

*Judicial review of Oriedo v DPI, 96-0124-PC-ER, 12/3/97,
rehearing denied 1/14/98*

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

MICAH A. ORIEDO,

Petitioner,

vs.

PERSONNEL COMMISSION,
DEPARTMENT OF PUBLIC INSTRUCTION,
DEPARTMENT OF EMPLOYMENT RELATIONS and
DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

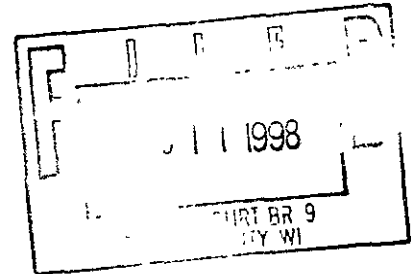
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PERSONNEL COMMISSION

MEMORANDUM DECISION
AND ORDER

Case No.: 98 CV 0260



ADMINISTRATIVE AGENCY REVIEW

This matter is before the court for judicial review under Ch. 227, Wis. Stats., of a decision of the Wisconsin Personnel Commission (the Commission) dismissing Petitioner Oriedo's complaint of race discrimination against the Wisconsin Department of Public Instruction (DPI). The Commission granted the DPI's Motion to Dismiss because Oriedo failed to appear at his scheduled hearing. After careful review, the court upholds the Commission's dismissal of Oriedo's complaint.

Oriedo's original complaint also contained allegations of race discrimination against the Department of Employment Relations (DER) and the Division of Merit Recruitment and Selection (DMRS). In an earlier ruling (dated March 12, 1997), the Commission dismissed the DER and DMRS as parties in this case, based on Oriedo's failure to state a claim upon which relief could be granted. Incidental to petitioner's request for judicial review, Oriedo has made

a motion for briefings on the issue of whether the Commission properly dismissed the DER and the DMRS. However, because the court upholds the Commission's dismissal of Oriedo's complaint, we need not address the issue of whether the DER and DMRS were properly dismissed as parties in this case, as the court's decision to uphold the Commission's dismissal makes the issue moot.

BACKGROUND

Petitioner Oriedo filed his complaint with the Commission on September 24, 1996. His complaint alleges that the DPI, the DER, and the DMRS committed race discrimination under the Wisconsin Fair Employment Act, in that respondent DPI failed to hire Oriedo for an Education Consultant position. On March 12, 1997, the Commission ruled on the motion of the DER and DMRS to be dismissed as respondents in this case. The Commission found that, since neither the DER nor the DMRS has authority to control the selection-appointment process, they were not proper parties to the action. Therefore, the Commission granted the motion of the DER and the DMRS on the grounds that Oriedo had failed to state a claim upon which relief could be granted.

On August 12, 1997, a pre-hearing conference was held, wherein Oriedo's request that the formal hearing on his complaint be set in April, 1998, was denied by the Commissioner. Instead, his hearing was set for November 24-26 and 28, 1997. Under the heading entitled "ADDITIONAL IMPORTANT INFORMATION," the Conference Report included the following information :

3. As provided in §PC 5.02, Wis. Admin. Code, a request to postpone a date for hearing will be granted only upon a showing of good cause. Postponement requests should be in writing, if possible, and the party making the request should indicate the reason for the request and whether the opposing party agrees with the

request. Generally speaking, the following reasons are not considered as good cause for granting a hearing postponement: a) waiting an unreasonable amount of time to request postponement after knowing that a reason exists to request the same, b) being unprepared for hearing, and [c] waiting until too close to the hearing date to initiate settlement negotiations or to seek representation. (emphasis in original)

On November 17, 1997, only a week before his scheduled hearing, Oriedo filed a request for hearing postponement, stating that his recent appointment as DNR representative to the Wisconsin Sesquicentennial Commission would not allow him to prepare for his hearing. In a proceeding attended by Oriedo and the DPI, the Commission denied Oriedo's request, based on the finding that Oriedo had not shown sufficient good cause to postpone the hearing under §PC 5.02, Wis. Admin. Code. This ruling was conveyed in a letter to the parties dated November 19, 1997.

The DPI appeared for the hearing on November 24, 1997, but Oriedo did not appear, and did not provide any advanced notice that he would not appear for the hearing. The DPI then moved for dismissal pursuant to §PC 5.03(8)(a), Wis. Admin. Code. In a letter dated November 24, 1997, the Commissioner allowed Oriedo the opportunity to submit a written explanation for his failure to appear at the hearing. The content of the letter sent to Oriedo states:

Respondent moved to dismiss your case at the hearing this morning because you did not appear. The pertinent administrative code provision is shown below:

PC 5.03 Conduct of hearings . . . (8) Sanctions. (a) Unless good cause can be shown, any party who fails to appear at a hearing after due notice is deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made. If the absent party has the burden of proof, the commission shall consider a motion to dismiss by the parties present without requiring presentation of any evidence.

You were the party with the burden of proof in this proceeding and, accordingly, respondent was not required to present any evidence today.

I will present respondent's motion to dismiss to the full Commission at its meeting on December 3, 1997. If you wish to submit an explanation as to why you did not appear and how such reason constitutes good cause for failure to appear within the meaning of §PC 5.03, Wis. Admin. Code, the Commission and opposing party must each receive your written materials by 4:30 p.m. on November 28, 1997. (emphasis in original)

Oriedo did not submit an explanation as to why he missed the hearing by the November 28, 1997, deadline. Instead, he delivered a letter to the Commission on December 2, 1997, requesting an extension to respond to the Commissioner's earlier letter. His letter states:

I am asking for an extension of time to respond to your letter of November 24, 1997 until December 19, 1997. The reason for this request is to allow me time to study and address the issue carefully. Please note that I am not an attorney and therefore I am not conversant with the various defenses which may be available to me for the proposed action.

On December 3, 1997, the Commission granted the DPI's motion to dismiss on the grounds that Oriedo failed to appear at the scheduled hearing. The Commission reasoned:

Complainant's request for an extension was not made until after November 28, 1997, the deadline established for his response. Further, the applicable administrative rule was provided for complainant's convenience in the Commission letter which provided him with an opportunity to explain why he failed to appear. His request for extension having been raised for the first time after the due date of his response is denied.

Based on complainant's failure to show good cause for failing to appear at the scheduled hearing, this case is dismissed. (emphasis in original)

Oriedo filed a Petition for Rehearing on December 18, 1997. The Commission denied his request in an order dated January 14, 1998. Oriedo now seeks judicial review upon this court.

STANDARD OF REVIEW

The scope of review for this court is found in § 227.57, Wis. Stats. This court must affirm the Commission's decision unless the court finds a basis for setting aside, remanding, or ordering agency action under a specific provision of § 227.57. However, this court will reverse or remand a case to the agency if the agency's exercise of discretion is: (1) outside the range of discretion delegated to the agency by law; (2) inconsistent with an agency rule, an officially stated agency policy or a prior agency practice; or (3) is otherwise in violation of a constitutional or statutory provision. Wis. Stat. §227.57(8); Barakat v. DHSS, 191 Wis. 2d 769, 782, 530 N.W.2d 392 (Ct. App. 1995).

The Commission's findings of fact must stand if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6). "[J]udicial review under ch. 227 is limited to whether the evidence was such that the agency might reasonably make the finding that it did." Boynton Cab. Co. v. ILHR Dept., 96 Wis. 2d 396, 405, 291 N.W.2d 850 (1980). Even if more than one inference can reasonably be drawn from the evidence, the finding of the agency is conclusive if it is supported by substantial evidence in the record. Village of Whitefish Bay v. WERC, 103 Wis. 2d 443, 448, 309 N.W.2d 17 (Ct. App. 1981).

Although the court is not bound by the Commission's interpretations of law, the supreme court has set out the appropriate standards of review of an agency's legal and statutory interpretation:

This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the

case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

Jicha v. DILHR, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256 (1992) (citations omitted). The Commission's decision in this case will be accorded "great weight" because this is not an issue of first impression, and because of the Commission's experience and expertise in interpreting and applying the facts to the relevant administrative code sections.

DISCUSSION

In its decision, the Commission dismissed Oriedo's complaint because he did not show good cause for why he failed to appear at his scheduled hearing. Oriedo argues that he was entitled to a separate hearing on whether he had good cause for failing to appear at the hearing, and that the Commission did not give him notice before granting the DPI's motion to dismiss. Oriedo also argues that his initial request to postpone the scheduled hearing date, which the Commission considered in a proceeding attended by Oriedo and denied on November 19, 1997, should have been granted because neither the DPI nor the Commission would have been prejudiced by the postponement, and because the Commission was biased against him because of his race and national origin.

The Commission maintains that it did not commit any error when it dismissed Oriedo's complaint. It claims that it was reasonable for the Commission to dismiss Oriedo's complaint because he simply failed to show good cause for why he did not appear at the hearing. The Commission insists that it *did* allow Oriedo the opportunity to show good cause in its November 24, 1997, letter, but that Oriedo did not provide a justification by the November 28 deadline. Pursuant to §PC 5.03(8)(a), Wis. Admin. Code, the Commission had authority to dismiss Oriedo's claim for failure to appear. The Commission argues that it did not abuse its discretion

because the Commission notified Oriedo in its November 24th letter that a motion to dismiss was pending because of his failure to appear, and because the November 24th letter stated applicable law and gave Oriedo a fair opportunity to explain his absence at the hearing.

In his brief, Oriedo argues that his initial request to postpone the hearing should have been granted. However, the only issue this court is reviewing is the Commission's dismissal of Oriedo's complaint. The Commission has the authority to consider a motion to dismiss if the party with the burden of proof fails to appear at a hearing after due notice, unless good cause can be shown. Section 5.03(8)(a), Wis. Admin. Code. The Commission was acting fully within its discretion when, in its November 24th letter, it notified Oriedo that a motion to dismiss was being considered by the Commission, and that he had till November 28th to explain that he had good cause for not appearing at the hearing. Thus, Oriedo was clearly put on notice that a motion to dismiss was pending due to his failure to appear. Oriedo argues that he should have been given a separate hearing on whether he had good cause for missing the hearing. However, he was given more than a fair opportunity to explain his absence at the hearing, but Oriedo failed to respond by the November 28th deadline, and in fact has never explained why he did not meet the initial deadline established for stating his reasons why he did not appear at the hearing. In view of all the circumstances of this case, it is clear that substantial evidence supports the Commission's finding that Oriedo did not show good cause for failing to appear at his scheduled hearing. Likewise, since the Commission's November 24th letter explicitly informed Oriedo that a motion to dismiss was pending, the Commission did not abuse its discretion when it granted the DPI's motion to dismiss Oriedo's complaint based on his failure to appear.

Finally, Oriedo has made a motion for briefings on the issue of whether the Commission properly dismissed the DER and DMRS as parties in this case. Oriedo appealed the Commission's decision to the Dane County Circuit Court, which found that the decision was preliminary and therefore non-appealable, since Oriedo could appeal after the Commission concluded its hearing on the merits of Oriedo's claim against the DPI. The court of appeals upheld the circuit court's ruling. Based on the circuit court and court of appeals decision, Oriedo would have had the opportunity to appeal the Commission's dismissal of the DER and DMRS as parties once proceedings on the merits of Oriedo's claim were concluded. However, the merits of Oriedo's claim were never heard because he chose not to appear at his hearing. *In addition, Oriedo never even attempted to demonstrate good cause for his absence at his scheduled hearing.* For these reasons, the Commission dismissed his complaint against the DPI. Thus even if the DER and DMRS *had* been proper parties in this case, Oriedo would have lost his opportunity to pursue his claim against the DER and DMRS by failing to appear at his scheduled hearing on the merits, and by failing to demonstrate good cause for his absence. Therefore, because the court upholds the Commission's dismissal of Oriedo's complaint, the issue of whether the Commission properly dismissed the DER and DMRS is now moot.

CONCLUSION

For the reasons stated above, the court affirms the Commission's decision dismissing Oriedo's complaint based on his failure to show good cause for not appearing at the scheduled hearing. Based on this decision, the court does not reach Oriedo's motion for briefings on the issue of whether the Commission properly dismissed the DER and DMRS, as our ruling makes this issue moot.

Dated this 11 day of December, 1998.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Gerald C. Nichol", written over a horizontal line.

Honorable Gerald C. Nichol
Circuit Court, Branch 9