

STATE OF WISCONSIN

PERSONNEL COMMISSION

DENNIS A. ALLEN,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**

Respondent.

Case Nos. 95-0057, 0071, 0110, 0125-PC-ER;
96-0001, 0007-PC-ER

**FINAL DECISION
AND ORDER**

NATURE OF THE CASE

These cases were consolidated for hearing which was scheduled in the Outagamie County Court House in Appleton for August 4-7, 1998. The hearing proceeded on August 4th-6th, but complainant failed to appear on August 7th. Prior to the scheduled start of the hearing (8:30 a.m.) complainant sent a fax to the Commission's office in Madison which stated he was too sick to attend that day's hearing. Respondent then submitted a motion to dismiss for failure to prosecute, and both parties filed written arguments. The hearing examiner issued a proposed decision proposing dismissal, and the matter is now before the Commission on consideration of the proposed decision and objections thereto. After having considered these objections and having consulted with the hearing examiner, the Commission adopts the attached proposed decision and order as its final disposition of the matter, and adds the following observations.

As indicated in the proposed decision, the complainant has demonstrated a lack of good faith in his approach to the processing of this case at the hearing stage. For example, at the motion hearings held prior to the hearing, complainant responded to his failure to have submitted a witness list and copies of exhibits prior to the hearing pursuant to §PC 4.02, Wis. Adm. Code, by stating that he would rely on the respondent's exhibits and witnesses, and that he was assuming that all the material submitted in the course of the investigation would be considered part of the hearing record. It was

pointed out that the January 15, 1998, prehearing conference report explicitly advised, among other things, of the cutoff date for submitting copies of exhibits and names of witnesses, that the information submitted during the investigation was not considered part of the hearing file, and that the complainant needed to submit the documents he wished to rely on, and identify his witnesses prior to the hearing. Complainant responded to this that he had never received a copy of that prehearing conference report. (He also stated that he had received numerous unsealed, empty envelopes from the Commission.) The conference report in question shows that a copy was sent to complainant, and there is no indication that it was returned in the mail. Also, the conference report is mentioned several times in documents prepared by the Commission. For example, Commissioner Rogers' February 10, 1998, letter to the parties explicitly states as follows:

A deadline was established at the prehearing conference for Mr. Allen to submit documentation regarding his claim that certain discovery requests were not answered by respondent. The initial due date was by 4:30 p.m. on February 4, 1998 (*see p. 4, conference report dated January 15, 1998*). On February 5, 1998, I granted Mr. Allen's request for an extension of time, as noted in my letter ruling of the same date. . . . (emphasis added)

The Commission's February 25, 1998, ruling on statement of issues for hearing also mentions the prehearing conference report, as do a number of other documents. There is no indication that complainant ever raised any questions about his alleged non-receipt of the conference report until after he had failed to comply with the explicit instructions in that report.

Another example of complainant's approach to these proceedings is his assertion that he never received any response to his discovery requests. Yet in a letter dated July 22, 1998, complainant explicitly states: "In his recent set of interrogatories Novitski swears under oath that he kept no files on me" This contradiction appears to be in keeping with complainant's repeated assertions that he would deny receiving any

documents that were not sent registered mail—see, for example, complainant’s letter of June 4, 1998:

Based on the recent decision by the Personnel Commission¹ and their insistence of proof I hereby declare that I have never received any response or documents from DOC and Van de Grift in any and all of my cases. Likewise I have never received any documents or responses from the Personnel Commission who is involved in ex parte and illegal acts by Van de Grift and DOC. . . .

I will refuse to accept anything from now on unless it is sent registered mail. I am denying delivery of any document unless it was sent registered mail. . . .

The Commission has considered whether a lesser sanction than dismissal would be appropriate. However, the Commission lacks the authority to assess costs, *see Tatum v. LIRC*, 132 Wis. 2d 411, 392 N. W. 2d 840 (Ct. App. 1986), and the Commission does not perceive how any other sanction short of dismissal will adequately address complainant’s pattern of contumacious behavior.

¹ This apparently is a reference to the Commission’s May 26, 1998, ruling on a discovery dispute. Complainant had served discovery requests directly on DOC employees, rather than on the DOC attorney, as required by §PC 1.05(4), Wis. Adm. Code. Because of this the Commission denied complainant’s motion to compel discovery, but pointed out that complainant could re-serve the documents on respondent’s attorney.



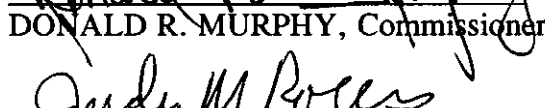
ORDER

The attached proposed decision and order is incorporated by reference as if fully set forth, and adopted as the Commission's final decision and order in this matter, and these complaints of discrimination are dismissed.

Dated: November 4, 1998.

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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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

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PROPOSED DECISION
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Respondent.

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NATURE OF THE CASE

These cases were consolidated for hearing which was scheduled in Appleton for August 4-7, 1998. The hearing proceeded on August 4th-6th, but complainant failed to appear on August 7th. Prior to the scheduled start of the hearing (8:30 a.m.) complainant sent a fax to the Commission's office in Madison which stated he was too sick to attend that day's hearing. Respondent subsequently submitted a motion to dismiss for failure to prosecute, and both parties have filed written arguments. The following findings are made solely for the purpose of addressing this motion.

FINDINGS OF FACT

1. The August 4-7, 1998, hearing dates were scheduled at a prehearing conference held on January 13, 1998.
2. The prehearing conference report dated January 15, 1998, included the following:

ADDITIONAL IMPORTANT INFORMATION:

1. The parties are reminded that pursuant to s. PC 4.02 and PC 6.02(2), Wis. Adm. Code, copies of exhibits and names of witnesses must be exchanged at least 3 working days before the day established for hearing, or will be subject to exclusion. **This means the information must be exchanged at or before 4:30 p. m. on July 30, 1998.** A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline. . . .

SPECIAL INFORMATION FOR COMPLAINANT

It has been the undersigned's experience that complainants who represent themselves frequently fail to understand the following procedural aspects of their case.

1. The information submitted by the parties to the investigator is maintained in a closed investigative file at the Commission. Such information is not included in the Commission's open hearing file. Accordingly, complainants must resubmit information which they wish to be considered at the hearing as a hearing exhibit, or through testimony of a properly disclosed witness.

2. On July 31, 1998, respondent filed a motion to dismiss on the grounds that complainant had neither filed nor served any witness list or copies of exhibits, and that he had missed various deadlines in the past. A telephonic hearing on this and other motions was convened on July 31st and continued to August 3rd. During the motion hearing, complainant stated he would rely on respondent's exhibits and witnesses, and thus did not intend to submit any of his own, with the exception that he wanted to call a Mrs. Kennedy as a witness. He also stated that he assumed all the information that had been submitted during the investigation could be used at the hearing. He denied having received a copy of the January 15, 1998, conference report, which is quoted above. Counsel for respondent contended that complainant must have received the conference report because he asked for and received an extension of his deadline for filing certain documents related to discovery, which deadline had been set forth in the conference report. At the close of the hearing, the hearing examiner granted respondent's motion to the extent of denying complainant the opportunity to call witnesses and present exhibits, based on complainant's failure to have served any documents or list of witnesses on respondent, despite having been explicitly advised of the necessity to have done so in the January 15, 1998, conference report. Over respondent's objection, the examiner ruled that complainant would be allowed to testify on his own behalf.

3. The hearing convened on August 4, 1998, and continued on August 5th and 6th. The examiner heard testimony from the complainant and several of respondent's witnesses.

4. On August 7th, respondent's counsel was present with some witnesses. Complainant did not appear but faxed a message to the Commission's office in Madison stating that he was unable to attend the hearing that date due to a case of diarrhea.

5. The hearing was adjourned and respondent's attorney served and filed another motion to dismiss for failure of prosecution.

6. Complainant was provided the opportunity to reply to the motion to dismiss. On August 17, 1998, the Commission received a letter from complainant that addressed a number of issues. His response to the motion to dismiss consists of the following: "The other issue is. As was clear from your unapproved tape recordings and from the hearing I was sick. I laid in bed all weekend running from the bed to the bathroom. There was no way I could have made it to the hearing." Complainant did not submit any medical documentation to corroborate his alleged illness.

CONCLUSIONS OF LAW

1. Complainant has failed to prosecute these matters.
2. These complaints should be dismissed.

OPINION

It is a severe sanction to dismiss a case for lack of prosecution. However, complainant's actions amount to egregious conduct, and in this case the sanction is warranted.

Notwithstanding complainant's failure to have followed the explicit instructions in the conference report with respect to submission of exhibits and names of witnesses, he has been allowed, over respondent's objection, to present his case through his own testimony. He was allowed considerable scope in cross-examining witnesses called by

respondent, and he referred to respondent's own documents during the course of the proceedings. In summary, complainant has been allowed a great deal of latitude in proceeding with these cases, and he has been given every reasonable opportunity to present his cases. However, complainant failed to appear at the fourth day of hearing, having faxed to the Commission's office that he was too sick to appear. Respondent immediately filed a motion to dismiss for failure of prosecution. Complainant has failed to provide any medical documentation that he was too ill to have attended the hearing on August 7, 1998. Complainant's credibility with respect to this proceeding has been severely debilitated. For example, throughout the course of the hearing of the first motion and the hearing on the merits conducted August 4-6, 1998, complainant insisted that he had never been served with a number of documents despite proof of service. He expressed lack of knowledge about whether it was his signature that appeared on documents. In the context of the absence of any medical documentation that complainant was too sick to have appeared on August 7, 1998, *see Coffey v. DHFS, 95-0076-PC-ER, 7/16/97*, dismissal is warranted.

ORDER

These cases are dismissed for failure of prosecution.

Dated: _____, 1998.

STATE PERSONNEL COMMISSION

AJT:950057Cdec1

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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