

**RANDALL TETZNER,**  
*Complainant,*

v.

**State Public Defender, OFFICE OF THE  
STATE PUBLIC DEFENDER,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
MOTION TO  
DISMISS**

Case No. 94-0182-PC-ER

**NATURE OF THE CASE**

This case involves a complaint of race, color, creed, sex and arrest record discrimination, in violation of the Wisconsin Fair Employment Act (WFEA) Subchapter II, Ch. 111, Wis. Stats. Respondent has filed a motion to dismiss for failure to prosecute and both parties have filed briefs on the motion. The findings below appear to be undisputed and are made solely for the disposition of this motion.

**FINDINGS OF FACT**

1. Complainant, a Caucasian male, started working for respondent (SPD) as a Public Defender Investigator 2 in its Racine office on October 3, 1994.

2. The respondent terminated complainant's employment after learning that complainant had two criminal charges pending against him in Brown County Circuit Court for recklessly endangering safety while armed, stemming from an incident that occurred on July 9, 1994.

3. On December 12, 1994, complainant filed a complaint with the Commission against the SPD, alleging it had discriminated against him on the basis of race, color, creed, sex and arrest/conviction record in connection with his conditions of employment and subsequent termination.

4. In an Initial Determination, dated March 29, 1996, the Commission found "No Probable Cause" on all counts and complainant appealed that ruling to the Commission on April 29, 1996.

5. A prehearing was held on July 22, 1996, issues were established, and the case was scheduled for hearing on December 9 through 12, 1996.

6. In September 1996, three telephone conferences were held to sort out complainant's confusion regarding subpoenas, serving documents and other discovery matters.

7. During this same period, respondent filed objections to complainant's request for subpoenas to the entire staff in its Green Bay and Racine offices, and to complainant's first set of interrogatories.

8. On November 20, 1996, complainant filed a motion to postpone the scheduled December 9 hearing because he had not answered numerous discovery requests; and his criminal case in Brown County was scheduled for hearing about the same day.

9. During a conference held November 26, 1996, the hearing examiner granted postponement of the hearing, set a briefing schedule for respondent's objections to the interrogatories, and scheduled another conference on December 9, 1996.

10. The December 9, 1996, conference involved a discussion regarding complainant's listing the staff members in respondent's Green Bay and Racine offices as witnesses. The examiner reduced the number of complainant's list of potential witnesses to eight, based on determining (after considerable discussion) their testimony would meet the test of being relevant, material and not unduly repetitious. No hearing date could be determined. The examiner advised complainant that appearance letters would be issued to qualified potential witnesses upon receipt from him of their addresses and after scheduling a date for hearing.

11. Complainant failed to file a brief in response to discovery objections raised by respondent by January 2, 1997, as he had agreed, or any time afterwards.

12. Complainant failed to provide the Commission with addresses of his potential witnesses, as instructed during the December 9, 1996, conference.

13. Complainant failed to promptly notify the Commission of his change of address as required under S. PC 1.03(1), Wis. Adm. Code.

14. Complainant failed to provide the Commission with alternative dates for hearing or express a readiness to prosecute his claim as he had been instructed to do at the December 9<sup>th</sup> conference.

15. Complainant did nothing to advance his claim during a fourteen month period, until he wrote the Commission on February 25, 1998, opposing respondent's motion to dismiss.

### OPINION

In support of its motion, respondent offers two arguments for dismissal of this action for lack of prosecution. First, that complainant took no action to prosecute his case during the six months preceding his incarceration—from December 9, 1996, to June 6, 1997; and second, that, since his incarceration, complainant failed to meet his obligations to inform the Commission of his whereabouts and continue litigating this complaint. Respondent asserts that Wisconsin correctional institutional policies regarding mail and telephone calls did not preclude this activity.

Respondent argues that complainant's conviction for recklessly endangering safety while armed with a semi-automatic rifle, disqualifies complainant for reinstatement to his former position as an SPD investigator, therefore, since the Commission has no authority to award damages, and can only order reinstatement with back pay, this action is moot.

Complainant has been incarcerated at a state correctional facility since June 6, 1997, currently he is at Oakhill Correctional Institution.

In response, complainant provides no explanation for his failure to continue litigating his complaint during the six months preceding his incarceration. Instead, he argues that prior to moving to Oakhill on December 29, 1997, he was incarcerated at Dodge Correctional Institution and then at Jackson Correctional Institution, and at these institutions was thwarted in his attempts to call legal counsel and had limited access to a law library. Complainant argues that his legal files in Kansas City are unavailable to

him, he has no family to assist him, and suffers from delays in receiving and sending mail. Regarding the discovery dispute, complainant states he can only answer from memory as his files are not available, can't remember if he filed anything or not and only remembers that he was going to have a hearing.

Also, complainant argues that respondent "had the ability to know where (he) was and the obligation to inform the Commission" and there is a conflict of interest because he wrote State Public Defender Chiarkas a letter, intends to continue correspondence with him and his criminal case in the appellate court.

Complainant's conflict of interest argument is nonsensical. A private attorney is handling complainant's criminal appeal and his gratuitous letters to the SPD do not establish a conflict of interest. The SPD as the respondent in this action has a right to defend itself.

In two prior cases, the Commission identified three factors to consider when deliberating a dismissal for lack of prosecution: the duration of the delay, the reason for the delay and any prejudicial effect on the adverse party. *Wermuth v. DATCP*, 82-PC-ER-47, 1/31/89, *Hanson v. DHSS*, 92-0765-PC, 8/4/95. In *Hanson, id.*, the Commission also observed 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."

The record here is that complainant has failed to prosecute this case since December 9, 1996. His asserted excuses are that he's been incarcerated since June 1997, was thwarted in his attempts to gain legal counsel and was limited in many respects by his incarceration. While his multiple claims of impediments caused by imprisonment may be true he provides no explanation for his failure to continue processing his complaint during the six month period prior to incarceration. Nor does he explain why at any time thereafter he failed to advise the Commission of his circumstances and whereabouts or make any attempt to keep his complaint alive. Only now after well over one year has complainant shown any interest in pursuing this claim. The Commission believes this delay is unreasonable and demonstrates a lack of

diligence and interest on the part of the complainant. To allow this case to continue on its present track would result in a prejudicial effect on respondent.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant had the burden to show a justifiable excuse for not diligently prosecuting this claim.
3. Complainant has failed to meet this burden.
4. There is cause to dismiss this claim.

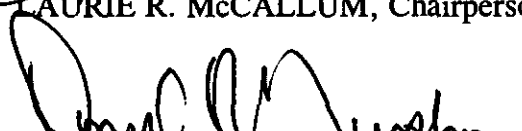
ORDER

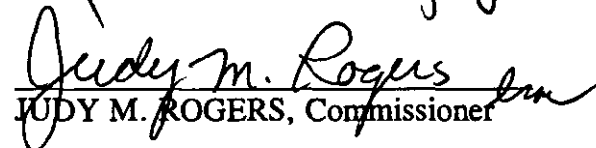
Respondent's motion is granted and this case is dismissed for lack of prosecution.

Dated: April 29, 1998. STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:rjb  
940182Cru1.2

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:  
Randal Tetzner  
Oakhill Correctional Institution  
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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