

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALLEN BEDYNEK-STUMM, Appellant,

vs.

Secretary, DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 1
No. 62942
PA(sel)-7

Decision No. 31332-A

Appearances:

Allen Bedynek-Stumm, P. O. Box 44771, Madison, WI 53744, appearing on his own behalf.

John R. Sweeney, Assistant Attorney General, Department of Justice, P. O. Box 7857, Madison, WI 53707-7857, appearing on behalf of the Department of Workforce Development.

FINAL RULING

On May 16, 2005, the designated Hearing Examiner, Susan J. M. Bauman, issued an Order to Show Cause why this matter should not be dismissed for lack of prosecution. Appellant filed a written response on May 26, 2005, and the final submission from the parties was filed on May 27th although it was not due until June 13, 2005. Appellant's response included a request that Examiner Bauman recuse herself "from this & other case-matters assigned her."

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. At all times relevant to this matter, the only means available to the Commission to contact Allen Bedynek-Stumm, the Appellant, has been by mail sent to his post office box. He has never provided the Commission with a home address, a telephone number or an e-mail address.¹

¹ Bedynek-Stumm states he has no telephone.

2. This case arises from the decision of the Department of Workforce Development (DWD) not to hire Bedynek-Stumm to fill an ESA-3 position. Bedynek-Stumm filed his appeal on June 14, 2001 and simultaneously filed a complaint of discrimination/retaliation alleging the decision violated the Wisconsin Fair Employment Act (WFEA), Subch. II, Ch. 111, Stats. The parties agreed to hold the appeal in abeyance during the investigation of the WFEA claims. After the investigation was completed, the parties participated in a prehearing conference in which they agreed to the following statement of issue in this appeal:

Whether Respondent's decision not to hire the [Appellant] for the Employment Security Assistant 3-Claims Specialist position as described in a rejection letter dated June 4, 2001, was either illegal or an abuse of discretion.

3. In January 2004, the parties agreed to hold the appeal in abeyance pending the outcome of a hearing on the merits of Bedynek-Stumm's WFEA claims. That action was dismissed on October 18, 2004 when the administrative law judge found that Bedynek-Stumm had failed to establish a violation of the WFEA.

4. Hearing Examiner Bauman conducted a conference with the parties on January 4, 2005, at which time the parties agreed to a hearing on May 26, 2005. The conference report also included the following:

Respondent requested clarification as to the nature of the illegal actions Appellant contended, as well as more specificity as to the abuse of discretion claimed. Appellant requested additional time to provide that information. Accordingly, another **Prehearing conference** has been scheduled for April 7, 2005, at 10:00 a.m. Mr. Bedynek-Stumm will telephone the undersigned at 266-3297, whereupon Mr. Sweeney will be reached at 264-9457. (Emphasis in original.)

5. Mr. Bedynek-Stumm failed to contact the Examiner as directed so the Examiner issued a letter dated April 8 that reiterated the May 26 hearing date and included the following:

As the additional prehearing conference was to be held to enable Appellant to clearly identify the nature of the illegal actions and abuses of discretion he contends were committed in the decision of the Respondent to not hire him . . . , I am hereby directing the Appellant to advise Respondent's attorney, in writing with a copy to me, by no later than April 18, 2005, as to the specific bases for his claims of illegal actions and abuses of discretion

6. Mr. Bedynek-Stumm left a voice message for Examiner Bauman on April 18th stating he had misplaced his file for the appeal and requesting a 60-day postponement of the hearing.

7. By letter dated May 4, 2005, the Examiner informed the parties that a prehearing would be held by telephone at 10:00 a.m. on May 12, 2005 to set a new hearing date and a date by which Bedynek-Stumm would detail his allegations of illegality and abuse of discretion. Bedynek-Stumm was again directed to telephone the Examiner to initiate the May 12th conference so that the Examiner could add DWD's representative to the conference call.

8. Mr. Bedynek-Stumm again failed to contact Examiner Bauman for the scheduled conference.

9. On May 16, 2005, Examiner Bauman ordered Bedynek-Stumm "to show cause by no later than May 26, 2005, as to why this matter should not be dismissed for lack of prosecution" and advised him that he had the "burden to demonstrate good cause as to why the matter should not be dismissed."

10. Also on May 16th, the Commission received an undated letter from Bedynek-Stumm that included the following:

The brief notice re: a teleconference scheduled for 12 April [sic] 2005 prevents participation because of a scheduling conflict.

In the alternative may I present a workable Hearing, and other matters; schedule for actions specific to the referenced case & the office of John Sweeney [counsel for Respondent]?

A Hearing scheduled for October, i.e., mid-month; 2005 for the case, with responses material to the issues of abuses of discretion & illegal actions, available within the prior two weeks before the Hearing. . . .

Please insert a copy of this ltr for J. Sweeney w/ your reply. . .I lack sufficient funds to postage this matter

Bedynek-Stumm went on indicate that a conference was "premature" and while Respondent could exercise its right to discovery, he did not expect to be able to respond until the last two weeks of September, thereby providing Respondent's witnesses with "at least two weeks in October to revise the schedules, appearances, they may have." The inside address on the letter read "Susan Baumann, WERC, 18 S. Thorton [sic] Ave, Madison Wi 53707." The Commission's correct mailing address is P.O. Box 7870, Madison, Wisconsin 53707-7870. The Commission's street address is 18 South Thornton Avenue, Madison, Wisconsin 53703.

11. The Commission received Bedynek-Stumm's response to the Order to Show Cause on May 26, 2005. The response included a notation suggesting he had mailed the letter referenced in Finding 10 on May 9, 2005, in advance of the conference scheduled for May 12th.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Appellant is the party with both the burden of proof and the burden of proceeding in this matter. LAWRY V. DP, CASE NO. 79-26-PC (PERS. COMM. 7/31/79).

2. Appellant has failed to prosecute this matter, his conduct is egregious, he has failed to supply an adequate excuse for his conduct and the matter must be dismissed.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

This matter is dismissed for a failure of prosecution.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Parties:

Allen Bedynek-Stumm
P.O. Box 44771
Madison, WI 53744

Roberta Gassman, Secretary
Department of Workforce Development
P. O. Box 7946
Madison, WI 53707-7946

Department of Workforce Development (Bedynek-Stumm)

MEMORANDUM ACCOMPANYING DISMISSAL FOR LACK OF PROSECUTION

Request to Recuse

As part of his response to the examiner's Order to Show Cause, Mr. Bedynek-Stumm has requested recusal of the examiner, Commissioner Bauman:

After careful, & case-historical; contemplation, the appellant has formed a rational, & reasoned belief, that he will not receive fair, & equitable; treatment within the examiner's decisions, & requires that she recuse herself from this, & other case-matters assigned her.

Bedynek-Stumm bases his request on an example of what he terms "egregious victimizations" of his rights. His sole example relates to a conclusion reached by Commissioner Bauman in her role as the designated hearing examiner in another appeal that is pending before the Commission, BOARD ON AGING AND LONG TERM CARE (BEDYNEK-STUMM) , CASE 1 No. 62940 PA-5. Appellant argues:

A case in point re: another matter reported untruthful testimonies by respondents, which was distorted to reflect upon allegations of appellant's misinterpretations of written-data recorded at time of utterances by respondents, which then yielded adverse actions against the appellant.

Appellant's argument relates to how Commissioner Bauman chose to weigh evidence of record in the other matter. He disagrees with the Commissioner's conclusion but has failed to show any bias. BORWNLEE V. STATE PUBLIC DEFENDER, CASE NO. 83-0107-PC-ER (PERS. COMM. 12/6/85) (Complainant's motion to disqualify a commissioner from participating in rendering the final decision of the Commission was denied where the complainant had contended the commissioner, who had presided at the hearing and prepared a proposed decision and order favorable to the respondent, was therefore prejudiced.) Therefore, the Commission denies the recusal request.

Lack of prosecution

The second topic before the Commission arises from the examiner's order to show cause why the matter should not be dismissed for lack of prosecution. The Commission applies the following standard in its analysis:

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. RUIPER V. DOC, 98-0155-PC-ER (PERS. COMM. 4/7/99), CITING JOHNSON V. ALLIS CHALMERS CORP., 162 WIS. 2D 261, 470 N.W.2D 859 (1991).

BEDYNEK-STUMM V. DOT, CASE NOS. 98-0168-PC, 98-0213-PC-ER (PERS. COMM. 7/10/02).

Mr. Bedynek-Stumm filed the present appeal, arising from the decision not to select him for a vacant position, in June 2001. For most of the subsequent four years, the parties have agreed to hold the appeal in abeyance pending resolution of Bedynek-Stumm's claims of discrimination/retaliation that he filed under Wisconsin's Fair Employment Act and that arise from the same selection decision. The WFEA matter was dismissed on the merits by the Equal Rights Division of the Department of Workforce Development in October 2004 after an administrative hearing.

Since then, Bedynek-Stumm has engaged in various conduct that was referenced in the Order to Show Cause. He failed to attend a prehearing conference that had been scheduled for April 7, 2005. After the examiner had written to direct him to more specifically explain the bases for his claim that the selection decision was illegal and an abuse of discretion, Bedynek-Stumm left a voice message for the examiner on April 18, stating he (Bedynek-Stumm) had misplaced his file and requesting a 60-day postponement of the hearing that had been scheduled for May 26. When the examiner scheduled another conference, on May 12th, to address Appellant's postponement request and to clarify the allegations underlying his appeal, he again failed to appear. Four days later, the Commission received a letter from him stating he had a "scheduling conflict" with the May 12th conference. His letter proposed a 5-month delay in the hearing date and stated he would be unable to respond to any discovery request for 4½ months. He also noted that the May 12th conference would have been "premature."

The Appellant has filed at least 10 separate administrative actions relating to employment with the State of Wisconsin.² The Commission reviews the Appellant's actions in the present matter in the context of the ruling on a motion to dismiss for lack of prosecution in BEDYNEK-STUMM V. DOT, CASE NOS. 98-0168-PC, 98-0213-PC-ER (PERS. COMM. 7/10/02), which provided, in part:

² Cases processed by this agency include: No. 62940 (filed against the Bureau on Aging and Long Term Care); and No. 62941 (Department of Health and Family Services). Cases processed by the Personnel Commission, the agency that until July 2003 had the authority to review claims filed under Sec. 230.44(1)(d), Stats., include: No. 99-0186-PC-ER (Department of Public Instruction); Nos. 98-0168-PC and 98-0213-PC-ER (Department of Transportation); No. 03-0055-PC-ER (Bureau on Aging and Long Term Care); and Nos. 01-0022-PC-ER, 01-0097-PC-ER, 01-0012-PC (Department of Workforce Development).

Petitioner [Bedynek-Stumm] 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. Petitioner has raised this same contention in another case The circumstances in that case show that at least in that instance, he received correspondence from the Commission that he later 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. . . .
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
3. He never supplied a response to the examiner's June 19th questions

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 Sec. 227.50, Stats., and Sec. PC 4.04, Wis. Adm. Code. He failed to reply in writing as directed. He failed to send a copy of this May 14th correspondence to respondent, despite the Commission's administrative rule (Sec. 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. (Footnotes omitted, emphasis in original.)

The Commission recognizes that, as a general matter, a mere failure to participate in a pre-hearing conference is not egregious misconduct that will justify dismissal of an appeal. *YOUNG v. DOT*, CASE NO. 00-0025-PC-ER (PERS. COMM. 2/23/01); *BALELE v. DOR*, CASE NO. 98-0002-PC-ER (PERS. COMM. 2/24/99). For example, dismissal on the respondent's motion was not warranted in *NEUMAIER v. DHFS*, CASE NO. 98-0180-PC-ER (PERS. COMM. 11/4/98) even though the complainant in that matter "knew of the importance of appearing at the prehearing and had no good excuse for failing to appear." In that case, however, the complainant had telephoned the examiner three hours after the scheduled conference, explained her failure to appear and then appeared at a conference on the following day in an effort to informally resolve the respondent's motion to dismiss for lack of prosecution.

Nevertheless, the failure to appear at prehearing conferences may justify dismissal. *ROSS v. DER*, CASE NO. 94-0412-PC (PERS. COMM. 2/6/95) (appellant, who was hearing impaired, failed to appear for three pre-hearing conferences and special arrangements had been made to accommodate that appellant's disability).

In the present matter, Mr. Bedynek-Stumm failed to attend the April 7th conference and he has never advanced any justification for his conduct. The conference had been scheduled three months earlier. In the interim, the Appellant was to provide more specific information about the nature of his allegations in this matter. Because he had failed to provide the information during the intervening three months, the examiner directed Appellant to do so "no later than April 18th." Once again, Appellant did not comply. Instead, he left a voice mail message for the examiner on April 18th, stating he had lost the file and requesting a two-month postponement of the hearing that had previously been scheduled for May 26th. Appellant's use of voice mail to convey this information prevented the examiner from immediately initiating a conference call with both parties. Appellant also failed to provide notice to Respondent of his request.

Nevertheless, the examiner issued a letter to the parties on May 4th that scheduled another conference on May 12th. The topics were to be the Appellant's request to postpone the hearing and the outstanding directive that he provide specifics beyond the mere allegation that the non-selection decision was "illegal or an abuse of discretion." Once again, Appellant refused to participate in the conference. Instead, he sent a letter to the examiner stating that he had "a scheduling conflict." He has never clarified the nature of the conflict despite the fact that he was later informed that he had the burden to establish good cause why the case should not be dismissed. The letter did not reach the examiner before the May 12th conference, most likely due to Appellant's addressing error. Appellant wrote that an "October mid-month Hearing would serve everyone concerned" even though he was unaware of the Respondent's and the Commission's calendars. He said he would need until "around the last two weeks of September" to either reconstruct or locate his case file and he expected he would be unable to provide any clarification of his allegations until that time. If this schedule had been implemented, he would have had from early January until late September, i.e. nine months, to simply clarify the nature of his appeal, despite that fact he had litigated his WFEA claim arising from the same transaction and received a decision in that case late last year.

Given all these circumstances, the Commission believes the Appellant's conduct reflects an egregious failure to prosecute his claim and he has failed to supply an adequate excuse for his actions.

Dated at Madison, Wisconsin, this 10th day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner