

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

JEFFREY ALLEN, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *
 NATURAL RESOURCES and *
 Administrator, DIVISION OF *
 PERSONNEL, *

Respondents. *

Case No. 83-0045-PC *

* * * * *

DECISION
 AND
 ORDER

The Commission has jurisdiction over the underlying appeal pursuant to §230.44(1)(d), Wis. Stats. On July 11, 1983, appellant made a request for continuance of the July 13, 1983, hearing date. On July 13, 1983, respondent filed a motion to dismiss the appeal on the basis of appellant's failure to appear at the scheduled hearing. On July 13, 1983, the hearing examiner designated by the Commission to hear the appeal heard argument by the parties relating to the request for continuance and the motion to dismiss. Neither party has requested an evidentiary hearing. Both parties have had an opportunity to file briefs. The following discussion is based upon documents in the case file and information presented by the parties in their arguments.

On March 18, 1983, appellant filed an appeal with the Commission relating to the manner in which an examination for the position of Administrative Budget and Management Officer 2 was conducted. On April 15, 1983, a prehearing conference was conducted before a staff attorney of the Commission. As evidenced in the prehearing conference report, the

appellant appeared personally at such conference and agreed to the scheduling of a hearing on his appeal on July 13, 1983.

As of July 11, 1983, appellant had not filed with the Commission a list of witnesses for the hearing (other than the list of witnesses appellant presented at the prehearing conference) or copies of exhibits he intended to present at the hearing. As a consequence of this, the hearing examiner designated by the Commission to hear the appeal contacted appellant by phone on July 11 to ascertain appellant's intentions in regard to proceeding with the appeal. Appellant indicated he would like to obtain a continuance of the hearing date to permit him to obtain additional evidence. The hearing examiner advised appellant to contact counsel for respondent and, if the respondent did not object to the continuance, the hearing examiner would grant the continuance. The hearing examiner further advised appellant that, if the respondent did object to the continuance, appellant should so advise the hearing examiner as soon as possible.

The hearing examiner spoke to counsel for respondent on the morning of July 12, 1983, and, as of that time, counsel for respondent had not been contacted by appellant regarding the request for continuance. Counsel for respondent further indicated that respondent objected to the continuance. In view of this, the hearing examiner advised counsel for respondent that she would contact appellant and ascertain how he intended to proceed. The hearing examiner telephoned appellant's office in the early afternoon of July 12 and was advised that appellant was out of the office that afternoon. The hearing examiner then telephoned appellant's home but there was no answer. Appellant did call counsel for respondent at 11 a.m. on the morning of July 12, but counsel for respondent was not in his office so

appellant left a message. On the basis of counsel's conversation with the hearing examiner, counsel did not return appellant's call.

As of the date and time scheduled for the hearing, neither the hearing examiner nor counsel for respondent had had any further contact with the appellant and appellant did not appear for the scheduled hearing. The hearing examiner telephoned appellant's office at 9:10 a.m. and was advised that the appellant was at work but away from his desk. The hearing examiner left a message for appellant to return the call. The hearing examiner then convened the hearing at 9:15 a.m. Counsel for respondent noted respondent's objection to the request for continuance and the hearing date and moved for dismissal of the appeal for lack of prosecution. The hearing examiner, noting appellant's failure to appear at the hearing and failure to exercise reasonable diligence in presenting and pursuing his request for continuance, denied appellant's request for continuance and indicated that she intended to recommend to the Commission that respondent's motion to dismiss for lack of prosecution be granted.

At 10:45 a.m. on July 13, 1983, appellant telephoned the hearing examiner and presented his arguments against denying his request for continuance and granting respondent's motion to dismiss for lack of prosecution. In recognition of the additional information appellant had presented relating to his request for continuance and his prosecution of the appeal, the hearing examiner agreed to reconvene the hearing at noon that day for the limited purpose of giving appellant and counsel for respondent an opportunity to argue their respective positions on such request and motion.

During the proceeding convened at noon on July 13, 1983, appellant offered the following in support of his request for continuance: After appellant had filed his appeal with the Commission, the respondent had advertised in its Career Opportunities Bulletin that two Budget and Management Officer 2 positions were to be filled by competition. These advertisements appeared in late May or early June of 1983. Appellant applied for these positions and feels that evidence of how the examinations for these positions were conducted could be an important element of his case. He was advised on July 8, 1983, at 5:30 p.m., that the written portion of the examinations for these positions were to be conducted on or around July 15 and July 20, 1983. Appellant had previously been advised that one of the exams would be conducted on June 27 but this exam was subsequently postponed. Appellant did not request a continuance of the July 13 hearing date when these positions were advertised or thereafter (until contacted by the hearing examiner on July 11) because he felt that if counsel for respondent had been made aware of the fact that appellant had applied for these positions, such knowledge on respondent's part could or would lead to manipulation of the exam or selection process in some manner. When questioned by the hearing examiner, appellant indicated that he was of the opinion that the exam process which forms the basis of his appeal was different from the prior practice followed by the respondent in administering such exams but he had made no effort to substantiate this in preparation for the hearing. In addition, appellant indicated that he had intended to appear at the hearing on July 13 and present his request for continuance at that time and had not intended to contact either the Commission or the respondent prior to July 13 for the purpose of presenting his request for a continuance. Appellant also indicated that, although he

had received the Commission's instructions for unrepresented appellants, he expected the hearing to be an informal discussion of the issue and he intended to rely for his case on the witnesses and exhibits presented by respondent.

The appellant has failed to show sufficient cause or substantial reason, within the meaning of §PC 3.02(1), Wis. Adm. Code, for the Commission to grant his request for continuance of the July 13 hearing date. Appellant has indicated that he intended to appear at the scheduled time and on the scheduled date for the hearing and present his request for continuance at that time. He further indicated that he was basing his request on the fact that he wanted to include as part of his case evidence as the manner in which the examination process for two Budget and Management Officer 2 positions had been conducted and the examination process for such positions had not been completed by July 13, and, in fact, appellant had not been advised of the dates the written portion of such examination were to be administered until 5:30 p.m. on July 8, 1983. It should have been obvious to appellant prior to July 8, however, in view of the fact that the exams had not yet been scheduled, that the exam process would not be completed prior to July 13. Appellant offers as his justification for not making the request for continuance sooner his concern that respondent would manipulate the exam or selection process if aware of appellant's intent to introduce evidence of such exam process as part of his case. One factor that the Commission considers in reviewing a request for a continuance is the degree of diligence the requesting party has exhibited in presenting his request. In the present case, appellant did not exercise reasonable diligence in presenting his request and his rationale for delay is speculative.

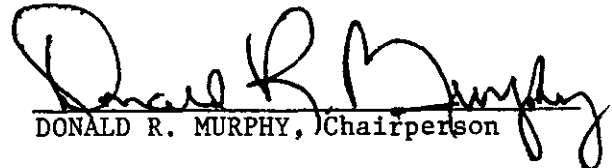
Appellant also did not exercise due diligence in prosecuting his appeal. Appellant did not appear at the scheduled hearing. Appellant attributed this failure to appear to his understanding that his request for continuance would be granted. However, the hearing examiner clearly indicated that she would grant the request on such short notice only if the respondent had no objection and it was appellant's responsibility to notify respondent of his request and ascertain if respondent had an objection. Despite the fact that the hearing was less than two days away when the appellant presented his request for continuance to the hearing examiner (and only after the hearing examiner had initiated contact with appellant), appellant waited another full day before contacting respondent. By this time, the hearing examiner had ascertained that respondent did have an objection to the request for continuance and attempted to contact appellant but he was unavailable the entire afternoon before the scheduled hearing. Appellant contends that the hearing examiner and respondent were unresponsive to his attempts to resolve the matter. However, it should be noted that the chronology of events cited in his decision is inconsistent with this contention and it was the responsibility of the appellant, not the respondent or the hearing examiner, to follow through. Appellant's lack of diligence is further underscored by his lack of preparation for the hearing. Appellant acknowledges that he had not assembled exhibits for introduction at the hearing or advised his witnesses that they were to appear at the hearing but had decided that he would instead make use of the respondent's exhibits and witnesses. Appellant attributed this lack of preparation to his understanding that the hearing would be an informal discussion of the issue. However, appellant acknowledges that he has

received and read the "Instructions for Unrepresented Appellants" prepared and distributed by the Commission. These instructions clearly state that a hearing is "not an informal discussion." Appellant also clearly understood that he had the burden of proof. It is not the responsibility of either the Commission or the respondent to prepare or present appellant's case.

ORDER

Appellant's request for continuance is denied and this appeal is dismissed for lack of prosecution.

Dated: August 17, 1983 STATE PERSONNEL COMMISSION .


DONALD R. MURPHY, Chairperson

LRM:jmf


DENNIS P. MCGILLIGAN, Commissioner

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