STATE OF WISCONSIN PERSONNEL COMMISSION

BARTHEL WAYNE HUFF,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Stevens Point),
Respondent.

Case No. 97-0092-PC-ER

RULING
ON
MOTION TO
DISMISS

This matter is before the Commission on the respondent's motion to dismiss for failure to appear at the scheduled deposition of complainant. The following facts appear to be undisputed:

FINDINGS OF FACT

1. During a telephone conference held on July 9, 1998, the parties agreed to a hearing to be held on October 13 and 14, 1998, in Stevens Point, on the following statement of issue:

> Whether respondent discriminated against complainant because of his age when in 1997, he was not hired for a faculty position in respondent's Department of Mathematics and Computing.

2. The prehearing conference report also included the following statement:

> All forms of discovery must be completed by September 28, 1998, in order to give the parties a full two weeks to prepare for hearing after the discovery cutoff. This means all depositions must be completed by September 28, 1998, and all forms of 30-day discovery (such as interrogatories) must be served on the opposing party by 4:30 p.m. on August 29, 1998.

3. Complainant issued a discovery request on July 11, 1998.

4. By letter dated August 15, 1998, the complainant, who resides in Utah, advised the Commission that he had received no reply to his July 11th discovery. In a response dated August 21, 1998, a representative of the Commission wrote:

> I . . . telephoned [counsel for respondent] asking if she had replied to the discovery yet. She said she had not. She told me she could mail a partial reply today by overnight mail. She indicated part of the problem has been that the Department Chair has been gone but will return on Monday. She agreed to supplement the answer by next Friday and again to use overnight mail. . . .
>
> I then telephoned Mr. Huff and provided the information noted above. He asked what to do if he is dissatisfied with the response. I indicated he [c]ould file a motion to compel further answer to each question with which [he] is dissatisfied with the answer.

5. By letter to the Commission dated August 31, 1998, the complainant wrote:

> I have received none of the material mentioned in your letter of August 21, 1998. I have received a incomplete, inaccurate, and disingenuous response to a request for discovery concerning UW-Whitewater that was mailed to [respondent's attorney] on June 30, 1998. . . .
>
> I must now make a motion that the Commission compel discovery from Respondent and request that the hearing be delayed until Respondent has made a full and complete response to the discovery request.

6. By letter dated August 31, 1998, respondent provided complainant with a partial response to the discovery request and agreed to provide certain application materials upon appellant's "execution of the enclosed Stipulation and Protective Order, and issuance of the Order by the Personnel Commission."

7. In another letter to the Commission dated September 8th, complainant acknowledged receiving certain materials but wrote:

> Despite "promises" that material was mailed on August 31, 1998 and sent by regular mail, information provided was incomplete and inaccurate, and Respondent has refused to provide relevant and admissible information unless compelled by the Personnel Commission.

8. The designated hearing examiner convened a telephone conference on September 11, 1998. The examiner issued a letter summarizing the conference as follows:

> Complainant stated that he had mailed a document to the Commission in which he agreed to the issuance of a protective order in this matter. While that document is not in the Commission's case file, the undersigned noted that he will rely on complainant's oral statement approving the language in the draft protective order prepared by respondent. Once respondent provides me with a copy of the protective order, I will issue it and respondent will release certain additional information to complainant.
>
> After informally discussing the other areas of discovery disagreement between the parties, it appeared that no disputes remained in terms of complainant's July 11th discovery request. Therefore, it was understood that the complainant's motion to compel had been withdrawn and that if, after respondent supplied the additional information, complainant wished to reassert the motion, he would have to do so at that time. *Respondent indicated it wished to depose the complainant and the parties agreed on a date of the afternoon of September 23rd.* (Emphasis added;)

9. The examiner issued the protective order on September 14, 1998.

10. By letter dated September 14, 1998, and received by the Commission on September 18th, complainant raised objections to his deposition and asked the Commission issue an order, pursuant to §804.01(3), Stats., "that discovery not be had." Complainant also argued that respondent had failed to met the requirements set forth in §804.02(1), Stats.

11. On September 15, 1998, respondent issued a notice of complainant's deposition for 1:00 p.m., on Wednesday, September 23rd, before "Court Reporter, Notary Public" at the offices of respondent's counsel in Madison.

12. By letter dated September 17th that was not received until September 22nd, complainant indicated he was "surprised by the content" of the examiner's September 11th letter, stated he "did not agree to withdraw the motion to compel," and had "not agreed to Respondent's attempt at 'deposition' and will not do so until it is verified that this constitutes something more than harassment and that the legal requirements of 95-96 Wis. Stats. have been met."

13. The designated hearing examiner convened another telephone conference on September 18th. The conference was summarized in a letter of the same date:

> This letter reflects our telephone conversation held earlier today which arose from complainant's letter dated September 14, 1998. In that letter, complainant requested a protective order pursuant to §804.01(3), Stats., regarding his deposition scheduled for September 23rd. After listening to the arguments, I declined to issue the protective order and directed complainant to make himself available for deposition.
>
> Complainant then requested that the deposition be held by telephone. Respondent opposed the request. I reviewed §804.05(8), and concluded that there was good cause for convening the deposition in person, rather than by telephone. This conclusion was based in part on the fact *that the deposition had been scheduled to dovetail with complainant's presence in Wisconsin for another case which is to be heard in Whitewater on September 24 and 25.* In addition, my September 11th letter to the parties had reflected the following: "Respondent indicated it wished to depose the complainant and the parties agreed on a date of the afternoon of September 23rd." Therefore, the deposition is to proceed as previously noticed. (Emphasis added.)

14. Complainant did not appear for the scheduled deposition.

15. By documents dated September 25th, respondent moved to dismiss the case, as a sanction under §804.12(4), Stats, "for the complainant's willful, bad faith and egregious misconduct in failing to attend his own properly-noticed deposition."

16. In a letter dated September 28, 1998, the examiner established a briefing schedule and directed complainant to address the following questions in his response:

1. Did you appear at the scheduled deposition?
2. If not, why not?
3. Did you attend the hearing in Case No. 97-0111-PC-ER, held at UW-Whitewater?
4. If so, when did that hearing commence, when was it scheduled to commence, when was it concluded, when was it scheduled to conclude, when did you arrive in Whitewater, when did you leave Whitewater, when did you return to Utah, and did you make any effort to contact Ms. Brady while you were in Wisconsin for Case No. 97-0111-PC-ER? If you sought to contact Ms. Brady during this period, how and when did you attempt to reach her?

The examiner also postponed, indefinitely, the hearing scheduled for October 13 and 14 and suspended all other outstanding discovery requests until further notice.

17. Complainant responded to the motion but did not answer the questions posed by the examiner.

18. Complainant subsequently filed a request that the designated hearing examiner "be removed from this case." The examiner considered the letter as a motion for substitution and deferred ruling on the complainant's motion until such time as the Commission addressed respondent's motion to dismiss.[1]

CONCLUSION OF LAW

The complainant's failure to appear on September 23, 1998, was intentional and in bad faith.

OPINION

Pursuant to §804.12(4), Stats.:

> If . . . a party fails . . . to appear before the officer who is to take the party's deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2)(a)1., 2. and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The sanctions set forth in §804.12(2)(a)1., 2. and 3., are:

> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

---

[1] Because this ruling grants respondent's motion to dismiss, it is unnecessary for the designated hearing examiner to consider complainant's recusal request.

> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

In *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 535 N.W.2d 65 (Ct. App., 1995), the court offered the following comments on review of the trial court's decision to dismiss a case due to "an egregious violation of discovery procedures":

> Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary. In *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 2651, 273, 470 N.W.2d 859 (1991), our supreme court held that dismissal is appropriate only where the non-complying party's conduct is egregious or in bad faith and without a clear and justifiable excuse. . . .
>
> [I]t is readily understood that bad faith by its nature cannot be unintentional. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368, 376 (1978). Given this fact, it is apparent that to dismiss a complaint for bad faith, the trail court must find that the non-complying party intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand. If the trial court concludes that the non-complying party acted in bad faith, the trial court may impose those sanctions it considers appropriate. (Citation omitted.)

In *Dorf v. DOC*, 93-0121-PC-ER, 5/27/94, the Commission addressed a motion to dismiss the complaint as a sanction for complainant's failure to appear at his deposition. In that case, the Notice of Deposition was served directly on the complainant who had retained counsel several days earlier. Complainant admitted that he had no real justification for missing the deposition and stated that he simply forgot about it and had failed to inform his attorney of the deposition. The Commission declined to accept complainant's suggestion that the deposition simply be rescheduled to another time and concluded that some sanctions should be imposed:

> [Complainant's] suggestion either ignores the possibility that costs were incurred by the opposing side in convening the deposition or would place the burden of those costs on the shoulders of respondent, which properly provided complainant with notice of the deposition.

> The Commission concludes that some sanctions should be imposed against the complainant. His failure to appear was unjustified and caused the respondent to incur costs which it otherwise would not have incurred. However, the failure to appear at the deposition, by itself, does not justify the extremely harsh sanction of dismissing the complaint. Dismissal, typically, would only be appropriate where there has been repeated misconduct.

For several reasons, the conduct of complainant in the present case is more egregious than in *Dorf*. Here, complainant made no suggestion that he had forgotten about the deposition. Instead, he simply refused to attend the deposition that had been scheduled with relatively short notice, but was scheduled in order to take advantage of the complainant's presence in Wisconsin to attend another Personnel Commission proceeding. The deposition had been discussed during two separate telephone conferences with the designated hearing examiner and the parties. Complainant also refused to respond to the specific questions posed by the designated hearing examiner in his letter to the parties that established a briefing schedule on respondent's motion. Together, this conduct meets the "bad faith" standard referenced in *Hudson Diesel*. While dismissal is an extreme sanction, it is an appropriate sanction under these circumstances...

Complainant argues that respondent's motion to dismiss should be denied because respondent has "unclean hands" due to its alleged failure to promptly and completely respond to complainant's discovery requests. Complainant's argument is based in part on respondent's conduct in a second case pending before the Commission[2] and those arguments will not be considered here. Complainant also argues that respondent has "unclean hands" due to its conduct during the discovery phase of the present case:

> A request for discovery was sent to Ms. Brady [respondent's counsel] with regard to 0092-PC-ER on July 11, 1998. Ms. Brady made no re-

---

[2] Complainant argues that respondent "destroyed relevant/admissible material protected by Federal law in 97-0111-PC-ER" and counsel for respondent "is in contempt of the commission's motion to compel the production of information requested under discovery" in that case. Complainant has requested sanctions against respondent in Case No. 97-0111-PC-ER and his request is being briefed by the parties. It would be inappropriate for the Commission to rely on complainant's allegations regarding another case where those allegations are the subject of a separate motion and no decision has been rendered by the Commission.

> sponse whatsoever until August 31, 1998 (after promising Commission Rogers that a reply would be sent by overnight mail on August 21, 1998.) That information provided did not satisfy the discovery request and a motion to compel was submitted to the Commission. Respondent has not provided the material/information covered by the Commission's protective order and the motion to relieve Respondent from the duty of providing information simply confirms that the motion is made to continue abuse of discovery.

The Findings of Fact set forth above suggest that respondent took more than 30 days to respond to complainant's July 11th discovery request but that complainant's motion to compel was withdrawn and that all outstanding discovery request were suspended as of September 28th. Therefore, complainant's argument fails.

Complainant also contends that respondent's notice of the deposition was "questionable at best" because it did not comply with §804.02, Stats. The language referenced by complainant is in §804.02(1), which relates to the perpetuation of testimony by deposition *before an action in court has been filed.* These requirements are inapplicable to the present case that is already pending before the Commission.

Complainant notes that respondent could seek to obtain the information from him by written or telephone deposition and suggests that the information developed in the deposition would be neither relevant nor admissible. The designated hearing examiner has previously found good cause for convening the deposition in person, rather than by telephone and the Commission is satisfied that the "information sought appears reasonably calculated to lead to the discovery of admissible evidence." §804.01(2)(a), Stats.

Finally, the complainant states that the hearing examiner's letter dated September 18, 1998, "did not arrive until after I had departed on September 23 and does not represent an action by the Commission." The hearing examiner obviously made every effort to resolve the complainant's objections to the deposition as soon as the examiner became aware of those objections and the complainant had notice of the examiner's de-

cision because both parties participated in the telephone conference on September 18th.[3] The hearing examiner's authority is described in §227.46(1), Stats. In addition, the Personnel Commission has adopted the following rule as §PC 4.03:

> All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission *or the hearing examiner* may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission *or the hearing examiner* may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery. (Emphasis added.)

The hearing examiner clearly has the authority to act on discovery disputes between the parties to cases pending before the Commission. The examiner's oral ruling on September 18th was a ruling made with the authority of the Commission.[4]

---

[3] The second telephone conference was held on September 18th, the same day the examiner received complainant's September 14th letter that raised objections to the deposition.

[4] Complainant contends that respondent's Notice of Deposition bore "a fake Commission letterhead" because the uppermost line of the caption to the notice included the words "PERSONNEL COMMISSION." This caption is not the Commission's letterhead. The caption clearly identifies the proceeding that is the subject of the notice. In order to adequately identify the proceeding, it is clearly appropriate and necessary to reference the forum in which the proceeding has been filed.

ORDER

Respondent's motion to dismiss for failure to attend complainant's deposition is granted and this matter is dismissed.

Dated: November 18, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

970092Crul2.2

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:
Barthel Wayne Huff
5686 South Park Place East
Salt Lake City, UT 84121

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Dr.
Madison, WI 53706

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 Wiscon-

sin 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