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"Until further direction is given me I will limit my activities greatly since I do not wish to in any way violate the work rules of the Department of Health and Social Services or the Division of Corrections.

"As soon as I receive the requested information, my Legal Counsel and I will get in touch with you and plan for the earliest possible date for rescheduling this prehearing."

By letter of June 22, 1977, the board's legal counsel informed the parties as follows:

"This will confirm that at the request of the appellant the prehearing conference scheduled for tomorrow has been postponed. It will be rescheduled when the appellant advises the board that he is ready to proceed."

By letter of August 1, 1977, counsel for respondent requested that an immediate prehearing conference be scheduled:

"Respondent Carballo requests immediate scheduling of a prehearing conference in this matter. If there are problems in preparing Mr. Basinas's case which would justify continued delay in scheduling a hearing, those problems could be discussed at the prehearing. If no such problems exist, and the board is continuing the matter indefinitely solely for the convenience of the Appellant, the Respondent would like an opportunity to apprise the Board of the damage such delay is causing this Department. A prehearing conference would therefore allow the Department and the Appellant to lay before the Board whatever competing equities may be involved in either expediting or delaying further action.

By letter of August 2, 1977, the board requested the appellant's response to respondent's request for an immediate prehearing. At the time the motion to dismiss was filed on September 26, 1977, appellant had not filed a response, although the board's file reflects that on August 17, 1977, the appellant told the board's secretary in response to her inquiry that he would respond in the "next couple days," and he also told her on August 26, 1977, that he would contact the board from his attorney's office to discuss scheduling of a hearing.

In response to the motion to dismiss, the appellant filed a letter dated October 11, 1977, to which respondent's counsel indicated in a letter dated October 14, 1977: "For the sole purpose of providing a factual basis for a

board decision on respondent's motion to dismiss, I am willing to stipulate to the information contained in Mr. Basinas's letter." Therefore, the factual allegations contained in appellant's letter of October 11, 1977, a copy of which is attached, are adopted and incorporated by reference as if fully set forth, for the limited purpose of deciding this motion. Briefly summarized, appellant cites the continuing failure of his supervisor to give him the requested advice concerning the amount of time he could spend on preparations for this appeal, the state employes strike and various problems encountered at the Oakhill institution which appellant supervises, which have required about 60 hours per week by the appellant. Appellant also indicates that his attorneys have been involved in study of the case.

CONCLUSIONS OF LAW

Section 227.07(5), Wis. Stats., provides in part: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default." (Emphasis supplied.) This board repeatedly over a number of years has exercised its power to dismiss cases for failure of prosecution, relying on this statute as well as its inherent powers to control the conduct of proceedings before it. See 73 C.J.S. Public Administrative Bodies and Procedure §129. Such determinations are committed to the sound discretion of the board. C.F., Zeis v. Fruehauf Corporation, 56 Wis. 2d 486, 202 N.W. 2d 486, 202 N.W. 2d 225 (1972).

In this case, the period between the delay of the original prehearing and the filing of this motion to dismiss was approximately three months. The prehearing had been scheduled for a date two weeks after the appeal was filed. While the appellant should have filed a substantive response to the board's letter

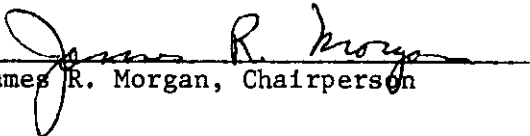
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of August 2, 1977, which requested a response to respondent's request for a prehearing conference, against the background of the problems appellant was facing on the job, the failure of his supervisor to clarify how much time he would be allowed to work on his appeal, and his consultation with various counsel, the delay in advising the board that he was ready to proceed with his appeal and his failure to file a substantive response to the board's letter cannot be concluded to amount to a failure of prosecution.

ORDER

Respondent's motion to dismiss is denied.

Dated: 11-15, 1977. STATE PERSONNEL BOARD


James R. Morgan, Chairperson