

STATE OF WISCONSIN

PERSONNEL COMMISSION

GARY BENSON,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (WHITEWATER),**
Respondent.

**RULING
ON PETITION
FOR REHEARING
AND DECISION
AND ORDER**

Case Nos. 98-0004, 0014-PC-ER

On July 15, 1998, the Commission issued a decision and order in these matters, dismissing the complaints for the failure to respond within 20 days to a certified letter sent to the complainant on June 15th. The certified letter provided:

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence dated May 4, 1998. Your response must be received by the Commission within 20 calendar days of the date of this certified letter. If you do not file your response with the Commission within the 20 day time period, I will recommend that your case be dismissed for lack of prosecution.

Pursuant to §111.39(3), Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint 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.

In its July 15th Order, the Commission dismissed the complaints because complainant "did not contact the Commission within the specified time period."

On July 27, 1998, the complainant filed certain materials with the Commission, including the following statement:

With regard to the attached¹ – you are precisely wrong. I *do not* wish to allow these complaint/cases against UWW to be dropped. . . .

You claim to have sent me something that I never received because I have been out of the country and/or on the road with groups of foreign visitors for the past two plus months and/or at my daughter's wedding, etc., in California – and when I got back I received the attached [dismissal order] from you. But I never received the other enclosed things that you said you sent to me – and you can not prove that I did. (emphasis in original)

The Commission construed complainant's July 27th submission as a petition for rehearing.

These complaints were filed under the whistleblower law, subch. III, ch. 230, Stats. Therefore, §111.39(3), Stats., is not applicable, and may not serve as the legal basis for dismissal. Complainant's petition for rehearing is granted.

In its response to complainant's petition, respondent summarized the procedural history of the two cases. Complainant was provided an opportunity to reply. While the Commission has granted the complainant's petition for rehearing due to the inapplicability of §111.39(3), the question of whether the complainant has failed to prosecute these matters is still properly before the Commission and the complainant has had an opportunity to offer arguments in that regard. The findings set forth below are consistent with the respondent's summary and reflect the contents of the Commission's case files.

FINDINGS OF FACT

1. The complaint in Case No. 98-0004-PC-ER was hand-delivered to the Commission on January 9, 1998, and was notarized in the Commission's offices on that date. The complaint form listed the complainant's address as PO Box 746, W3601 Wildwood Drive, Lake Geneva, WI.

¹ While complainant's submission referred to an attachment, there was none. However, it is clear from the context of complainant's comments that he was referring to the July 15th dismissal order.

2. The complaint in Case No. 98-0014-PC-ER, was hand-delivered to the Commission on January 22, 1998, and was notarized in the Commission's offices on that date. The complaint form listed the complainant's address as PO Box 746, Lake Geneva, WI.

3. The Commission's complaint form includes the following statement: "Failure to keep the Personnel Commission informed of your current address and phone number may result in dismissal of this complaint."

4. Complainant has filed numerous other complaints with the Commission, both before and after these filings: 97-0112-PC-ER, 97-0115-PC-ER, 97-0129-PC-ER, 97-0132-PC-ER, 97-0140-PC-ER, 97-0165-PC-ER, 97-0185-PC-ER, 98-0017-PC-ER, 98-0039-PC-ER, 98-0040-PC-ER, and 98-0041-PC-ER.

5. By letter dated January 9, 1998, the Commission asked complainant to provide certain additional information regarding Case No. 98-0004-PC-ER by February 12th. The letter was mailed to complainant at his Lake Geneva address.

6. By letter dated January 27, 1998, the Commission asked complainant to provide certain additional information regarding Case No. 98-00014-PC-ER by March 2nd. The letter was mailed to complainant at his Lake Geneva address.

7. Both the January 9th letter and the January 27th letter included the following language:

Failure to answer a Commission request for information may result in the imposition of the sanctions (penalties) set forth in §PC2.05(4)(b), Wis. Adm. Code:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

8. Complainant did not reply to the January 9th letter or to the January 27th letter.

9. On January 15, 1998, respondent filed motions to dismiss various claims raised in complainant's 1997 cases. The motions did not address either Case No. 98-0004 or 0014-PC-ER.

10. In a February 6, 1998, letter to the Commission, sent via certified mail, complainant asked if he would have a "chance to respond to their response to my response." The letter did not reference a case number but related to respondent's motion to dismiss the claims in complainant's 1997 cases. The complainant's return address listed on the envelope was his Lake Geneva postal box. However, the envelope bore a Provo, Utah cancellation. The letter was received by the Commission on February 9th.

11. A member of the Commission's staff spoke with complainant by telephone on February 9th. As a consequence of this conversation, the Commission sent the following letter to respondent's attorney:

Enclosed is a copy of a handwritten response from the complainant to respondent's motions to dismiss.

I spoke with complainant on February 9th. During the conversation, he indicated he may be submitting additional materials or requesting additional time to supplement his response. Therefore, you should not file your reply until, at least, February 27th.

Mr. Benson also provided the Commission with an updated address. You should use the following address for Mr. Benson until you are notified otherwise:

2295 North 650 East
Provo, UT 84604-1710

12. By certified letter sent to complainant's Provo address and dated February 20th, a member of the Commission's staff directed the complainant to submit the information requested in the January 9th letter within 20 calendar days or she would

“recommend that your case be dismissed for lack of prosecution.” It was returned to the Commission on March 25th, as “unclaimed.”

13. In a letter dated February 21st and received by the Commission on February 25th, complainant wrote, in part:

I need more time to get an attorney to formally and completely respond to the university's motions to dismiss because I have been out here and under a doctor's care for clinical depression and suicidal tendencies ever since before I talked with you on the phone last time.

14. The Commission responded by letter dated February 26th that related to all of complainant's pending cases at that time. The Commission interpreted complainant's letter “as a request to place all of his pending cases on hold, so that he has further opportunity to retain counsel.” The net effect of the letter was to provide complainant until April 13, 1998, “to retain an attorney or, if he feels that he is prevented from doing so by his medical condition, to provide medical certification/verification that he is unable to retain an attorney.”

15. When complainant had not responded by April 17th, the Commission sent another letter to the complainant, providing him until May 7th “to indicate if you intend to pursue these cases before the Commission.”

16. Complainant responded by correspondence dated April 20th that was received on April 24th. The submission included a letter that stated, in part:

[B]e assured that not only do I wish to pursue the University with regard to the complaints I have already filed and with regard to the ones they filed motions to dismiss on (the complaints filed prior to Jan. 1, 1998) but I have already filed additional complaints against them since January 1.

Various documents were attached to the letter, including a memo dated April 17, 1998, from complainant to persons at the University of Wisconsin-Whitewater. The memo read, in part:

I have a group of Russians coming May 1-10 – and the media plans to cover their visit here very closely – I will send you copies of things they write about it. Among other things I will be taking them to Las Vegas, the Grand Canyon and the Jackson Hole/Tetons/Yellowstone area – eat your hearts out.

And I have a group of Mexicans coming in June and a group of South Africans coming in July and a group of Cubans in August.

My next trip to Mexico is in May and to Cuba in June and South Africa in July and Russia in August.

In a cover letter to the April 24th submission, complainant wrote:

My health has not been very good, recently, so I haven't been able to retain an attorney, as yet, or deal with this. Therefore, I need a continuing extension. If you need to send a doctor's statement to you in this regard I would be glad to do that.

17. Complainant's request for an extension to file additional materials relating to respondent's motions to dismiss was denied.

18. On April 27th, the January 27th letter to complainant in Case No. 98-0014-PC-ER, was returned, unopened, to the Commission. It bore a sticker indicating, "Box closed, unable to forward."

19. By letter dated May 4, 1998, an investigator for the Commission requested responses from complainant to the January 9th letter regarding Case No. 98-0004-PC-ER, and to the January 27th letter regarding Case No. 98-0014-PC-ER. The responses were due no later than June 8, 1998.

20. Complainant wrote the Commission on May 18th, stating, in part: "I have been on the road for 2½ weeks hosting a group of Russians we have here."

21. Complainant again wrote the Commission on May 21st. The letter stated, in part:

Could you please send me a copy of my entire file at the State Personnel Commission – with all the complaints I have filed and all the

documentation. If there are copying costs involved I would be glad to pay them.

I need this info, ASAP, because my attorneys and I are preparing a 25 million dollar action against the University and they would like to see copies of all those things, ASAP.

22. Complainant sent the Commission a copy of a May 25th memo written "to whom it may concern." The memo was received by the Commission on June 1, 1998. It was unrelated to the Commission's May 4th letter.

23. When complainant did not respond to the May 4th letter, the investigator sent him a certified letter directing him to respond within 20 calendar days. The language of that letter is set forth in the initial paragraph of this Ruling and Decision. The certified letter, sent to complainant at his Provo address, was returned to the Commission on July 17th as "unclaimed."

OPINION

This analysis is made more difficult by the number of cases filed by complainant and by his failure to identify the particular case or cases to which a given submission refers. However, the extensive findings of fact show a consistent (and, to this point, successful) practice by complainant to avoid or ignore the Commission's requests for information regarding these two cases.

The Commission's analysis of complainant's conduct is based on §PC2.05(4)(b), Wis. Adm. Code:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

Complainant has consistently ignored the warnings given him by the Commission in these matters. On the complaint forms he completed on January 9 and 22, 1998, complainant was advised that the “[f]ailure to keep the Personnel Commission informed of your current address and phone number may result in dismissal this complaint.” However, by approximately January 28th, complainant had stopped accessing the Lake Geneva postal box listed on his complaints as his mailing address. He continued to use the Lake Geneva postal box as his return address on correspondence until at least February 6, 1998.

Complainant also has ignored the notice of sanctions available under §PC 2.05(4)(b), Wis. Adm. Code, if he fails to “answer or to produce requested information necessary for an investigation.” See Finding 7, above.

In his July 21st memorandum, which was interpreted by the Commission as a petition for rehearing, complainant stated he had “been out of the country and/or on the road with groups of foreign visitors for the past two plus months and/or at my daughter’s wedding, etc., in California.” He also stated that he “never received the other enclosed things that you said you sent to me – and you can not prove that I did.”

It is clear that the complainant did not receive some of the materials sent to him by the Commission. As noted in the Findings of Fact, certified letters sent to him in Provo were returned to the Commission as “unclaimed.” Another letter, sent to his (then current) Lake Geneva mailing address, was returned because his postal box had been closed and he had failed to give a forwarding address. The fact that complainant may not have claimed, opened or read the correspondence from the Commission does not absolve him from his responsibilities to pursue his case. To conclude otherwise would remove procedural control of a case from the Commission and place it squarely in the hands of the complainant.

The Commission also notes that the complainant submitted materials to the Commission during the same period in which he alleges he was unavailable or too busy. He filed four cases after the two complaints that are the subject of this decision. He filed a letter on February 6th that related to respondent’s motion to dismiss claims in

his 1997 cases. He requested, and was granted, a lengthy period for retaining counsel. On April 20th, he wrote that he wanted to proceed with his cases, and attached materials showing he was carrying out a busy travel schedule. On May 21st, he asked for (and was sent) copies of his case files because "my attorneys and I are preparing a[n]. . . action against the University." He also wrote to the Commission on May 25th. None of these efforts by the complainant responded to the Commission's requests on January 9, January 27, February 20, May 4 and June 15, 1998, for information relating to his claims in these two cases.



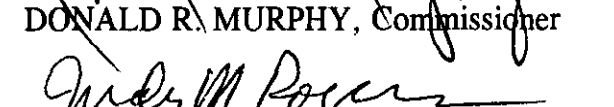
Despite complainant's claims that he has a desire to proceed, it is clear that he has not exerted the minimal effort necessary to prosecute these two complaints of discrimination. Therefore, they must be dismissed.

ORDER

The appellant's petition for rehearing is granted. These cases are dismissed for lack of prosecution.

Dated: August 26, 1998. STATE PERSONNEL COMMISSION

KMS:980004Cru11


LAURIE R. MCCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Gary Benson
2295 North 650 East
Provo UT 84604-1710

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

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