STATE OF WISCONSIN PERSONNEL COMMISSION

JOLEEN K. NELSON,
Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
Respondents.

Case No. 98-0176-PC

RULING ON MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

This case involves an appeal of the denial of a reclassification. It is before the Commission on respondent DOT's motion for summary judgment filed on June 14, 1999. Both parties have filed briefs. The following findings of fact appear to be undisputed. These findings are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. At a prehearing conference held on February 16, 1999, a hearing was scheduled for June 21, 1999.[1] The conference report included the following: "The parties agreed to a discovery cutoff so that they could have the two week period prior to hearing just to prepare for hearing. All forms of discovery must be completed by June 10, 1999. This means interrogatories must be served on the opposing party no later than May 10, 1999."

2. On May 5, 1999, respondent DOT mailed to appellant by certified mail "Respondent's First Request for Admissions."

3. Appellant received these documents on May 14, 1999.

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[1] On June 16, 1999, the parties agreed to postpone the hearing while the motion for summary judgment was decided.

4 The first paragraph of the request for admissions reads as follows: "Pursuant to sec. 804.11, Stats., you are requested to admit the truth of the following statements of fact, or the application of law to fact, including genuineness of any documents described in the request within 30 days of the service of this request on you."

5. The request for admission did not explain the meaning of "service of this request on you," and it did not set forth the date of mailing of the document to appellant.

6. The last request for admission is: "The Appellant's position is properly classified as a Program and Planning Analyst 5.[2]"

7. Appellant has been proceeding without counsel throughout this proceeding.

8. Appellant did not respond to the request for admission because she interpreted the time limit stated above—"within 30 days of the service of this request on you"—to mean 30 days of the date she received the document. Accordingly, she believed that the discovery request was untimely because as she interpreted it, the time for response would have been subsequent to the discovery deadline established by the prehearing conference report, i. e.: "All forms of discovery must be completed by June 10, 1999. This means interrogatories must be served on the opposing party no later than May 10, 1999."

OPINION

The commission's rules permit parties to cases before it to "obtain discovery and preserve testimony as provided by ch. 804, Stats." §PC 4.03, Wis. Adm. Code. Section 804.11, Stats., permits the use of requests for admission. Section 804.11(1)(b) provides that a request for admission is deemed admitted unless a response is served within 30 days of service of the request. However, §804.11(2) provides:

> Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment when the presen-

[2] Appellant had requested reclassification from Program and Planning Analyst 5 to Program and Planning Analyst 6.

> tation of the merits will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits.

The decision whether to allow the withdrawal of an admission is discretionary and involves consideration of the two criteria set forth in §804.11(2), Stats. *See Schmid v. Olson,* 111 Wis.2d 228, 234, 330 N. W. 2d 547 (1983). This statute tracks Rule 36 of the Federal Rules of Civil Procedure (FRCP), and federal case law can be looked to for guidance. *See Schmid,* 111 Wis. 2d at 236.

The first §804.11(2) criterion is that "the presentation of the merits will be subserved" by allowing the withdrawal. In *Local Union No. 38 v. Tripoldi,* 913 F.Supp290, 294 (S. D. N. Y.1996), the court addressed this factor as follows:

> [T]he court has power to excuse the defendant from its admissions "when (1) the presentation of the merits will be aided and (2) no prejudice to the party obtaining the admission will result." The presentation of the merits clearly would be served here by permitting defendant to dispute a central issue in this case—i. e., whether or not he was a member of Local 38 during the times in question. From the very outset of this litigation, defendant has asserted that he was not a member of Local 38 during the times in question and that Local 38 therefore lacked the power to fine him for the alleged violations. . . . (citations omitted)

Similarly, in the instant case appellant has consistently taken the position that the denial of her reclassification request was erroneous; this is the very reason she filed this appeal. To prohibit the withdrawal of the default admission of the correctness of respondents' action would also "block any consideration of the merits." *Id.*

With regard to the second criterion,[3] respondent has the burden of showing that allowing the withdrawal of the admission would be prejudicial. DOT has made no showing of prejudice, except to the extent that it is implicit that if the admission is withdrawn it will have to mount a defense to the appeal at a hearing. This is not a sufficient showing of prejudice. *See Kerry Steel Inc. v. Paragon Industries, Inc.,* 106 F. 3d 147, 154 (6th Cir. 1997):

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[3] "[T]he party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits." §804.11(2), Stats.

> In regard to prejudice, "[t]he prejudice contemplated by [Rule 36(b)] is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth." Prejudice under Rule 36(b), rather, "relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." Kerry Steel has not shown any prejudice of the sort required by the rule. (citations omitted)

See also Davis v. Noufal, 142 F. R. D. 258, 259 (D. D. C. 1992) ("[T]he burden of addressing the merits does not establish prejudice under Rule 36(b)." (citation omitted).

Another factor that has been considered by the courts is the pro se (without counsel) status of the party seeking relief from the admission: "We do not believe that to deem a central fact to have been admitted by the failure of this *pro se* defendant to respond to the Request for Admission would further the interests of justice." *Local Union No. 38 v. Tripoldi,* 913 F.Supp. 290, 294 (S. D. N. Y.1996). In this case, Ms. Nelson is representing herself. Furthermore, the confusion about when service is deemed to occur is understandable, and there is no reason to think that she was not acting in good faith when she did not answer the requests for admission.

ORDER

Respondent's motion for summary judgment is denied. Appellant is ordered to respond to the requests for admission within 30 days of the date of this order.

Dated: August 27, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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