

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

BRENT BERG, *

Complainant, *

v. *

President, UNIVERSITY OF *

WISCONSIN-SYSTEM (Eau Claire), *

Respondent. *

Case No. 94-0154-PC-ER *

* * * * *

RULING
 ON MOTION TO DISMISS
 FOR
 LACK OF PROSECUTION

Complainant filed a complaint of handicap discrimination on October 12, 1994, arising from a five day suspension issued to him on February 9, 1994. Complainant also alleged that the February 9th suspension was part of a pattern and practice of handicap discrimination against him, and that he was harassed at work "on a regular and constant basis" due to his handicap and disability.

Respondent filed an answer to the complaint on December 12, 1994.

Complainant, who is represented by counsel, was given until January 17, 1995, to respond to the answer. On January 17, 1995, in response to a telephone request, complainant was granted an extension until January 27th to respond. On January 27th, in response to a telephone request, a representative of the Commission granted a second extension until February 3rd to respond. The Commission's representative further indicated that this was complainant's last extension.

On January 31st, again by telephone, complainant informed the Commission that he was going to file an amendment¹ to his complaint by February 15, and that, by the same date, he would advise the Commission in writing whether he would proceed with the matter before the Commission or file in another forum. Complainant confirmed this conversation by letter dated February 1st.

¹The contents of the Commission's file suggests that the complainant received another suspension in January of 1995.

In a letter dated February 15, 1995, complainant's counsel wrote the Commission as follows:

The purpose of this letter is to advise you that the complainant intends to request his right to sue letter once his amended charge of discrimination and retaliation is filed with the Commission. I will be providing that amended charge in the near future.

On February 17, 1995, respondent filed a motion to dismiss the complaint for lack of prosecution, based upon complainant's failure to respond to the respondent's answer. A briefing schedule was established. Complainant did not file any arguments, and complainant still has neither responded to the answer nor filed an amended charge.

The Wisconsin Fair Employment Act requires dismissal of complaints for lack of prosecution when the complainant "fails to respond within 20 days to any correspondence from the [commission] concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person." §111.39(3), Stats. The Commission's letter providing the complainant with an opportunity to file a response to the answer, which was sent on December 15, 1994, was not sent by certified mail.

In addition to the statutory provision requiring dismissal for lack of prosecution under certain circumstances, dismissal may also be appropriate under other circumstances. For example, §PC 2.05(4)(b), Wis. Adm. Code, gives the Commission the discretion to dismiss a complaint when the complainant fails to answer the Commission's discovery request or fails to produce the information requested by the Commission that is necessary for an investigation. Pursuant to that rule, the Commission may also make an appropriate inference and issue a determination, or, at any hearing arising from the complaint, may "exclude any evidence which should have been offered in response to the discovery request."

It is important to note that the Commission's December 15th letter did not require a response from complainant. It merely provided an opportunity to set forth any disagreement he may have had with the respondent's answer. Therefore, the failure to respond to the letter within the period provided by the letter or by subsequent extensions is not a basis for dismissal.

However, in light of the complainant's repeated failure to file any response to the answer, no consideration will be given by the investigator to any response that might be filed now.

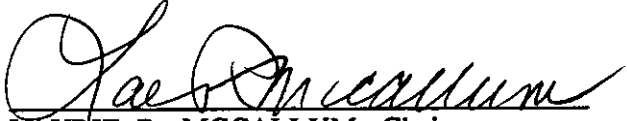
ORDER

Respondent's motion to dismiss for lack of prosecution is denied.

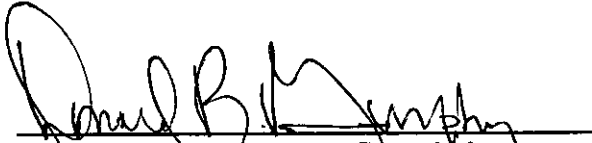
In the event the complainant intends to pursue, with the Commission, allegations arising from a January, 1995, suspension, those allegations should be filed as a separate complaint.

A schedule will be established for the parties to submit any arguments relating to complainant's request, made by letter dated March 20, 1995, for a stay pending other proceedings.

Dated: March 31, 1995 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner