STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

D. L.,[1] Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 51
No. 69581
PA(sel)-66

Decision No. 33131

Appearances:

D. L., appeared on her own behalf.

Joely Urdan, Associate Director and Senior University Legal Counsel, University of Wisconsin Milwaukee, Chapman Hall 380, P.O. Box 413, Milwaukee, WI 53201-0413, appearing on behalf of the University.

DECISION AND ORDER

This matter arises from the University of Wisconsin's decision to rule D. L. (Appellant) ineligible for veterans preference points as part of her effort to be employed as a University Services Associate 2. It was filed as an appeal of a "personnel action after certification which is related to the hiring process in the [State of Wisconsin] classified service." Sec. 230.44(1)(d), Stats. The parties agreed to the following statement of issue for hearing:

> Whether [Respondent's] decision that the Appellant was ineligible (due to not being a "veteran" as provided by statute) for the position of University Services Associate 2 was illegal or an abuse of discretion.

A hearing was scheduled to commence at 10:00 a.m. on August 11, 2010. When Appellant had not appeared by 10:30, the Respondent moved to dismiss. However, the Respondent also called a single witness and moved exhibits into evidence before the hearing concluded. Later

[1] The Commission has chosen to use initials, rather than the Appellant's entire name, in order to maintain the confidentiality of Appellant's service record. See Sec. VA 1.10, Wis. Adm. Code.

on August 11, as well as in subsequent written materials, the Appellant indicated she wished to pursue her appeal and asked that she be provided an opportunity to testify and otherwise present a case. The parties were provided an opportunity to file written argument relating to Respondent's motion and the final brief was received on August 23, 2010. Nevertheless, the Appellant continued to file materials relating to the merits of her case. The Commission received the Appellant's final submission on September 4, 2010. The examiner issued a proposed decision on September 28, 2010, and "objections with written arguments or with a request for oral argument" were due by October 28. Appellant, by letter received October 28, 2010, requested "a hearing or oral arguments to present [] supporting documentation" relating to a separate position she sought at the University of Wisconsin – La Crosse. In a letter received on November 4, 2010, Respondent opposed the request.

The Commission has denied the Appellant's request for oral argument or to reopen the hearing and has adopted the proposed decision in all material respects. Substantive modifications to the proposed decision are identified by footnotes. In reaching our conclusions in this matter, the Commission has not considered any of the materials submitted by the Appellant regarding the merits of her case that were received after the August 11 hearing was closed.

Being fully advised in the premises, the Commission makes the following

FINDINGS OF FACT

Facts relating to the Respondent's Motion to Dismiss

1. Appellant resides in Milwaukee.

2. In an email dated July 7, 2010, the parties were notified that the administrative hearing on the merits of the Appellant's appeal would commence at 10:00 a.m. on Wednesday, August 11, 2010 in Room 116 of the Milwaukee Sate Office Building at 819 North 6th Street in Milwaukee.

3. On approximately the same date, the Commission separately issued the parties a formal Notice of Hearing that included the same information.

4. The Examiner, counsel for the Respondent, and Respondent's sole witness all appeared for the hearing at the scheduled time and location. The Appellant did not.

5. The Examiner convened the hearing at approximately 10:30 a.m. and referenced the Appellant's absence. Respondent moved to dismiss, but proceeded to put on its case by offering previously exchanged exhibits and calling a previously identified witness, who proceeded to testify.

6. The hearing concluded at approximately 10:50 a.m., after Respondent's closing argument. The Appellant still had not appeared.

7. The Appellant did not contact the Hearing Examiner, the Commission, or the Respondent regarding her absence until she telephoned and left a voice mail message for Respondent's counsel at 11:37 a.m. on August 11. In her message, the Appellant indicated she was trying to find the hearing location.

8. In a written statement dated August 18, 2010, the Appellant explained her absence. Her explanation included the following:

> I did not attend the hearing on Wednesday due to traveling to Madison, WI for a job fair with Aldi's from 6-10am and 2-6pm. I did not realize that the drive to Madison was 1½ hours to and from Milwaukee, WI. I did not have Ms. Urdan [Respondent counsel's] or Mr. Stege's [the Examiner's] phone numbers saved in my cell phone. My cell phone is a pre-paid cell phone and I have had issues with my cell phone due to my financial situation, power shortages, and a new number. However, I did have the documents and exhibits in my car which Ms. Urdan sent by mail. Ms. Urdan's phone number was noted in the documents which upon my return to Milwaukee, WI – I contacted Ms. Urdan at 11:30am.

Facts relating to Merits

9. In January 2010, the Appellant submitted application materials for the position of University Services Associate 2 in the Department of Curriculum and Instruction within the School of Education at the University of Wisconsin-Milwaukee.

10. She claimed she was a "veteran" for purposes of receiving Veterans Preference Points. Status as a veteran would have augmented Appellant's exam grade by ten points.

11. By letter dated February 3, 2010, and after considering materials submitted by the Appellant relating to her military record, Respondent notified the Appellant that she was "ineligible for Veterans Preference Points" for the position and, as a consequence, that her exam score was not high enough to be considered for the vacant University Services Associate 2 vacancy in question.

12. Appellant's "Certificate of Release or Discharge from Active Duty" (typically referred to as a DD214), indicates a period of military service from September 11, 1989 until October 18, 1989. Both her "character of service" and her "type of separation" are listed as "Entry Level Separation". The "narrative reason for separation" is: "Erroneous Enl[istment] – when it is determined a woman Marine was pregnant at the time of enlistment and did not know she was pregnant."

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

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to Sec. 230.44(1)(d), Stats.

2. The Appellant had the burden to establish that the Respondent's decision to deny her eligibility for Veterans Preference Points was illegal or an abuse of discretion.

3. There was no good cause for Appellant's failure to appear at the August 11, 2010 hearing.

4. The Appellant has failed to provide sufficient basis for the Commission to either grant oral argument or reopen the hearing.

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

ORDER[2]

Appellant's request for oral argument or to reopen the hearing is denied, Respondent's motion to dismiss for failure to appear at hearing is granted, and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/
Terrance L. Craney, Commissioner

[2] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

University of Wisconsin (D. L.)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Motion to dismiss

The Respondent has moved to dismiss this appeal because the Appellant failed to appear at the hearing scheduled for 10:00 a.m. on August 11, 2010, at the Milwaukee State Office Building.

Pursuant to Sec. PC 5.03(8)(a), Wis. Adm. Code:

> 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.

This appeal arises under Sec. 230.44(1)(d), Stats., and the Appellant had the burden to establish that Respondent's action was either illegal or an abuse of discretion. LAWRY V. DP, CASE NO. 79-26-PC (PERS. COMM. 7/31/1979) (With the exception of appeals of disciplinary matters, the burden of proof as to all issues, including jurisdiction, is on the party seeking relief.)

As reflected in the Commission's administrative rule, the standard for considering the motion is whether there was "good cause" for the Appellant's failure to appear at the hearing. Precedent in this area is not extensive, and the cases are highly fact-specific. One example is SALAZAR V. DHSS, CASE NO. 84-0038-PC (PERS. COMM. 6/27/1984). The appellant in that matter failed to contact the Commission to advise that he would not be appearing and failed to file copies of exhibits prior to the scheduled hearing. The examiner called the appellant at his workplace 15 minutes after the hearing was scheduled to begin. He answered the phone, said he was just looking up the examiner's number and said that he had not appeared because of a "crisis in the office" that morning. In subsequent correspondence he stated he had been needed in his office in order to act as a legal guardian for two students, one of whom was having chest pains and another who cut her foot. According to the appellant, both needed medical services and the appellant's authorization in order to obtain those services. The Commission concluded that even if the appellant "could not leave his work site because of office emergencies that only he could handle, he obviously had access to a phone." The appeal was dismissed due to the absence of "good cause" for the appellant's failure to appear at hearing.[3]

[3] Other cases confirm that "good cause" is more than a mere excuse. In COFFEY V. DHSS, CASE NO. 95-0076-PC-ER (PERS. COMM. 7/16/1997), the matter was dismissed for lack of prosecution where the only notice of the complainant's failure to appear at the scheduled hearing was a message from his wife on the answering machine of his employer and a call to the agency attorney. The latter call was made after the attorney had already left for

In the present case, it is undisputed that the Appellant had been notified, at least twice, that the hearing on her appeal from Respondent's decision to deny her eligibility for Veterans Preference Points was to commence at 10:00 a.m. on Wednesday, August 11, 2010, in the Milwaukee State Office Building. Appellant lived in Milwaukee. During the week preceding the hearing, she sent several emails to the Examiner relating to her preparation for the hearing.

The Appellant explained her absence from the hearing in an affidavit which included the following statement:

> I did not attend the hearing on Wednesday due to traveling to Madison, WI for a job fair with Aldi's from 6-10am and 2-6pm. I did not realize that the drive to Madison was 1½ hours to and from Milwaukee, WI. I did not have Ms. Urdan [Respondent counsel's] or Mr. Stege's [the Examiner's] phone numbers saved in my cell phone. My cell phone is a pre-paid cell phone and I have had issues with my cell phone due to my financial situation, power shortages, and a new number. However, I did have the documents and exhibits in my car which Ms. Urdan sent by mail. Ms. Urdan's phone number was noted in the documents which upon my return to Milwaukee, WI – I contacted Ms. Urdan at 11:30am.

Elsewhere in her affidavit, the Appellant stated that she has been under-employed in a part-time hourly position, suggested that she was receiving unemployment compensation, and stated that she had to complete two job searches per week in order to continue to receive that benefit.

Appellant suggests she drove to Madison in an effort to improve her employment situation and to continue to qualify for unemployment compensation. While these are laudable goals, she was not compelled to leave Milwaukee on August 11th because of her health or because of some other true emergency. She also admits that the "job fair" continued until 6:00 p.m. that day, a full eight hours after the Milwaukee hearing was scheduled to begin. There is no reason to believe that Appellant could not attend the hearing at 10:00 a.m. and still reach Madison well before the job fair ended.

The Appellant also made no effort to contact the opposing party or the Commission until 90 minutes *after* the hearing was scheduled to begin. She contends she did not know it would take 90 minutes for one-way travel between Milwaukee and Madison. However, as she

---

the hearing. Coffey failed to submit any documentation that his absence at hearing was in fact due to a claimed "ulcerative colitis flare-up." In ALLEN v. DNR & DP, CASE NO. 83-0045-PC (PERS. COMM. 8/17/1983), the Commission denied the appellant's request for a continuance and dismissed the appeal for lack of prosecution where appellant failed to submit any exhibits or additional names of witnesses, failed to contact opposing counsel to request a continuance as advised by the hearing examiner and failed to appear on the scheduled date of hearing. In a third case, SHULTIS v. DHSS & DP, CASE NO. 81-79-PC (PERS. COMM. 3/17/1983), the appellant's request for a continuance was denied and respondents' motion to dismiss was granted where the case had been postponed previously, where appellant failed to submit exhibits, and where even though the Commission was advised that appellant's representative was ill, evidence showed the representative worked a regular work day at his place of employment on the scheduled date of the hearing and there was no showing that he was, in fact, ill.

was traveling away from Milwaukee, she must have realized how long it would take for her to return. Appellant's reference to "issues" with her cell phone is insufficiently specific to justify her failure to call the Commission or the Respondent's representative, to delay her departure, or to otherwise get word to the Examiner. Appellant's affidavit and her emails to the Examiner also indicate she was unprepared for the hearing. The only materials she had with her on the way from Milwaukee (via Madison) to the hearing in Milwaukee were the Respondent's proposed exhibits. She had not arranged for any witnesses to appear. She had earlier indicated her only exhibits would be several that Respondent had already submitted.

We conclude that Appellant's journey to a job fair in Madison does not serve as "good cause" for her failure to appear at the administrative hearing relating to the merits of her State civil service claim.

Appellant's conduct after she failed to appear at the hearing continued to reflect a carefree attitude towards her appeal. Later on August 11, after the Hearing Examiner had been able to telephone the Appellant and she indicated she wished to pursue her appeal, the Examiner scheduled a phone conference with the parties at 3:30 p.m. on Thursday, August 12, after confirming with them that they would be available at that time. At 3:12 p.m. on August 12, the Appellant emailed the Examiner with the following message:

> I am currently at training until 5pm. I originally thought it was done at 1130am. Let[']s do Friday from 11-3pm. Thanks.

In light of the Appellant's last-minute request, the telephone conference was rescheduled for 11:00 a.m. on Friday, August 13, after both parties again confirmed they would be available at that time.

The examiner was unable to reach the Appellant via telephone at either 11:00 or 11:05 on Friday. The Appellant finally called the Examiner at 11:11 and the conference proceeded at that time. Appellant again indicated that she wished to pursue her appeal. At that point the Examiner directed her to prepare an affidavit, sworn to before a notary public, setting forth the reasons for her actions over the course of the previous several days.

The Appellant's actions of cancelling the August 12th telephone conference, unilaterally and at the last minute, and being late for the August 13th conference confirm that she assigned inadequate significance to her responsibilities as a party to this legal matter, one that she had initiated. Even after she failed to appear at August 11th hearing, Appellant did not accept, to a sufficient degree, the burden of pursuing her appeal.[4]

Even though the Commission grants the Respondent's motion to dismiss for failure to appear, we will, in *dicta*, address the question of the appropriateness of the Respondent's eligibility decision, based solely on the evidence presented on August 11.

---

[4] The Commission has modified this paragraph in the proposed decision to more clearly explain the Appellant's continuing responsibility to pursue her appeal.

Merits

Were the Commission to reach the merits of the appeal, it is clear the Respondent's decision finding the Appellant ineligible for veterans preference points would be affirmed.

Veterans preference points are a statutory method for adding qualifying veterans to the list of certified candidates from which a State civil service appointment is made. As provided in Sec. 230.25(1m):

> After certifying names under sub. (1) [from the head of the examination register], additional names shall be certified in rank order of whose who with the combination of veterans preference points awarded under s. 230.16(7) and examination score earn a total score equal to or higher than the lowest score of those certified on the basis of examination only.

Appellant claimed eligibility for ten preference points pursuant to Sec. 230.16(7)(a), Stats. The definition of veteran, for the purpose of the case before us, is found in Sec. 230.03(14), Stats.:[5]

> (14) Except as provided in s. 230.16(7m), veteran means any of the following:
> (a) A person who served on active duty under honorable conditions in the U.S. armed forces and who was entitled to receive any of the following:
> 1. The armed forces expeditionary medal . . . .
> 2. The Vietnam service medal . . . .
> 3. The navy expeditionary medal.
> 4. The marine corps expeditionary medal.
> (b) A person who served on active duty under honorable conditions in the U.S. armed forces in a crisis zone . . . .
> (c) A person who served on active duty under honorable conditions in the U.S. armed forces for at least one day during a war period. . . .
> (d) A person who served on active duty under honorable conditions in the U.S. armed forces for 2 continuous years or more or the full period of the person's initial service obligation, whichever is less. A person discharged from the U.S. armed forces for reasons of hardship or a service-connected disability or a person released due to reduction in the U.S. armed forces prior to the completion of the required period of service shall also be considered a "veteran", regardless of the actual time served.

---

[5] At least at one point after filing her appeal, the Appellant asserted that she qualifies as a veteran under Sec. 230.16(7m), Stats. That subsection uses an entirely separate definition of "veteran" when allowing persons *released from the armed forces within the previous 45 days* to submit what would otherwise be a late application for vacant positions in the State civil service. The subsection has no application to the veterans preference points benefit established in subsection (7), which is a separate subsection of Sec. 230.16, Stats., from (7m). \

The Appellant's "Certificate of Release or Discharge from Active Duty" (typically referred to as a DD214), indicates she served in the U.S. armed forces from September 11, 1989 until October 18, 1989. Both her "character of service" and her "type of separation" are listed as "Entry Level Separation". The form further explains the separation as: "Erroneous Enl[istment] – when it is determined a woman Marine was pregnant at the time of enlistment and did not know she was pregnant."

The "Veterans Preference Supplement to the Application for State Employment" includes information describing the periods of active duty that satisfy the terms of Sec. 230.03(14)(a), (b), and (c), Stats. The Appellant's service period between September 11 and October 18 of 1989, does not fall within any of the numerous war periods or military campaigns listed on the form. Appellant's DD214 also does not show the character of her service to have been "under honorable conditions" or that she was discharged due to hardship, "service-connected disability", or a reduction in force as required by Sec. 230.03(14)(d), Stats.6 Therefore, she does not meet any of the requirements to be a "veteran" for purposes of Sec. 230.16(7)(a), Stats.

The record shows Appellant does not satisfy the applicable standard for "veteran", so there is nothing to suggest that the Respondent's decision finding the Appellant ineligible for veterans preference points was either illegal or an abuse of discretion.

Request for oral argument or to reopen the hearing

After the proposed decision was issued in this matter and within the period for filing objections pursuant to Sec. 227.47(1), Stats., the Appellant submitted a half-page document that included the following:

> I object to my case being dismissed without review of my supporting documentation sent to WERC on August 23, 2010. On August 13, [d]uring a phone conversation – upon specific request as noted in an email by Mr. Stege to prepare and submit an affidavit and to send supporting documentation for the case by August 18. . . . Per the conversation, my impressions and thinking was that another hearing date would be scheduled for me to present my side of the case. . . .
>
> I request a hearing or oral arguments to present the supporting documentation . . . .

Oral argument is distinct from an evidentiary hearing, and does not provide an opportunity to present evidence. Although the Appellant may have understood the hearing would be reopened so she could present her case, the examiner's August 13th email directed her to submit "your

[6] In addition, Appellant's DD214 indicates she did not serve for "2 continuous years" or serve her "initial service obligation."

affidavit and *any accompanying arguments* you may have" by August 18.[7] The previous paragraph in the email summarized the parties' dispute at that time as follows:

> Respondents indicated that they were pursuing their motion to dismiss, including for a lack of prosecution, and were objecting to any reconvening of the hearing. Appellant indicated she wanted to pursue her appeal.

The examiner's message made no mention of "supporting documentation" relating to the merits of the appeal. The documents and arguments not related to the Respondent's motion were inappropriate and were not considered in that regard.

Appellant's opportunity to present her case on the merits was at the hearing on August 11. She failed to appear on that date and she did not have an adequate cause for that failure, so her appeal is dismissed.

Dated at Madison, Wisconsin this 17th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/
Terrance L. Craney, Commissioner

[7] The Appellant submitted her affidavit and "supporting materials" on August 18, 2010 rather than August 23 as suggested by a reference in her objections to the proposed decision. Her "supporting materials" included materials related to the question of her availability on August 11 and 12 as well as materials related to the merits of her appeal.