STATE OF WISCONSIN PERSONNEL COMMISSION

MARION E. MCMILLAN,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

RULING ON MOTION TO DISMISS

Case No. 99-0009-PC-ER

This is a complaint alleging race and sex discrimination and retaliation for engaging in protected fair employment activities with regard to conditions of employment. On June 6, 2001, respondent made a motion to dismiss for failure to prosecute at a status conference at which complainant failed to appear The parties were permitted to brief this motion. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. A prehearing conference was conducted by telephone conference call on August 31, 2000. At this conference, complainant appeared personally and by Attorney Michael Finley. The parties agreed at this conference that the hearing would be held on November 30 and 31, 2000. November 9, 2000, was established as the cutoff date for the completion of all discovery.

2. On October 26, 2000, at a status conference requested by complainant, she advised that she was in the process of retaining new counsel and requested a postponement of the hearing. The request was granted by the hearing examiner, and the hearing was rescheduled for February 8 and 9, 2001.

3. In a letter dated November 29, 2000, counsel for respondent requested a postponement of the February hearing dates due to the fact that he would be retiring in December of 2000 and new counsel would have to be appointed. Complainant had no objection to this postponement request, the parties agreed to reschedule the hearing for April 5 and 6, 2001, and the hearing examiner granted the postponement request and sent a written notice of the new hearing dates to the parties.

4. In a letter to the parties dated March 23, 2001, the hearing examiner stated as follows as relevant here:

> This will confirm our conference call this date. I granted complainant's request for postponement over respondent's objection, due to the extenuating circumstances faced by complainant, which includes the withdrawal of her first attorney, and subsequent delays she described by attorneys she has been trying to retain.
>
> Complainant will have 45 days—until May 7, 2001—in which to retain counsel. If the Commission has not received a notice of appearance by then, complainant will have to proceed without counsel if she wants to pursue this case.

5. On April 9, 2001, Attorney McNeely of Milwaukee contacted the Commission, indicated that he was considering representing complainant in this matter, and requested information from the Commission which he was provided.

6. Complainant contacted the Commission by phone on May 7, 2001, and a telephone conference call was initiated by the hearing examiner so that counsel for respondent could participate in the conversation. Complainant indicated that she would be proceeding without counsel, and that she wanted to conduct discovery before the hearing. Respondent objected on the ground that it was after the cutoff date (November 9, 2001, for the completion of all discovery, and the conference was continued to June 6, 2001, to further discuss the conduct of discovery.

7 In a letter dated May 25, 2001, the hearing examiner indicated as follows as relevant here:

> In light of the discussion at our May 7, 2001, conference, **which was continued to June 6, 2001, at 9:00 a. m.,** I am enclosing copies of

> *Verhaagh v. LIRC,* 204 Wis. 2d 154, 554 N. W. 2d 678 (Ct. App. 1996), and *Hiegel v. LIRC,* 121 Wis. 2d 205, 359 N. W. 2d 405 (Ct. App. 1984). (emphasis added)

8. At 9:00 a.m. on June 6, 2001, the hearing examiner initiated a conference call to convene the continued status conference. A man answered the phone at the number complainant had provided, indicated that complainant was not there, and provided complainant's cell phone number. The hearing examiner left a message with this man indicating the purpose of the call, and providing his phone number. The hearing examiner initiated a call to complainant's cell phone number but there was no answer. The hearing examiner then called complainant's original number again, and the man who answered the phone gave him complainant's work number. The hearing examiner called this work number, there was no answer, and the recording on the answering machine did not reference complainant's name.

9. As a result of complainant's failure to appear at this June 6 conference, counsel for respondent made an oral motion to dismiss for failure to prosecute.

10. At 12:36 p.m., complainant telephoned the hearing examiner and indicated that she had not appeared for the 9:00 a.m. status conference call because she had been confused about the date of the conference. The hearing examiner advised her that he would send out a letter requesting a written statement of the reason she had failed to appear.

11. In a letter to the parties dated June 8, 2001, the hearing examiner stated as follows as relevant here:

> This will confirm that we were unable to locate Ms. McMillan at 9:00 am, June 6, 2001, the appointed time for the prehearing conference call. Mr. Pultz made a motion to dismiss for failure of prosecution. Ms. McMillan then called me at 12:36 p. m., June 6, 2001, and advised me that she was not available for the call because she had been confused about the date for the conference. Ms. McMillan will have until June 21, 2001, to submit a response to the motion. Mr. Pultz will then have until July 2, 2001, to reply.

12. In a letter to the parties dated August 6, 2001, the hearing examiner stated as follows as relevant here:

My June 8, 2001, letter to the parties stated as follows

> This will confirm that we were unable to locate Ms. McMillan at 9:00 a. m., June 6, 2001, the appointed time for the prehearing conference call. Mr. Pultz made a motion to dismiss for failure of prosecution. Ms. McMillan then called me at 12:36 p. m., June 6, 2001, and advised me that she was not available for the call because she had been confused about the date for the conference. Ms. McMillan will have until June 21, 2001, to submit a response to the motion. Mr. Pultz will then have until July 2, 2001, to reply.

As of this date we have not received a response from Ms. McMillan. If we do not receive a written (email or regular mail) response from her by August 16, 2001, we will assume she is no longer interested in pursuing this case. If we do receive a response by August 16, 2001, we will take the delay in responding into consideration in deciding Mr Pultz's motion to dismiss for lack of prosecution. Mr. Pultz will be provided an opportunity to reply to any response from Ms. McMillan.

13. In an email sent to the hearing examiner on August 15, 2001, at 11:48 a.m., complainant stated as follows as relevant here:

> I apologize for my absence at the last scheduled conference call. I began a new job on June 4, 2001, which required training out of town. Although I was able to contact you later that day from my training sight [sic], I was unclear as to my directives concerning this case. Although you did inform me that Mr. Pultz [counsel for respondent] would be filing a motion to dismiss and that I needed to respond with a reason for my absence. I continued to train for 8 weeks in Cemetery Services and Products, while under the impression that I would receive a copy of Mr. Pultz's petition to withdraw. I have received copies of all of the other correspondence concerning this case. I am very interested in pursuing this case in a hearing. Thank you for your time and patience.

OPINION

The authority of the Commission to dismiss matters for lack of prosecution is inherent in the Commission's responsibility to process the cases that are placed before

it, and its authority under the Administrative Procedure Act, *see* §227.44(5), Stats.: "disposition may be made of any contested case by default." The determination of whether to dismiss a case for lack of prosecution is committed to the discretion of this agency. *See Veerhagh v. LIRC,* 204 Wis. 2d 154, 554 N. W 2d 678 (Ct. App. 1996) (interpreting very similar language in §102.18(1)(a), Stats.) In *Veerhagh*, the Court rejected the application to a default situation of the standard applicable in similar cases in the judicial arena:

> Because of the limited application of the rules of civil procedure to the administrative agencies of this state, we reject Veerhagh's contention that the appropriate legal standard to be applied by LIRC in determining whether to grant his motion for a default order is based upon a finding of surprise, mistake, or excusable neglect. Rather, the agency is entitled to exercise its discretion based upon its interpretation of its own rules of procedures, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness. 204 Wis. 2d at 161.

Some of the factors that the Commission may consider in a default situation are similar to the criteria applied by courts. For example, in examining the "reasons, if any, advanced for the tardiness," *id.*, the Commission's inquiry may very well touch on factors similar to those relevant to the "surprise, mistake or excusable neglect standard." *Id.* While the Commission has relied on an egregious or bad faith conduct requirement for dismissal for failure of prosecution, *see Young v. DOT,* 00-0025-PC-ER, 2/25/01, it would not be consistent with *Veerhagh* to use this as an inflexible requirement. Rather, the Commission will consider the degree of inappropriate conduct, including whether the conduct is at the egregious or bad faith level, along with all the other related circumstances. Also, it should be noted that since the default issue here does not involve a delay in filing an answer, the "time elapsing before the answer was filed" factor is not applicable per se, although a similar inquiry concerning the amount of delay occasioned by the alleged basis for the default is appropriate.

The Commission will first look at the reasons complainant advanced for her failure to appear at the scheduled prehearing conference. Her first explanation, i.e.,

that she was confused about the date, lacks credibility given the fact that the June 6th date was established during the May 7, 2001, conference, the hearing examiner referenced it in his letter to the parties of May 25, 2001, and complainant acknowledged receiving all of the Commission's correspondence to her Complainant's failure to reiterate this explanation in her response to the motion appears to further weaken her credibility in this regard. Complainant's second explanation, i.e., that she was out of town in training that day, is not persuasive since she should have been aware prior to the scheduled conference that her training schedule would conflict with it, but made no effort to so advise the Commission or the respondent. Complainant's final explanation, i.e., that she was "unclear as to my directives concerning this case" (Complainant's August 15, 2001, email, Finding of Fact 13), appears to be irrelevant to the issue of why she did not appear for the scheduled prehearing conference, and conflicts with the written information provided to her explaining the scheduling of the conference and other relevant matters.[1] In conclusion, complainant's explanation for failing to participate in the June 6, 2001, conference is at the low end of the scale on the "good cause," "clear and justifiable excuse," or "excusable neglect," continuum.

As to the prejudicial effect of the delay, the respondent does not contend there was any particular prejudice occasioned by the complainant's failure to appear at the conference, although there is a degree of prejudice inherent in any delay in a case of this nature due to the erosion of witnesses' memories, etc.

The Commission's consideration of the circumstances related to this failure to appear include the complainant's overall approach to pursuing this case. This case originally was scheduled for hearing on November 30 and 31, 2000, pursuant to the parties' agreement at the August 31, 2000, prehearing conference. At this point, complainant was represented by counsel. A deadline of November 9, 2000, for the completion of all discovery was established at this prehearing conference. Complainant then requested and received a postponement of the hearing to February 8 and 9, 2001,

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[1] To the extent this comment was intended to address the reason she did not respond within the

because she said she was in the process of retaining new counsel. After respondent sought a postponement on November 29, 2000, due to the impending retirement of its attorney, the hearing was rescheduled, with the concurrence of both parties, to April 5 and 6, 2001. Then on March 23, 2001, complainant requested a postponement because of delays she had encountered in trying to retain a new attorney. This was granted over respondent's objection, the hearing was postponed, and complainant was given another 45 days in which to retain counsel. Complainant called the Commission on the 45th day to advise she would be proceeding without counsel. She also advised she wanted to conduct discovery, and the respondent objected, noting that there had been a November 9, 2000, deadline for the completion of all discovery. The June 6, 2001, conference was established during this call to address complainant's discovery request. This scheduling was confirmed in a letter from the examiner to the parties dated May 25, 2001. Complainant then failed to be available for the call at the appointed time. After the examiner established June 21, 2001, as the deadline for complainant to respond to respondent's motion to dismiss, complainant completely failed to respond to that deadline, or even request an extension, and only contacted the Commission at all when the examiner advised her by letter of August 6, 2001, that her further failure to respond would be interpreted as an abandonment of her claim. As discussed above, the complainant's August 15, 2001, email, does not offer any kind of plausible reason for complainant failing to have been available for the June 6, 2001, conference. She also does not offer a plausible explanation for completely ignoring the June 21, 2001, deadline to respond to the motion to dismiss. If she had been confused about whether she was going to get anything further from respondent before she had to respond to the motion to dismiss, she should, at the least, have contacted the Commission to inquire about this.

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deadline established by the examiner to the motion to dismiss, this will be addressed below.

In considering whether complainant's failure to have been available at the June 6, 2001, conference, in the context of the course of conduct just discussed, justifies dismissal, the resolution of similar issues in other cases offers some guidance.

In *Neumaier, v. DHFS,* 98-0180-PC_ER, 11/4/98, the complainant failed to appear at a prehearing conference, she contacted the Commission three hours after her conference was scheduled to begin, and she indicated in this contact that her work schedule had prevented her from participating in the conference at the scheduled time and that she had attempted to call the Commission before office hours that morning to provide this information. There was no history of delay or dilatory conduct under the facts of the *Neumaier* case, and the complainant's explanation for her failure to appear at the conference was plausible and consistent, although not sufficient to constitute good cause. The Commission concluded that, even though complainant knew the importance of appearing at the conference and had no good excuse for failing to appear, dismissal as a sanction was too severe under the circumstances. The Commission did warn the complainant, however, that "a repeated failure by her to prosecute her case will be viewed as a serious matter with the potential that dismissal may be imposed as a sanction."

In *Witt v. DOT & DER*, 93-0093-PC, 11/14/95, the appellant had a history of dilatory conduct, including an 11th hour request for a hearing postponement, a lengthy failure to respond to a draft of a written settlement agreement, and two failures to respond to Commission directives to report on the status of the settlement agreement. The Commission dismissed the case for lack of prosecution, noting that, in reaching this conclusion, it had considered "the duration of the delays, the reasons for the delays, and the statements by respondents that the elements in its settlement draft were time critical and that the appellant's conduct has wasted the time and resources of respondents."

Here, in assessing whether the subject conduct qualifies as "egregious," the circumstances fall somewhere between those in *Neumaier* and those in *Witt*. In this case, unlike *Neumaier*, there is a history of delay, a failure to respond at all to a

Commission deadline for opposing the motion to dismiss for failure of prosecution, and inconsistent explanations offered for missing the June 6, 2001, conference call. Unlike *Witt,* the present case involves not only delay and failure to respond to a Commission directive but also a record of delay in pursuing this matter. However, it should also be noted that, in the present case, the length of the delays attributable to complainant's conduct were not as significant, nor the failure to timely respond to a Commission directive as numerous or as flagrant, as in *Witt.*

On balance, given that complainant did not provide any plausible reason for her failure to appear at the scheduled prehearing conference, that she did not timely respond to the Commission's directive to explain her failure to appear, that she offered inconsistent reasons for her failure to appear, and that her previous conduct precipitated delays in proceeding with this case, it is concluded that complainant's conduct is more closely comparable to that exhibited by the petitioners in *Witt,* than to that exhibited by the complainant in *Neumaier,* and is sufficiently egregious to support dismissal of this case.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. This case should be dismissed for failure of prosecution.

ORDER

Respondent's motion is granted and this case is dismissed for failure of prosecution.

Dated: September 21, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:990009Crul1.1

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, 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