STATE OF WISCONSIN PERSONNEL COMMISSION

DENNIS WITT,

Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 93-0093-PC

RULING ON MOTION TO DISMISS

This matter is before the Commission on the respondents' motion to dismiss. The parties have filed written arguments. The findings set out below are based upon information set forth in the Commission's file.

1. This appeal arises from the respondents' reallocation decision. During a prehearing conference held on April 8, 1994, the parties agreed to the following statement of issue:

> Was the respondents' decision effective June 17, 1990, to reallocate the appellant's position from Civil Engineer-Transportation 3 to Civil Engineer Transportation Journey correct, or should it have been reallocated to Civil Engineer Transportation Senior as of that date?

A hearing was scheduled for August 18, 1994. Appellant appeared *pro se* at the prehearing conference.

2. The Commission mailed a conference report to the parties. The conference report set forth the scheduled hearing date and included the following language:

> The parties are reminded that pursuant to s. PC 4.02, Wis.Admin. Code, all additional exhibits and names of witnesses must be received by the opposing parties and filed with the Commission at least 3 working days before the day established for hearing, or will be subject to exclusion.

* * *

> A request to postpone a date for hearing will only be granted if good reason(s) for the request can be shown. **Requests received within the last few days prior to a scheduled hearing date are disfavored by the Commission.** Postponement requests should be in writing, if possible, and the party making the request should indicate whether the opposing party or parties agree to the request. The parties should be aware that proper preparation for an administrative hearing requires substantial time and effort. **The parties must allow sufficient time to complete their preparation, including any consultations with an attorney, prior to the hearing date.** (Emphasis added)

The parties had to file their exhibits and witness lists on or before Monday, August 15th in order to comply with §PC 4.02, Wis. Adm. Code.

3. Respondents filed their witness list and exhibits on August 15th.

4. By letter dated August 16, 1994, the designated hearing examiner informed the parties as follows:

> At approximately 4:35 p.m. on Friday, August 12, 1994, [appellant's counsel] telephoned me, indicated that he had just been retained by the appellant in this matter and requested a postponement of the hearing scheduled for August 18, 1994. I was unable, at that time to reach [respondents' counsel] for a telephone conference regarding the request. A conference was convened on Monday, August 15, 1994. Respondent objected to the request. I granted it over objection and a new hearing date of September 15, 1994, commencing at 9:00 a.m. in the Commission's offices has been set. Please advise your witnesses accordingly.

Commencing with the telephone call on August 12th, appellant has been represented by counsel in this proceeding.

5. Respondents disagreed with the examiner's ruling and on August 18, 1994, filed a motion to indefinitely postpone the hearing and to dismiss the matter. A briefing schedule was established which called for appellant to reply to the motion by August 26th. By letter dated August 29th, appellant advised the Commission that he was not planning to file a brief. In that letter, appellant proceeded to argue that it would be absurd to dismiss the matter and took no position relative to respondents' postponement request other than to ask that the matter be rescheduled to a mutually convenient time. In a ruling issued on September 6, 1994, the Commission denied the motion to dismiss, holding that respondents were not entitled to dismissal merely on the basis that they disagreed with the examiner's exercise of discretion.

6. Two days after the motion was denied, the parties agreed to postpone the hearing from September 15 until October 31, 1994.

7. On Sunday, October 30, 1994, the hearing scheduled for October 31st was again postponed at the request of the appellant, this time because of an eye injury sustained by appellant's counsel the day before. Respondent had expressed reluctance with respect to the postponement.

8. By letter dated December 6, 1994, the hearing was rescheduled to May 18, 1995. On December 15th, respondents' counsel contacted the Commission, stated that respondents' witnesses had a conflict on May 18th, and the parties agreed to reschedule the matter to May 23, 1995.

9. On May 23, 1995, prior to the commencement of the hearing, the parties engaged in settlement discussions and reached an agreement in principle to settle the matter. The parties agreed to reduce their agreement to writing, which was to serve as the basis for resolution of the matter so that it could be dismissed by the Commission. The parties further agreed that it was reasonable to anticipate receipt of the agreement within 3 weeks. (Electronic record of proceeding)

10. In correspondence dated May 23rd, the same date as the scheduled hearing, respondents' counsel forwarded to appellant's counsel duplicate originals of a release and settlement agreement, drafted and executed by respondents' counsel. The key provisions that are relevant to respondents' motion to dismiss are as follows:

> 2. By execution of this Agreement, Mr. Witt does hereby confirm his request that the Personnel Commission dismiss this case and DOT will partially reimburse Mr. Witt for attorney fees by check in the amount of two thousand five hundred dollars ($2,500.00) made payable jointly to Mr. Witt and Kelly and Haus....
>
> 3. Mr. Witt also hereby confirms that he voluntarily agrees to enter into DOT's intensive performance evaluation program (Final Performance Improvement Program), as described in TAM 79 and TAM 416-1 dated 08/31/94, copies of which are attached hereto. Exhibits A and B. DER & DOT agree that prior disciplinary matters in Mr. Witt's personnel file from 1990 and earlier shall not be used in this intensive performance evaluation process. Further DER & DOT confirm and agree not to retaliate against Mr. Witt for exercising his right to bring this appeal.

11. From May 23rd until some time after September 19, 1995, the appellant's counsel did not respond to the draft agreement.

12. In a memo to appellant's counsel dated July 24, 1995, the hearing examiner stated that he had not received a fully executed copy of the settlement agreement and directed appellant's counsel to advise as to the case status no later than August 14, 1995.

13. Appellant's counsel did not respond to the examiner's memo.

14. In a letter to appellant's counsel dated August 23, 1995, the hearing examiner wrote:

> Because I have not received a response to my memo dated July 24, 1995, I must assume that, for whatever reason, the appellant has decided not to pursue the above matter. Therefore, absent some contrary indication from you received no later than September 6, 1995, I will recommend that the Commission dismiss the above matter at the request of the appellant.

15. Appellant's counsel did not respond to the August 23rd letter until the afternoon of September 8, 1995, when he telephoned the examiner and stated that he would call respondents' counsel in an effort to get the settlement discussions back on track and would send the examiner a letter to that effect. In a letter dated September 8th, appellant's counsel stated that there "has been some difficulty in getting the agreement reduced to writing" and stated that he was trying to reach respondents' counsel.

16. In a letter to the examiner dated September 12, 1995, respondents' counsel wrote:

> I have received no correspondence whatsoever from [appellant's counsel] in response to my May 23, 1995 RELEASE AND SETTLEMENT AGREEMENT. Some of the terms of that agreement were time critical; more advantageous to DOT if signed then, but less or not so now. It is the position of the DOT that the case should be dismissed.

17. The examiner set up a briefing schedule on respondents' motion.

18. In respondents' reply brief, respondents describe certain events as follows:

> [After executing and filing the May 23rd settlement agreement,] Mr. Witt and his counsel did not sign or return the agreement. I received no correspondence from them whatsoever. Meanwhile,

> in June, DOT developed an intensive performance improvement plan for Mr. Witt with timelines and deliverables with weekly review meetings. [footnote omitted] The performance improvement plan was discussed with Mr. Witt on June 7, 1995; he refused to sign it. It was implemented anyway. Mr. Witt passed this first plan for the period ending August 5, 1995. Mr. Witt is now on his second performance improvement plan; it does not include weekly reviews and coaching. It does require Mr. Witt to achieve the set goals without such direct, intense supervision as the first plan. Again, Mr. Witt refused to sign any documents and DOT implemented the plan without his signature.
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> In short, Mr. Witt did not live up to his end of the settlement agreement. Elements were time critical.
>
> For the first time, on October 20, 1995, I received any form of counter offer settlement from [appellant's counsel], oral or written.

DISCUSSION

In his response to the motion to dismiss, appellant contended that during the settlement discussions on May 23rd, the parties orally agreed that the appellant would voluntarily participate in a performance improvement plan, rather than a "Final Performance Improvement Program" as provided in respondents' draft settlement agreement. The Department of Transportations' Administrative Manual (TAM 79, page 1) states that the Final Performance Improvement Plan is established to:

> Provide a final opportunity to set clear, obtainable performance standards and communicate to the employe that failure to meet these standards may lead to dismissal.

Appellant's counsel stated that he had never heard of a Final Performance Improvement Plan before it was included as part of the draft settlement agreement, and describes is as a "last chance" agreement. As part of his response to the motion, appellant sent respondents an alternative version of a settlement agreement. Appellant contends that if the parties are unable to reach a settlement, the matter should be rescheduled for hearing.

Although the Commission was never provided with a complete copy of the appellant's proposed settlement, the proposal is quoted by respondent as including certain language as part of paragraph 3 ("Dennis Witt's participa-

tion and performance in this program shall not be used as a basis for discipline and shall not be used to disadvantage him with respect to any personnel transactions that are considered in the future.") and paragraph 4 (Such disciplinary history and record shall not be used for any purpose in the future.")

This case has a lengthy history of delays on the part of the appellant. On August 12, 1994, within five minutes of the standard closing hour for state government agencies,[1] appellant's counsel contacted the hearing examiner assigned to the case and requested a postponement.[2] Appellant had failed to notify the Commission during the proceeding 4 months of a need to postpone the hearing despite the very specific directive in the April 8th conference report that requests for postponement during the last few days prior to a scheduled hearing were disfavored and despite the directive in the conference report "to allow sufficient time to complete [case] preparation, including any consultations with an attorney, prior to the hearing date." The Commission's rules required the parties to file exhibits and witness lists no less than 3 working days prior to the hearing date, or no later than August 15th. The examiner was able to arrange for a telephone conference on the afternoon of Monday the 15th. Respondents filed their witness list and exhibits on that day. The examiner exercised his discretion and, over the objection of respondent, postponed the August 18th hearing. Even though, in its September, 1994 ruling, the Commission did not disturb the examiner's exercise of discretion when he granted appellant's last minute postponement in August of 1994, that does not mean such a delay must be ignored when considering the current dispute before the Commission. In addition to the August, 1994 delay, this case was postponed at the last minute in October of 1994, again at the request of the appellant, although this time the delay was due to an unavoidable health issue rather than an avoidable issue of preparation.

The most recent delays in this matter are directly attributable to the inaction of appellant. There simply was no response to the executed settlement

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[1]Section 230.35(4)(f), Stats., provides that "offices of the agencies of state government shall open at 7:45 a.m. and close at 4:30 p.m.," from Monday to Friday.

[2]The Commission's file contains a handwritten note by the examiner indicating the phone call from appellant's counsel was received at 4:25 p.m. The examiner's note was written at 4:35 p.m. The subsequent letter from the examiner (finding 4) incorrectly stated that appellant's counsel telephoned at 4:35 p.m.

proposal submitted by respondents' counsel on the same day as the parties' settlement discussions. The parties had agreed that the settlement document should be submitted within a period of three weeks. Respondent did not hear from appellant and imposed a performance improvement plan for him. A full two months after the May 23rd hearing, the examiner directed the appellant to advise as to the status of the case. The response was due by August 14th. Appellant did not respond to this written directive. The examiner sent appellant a letter on August 23rd, which directed appellant to contact the Commission "no later than September 6, 1995," or the examiner would recommend dismissal of the case. Appellant did not reply to this directive within the time specified. Appellant's counsel finally contacted the examiner on September 8th. Before that date there had been no contact by appellant with either the respondents or the Commission relating to the May 23rd settlement draft. Respondent did not receive a counter offer from appellant until October 20th, five months after the May 23rd proceeding.

Given this extensive factual background, dismissal of the case is warranted. The appellant was provided repeated opportunities and directives to respond to the respondents' draft agreement. Appellant did not respond at all until after the September 6th date established by the examiner. Because the respondents are now unwilling to accept the appellant's settlement proposal, appellant requests that the matter be rescheduled for hearing, at his request, for a third time. Respondent has already prepared for hearing on three different dates. If the Commission denied the respondents' motion and rescheduled this matter for hearing, it would require respondent, for a fourth time, to prepare its case for hearing. The circumstances do not warrant an additional opportunity for the appellant to pursue his case. In reaching this conclusion, the Commission has considered the duration of the delays, the reasons for the delays, and the statements by respondents that the elements in its settlement draft were time critical and that the appellant's conduct has wasted the time and resources of respondents.

In Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 470 N.W.2d 859 (1991), the Court held that dismissal of a case under §805.03, Stats., is improper "unless bad faith or egregious conduct can be shown on the part of the non-complying party." 162 Wis. 2d 275 The Court went on to state that dismissal will be upheld "if there is a reasonable basis for the circuit court's determination

that the non-complying party's conduct was egregious and there was no 'clear and justifiable excuse' for the party's noncompliance." 162 Wis. 2d 276-77 The Commission does not address the question of whether these criteria are applicable to this type of administrative proceeding. However, if the criteria are applicd, they are clearly met in the present case. The appellant's conduct during the course of this case, as summarized above, has been egregious, and appellant has provided no adequate excuse for the failure to respond to the draft settlement proposal or to the examiner's clear written directives.

ORDER

Respondents' motion is granted and this matter is dismissed.

Dated: November 14, 1995 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-11/95 Witt

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate

circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95