

PASTORI M. BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
REVENUE,**
Respondent.

**RULING ON
COMPLAINANT'S
MOTION FOR
DEFAULT JUDGMENT**

Case No. 98-0002-PC-ER

This case is before the Commission to resolve complainant's motion for default judgment, which was filed with the Commission on January 26, 1999. The facts recited below are made solely for resolution of the present motion. The recited facts are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. On December 21, 1998, the Commission's Legal Secretary sent a letter to complainant and counsel for respondent scheduling a prehearing conference by telephone on Monday, January 25, 1999, at 10:00 a.m. The letter contained the following concluding paragraph:

If you are unable to participate in the conference at the above time, you should confer with the other party in an effort to come up with an alternative date or time for the conference. Once the parties have agreed on a new date/time, or if they are unable to agree, one of the parties should contact the Commission at (608) 266-1995.

2. On December 22, 1998, respondent sent the Commission a memo saying that the counsel assigned to the case resigned and the case had been reassigned to another of respondent's attorneys (hereafter, Second Attorney). The Commission received this memo on December 28, 1998.

3. On Friday, January 22, 1999, the Second Attorney telephoned the Commission and requested that the prehearing be postponed. The Commission's Legal Secretary granted

the request and advised the Second Attorney to inform the complainant of the change because the prehearing was scheduled to occur on the following Monday.¹ Respondent's new counsel failed to inform complainant.

4. On Monday, January 25, 1999, complainant telephoned the Commission shortly after 10:00 a.m., to ask why the conference call had not been initiated. The Commission's Legal Secretary informed complainant that the prehearing had been cancelled at respondent's request.

5. On January 26, 1999, complainant filed a motion "for judgment by default" for respondent's failure to appear at the prehearing conference on January 22, 1999. Respondent's Second Attorney filed a response to complainant's motion by letter dated January 27, 1999. Complainant filed additional arguments on February 1, 1999.

6. On February 2, 1999, the Commission's Legal Secretary (at the direction of Commissioner Rogers) sent the parties a letter, which re-scheduled the prehearing conference for February 9, 1999, at 10:00 a.m. On February 4, 1999, respondent advised the Commission's Legal Secretary (via telephone call) that a new attorney (hereafter referred to as the Third Attorney) would be handling the case for respondent.

7. The prehearing was held as scheduled on February 9, 1999, at which time respondent's Third Attorney indicated respondent would not file any additional arguments in response to complainant's motion. The parties at this conference agreed to a statement of issue for hearing and to hearing dates in August 1999.

¹ A file note memorializes the contact on January 22, 1999, as follows
She (respondent's new counsel) has recently been assigned to this case. Wants to postpone (pre-) hearing. Will contact Balele to reschedule.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.
2. Complainant failed to meet his burden to establish entitlement to judgment by default.

OPINION

The sanction of dismissal for a party's first failure to appear at a prehearing conference is appropriate only where sufficiently egregious circumstances exist. See *Neumaier v. DHFS*, 98-0180-PC-ER, 11/4/98. In the present case, respondent's Second Attorney called the Commission's Legal Secretary to request that the prehearing be postponed. The fault found in the Second Attorney's conduct is her failure to inform the complainant. Dismissal as a sanction is too severe under the circumstances presented. The Commission does not mean to imply that it condones or approves of the Second Attorney's conduct. If the Second Attorney still were assigned to represent respondent in this case, the Commission would have emphasized the inappropriateness of her behavior and warned that repeated similar conduct could be subject to sanctions. However, such warning is not necessary here because respondent has selected a Third Attorney.

Complainant compared the circumstances of the present motion to a party's request in a different case for postponement of the hearing, such request having been raised close to the scheduled hearing date. The request for hearing postponement, however, is governed by a different legal standard pursuant to §PC 5.02(1), Wis. Adm. Code. The cited example, accordingly, is not comparable.

Complainant also contends he is entitled to a judgment by default for the separate reason that respondent has not disputed the "pleadings" in his present motion. Failure to dispute pleadings does not entitle complainant automatically to a judgment by default.

ORDER

Complainant's motion for judgment by default is denied.

Dated: February 24, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter.