

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

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IOWA CIVIL RIGHTS COMMISSION State Law Enforcement Agency, and MICHAEL FISHNICK and PATRICIA KELLY, Complainants, vs. FRATERNAL ORDER OF EAGLES #568 and STEVE KUHLE. Respondents.	IRCR Case Nos. 03-13-64009 and 03-13-63965 DIA No. 14ICRC009 No. 14ICRC010  FINDINGS OF FACT AND RULING ON COMPLAINANT'S MOTION TO DISMISS APPEAL
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Pursuant to Iowa Admin. Code 161 – 4.23, this matter comes before the Iowa Civil Rights Commission upon receipt of a Motion to Dismiss Appeal filed herein by Counsel for the Complainant, the Iowa Civil Rights Commission (hereinafter “Commission”), and joined in by Complainants Michael Fishnick and Patricia Kelly. The Iowa Civil Rights Commission hereby denies the Motion to Dismiss the Appeal, and remands the case for to the Executive Director, to set a hearing date before the Commission on the appeal filed herein pursuant to Iowa Admin. Code 161-4.23(4).

FINDINGS OF FACT

Complainants, Michael Fishnick and Patricia Kelly, filed complaints with the Commission alleging disparate treatment in employment on the basis of age and sex for Complainant Fishnick, and age for Complainant Kelly. After a probable cause finding by

the Commission and filing of a Statement of Charges, this matter was referred to the Department of Inspections and Appeals for a contested case hearing. A hearing in this matter was conducted before the Honorable Administrative Law Judge, Laura E. Lockard, on March 10, 2015. A Proposed Decision in these matters was issued by Administrative Judge Lockard on September 2, 2015, and copies of these rulings were distributed by first class mail to the Respondent and Complainants Fishnick and Kelly, and by first class mail and email notification to the Complainant's Attorney, Mr. Sabers, and Respondent's Attorney, Mr. Richards, said notices being sent on September 2, 2015. (Complainant, Iowa Civil Rights Commission Motion to Dismiss, Exhibit 1 and distribution list Proposed Decision entered September 2, 2015). The Commission did not send notice of the Proposed Decision by certified mail to Respondents, nor was it personally served upon them.

On October 6, 2015, Respondents' counsel emailed an Appeal of the Commission's Proposed Decision of this matter to Administrative Law Judge Laura Lockard and Commission Staff Attorney, Ben Flickinger, and mailed the Appeal to these same parties and Complainants' counsel, Robert Sabers. (Respondents' emailed and mailed Appeals dated 10/6/15). The Commission received the mailed Appeal on October 9, 2015 which was addressed to Ben Flickinger. (Respondents' mailed Appeal and envelope). The Commission's Executive Director sent an Acknowledgment of Appeal to the parties indicated receipt of Respondents' appeal. (Acknowledgment of Appeal).

On October 22, 2015, a Motion to Dismiss Respondents appeal as untimely was filed by the Commission's counsel and was joined by Complainants Fishnick and Kelly by motion filed on October 26, 2015. (Fiala, Motion to Dismiss Untimely Appeal and

Sabers, Motion to Dismiss Appeal). On October 13, 2015, an Order Setting Briefing Schedule and Oral Argument for the motion to appeal was issued by the Commission's Executive Director setting the hearing for March 4<sup>th</sup>, 2016 and requiring briefs to be filed by February 15, 2016. (Order Setting Briefing Schedule and Oral Argument). On February 19, 2016, the Commission's Executive Director issued and served an order requiring Respondent to file a resistance to the Motion to Dismiss by February 26, 2016 or the motion would be granted without hearing. Respondents filed its Resistance to the Motion to Dismiss on February 24, 2016. (Order Regarding Appeal 2/19/2016, Resistance to Motion to Dismiss 2/24/2016).

#### FINDINGS OF LAW

Iowa Code Sec. 17A.16 requires the parties in a contested case to be promptly notified of the proposed decision by delivery of a copy of the proposed order in the manner provided by Iowa Code Sec. 17A.12, subsection 1 – which requires notice by personal service, as in civil actions, or certified mail, return receipt requested. Iowa Code Sec. 17A.12(1) also allows delivery of notice may be provided by other means set out in the agency's rules. The rules of the Commission require that a copy of a proposed decision be delivered to each of the parties by certified mail and a copy be sent to counsel and the Commission. Iowa Admin. Code 161-4.22(2). As of the date of this hearing, no proof has been received that a copy of the Proposed Decision herein was mailed by the Commission to Respondents by certified mail as required by Iowa Admin. Code 161-4.22(2) or alternatively provided to the parties by personal service or certified mail return receipt requested as required by Iowa Code Secs, 17A.16 and 17A.12(1). The evidence does show that notice of the propose decision was mailed via standard mail to

Respondents and mailed via standard mail and email to counsel for the Respondents. (Proposed Decision p. 23 -distribution list; Motion to Dismiss Appeal, Exhibit 1-9/2/2015 email Van Gundy to parties).

The rules of the Commission require that a party appeal a proposed decision of the Commission within 30 days after the issuance of the proposed decision. Iowa Admin. Code 161-4.23(1). Actual receipt of notice of the proposed order by Respondents' counsel is shown in this matter by counsel's sending their Notice of Appeal to the Commission on October 6, 2015. (Respondents' emailed and mailed Appeal). The essential issue in this matter is whether the 30-day time period to appeal the proposed order from the date the order was issued is tolled in any way by the failure to notice the Respondents of the proposed decision by certified mail.

We find that it would be unreasonable for the Commission to enter a dismissal for Respondents' filing an untimely appeal of the proposed decision under the Commission's rules where the Commission has failed to follow its own rule to provide Respondents notice of the same proposed decision by certified mail or the requirement under Iowa Code sections 17A.16 and 17A.12(1) and that such decisions be "promptly" notified by personal service or certified letter, return receipt requested. Such dismissal would be the type of action subject to court reversal under Iowa Code Section 17A.19(10)(c) (providing reversal of agency action taken without following prescribed procedure).

WHEREFORE, the Commission hereby denies the Motion to Dismiss the Appeal filed by the Complainants in this matter. Appeal of this matter shall be scheduled before the Commission at a future meeting, to be set by a separate order by the Executive Director.

ORDER

IT IS THEREFORE ORDERED that Complainants' Motion to Dismiss the Appeal in this matter is denied.

Dated this 4th day of March, 2016.

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Angela Williams  
CHAIR, IOWA CIVIL RIGHTS COMMISSION

*See Separate Concurrence*

Patricia Lipski  
COMMISSIONER

*Patricia J. Lipski*

Thomas Conley  
COMMISSIONER

*SEE SEPARATE DISSENT*

Mathew Hosford  
COMMISSIONER

*] NOT PRESENT*

~~Lawrence Cunningham  
COMMISSIONER~~

~~Lily Lijun Hou  
COMMISSIONER~~

*] NOT PRESENT -*

Doug Oelschlaeger  
COMMISSIONER

*Doug Oelschlaeger*

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State Law Enforcement Agency,

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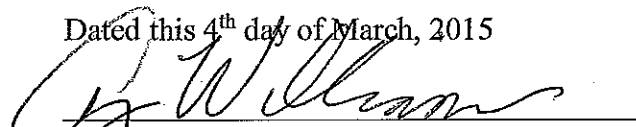
DIA No. 14ICRC009

No. 14ICRC010

CONCURRENCE IN RESULT  
BY CHAIRPERSON WILLIAMS  
DENIAL OF MOTION TO DISMISS

Comes now Iowa Civil Rights Commission Chairperson Angela Williams, and by my signature hereon, does hereby join in the result in denial of the Motion to Dismiss reached by the Commission in this matter, but do not join in the written Finding of Fact and Ruling on the Motion to Dismiss Appeal.

Dated this 4<sup>th</sup> day of March, 2015

  
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Angela Williams  
Chair, Iowa Civil Rights Commission

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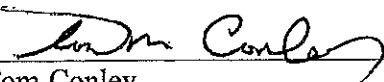
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<p>IOWA CIVIL RIGHTS COMMISSION</p> <p>State Law Enforcement Agency,</p> <p>and</p> <p>MICHAEL FISHNICK and PATRICIA KELLY,</p> <p>Complainants,</p> <p>vs.</p> <p>FRATERNAL ORDER OF EAGLES #568 and STEVE KUHLE.</p> <p>Respondents.</p>	<p>IRCR Case Nos.</p> <p>03-13-64009 and 03-13-63965</p> <p>DIA No. 14ICRC009 No. 14ICRC010</p> <p>DISSENT IN RESULT BY COMMISSIONER CONLEY IN DENIAL OF MOTION TO DISMISS</p>
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Comes now Iowa Civil Rights Commissioner, Tom Conley, and by my signature below do hereby dissent from the decision of the Commission. I would vote to grant the Motion to Dismiss the Appeal filed by the Complainants in this matter as I find that the Respondents received actual notice of the Proposed Decision in this matter and failed to file their Appeal in a timely manner. Dated this 4<sup>th</sup> day of March, 2015.

  
\_\_\_\_\_  
Tom Conley  
Commissioner, Iowa Civil Rights Commission

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