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GEORGE GABAY,

Appellant,

v.

Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,
and Secretary, DEPARTMENT OF
CORRECTIONS,

Respondents.

Case No. 90-0410-PC

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RULING
ON
MOTION TO DISMISS
FOR
LACK OF
PROSECUTION

This matter is before the Commission with respect to respondents' motion to dismiss for lack of prosecution filed July 24, 1992.¹ By way of background, this nonselection appeal was filed on December 27, 1990, and originally was scheduled for hearing on April 2, 1991. This was rescheduled for April 22, 1991, at respondent DOC's request due to a scheduling problem. Following a conference call on April 9, 1991, it was agreed that the hearing would be postponed because of unresolved issues regarding discovery, and would "be rescheduled once there is a clearer picture of the discovery issues." The file reflects that the parties were involved in discovery proceedings during the next several months, apparently continuing into November, 1991.

By a January 15, 1992, letter, the examiner asked appellant to advise by January 31st "as to whether discovery is complete and whether you wish to proceed to hearing." There was no response to this correspondence. By letter to appellant dated June 30, 1992, the examiner again inquired as to the status of discovery and as to appellant's intentions, and advised that if he did not respond by July 20th he could assume the appeal would be dismissed.

By a letter dated July 20, 1992, and filed July 24, 1992, appellant asserts in part as follows:

¹ Pursuant to §PC 5.01(2), Wis. Adm Code, "no hearing examiner shall decide any motion which would require final disposition of any case except when the commission has directed that the hearing examiner's decision shall be the final decision of the Commission."

I think I owe you an apology for the great length of time. Part of it comes from a complication from medication I have been taking. It caused extreme mental lethargy and as the PDR [Physician's Desk Reference] said interference with the cognitive processes. In other words it made me stupid.

Looking over my notes I am not quite sure what I was trying to do or what I was looking for. However, since my mind has cleared I believe what I do have now and my understanding of what I wish to accomplish is enough.²

In support of the motion to dismiss, respondent points out the extended period of appellant's inactivity is by his own admission only partly accounted for by his medication, and that he has not submitted any documentation or specific information about the drug. Respondent also contends that the delay has created prejudice due to the passage of time and the fading of memory.

Respondent also moves for an order requiring that the appellant "obtain a physician's statement verifying what drug, if any, was prescribed for the appellant, when that drug was prescribed and what its possible side effects are. It should also be determined when the appellant stopped taking the medication...." In response, appellant claims that this information constitutes confidential medical information, but offers to provide it for an in camera inspection, -- i.e., by the Commission but not by respondent.

The general rule with respect to dismissal of court proceedings for lack of prosecution is that this extreme sanction is only justified if the party in question has engaged in "bad faith or egregious conduct." Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 275, 470 N.W. 2d 859 (1991). Given the less formal nature of administrative proceedings, it would not appear to be appropriate to utilize any stricter rule here. Complainant's failure to have responded to the Commission's January 15, 1992, letter, and failure to have pursued this matter during this approximate period, would not constitute bad faith or egregious conduct, in the Commission's opinion, if his asserted excuse -- the side effects of a drug -- has validity. In this regard, respondent has the right to have access to the information sought by its motion quoted above. While such information normally is privileged, this privilege was waived when appellant interjected this information into this proceeding to attempt to justify his inactivity. See §905.04(4)(c), Stats. Therefore, the Commission will order this in-

² Presumably this is a reference to the inquiry regarding the status of discovery.

formation produced. The parties then will be given an opportunity to submit any further arguments with respect to the effect of that information.

ORDER

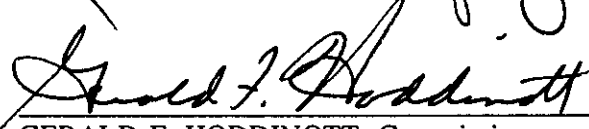
Appellant is to file with the Commission (with a copy to respondent) within 30 days of the date of this order the information sought by respondent -- i.e., a physician's statement setting forth what drug, if any, was prescribed for appellant, when it was prescribed, what its possible side effects are, and the period during which appellant was, or presumably would have been taking it. The respondent will then have 10 days in which to indicate whether it wishes to pursue its motion to dismiss and, if so, to file any additional arguments in support thereof. The appellant will then have 10 days to respond.

Dated: October 1, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner