

ALLEN BEDYNEK-STUMM,
Petitioner,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING
ON
MOTION TO
DISMISS**

Case Nos. 98-0168-PC, 98-0213-PC-ER

These matters are before the Personnel Commission on respondent's motion to dismiss for lack of prosecution. The following facts appear to be undisputed.

FINDINGS OF FACT

1. On November 25, 1998, petitioner filed both a civil service appeal (Case No. 98-0168-PC) under §230.44(1)(d), Stats., and a complaint of discrimination (Case No. 98-0213-PC-ER) arising from the decision not to select him for either of two positions of Transportation Customer Representative 2 Field.

2. At all times relevant to these proceedings, the petitioner has appeared *pro se*.

3. At all times relevant to these proceedings, the petitioner has used a postal box as his address for receiving mail.

4. At all times relevant to these proceedings, the petitioner has indicated he cannot be reached by telephone. The Personnel Commission has no phone number for reaching the petitioner

5. The parties agreed to hold the civil service appeal in abeyance pending the outcome of the investigation of the discrimination complaint. An initial determination of "no probable cause" was issued in Case No. 98-0213-PC-ER and petitioner filed a timely appeal.

6. During a prehearing conference held on August 29, 2001, the hearing was scheduled for December 4, 5 and 6, 2001.

7 At petitioner's request, and without objection by respondent, the hearing was rescheduled until January 29, 30 and 31, 2002.

8. Because of unexpected staff changes, the Commission had insufficient staff to conduct the hearings on its calendar for the week of January 28, 2002. At the Commission's request and with the agreement of the parties, the hearing was rescheduled to April 15 and 16, 2002.

9. On April 3, 2002, complainant filed a motion for substitution/disqualification of the hearing examiner. The examiner concluded that petitioner had failed to provide an adequate basis for his motion and, pursuant to §PC 5.01(4), Wis. Adm. Code, referred the motion to the Commission. On April 10, 2002, the Commission denied petitioner's motion.

10. The hearing commenced as scheduled on April 15, 2002. Various exhibits were admitted by stipulation. The parties made opening statements and the petitioner called himself as his initial witness. Petitioner testified for an extended period. What occurred next is reflected in the examiner's letter to the parties dated April 16, 2002:

At approximately 12:30 p.m. yesterday on April 15th, the first day of hearing in these matters, it appeared to me that we had concluded the petitioner's direct testimony, as a witness, and I went off the record to set the time for the lunch break. After discussing that topic at some length and after petitioner stated at one point that he wanted to reconvene the proceeding in 10 minutes, the petitioner suddenly asked for a postponement of the proceeding until 10:00 a.m. on Tuesday. We went back on the record. The hearing tape reflects the following comments:

PETITIONER: [My request is] based on my inability to continue today. Purpose of which is to recover my stamina and, hopefully, congeny, in order that I can be an effective witness and litigant. At my present circumstance I am unable to continue.

Mr. Lepeska [respondent's attorney] stated respondent had "no opinion" regarding the request. I made the following comments:

I have to be confident that this proceeding can be completed tomorrow before I grant that request. There has been no evidence to me that there has been any diminution in your ability to present your case, Mr. Bedynek-Stumm. If postponement is granted until tomorrow, I am very concerned that we would be able to complete the matter. I am not willing to take the chance of starting at 10 tomorrow and then running into some real time constraints.

After petitioner stated that he estimated that his case would take approximately 3 hours on Tuesday to complete, respondent suggested that we extend the lunch hour somewhat on Monday and complete the hearing Monday afternoon. Petitioner's response and my ruling are set forth below:

PETITIONER: That is not going to be possible. I am totally unable to grasp the circumstances. If it makes sense what I have been saying to you, that I am coherent, it doesn't make sense to me.

EXAMINER: [I am granting petitioner's request to adjourn until 10:00 on Tuesday] for the reason specified. I do that without as much basis as maybe I'd like to [have], but I do not perceive any prejudice or negative consequence from what I have heard otherwise. And under these circumstances I think it is prudent to simply accept Mr. Bedynek-Stumm's characterization of his status.

I will advise you, Mr. Bedynek-Stumm, that when] we do return tomorrow, it will be for purposes of completing the hearing.

11. The petitioner telephoned the office of the designated hearing examiner at 7:39 a.m. on April 16th and left a voice mail message. The hearing had been scheduled to reconvene at 10:00 a.m. The examiner transcribed the message and included the transcription in his April 16th letter to the parties. The transcription of the voice mail message reads as follows:

Good morning, Mr. Stege. This is Allen Bedynek-Stumm calling. I am calling earlier than anticipated, hoping to get through and succeeded in this voice-mail.

Matters have worsened in terms of my health, and forcing me to request a postponement of these matters. Should you wonder what the situation

is, my vision has been affected and I am unable to read clearly as you may have noticed yesterday. I regret the inconvenience to all parties concerned. But this is not a matter of choice and appropriateness. Again, I am requesting a postponement in these matters. Thank you for your assistance in facilitating that request.

I don't have any options here apparently. I indicated an inability to read clearly and that is a distinct disadvantage.

Thank you and I await correspondence indicating a change of circumstances material to this postponement. Thank you for your assistance. Bye.

12. After receiving petitioner's call, the examiner telephoned respondent's representative and described petitioner's message. Respondent objected to a postponement and explained respondent's objection. For the reasons noted in Finding 4, the examiner was unable to obtain additional information from petitioner.

13. The examiner ruled on petitioner's request and summarized his decision in his April 16th letter to the parties as follows:

I note that the petitioner does not have a telephone and the only way the Commission has to reach him is to send him mail to his post office box. Petitioner has provided no explanation as to why he telephoned me at 7:39 a.m. rather than at some time during the normal work day.

I am granting the petitioner's postponement request with the following conditions/qualifications:

- a. Petitioner must, by April 26, 2002, file documentation, from a medical professional, of the medical condition that serves as the basis of today's postponement request.
- b. Kelley Mooney, [a witness scheduled to testify on April 15 or 16] will not be required by the Commission to appear in person for the reconvened hearing. Ms. Mooney normally works in Tomah and respondent had made arrangements for her to work in Madison on both April 15 and 16 so she would be available to testify in person. The petitioner will have to make arrangements for Ms. Mooney to have copies of any exhibits that petitioner intends to have her reference during her testimony.
- c. Petitioner is responsible for contacting Mr. Lepaska by telephone, discussing possible days for reconvening the hearing and then in-

cluding me in the conversation to confirm the dates. This process is to be completed by April 25, 2002.

14. By letter dated April 29, 2002, respondent's attorney informed the hearing examiner that respondent had "not received any written or oral communication from Mr. Bedynek-Stumm as of this date related to your April 16, 2002 ruling." Respondent moved to have the cases dismissed for failure to prosecute "unless Mr. Bedynek-Stumm can show good cause why the matters should not be dismissed."

15. By letter to the petitioner dated April 30, 2002, the examiner wrote, in part:

I have not received any medical documentation from you, nor had you advised me of the new hearing dates. You have not contacted me at all since my April 16th letter. Mr. Lepeska has filed a motion dated April 29th to dismiss these matters "for failure of prosecution" because he had "no received any written or oral communication" from you regarding the April 16th ruling.

The absence of any communication from you leads me to believe that you do not wish to pursue the above matters, and that they should be dismissed at your request. If my understanding is incorrect, you must respond, in writing and by May 14, 2002, to respondent's motion to dismiss for failure to prosecute. If you do not respond by May 14th, I will recommend that the Commission dismiss these cases at your request.

16. On May 14, 2002, petitioner hand-delivered the following letter to the examiner:

Material to your letter [of April 30] it arrived unsealed and consequently your other referenced letter of April 16, 2002, was either not enclosed or mailed or was misdirected, etc.

Therefore we request a copy of your April 16, 2002, letter.

Specific to the enclosed copy of your letter of April 30, 2002, the Primary care Physician has provided the medical circumstances which address the postponement and the bases for such action.

The medical care is continuing, e.g., I have appointments in June, July, and thereafter; dependent upon conditions.

The medical attestation authorizes such postponement " for about 60 days."

I intend to prosecute the above matters in accordance with that medical recommendation, which may be subject to adjustments, i.e., if conditions do not improve as anticipated.

I expect to obtain a release from such circumstances after 60 days and will submit such information accordingly, e.g., per telephone, etc.

17 Attached to petitioner's letter was a copy of a photocopy of a handwritten note signed by Theodore Goodfriend, M.D., dated May 2, 2002, and addressed "To whom it may concern:"

I believe Mr. Bedynek would be better able to meet the needs of a hearing if he were allowed to recuperate from his double-vision for about 60 days.

Thank you.

18. By letter dated May 16, 2002, the hearing examiner sent petitioner a copy of the April 16th letter and provided respondent an opportunity to respond to petitioner's May 14th filing.

19. Respondent's response, dated May 21st, noted that petitioner had failed to supply respondent with a copy of the May 14th submission and that petitioner had still not contacted respondent to discuss possible dates for reconvening the hearing.

20. By letter to the petitioner dated June 19, 2002, the examiner noted that he needed additional information before deciding to schedule another day for hearing:

I am directing you to file, by June 27, 2002, a written response to the following questions:

1. When did you first see my letter dated April 16, 2002?
2. Did you receive an envelope from the Personnel Commission on or about April 17, 2002? If so, what, if anything, did the envelope contain?
3. What was the medical condition, if any, that was the basis for your request at approximately 12:45 p.m. on April 15, 2002, for a postponement of the proceeding until 10:00 a.m. on April 16th? If it was double-vision, why did you not refer to double-vision on April 15th?
4. What was the medical condition, if any, that was the basis for your request at approximately 7:39 a.m. on April 16th for postponement?

If it was double-vision, why did you not refer to double-vision on April 16th?

5. Why did you telephone me at 7:39 a.m. on April 16th, rather than at a time during normal work hours? Why didn't you telephone me again later on April 16th after you left your voice mail message?

I am also directing you to file, no later than July 3, 2002, more complete documentation, from a medical provider, of the medical condition that served as a basis for your request on April 16, 2002, for a postponement of the hearing. That documentation should indicate the following:

1. When was the medical provider first consulted regarding this medical condition?

2. Is it the medical provider's opinion that this medical condition existed in the early morning of April 16, 2002, and that it would have significantly impaired petitioner's ability to participate in an administrative hearing on April 16th?

3. Does the medical provider rely entirely on the petitioner's own description of the medical condition or are there any tests or other indices that confirm the existence of the condition?

21. Petitioner did not respond to this letter until he telephoned the office of the hearing examiner on Thursday, July 4, 2002, and left a voice mail message. The "envelope" to the message indicated it was left at 1:27 p.m. The examiner transcribed the message as reflected in a letter dated July 8, 2002. The transcription reads as follows:

Good afternoon. This is Allen Bedynek-Stumm calling material to the DOT case 98-0168-PC, for example.

In regard to your recent correspondence, I realize that you had stated in your April 16, 2002, letter that postponement was granted and petitioner, now this is my report, petitioner met the conditions of those matters.

Petitioner filed a subsequent letter sometime in May, and, may I direct your attention to that as having answered all of your items in your recent letter.

Number 3. That letter in May sometime addressed the pending medical treatment conditions, inter alia.

Four. Petitioner will be composing additional concerns within 2 weeks for Personnel Commission.

Five. Petitioner believed that he fulfilled the necessary commitments with respect to your April 16, 2002, letter. And with respect for me, I believe this is, uh, retaliatory in nature, confused with the request for earlier recusal. I cannot put any other shade to this.

Five one, two, three, four, five

Six. As I indicated, expect a more complete definition of these items, today discussed, within approximately 2 weeks from today's date call.

To reiterate, your April 16 letter, 2002, indicated postponement was granted. The petitioner met the conditions of those matters. That is, I believe, as petitioner, I have met the conditions of those matters and can put no other light on this matter other than it appears to be confused circumstance with request for the earlier aspect.

As I indicated I will be addressing these points more thoroughly within 2 weeks. I had hoped to speak to you in person today but I have, I believe, presented an orderly response to you per your letter of recent submittal. I don't have the date of that.

And specific to not having that last letter date, assume, correctly, that this is a response in full, pending a more complete definition of the items presented to you today within approximately 2 weeks.

I have repeated this message with the anticipation that you might be in the vicinity and would address this in person, but apparently you are away from the phone right now and I understand that matter

As indicated, I consider this matter complete with the exception of the more extensive definition of these items within approximately 2 weeks.

This would, then, comply with my respect for matters material to me and pending, of course.

Thank you very much.

The case number is 98-0168-PC-ER.

[End of recorded message.]

22. July 4, 2002, was a state holiday and the offices of the Personnel Commission were closed.

23. On May 14, 2002, petitioner filed a document with the Personnel Commission relating to another case he filed with the Commission, *Bedynek-Stumm v. DPI*, 99-0186-PC-ER. On page 7, petitioner noted: "the petitioner had not received this Proposed Decision & Order prior to its attached appearance to the Final Decision & Order of 25 April '02." The proposed decision and order in Case No. 99-0186-PC-ER was mailed to the parties to that matter on January 25, 2002. A copy was addressed to the petitioner at his post office box. The deadline for submitting objections to that proposed decision was February 25, 2002. On February 22, 2002, the Commission received, by hand-delivery, documents specifically identified as petitioner's objections to the proposed decision in Case No. 99-0186-PC-ER.

CONCLUSIONS OF LAW

1. Petitioner is the party with the burden of proof and the burden of proceeding in these matters. *Lawry v. DP*, 79-26-PC, 7/31/79; *Huff v. UW(Superior)*, 97-0105-PC-ER, 3/10/99.

2. Petitioner has failed to prosecute these matters, his conduct is egregious, he has failed to supply an adequate excuse for his conduct and the matters must be dismissed.

OPINION

Petitioner requested a postponement in the middle of the first day of the scheduled 2 days of hearing because he had lost his "cogency" and "stamina." He agreed to continue at 10:00 a.m. the next day after the examiner questioned the parties and confirmed that the matter could be concluded on that day. However, the petitioner did not appear and simply left a telephone message, citing a worsening condition of his vision. He assumed that the hearing would be postponed. The examiner granted a postponement, over respondent's objection, with 3 conditions/qualifications, including 2 that had to be completed by specified dates. Petitioner didn't comply and respondent moved for dismissal for lack of prosecution. The examiner sent a follow-up letter to petitioner,

threatening dismissal if there was no response to the motion to dismiss by May 14th. On May 14th, petitioner finally communicated with the Commission, but seemed to suggest that he had never received the April 16th letter setting forth the conditions. He supplied a very general statement from a physician stating that petitioner would "be better able to meet the needs of a hearing" if allowed to recuperate for 60 days. The examiner subsequently directed petitioner to respond *in writing* to several specific questions by June 27th and to supply more complete documentation from a medical provider by July 3rd. Petitioner did not respond at all until he left a voice mail message on the 4th of July and said that his May 14th submission had answered all of the examiner's questions.

The decision whether to dismiss a claim for lack of prosecution is discretionary with the Commission. However a case should not be dismissed for failure of prosecution unless the conduct of the party is egregious, and the party does not have a clear and justifiable excuse for its course of action. *Rupiper v. DOC*, 98-0155-PC-ER, 4/7/99, citing *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 470 N.W.2d 859 (1991).

Petitioner has made it extremely difficult for the Commission to communicate with him. The Commission is unable to telephone him, because he has not supplied a telephone number, stating he does not have a telephone. Most recently, when petitioner has made calls to the examiner, he has done so before the start of the normal work day or on a state holiday when the Commission's offices are closed. The Commission is limited to mailing correspondence to petitioner, but he appears to suggest he never received the examiner's April 16th letter.¹ Petitioner has raised this same contention in another case, as outlined in Finding 23. The circumstances in that case show that at least in that instance, he received correspondence from the Commission that he later

¹ Petitioner's statement regarding the April 16th letter is set forth in Finding 16:

Material to your letter [of April 30] it arrived unsealed and consequently your other referenced letter of April 16, 2002, was either not enclosed or mailed or was misdirected, etc.

Therefore we request a copy of your April 16, 2002, letter.

claimed not to have received. The only way petitioner could have prepared his objections to the proposed decision and submitted them shortly before the due date was if he had received a copy of the proposed decision. Nevertheless, petitioner claimed he never received the proposed decision until 2 months *after* he filed his written objections.

Even if petitioner did not receive the April 16th letter from the examiner until a copy was mailed on May 16th, petitioner has simply ignored a variety of reasonable requirements imposed by the examiner:

1. He never supplied "documentation, from a medical professional, of the medical condition" that served as the basis for his April 16th postponement request. The note from Dr Goodfriend is dated May 2, 2002, and merely references prospective recuperation from "double-vision." The physician does not describe the severity of the condition, nor does he specify whether it was extant on April 16th

2. He never replied to the examiner's June 19th questions that were designed to elicit unambiguous statements that would clarify petitioner's previous ambiguous statements: a) On April 15th he stated that he lacked "stamina", was "unable to grasp the circumstances" of the proceeding, and was incoherent; b) on April 16th he stated his "vision has been affected" and he was "unable to read clearly"; and c) in his May 14th letter he stated that the April 16th letter "was not enclosed or mailed." Petitioner's written response to the examiner's questions was due on June 27th

3. He never supplied a response to the examiner's June 19th questions for additional medical documentation that would have provided an understanding of the relevant medical condition during the relevant period of time. This written response was due on July 2nd

Petitioner's response was late and by telephone, which once again required the examiner to transcribe petitioner's message so that it would not be an *ex parte* communication prohibited by §227.50, Stats., and §PC 4.04, Wis. Adm. Code. He failed to reply in writing as directed. He failed to send a copy of his May 14th correspondence

to respondent, despite the Commission's administrative rule (§PC 1.05, Wis. Adm. Code) to the contrary.


Petitioner appears to take the view that he, unilaterally, will decide when and how he will prosecute his claims against the respondent. The resources, and patience, of the Personnel Commission are finite rather than infinite. Petitioner didn't want to proceed on April 15th, he didn't want to proceed on April 16th, he didn't want to contact respondent in order to reschedule a new hearing date and he didn't want to supply the information required by the hearing examiner that could have clearly shown if he had a valid basis for his postponement request. It is nearly 3 months after his postponement request and he has still failed to make efforts to set a date in order to conclude the administrative hearing.

Under all of these circumstances, the Commission concludes that the petitioner has engaged in egregious conduct relating to his conduct of these matters and has failed to supply a clear and justifiable excuse for his conduct. Therefore, these matters should be dismissed due to a failure of prosecution.

ORDER

These matters are dismissed for a failure of prosecution.

Dated: July 10, 2002 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

KMS:980168Arul2


KELLI S. THOMPSON, Commissioner

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|| 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 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