

STATE OF WISCONSIN

PERSONNEL COMMISSION

**MICAH A. ORIEDO,**  
*Complainant,*

v.

**Superintendent, DEPARTMENT OF  
PUBLIC INSTRUCTION,**  
*Respondent.*

**RULING ON  
COMPLAINANT'S  
PETITION FOR  
REHEARING**

Case No. 96-0124-PC-ER

This case is before the Commission on complainant's petition for rehearing regarding the Commission's ruling on respondent's motion to dismiss dated December 3, 1997 (hereafter, Prior Ruling), based on complainant's failure to appear at his scheduled hearing. A procedural summary is presented (in relevant part) in the following paragraphs.

Complainant initiated this action when he filed a complaint on September 24, 1996. He thereafter requested waiver of the investigation of his complaint to "proceed directly to the hearing on the merits" (see complainant's letter dated October 14, 1996). The Commission granted complainant's waiver request at its meeting on November 20, 1996, after which time the parties engaged in discovery. Several disputes arose over discovery requests which the Commission resolved by ruling dated February 27, 1997. A dispute arose over the proper parties to the litigation which the Commission resolved by ruling dated March 12, 1997. The parties disagreed as to the correct statement of hearing issues and this matter was resolved by Commission ruling dated October 8, 1997.

A prehearing conference was held on August 12, 1997, at which time complainant's request to delay hearing until April 1998, was rejected. (See complainant's letter dated August 19, 1997.) The following were established as hearing dates at the prehearing conference: November 24-26 and 28, 1997. (See Conference Report dated August 15, 1997.) The Conference Report included the following information (p. 2, item #3 under heading entitled: "Additional Important Information", with same emphasis as appears in the original document):

As provided in §PC 5.02, Wis. Adm. Code, a request to postpone a date for hearing will be granted only upon a showing of good cause. Postponement requests should be in writing, if possible, and the party making the request should indicate the reason for the request and

whether the opposing party agrees with the request. Generally speaking, the following reasons are not considered as good cause for granting a hearing postponement: a) waiting an unreasonable amount of time to request postponement after knowing that a reason exists to request the same, b) being unprepared for hearing, and [c] waiting until too close to the hearing date to initiate settlement negotiations or to seek representation.

On October 8, 1997, the Commission sent the parties notice that a hearing examiner had been assigned to conduct the hearing. By letters dated October 15 and 16, 1997, the examiner sent the parties letters containing instructions for hearing, including a reminder of the requirement to exchange witness lists and exhibits by 4:30 p.m. on November 19, 1997. Respondent complied with the exchange requirement on November 17, 1997.

On November 17, 1997, complainant filed a request for hearing postponement and such request was considered in a tape-recorded proceeding on November 19, 1997. The hearing examiner found that complainant had not shown good cause sufficient to grant the postponement request, as required by §5.02(1), Wis. Adm. Code. The ruling was memorialized by letter to the parties dated November 19, 1997.

Respondent appeared for hearing on November 24, 1997, with witnesses and the previously-exchanged exhibits. Complainant had not exchanged any exhibits or witness list. Complainant did not appear at the hearing and did not provide advance notice that he would not appear. Respondent moved for dismissal pursuant to §PC 5.03(8)(a), Wis. Adm. Code.

By letter dated November 24, 1997, complainant was provided an opportunity to submit a written explanation for his failure to appear at hearing. The content of the letter is shown below with emphasis as shown in the original document.

Respondent moved to dismiss your case at the hearing this morning because you did not appear. The pertinent administrative code provision is shown below:

PC 5.03 Conduct of hearings. . . . (8) Sanctions. (a) Unless good cause can be shown, any party who fails to appear at a hearing after due notice is deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made. If the absent party has the burden of proof, the commission shall consider a motion to dismiss by the parties present without requiring presentation of any evidence.

You were the party with the burden of proof in this proceeding and, accordingly respondent was not required to present any evidence today.

I will present respondent's motion to dismiss to the full Commission at its meeting on December 3, 1997. If you wish to submit an explanation as to why you did not appear and how such reason constitutes good cause for failing to appear within the meaning of §PC 5.03, Wis. Adm. Code, the Commission and opposing party must each receive your written materials by 4:30 p.m. on November 28, 1997.

Complainant did not file any written arguments by the established deadline of November 28<sup>th</sup>.

Complainant wrote a letter to the Commission dated December 2, 1997, and delivered on the same day stating, in pertinent part, as follows:

I am asking for an extension of time to respond to your letter of November 24, 1997 until December 19, 1997. The reason for this request is to allow me time to study and address the issue carefully. Please note that I am not an attorney and therefore I am not conversant with the various defenses which may be available to me for the proposed action.

The Commission by ruling dated December 3, 1997 (Prior Ruling), granted respondent's motion to dismiss for complainant's failure to appear at the hearing stating in the opinion section (pp. 2-3) as follows:

Complainant's request for an extension was not made until after November 28, 1997, the deadline established for his response. Further, the applicable administrative rule was provided for complainant's convenience in the Commission letter which provided him with an opportunity to explain why he failed to appear. His request for an extension having been raised for the first time after the due date of his response is denied.

Based on complainant's failure to show good cause for failing to appear at the scheduled, hearing, this case is dismissed.

It is this Prior Ruling which is the subject of complainant's petition for rehearing.

#### OPINION

Petitions for rehearing are governed by §227.49, Stats., which provides as follows:

- (3) Rehearing will be granted only on the basis of:

- (a) Some material error of law.
- (b) Some material error of fact.
- (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Complainant first claims that Commissioner Murphy showed bias against him at the prehearing conference (see pp. 3-5, complainant's arguments dated 12/18/97). The Commission does not agree with complainant's perceptions of the prehearing conference. In any event, Commissioner Murphy's involvement with this case ended with assignment of Commissioner Judy M. Rogers as hearing examiner. Furthermore, the nature of complainant's arguments about Commissioner Murphy do not meet the statutory requirements for establishing entitlement to a rehearing.

Complainant next argues that Commissioner Rogers erred in denying his request for hearing postponement. He contends Commissioner Rogers showed bias by providing respondent with an opportunity to respond to complainant's suggestion at the conference that the hearing be postponed until some time in 1998. It is the presiding official's responsibility to give each side an opportunity to reply to the issues raised. His allegation of bias is without merit and, further, is unrelated to the statutory requirements for establishing entitlement to a rehearing.

Complainant contends he did not have notice of the potential dismissal of his case and, accordingly, an error of law occurred, within the meaning of §227.49(1), Stats. This contention is absurd. The Commission's letter dated November 24, 1997, placed complainant on notice that a motion to dismiss was pending due to his failure to appear at the hearing. The letter recited the applicable law and provided a full and fair opportunity for complainant to explain why he did not appear at hearing. That he failed to respond to the opportunity provided by the timeline established by the Commission does not mean he was deprived of notice that the issue was pending or notice of the importance to file a timely response. The Commission further notes complainant has never explained why he did not meet the initial deadline established for stating his reasons why he did not appear at the hearing.

The complainant also contends (p. 5, arguments dated 12/18/97) that "(b)y November 17, 1997, Oriedo knew he could not handle his old and new duties and at the same time prepare for the hearing." The statement is incomplete. Complainant stated at oral arguments held on November 19, 1997, that he as recently as a month before the oral arguments thought he could handle preparing for hearing and his new duties "but a week later realized it was too much to handle." The point being that

according to his own testimony, he knew almost a full four weeks prior to his request for postponement that he felt he would not be able to prepare for hearing yet he continued to wait to request postponement. Even if this argument could be construed as an error of law it would be pertinent only to the ruling that he failed to show good cause for requesting hearing postponement, as opposed to an alleged error of law regarding the Commission's Prior Ruling which dismissed this case for failure to appear at the hearing.

ORDER

Complainant's petition for rehearing is denied.

Dated: January 14, 1998.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
JUDY M. ROGERS, Commissioner

JMR  
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Commissioner Donald R. Murphy did not participate in the consideration of this matter.

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