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STEVEN MAYER,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
and Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 95-0002-PC

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RULING ON
PETITION FOR
REHEARING

This matter is before the Commission on appellant Mayer's petition for rehearing filed on December 15, 1995.

The Commission's December 7, 1995, decision and order dismissed this appeal for lack of prosecution as to those appellants (Mayer, Becker, Farrelly, and Newman) who had failed to appear at the hearing on the merits. In his petition for rehearing, Mr. Mayer claims he never received notice of the hearing and pointed out that he had a new address.

In response to the petition for rehearing, counsel for respondents (Mr. Witter) asserts that during the week prior to the hearing he discussed the impending hearing with Mr. Mayer and asked Mr. Mayer whether he intended to proceed with the case. He further asserts that Mr. Mayer told him to send respondents' exhibits to another appellant (Mr. Becker) and that he (Mr. Mayer) would let him know if the appellants decided not to proceed to hearing. The Commission gave Mr. Mayer an opportunity to advise if he disagreed with Mr. Witter's assertions in this regard, and Mr. Mayer did not do so.

Assuming that Mr. Mayer did not receive the notice of hearing contained in the prehearing conference report dated August 7, 1995,¹ the Commission concludes that Mr. Mayer had at least actual notice of the hearing and waived any failure of formal notice by failing to come forward with his claim of lack of notice until after the final decision had been mailed.

¹ The conference report reflects that each appellant was mailed a copy, but it does not indicate which addresses were used.

Initially, the file reflects that Mr. Mayer was informed by a letter sent to his correct address -- i.e., the address to which he refers in his petition for rehearing as his correct address -- of the August 7, 1995, prehearing conference. The conference report states that Mr. Mayer did not answer his phone, and that Mr. Becker "appeared on behalf of all appellants." Thus, even if Mr. Mayer's copy of the conference report had been mailed to the wrong address, notice was provided to the only appellant who did appear at the prehearing and who, at least at that point, appeared on behalf of the other appellants.

Second, even if the foregoing were not considered constructive notice to Mr. Mayer, Mr. Witter's letter establishes that Mr. Mayer had actual notice of the hearing during the week preceding the hearing. He neither appeared at the hearing nor requested a copy of the formal notice of hearing from the Commission prior to the hearing. He has waived his right to raise an issue concerning lack of formal notice by waiting until after an adverse final decision has been rendered to make his objection. Cf. 67 OAG 188 (1978); 2 AM JUR 2d Administrative Law §296.

ORDER

Mr. Mayer's petition for rehearing is denied.

Dated: January 16, 1996

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner

Parties:

Steven Mayer
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Winnebago, WI 54985-0021

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Secretary, DHSS
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Madison, WI 53707

Jon Litscher
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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