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* JAMES SMITH,

* Complainant,

*v.

*Secretary, DEPARTMENT OF

*CORRECTIONS,

* Respondent.

*Case Nos. 95-0134-PC-ER

* 95-0169-PC-ER

* * * * *

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss on the ground of failure of prosecution. The hearing examiner heard the motion on September 9, 1996.

The Commission bases its resolution of this motion on the following:

1 A prehearing conference had been scheduled for April 4, 1996, at 3:00 p.m. The conference report dated April 9, 1996, reflects the following:

Complainant failed to appear. His spouse telephoned the Commission at 2:05 p.m. on April 4, 1996, saying he had been ill since the prior evening and would not appear. She refused the Commissioner's [Judy Rogers] request to speak with Mr. Smith saying he was sleeping. Mrs. Smith was unable to explain why he waited until so close to the scheduled conference to provide notice of his claimed inability to attend. The Commissioner indicated such lack of explanation was unacceptable. Ms. Smith said she would have Mr. Smith call the Commissioner when he woke up.¹

2. Commissioner Rogers held the prehearing conference in complainant's absence. The conference report states that the hearing was scheduled for September 9-10, 1996, at 9:00 a.m. It further stated that §PC 4.02 Wis. Adm. Code, provided for the exchange of witness' names and copies of exhibits at least three working days before the hearing, and that "[T]his means exhibits must be exchanged at or before 4:30 p.m. on September 4, 1996 [Emphasis in original]. A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline." (Emphasis shown appears in the original.)

¹ The conference report reflects that Mr. Smith did not call Commissioner Rogers until 11:30 a.m. on April 9, 1996

3. The prehearing conference report also cited §PC 1.05, Wis. Adm. Code, and specifically advised the parties of the need to serve on the opposing party copies of any materials submitted to the Commission.

4. At no time prior to the hearing on Monday, September 9, 1996, did complainant serve on respondent's attorney any exhibits or names of witnesses. On Friday, September 6, 1996, complainant filed a "motion in Limine and for Continuance." He did not serve this document on respondent.

5. At the same time he filed the aforesaid motion on September 6, 1996, complainant also filed a letter dated September 6, 1996, that he intended to use at the hearing.² He also never served this letter on respondent prior to the hearing.

6. Despite the fact that the prehearing conference report scheduled the hearing to begin at 9:00 a.m. on September 9, 1996, due to a typographical error the Commission's internal calendar listed the starting time of the hearing as 10:00 a.m.

7. A person acting on complainant's behalf called the Commission's office about 8:00 a.m. on September 9, 1996, to inquire about the time of the hearing. A Commission staff member referred to the Commission's internal calendar and read off the 10:00 a.m. time listed thereon.

8. Complainant had not appeared for the hearing by 9:20, at which time the hearing was convened briefly and respondent made a motion to dismiss based on complainant's failure to have appeared and failure to have pursued the case since prior to the prehearing conference. The hearing then was adjourned at 9:30 a.m. At this time, the examiner was unaware of the matters set forth in paragraphs #6 and #7 above.

9. At about 9:45 a.m., complainant appeared at the Commission's offices and explained that based on the aforementioned telephone call, he understood that the hearing was to have convened at 10:00 a.m.

10. Respondent's counsel was summoned and the hearing was reconvened at about 10:30 a.m.

DISCUSSION

The motion to dismiss for failure of prosecution involves a number of factors.

As to complainant's failure to have appeared at the noticed starting time, while the Commission is of the opinion that complainant should have been aware of the correct

² Complainant exhibited this document at the motion hearing but, after he was advised that there was no copy of this document in the Commission's file, he declined to submit another copy. Since the copy he exhibited appeared to bear the Commission's September 6, 1996, date stamp, and Commission staff who handled Mr. Smith's filing confirmed subsequently that he had submitted two separate documents, the Commission concludes for the purposes of deciding this motion that this letter was filed but never reached the hearing file probably because it was inadvertently either misplaced or returned to complainant along with or instead of his confirmation copy. As discussed below, in the context of the other circumstances of this case, the conclusion that complainant filed the document in question on September 6, 1996, does not affect the outcome of this ruling.

starting time from the conference report, it remains that he received inadvertent misinformation from the Commission staff through a call on the morning of the hearing. Under these circumstances, the Commission attaches little if any weight to his late appearance on September 9, 1996.

Of considerably more significance is complainant's failure to have served on respondent either exhibits or a witness list, either by the due date of September 4, 1996, or at any time prior to the hearing. Complainant contends that he understood he could rely on documents already submitted during the course of the investigation without having to satisfy the filing and service requirement of the Commission's rules. While it is a familiar axiom that ignorance of the law is no excuse, *see, e.g., Larson v. Industrial Commission*, 224 Wis. 294, 297-98, 271 N.W. 835 (1937), ignorance could be a mitigating factor under §PC 4.02, Wis. Adm. Code. However, the prehearing conference report explicitly advised the parties of the need to effectuate the filing and service of documents and names of witnesses no later than September 4, 1996.

Complainant also asserted he had submitted, as projected evidence, a letter dated September 6, 1996, along with his motion in limine and for continuance. However, even assuming (as the Commission does) that this letter was filed on September 6, 1996, the facts remain that it was never served on respondent, and it was filed after the deadline for submission of exhibits.

Complainant also stated there were mitigation circumstances at Oakhill Correctional Institution. However, he refused to explain what these matters were, but rather requested that he first have the opportunity to consult with counsel or to speak to the hearing examiner off the record. Respondent objected and these requests were denied.

Whether because of preference or other reasons, complainant chose to proceed with the litigation of this matter pro se (without counsel). Having decided to proceed pro se, complainant does not have the right to recess the hearing whenever he decides he wants to consult with counsel. As to his request to consult with the examiner, the latter can respond to procedural questions, but there is no reason to exclude respondent's counsel from a discussion of a procedural issue. If complainant had intended to raise a procedural issue, there is no reason why it could not have been discussed with respondent's attorney present.³

³ A conversation between a party and the hearing examiner in the absence of the other party is not considered an ex parte communication unless it is "relative to the merits" §227 50(1), Stats. However, there is nothing in this statute, or any other authority of which the Commission is aware, which gives a party the right to insist on a private conference with the examiner in the middle of a hearing at which the other party appears.

Complainant objected to a telephone conversation on September 5, 1996, between the examiner and respondent's attorney. However, this conversation related strictly to procedural matters, as respondent's attorney had called the examiner to inquire about the posture of the case and particularly whether complainant had filed any exhibits or witness list with the Commission. A routine procedural inquiry of this nature is not an ex parte communication.

Complainant also requested that he be allowed to testify on his own behalf. Again, complainant did not provide any notice of any witnesses as required by §PC 4.02, Wis. Adm. Code. While it can be assumed that any prejudice to respondent from not having prior notice that complainant would be a witness would be minimal, under all the circumstances of these cases, allowing such noncompliance with the disclosure requirement would not be appropriate. Complainant did not appear at the prehearing conference, after asserting (through his wife's call) that he was ill less than an hour before the scheduled time for commencement of the prehearing. He did not contact the examiner for several days after the prehearing. Notwithstanding that the prehearing conference report provided explicit notice of the deadline for the provision of notice of witnesses and exhibits, complainant failed to comply. Under these circumstances, the egregious failure to pursue this matter leads to the conclusion that complainant should not be allowed to proceed with his case, and his complaint should be dismissed for failure of prosecution.⁴

ORDER

This complaints are dismissed for failure of prosecution.

Dated: November 14, 1996.

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

ATJ:jmr

Parties:
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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

⁴ This ruling effectively disposes of complainant's motion in limine and for continuance, and it is denied

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)