

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 *
 CARLTON PUGH, *
 *
 Complainant, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF *
 NATURAL RESOURCES, *
 *
 Respondent. *
 *
 Case No. 86-0059-PC-ER *
 *
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the designated hearing examiner on respondent's motion for reasonable expenses caused by complainant's failure to attend his own deposition.

It is undisputed that on March 28, 1988 at 7:15 p.m., the respondent served a notice of complainant's deposition at the complainant's 24th Street address. The notice stated the deposition was scheduled for April 5, 1988 at 10:00 a.m. at a specified location. Service was made on the complainant's mother. Complainant failed to appear for the scheduled deposition. The transcript of the deposition establishes that the respondent closed the record at 10:20 a.m. because the complainant had failed to appear by that time.

Respondent incurred court reporter fees of \$43.75 for the deposition plus attorneys fees of \$79.35 and travel costs of \$26.22. On April 8, 1988, the respondent filed a motion to compel discovery, a motion for reasonable expenses associated with the deposition and a motion to postpone both the deadline for close of discovery and the scheduled hearing. On

April 11, 1988, the designated hearing examiner convened a conference with the parties to discuss the respondents motion(s). In a letter dated April 12, 1988, the examiner summarized the conference as follows:

During the course of the telephone conference, the parties were provided an opportunity to offer arguments regarding respondent's motion to require complainant to pay all of respondent's costs, including attorney's fees, incurred in pursuing the motion. The complainant stated that he was not present at the address of 1348 North 24th Street on March 28 or March 29, 1988; that his mother never gave complainant the notice of deposition nor otherwise informed him of the notice; that complainant was in Chicago from the period from the morning of March 29th through at least April 5, 1988; that complainant did not tell his mother how to reach him during the period he was in Chicago; that complainant does not live at 1348 North 24th Street but uses it as his primary mailing address; that as of April 11, 1988, complainant still had not seen the notice; and that complainant is currently unemployed and would be unable to pay the costs as requested by respondent.

The parties were provided an opportunity to identify any inaccuracies in the above paragraph and by letter dated April 20, 1988, respondent's counsel wrote that he objected "to the following facts:"

I do not recall the Complainant stating that he (1) was unemployed and (2) would be unable to pay the costs as requested by the Respondent. The fact that the Respondent could not pay should not be a factor in your decision to grant costs.

The Commission's rules provide that "parties to a case before the commission may obtain discovery and preserve testimony as provided in Ch. 804, Stats." S. PC 4.03 Wis. Adm. Code. Pursuant to s. 804.12(4), Stats:

If a party . . . fails . . . to appear before the officer who is to take the party's deposition, after being served with a proper notice . . ., the court in which the action is pending on motion may make such orders in regard to the future as are just In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses; including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

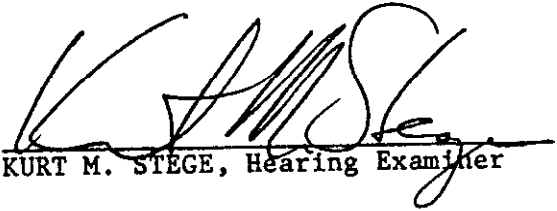
The respondent met the requirements for serving the notice of the deposition when it left a copy of the notice with complainant's mother at complainant's abode. §§ 804.05(1), 805.07(5) and 885.03, Stats.

The key determination is whether the complainant was substantially justified "in failing to appear at the deposition or whether other circumstances, [would] make an award of expenses unjust". § 804.12(4), Stats. Here, the complainant never actually received the notice of depositions until well after the date scheduled for the deposition had passed. The notice was served on complainant's mother on March 28th. The deposition was scheduled for 8 days later. Complainant was in Chicago from the morning of March 29th until at least through April 5th, which was the scheduled deposition date.

Because complainant did not receive the notice and because of the relatively short time period between the service of the notice and the date of the deposition, the examiner concludes that the complainant's failure to appear at the deposition was substantially justified. This result does not mean that a party can be away from his abode for an extended period and avoid any liability if the opposing party schedules (and notices) his deposition during that period. The time period involved here, eight days between notice and deposition, is such that it is not unreasonable to expect a party to be, for example, on vacation for that entire period.

Therefore, the respondent's motion for expenses is denied. The other motions raised in respondents April 8th letter were disposed of at the April 11th conference between the parties.

Dated: April 28, 1988 STATE PERSONNEL COMMISSION


KURT M. STEGE, Hearing Examiner

KMS:akw
RCR03/2