrimination against the Respondent, Research Products. The complaint alleged that the Respondent discriminated against the Complainant on the basis of his race when it failed to promote him. Subsequent to investigation, the Investigator/Conciliator issued an Initial Determination concluding that there is no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his race in his employment. The Initial Determination is dated January 12, 1995 and was mailed by certified mail return receipt requested on that date. The white slip that accompanies a certified letter is dated January 13, 1995. The return receipt or green card is dated as having been returned to the Commission on January 17, 1995. On January 23, 1995 the Complainant filed a written appeal with the Commission seeking review by the Hearing Examiner of the Initial Determination's conclusion that there was no probable cause to believe that discrimination had occurred. The Hearing Examiner issued a Notice of Review on January 30, 1995. On March 1, 1995, the Respondent filed a Motion to Dismiss the appeal asserting that the Commission was without jurisdiction to hear the appeal.

DECISION

The grounds of the Respondent's motion are somewhat confused. At first the Respondent appears to assert that the Complainant did not file his appeal within the time period provided for by the rules of the Commission. Rule 7.5. This period is ten days from the receipt of the Initial Determination not ten days from the sending of the Initial Determination. Moore v. Leader Nursing and Rehabilitation Center, Case No. 21810 (MEOC 10/13/94, ex. dec. 05/06/94). The record is not clear about the date upon which the Complainant received the Initial Determination. The return receipt or green card does not contain the date it was delivered to the Complainant, but indicates that it was received at the Commission on January 17, 1995. It appears that the Complainant must have received the Initial Determination on either January 14, 1995 or January 16, 1995. This is because the white slip accompanying the return receipt is dated January 13, 1995. This is the date that the post office received the certified mail package from the Commission. Since the Commission received the return receipt on January 17, 1995, the Complainant could have only received the Initial Determination on

January 14, 1995, January 15, 1995, or January 16, 1995. January 15, 1995 was a Sunday so the Complainant could not have received the Initial Determination on that day.

Given these calculations it is clear that the Complainant's appeal filed on January 23, 1995 was filed within the ten days of the Complainant's receipt. Even if the Complainant had received the Initial Determination on January 13, 1995 (the first possible day of receipt given a mailing on January 12, 1995), the appeal filed on January 23, 1995 is within ten days of the date of receipt assuming that the count begins on the day after receipt. Even if the period begins on the date of receipt, the period would lapse on January 22, 1995, a Sunday, and would have therefore been extended to the end of the next business day. Under any of these circumstances, the Complainant filed his appeal in a timely manner.

The Respondent then contends that because it did not receive a copy of the Complainant's appeal, the Commission is without jurisdiction to hear the appeal. The Respondent relies on Commission rules 15.252 and 15.253 for support of its position. These provisions require service of any document filed with the Commission on any other party or his, her or its attorney. It is unclear whether or not the Respondent contends that such service must be made within the same ten day period provided for filing the appeal.

There is nothing in Rule 15.252 or 15.253 that can be read to tie the time requirement for appealing an Initial Determination of no probable cause to the requirement that service be made on opposing parties. Equally there is nothing in either of those provisions that indicate that such service is a jurisdictional prerequisite. Filing the appeal with the Commission within ten days is clearly jurisdictional but service on opposing parties is not. Nothing in Rule 7.5 requires a complainant to serve the appeal on the opposing party. It speaks only to filing a written appeal with the Commission.

While Rules 15.252 and 15.253 are mandatory in nature, the rules do not specify any remedy for a failure to comply with the requirements. This lack of remedy brings their enforcement into the realm of the Hearing Examiner's discretionary authority to regulate proceedings before him or her. Rule 15.442

In considering the exercise of the Hearing Examiner's discretion in a matter such as this, the highest concern is whether there has been prejudice to one party or another. In the present insurance, the Respondent does not explain how it was prejudiced or in any way placed at a disadvantage by not receiving a copy of the Complainant's appeal. The Respondent, once it received the Hearing Examiner's Notice of Review, presumably reviewed the Commission's file to see what had been filed. Since the rules of the Commission do not require an appeal to state any particular fact other than the desire to appeal, it is difficult to see how any respondent that did not receive a copy of the request for review might be prejudiced by such lack of service. As in the current case, a respondent that believes an appeal was not filed in a timely manner may submit that position as an additional submission as allowed by the Hearing Examiner, or may file a motion to dismiss on that basis.

Without some demonstration of how the Respondent was injured by the Complainant's lack of service, the Hearing Examiner is at a loss for a basis on which to apply sanctions against the Complainant. If the Respondent demonstrates how it was prejudiced by the Complainant's failure to serve his appeal on it or what sanction short of dismissal is appropriate, the Hearing Examiner will reconsider this decision. Absent these showings, the Hearing Examiner will deny the Respondent's Motion to Dismiss.

ORDER

The Respondent's Motion to Dismiss the appeal for lack of service of the appeal on the Respondent is denied without costs to either party.

Signed and dated this 8th day of March, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner