

STATE OF WISCONSIN

PERSONNEL COMMISSION

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DALE L. ROSS, *

Appellant, *

v. *

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, *

Respondent. *

Case No. 94-0412-PC *

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DECISION AND ORDER

On August 18, 1994, the Commission received Mr. Ross's appeal of a reallocation decision made by the Department of Employment Relations (DER) which affected the classification of his position. The Commission asked Mr. Ross to explain why his appeal should not be dismissed due to his failure to attend three prehearing conferences. His written reply was dated January 22, 1995, and was received by the Commission on January 25, 1995.

BACKGROUND

The Commission provided the parties with notice of the first-scheduled prehearing conference by letter dated September 27, 1994. The letter informed Mr. Ross that a Commission staff person would call him at a pre-arranged TDD telephone number at 11:00 a.m., Thursday, November 3, 1994. He did not contact the Commission to indicate a problem existed with the scheduled conference date, time or TDD number listed.

On October 31, 1994, DER sent Mr. Ross a letter to explain that DER would not appear at the prehearing. The letter provided information which DER would have given had it attended the prehearing.

A Commission hearing examiner was assigned to conduct the first prehearing. The hearing examiner called Mr. Ross at the pre-arranged time and TDD phone number but no one answered. She called the Waukesha office of the Department of Transportation (DOT) where he worked and explained the situation to a receptionist. The receptionist indicated he would look for Mr. Ross and have someone call the hearing examiner back. No one called her back. She tried the TDD number 20 minutes after the scheduled starting time, but again received no answer.

The hearing examiner sent Mr. Ross a letter on November 3, 1994, which summarized information contained in the prior paragraphs. The letter included the following statement:

I will assume that your failure to appear at the prehearing means you have decided to withdraw your case, unless I receive a written statement from you on or before 11/18/94. (Emphasis contained in original.)

The hearing examiner received Mr. Ross's reply on November 14, 1994. She was confused by the following sentence in his letter:

I believe that I would not win case because I never attend school of engineering at this point.

The hearing examiner wrote Mr. Ross a follow-up letter on November 14, 1994, in which she asked whether the the sentence shown above meant he wished to withdraw his appeal. She further wrote as follows:

Did you intend to withdraw your appeal by the above statement because you felt you would not win? I will assume this was your intended meaning, unless I receive a contrary written statement from you on or before 11/22/94. If you do not submit any statement, I will recommend dismissal of your case at the Commission meeting on 11/13/94, based on your decision to withdraw. (Emphasis contained in original.)

Mr. Ross did not reply by November 22, 1994. Accordingly, the Commission dismissed his appeal at its meeting the morning of November 23, 1994. After the meeting and before the dismissal order was mailed, Mr. Ross's reply letter was received by the hearing examiner. He stated in the reply letter: "Your work has been legal assistance to scare me." He also requested that his case be held in abeyance for 6 months. He further indicated: "I believe I would be facilitated to appear in person at your conference although I'm hearing impaired."

The hearing examiner was concerned at this point that Mr. Ross felt threatened by her letters. She also was concerned that the Commission's usual practice would be to deny his request for abeyance. She thought a less threatening way to proceed would be to ask the DOT affirmative action office

where Mr. Ross works to assist in scheduling the prehearing. She obtained permission from DER and DOT to proceed accordingly. At the hearing examiner's request, the Commission's prior meeting was reconvened and the dismissal of Mr. Ross's case was rescinded.

A second prehearing conference was scheduled for December 20, 1994, at the Commission's offices. Mr. Ross was notified twice, in writing (by "E" mail") of the scheduled prehearing. The first notice was sent on December 13, 1994, by J. P. Willowhawk of DOT's Affirmative Action Office. The second notice was sent on December 14, 1994, Deb Tribbey, Director of DOT's Waukesha office. Ms. Willowhawk also made arrangements for a sign language interpreter to be present.

Ms. Willowhawk appeared for the second prehearing on December 20, 1994. Mr. Ross did not appear. For some reason the interpreter also did not appear. The hearing examiner determined that a third prehearing would be scheduled due to the nonappearance of the interpreter which would likely would have caused the second prehearing to be rescheduled even if Mr. Ross had appeared. Before Ms. Willowhawk left the prehearing, she and the hearing examiner agreed the third prehearing would be held on January 20, 1995, at the Commission's office at 9:30 a.m. Ms. Willowhawk again agreed to make arrangements for an interpreter.

Ms. Willowhawk saw Mr. Ross on January 20, 1995, as she left the building after the prehearing conference. This was 35 minutes after the second prehearing conference was scheduled to start. She wrote the date, location and time of the third prehearing conference on a piece of paper and gave the same to Mr. Ross.

The hearing examiner telephoned Ms. Willowhawk on January 20, 1995, the morning of the third prehearing conference, to confirm that it would proceed as planned. Ms. Willowhawk checked her E-mail messages while the examiner was on the phone and found no message from Mr. Ross. The interpreter also contacted Ms. Willowhawk that morning to confirm the prehearing would proceed.

Everyone attended the third prehearing except Mr. Ross. The hearing examiner was present, as were Ms. Willowhawk and the interpreter. The hearing examiner and Ms. Willowhawk made calls to various people at DOT's Waukesha office to determine if Mr. Ross was just running late, or if he had

not even left work. Thirty minutes later, Ms. Willowhawk was informed that Mr. Ross had never left for the prehearing and claimed he did not know the meeting was scheduled. A suggestion was relayed from Waukesha that the hearing examiner, Ms. Willowhawk and the interpreter could go to a nearby building to see if a TDD in a different state agency would be available to call Mr. Ross and conduct the prehearing by phone. The hearing examiner declined for at least the following 3 reasons. First, it was Mr. Ross who requested the in-person meetings yet he failed to attend them and now wanted to go back to a telephone conference which he also had failed to attend in the first instance. Second, there was much time and resources expended by the Commission and Ms. Willowhawk to comply with Mr. Ross's request for an in-person meeting. Third, Mr. Ross's conduct evidenced a repeated pattern of being unwillingness to invest even a modest amount of his time to pursue his own appeal. Fourth, the examiner felt she had no reason to believe Mr. Ross's behavior would be different in the future.

The examiner wrote Mr. Ross a final letter on January 20, 1995. The above-noted events were summarized and Mr. Ross was given an opportunity to submit written reasons why his appeal should not be dismissed due to his failure to attend three prehearings. His written reply was received by the Commission on January 25, 1995, the text of which is shown below:

Today is Sunday to open a letter from you to find very unhappiness regarding the possibility of dismissal case. So I speedily write letter to you.

On last month of Dec. 20, I did seated earlier at a lobby of room #104 (wrong number room given) before conference was started at 9:00 but passed that time about one hour late so I walked out of your bldg. late to meet Ms. Willowhawk outside at entrance. Meanwhile she said in writting a note in person to me that it is rescheduled on January 20 at 9:30 in room #1004, but she would e-mail confirmation date to me at this point.

I don't like to get mental harmful by misunderstanding and would play it safe to get confirmation date simply by evidently either e-mail or letter.

Look forward to your reply.

DISCUSSION

Mr. Ross has never explained why he missed the first prehearing conference. He contends he had the incorrect room number for the second conference. However, the lobby of the building which houses the Commission

has a directory which a reasonable person would have consulted to obtain the correct room number. Furthermore, the Commission's correct address and room number are printed on the letterhead of each letter sent to Mr. Ross.

As to the third prehearing, Mr. Ross acknowledged that he received the meeting information in writing 30 days in advance of the scheduled meeting from Ms. Willowhawk. He said he understood she would confirm by E-mail. A reasonable person having received written notice of the meeting would have followed up on his own initiative if he had not received the expected E-mail confirmation from Ms. Willowhawk. For example, a reasonable person would have sent an E-mail message to Ms. Willowhawk at least a few days prior to the scheduled meeting to confirm that the meeting was still planned. This is especially true where, as here, the appellant already had missed two prehearings and, in fact, his case already had been dismissed once due to his failure to act in a timely fashion.

Mr. Ross is the person who initiated this appeal yet he has invested insufficient effort in ensuring his right to proceed. His failure to attend three *prehearing conferences under the circumstances described previously* is inexcusable. Accordingly, his appeal is dismissed for lack of prosecution.

ORDER

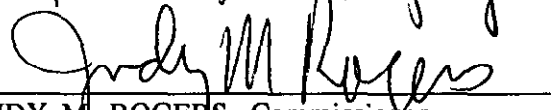
That this appeal be dismissed for lack of prosecution.

Dated February 6, 1995.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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 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.)