

* * * * *

ROBERT HANSON,
 Appellant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 92-0765-PC

* * * * *

*
*
*
*
*
*
*
*
*
*
*
*

RULING
 ON
 MOTION
 TO DISMISS

This matter is before the Commission on respondent's motion to dismiss appellant's appeal of its decision to terminate appellant's employment on July 23, 1992. The respondent claims the appellant has failed to prosecute this case "with adequate diligence."

BACKGROUND

Appellant's appeal from the termination of his employment was filed with the Commission by his attorney on August 21, 1992. On January 22, 1993, during the second prehearing conference, the parties set the issue and agreed to a hearing on June 16 and 17, 1993.

On June 8, 1993, during a telephone conference, appellant's attorney requested postponement of the scheduled hearing because appellant was ill and would not be able to proceed at that time. Counsel agreed to attempt to provide medical support for appellant's request, which was granted by the hearing examiner. Appellant failed to supply the supporting information. By letter dated June 29, 1993, the respondent restated its position taken at the conference, indicating that it was prepared to go to hearing as scheduled and that it was concerned about preserving evidence and about witnesses moving out of state.

The appeal remained dormant until February 23, 1995, when the Commission initiated and scheduled a status conference to be held March 14, 1995. At the conference, appellant's counsel said he did not know if appellant wanted to continue his appeal but would attempt to find out and report back at the next status conference, which was set for April 13, 1995.

On April 13, 1995, appellant's counsel informed the Commission and respondent that his office had failed to locate the appellant. Another status conference was scheduled for May 16, 1995. Again, at that conference appellant's counsel stated that his office had failed to locate the appellant. On May 31, 1995, respondent filed a motion for dismissal and appellant's counsel, as agreed, responded to it on June 12, 1995.

DISCUSSION

In requesting dismissal for lack of prosecution, respondent argues that it has been prejudicially affected by this delay; that, in fact, two potential witnesses are no longer employed by respondent; that appellant's failure to contact his counsel indicated his lack of interest in pursuing this appeal; and that appellant and his counsel have failed to demonstrate "diligence" in attempting to maintain contact. Respondent cites Wells-Patterson v. Sec. of State, 83-0049-PC-ER (5/3/84) and Wermuth v. DATCP, 82-PC-ER-47 (1/31/89) in support.

Alternatively, respondent makes two requests: that the Commission direct counsel for appellant to document his office's attempts to contact appellant and if "due diligence" is not shown dismiss the case; that if the Commission is unwilling to take any other action, then correspond directly with appellant at his last known address as provided under §111.39(3), Wis. Stats., and if there is no response, dismiss the case.

In rebuttal, appellant's counsel argues that his client's disability¹ is the cause of his office's loss of contact with him; that respondent cannot demonstrate any concrete injury suffered by this delay; and that his office has been diligent in attempting to keep contact with appellant and that it will comply with any order of the Commission to produce documentation verifying such attempts.

In Wermuth v. DATCP, Case No. 82-PC-ER-47 (1/31/89), the Commission recited three factors to consider in application of the discretionary power to dismiss a matter for lack of prosecution:

¹ In respondent's letter of termination, dated July 23, 1992, which was addressed to appellant's counsel, it refers to a Dr. Fullerton letter of August 26, 1991, indicating the appellant suffered from acute episodes of bi-polar affective disorder.

1) the duration of the delay, 2) the reason for the delay and any prejudicial effect on the adverse party "such as the death of or unexplained absence of material witnesses" Holliday v. Foster, 221 Pa Super 388, 292 A 2d 438 (1972). (footnote omitted)

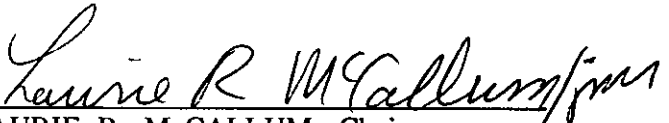
Also, the Commission said that prejudicial effect may be presumed from an unreasonable delay, and, even where good cause exists for delay, prejudice to the adverse party may be found and the case dismissed.

Here, there has been a two-year delay. Respondent alleges this delay prejudices his ability to preserve evidence and maintain witnesses. The Commission notes that this appeal arises from a discharge decision and that respondent has the burden of establishing, at hearing, that there was just cause for its decision. If this case was allowed to continue in its current status, there would inevitably be an adverse effect upon respondent's ability to sustain its burden. Respondent has stated "that already, two likely witnesses are no longer employed by the agency. Opposing counsel claims his office has not been able to maintain contact with appellant because of his disabilities. This claim is not buttressed by supporting medical documentation. Complainant has failed to supply any medical verification, even though appellant's counsel agreed to do so in 1993. Consequently, it could be just as readily concluded that appellant lost interest in this appeal and chose not to keep contact with counsel. The presumption of prejudice due to unreasonable delay remains and has not been successfully rebutted by appellant.

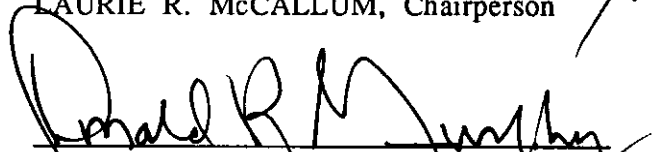
ORDER

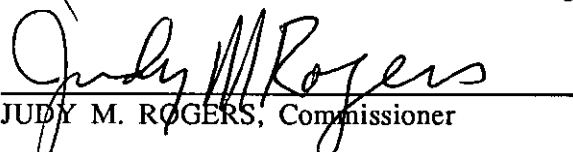
The Commission grants respondent's motion and this matter is dismissed for lack of prosecution.

Dated: August 4, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Robert Hanson
c/o Robert Gingras
131 W. Wilson St., Ste. 610
Madison, WI 53703

Joe Leann
Acting Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

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