

STATE OF WISCONSIN

PERSONNEL COMMISSION

CURTIS ALLISON,
Complainant,

v.

**Secretary, DEPARTMENT OF
REVENUE,**
Respondent.

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

Case No. 98-0190-PC-ER

This case is before the Commission to resolve respondent's motion to dismiss with prejudice and for costs. Both parties are represented by counsel and have filed written arguments, with the final argument received by the Commission on November 19, 1999.

NATURE OF CASE

The complaint in this case was filed on October 19, 1998, when complainant worked for the Department of Revenue's (DOR) Lottery Division where he continues to work. Complainant applied for vacant positions classified as Retailer Marketing Specialists. In or around September 1998, respondent hired candidates other than complainant. Respondent, on August 30, 1998, filled a position classified as a Lottery Game & Drawing Specialist - Journey, with an internal transfer candidate. Complainant also was interested in the position as a transfer opportunity but was not hired. Complainant contends respondent did not hire him for the mentioned positions because of his race.

Respondent scheduled complainant's deposition for March 30, 1999. Complainant, who was unrepresented by counsel at this time, received notice of the deposition but failed to appear or to provide advance notice that he would not appear. Respondent's attorney telephoned complainant while the court reporter still was present. Respondent's attorney reminded complainant of the deposition and his legal obligation to appear. Complainant responded that he would not appear. Respondent filed a motion for reimbursement of reasonable expenses associated with complainant's failure to appear at the March 30th

deposition. Both parties filed written arguments, with complainant's arguments submitted by his own attorney. The Commission, in a ruling dated July 20, 1999 (hereafter, First Ruling) granted respondent's motion because the complainant failed to demonstrate substantial justification or other circumstances to make an award unjust.

The complainant was ordered, in a related ruling dated September 9, 1999 (hereafter, Second Ruling), to pay respondent \$1,770.95 in costs. Pursuant to the Second Ruling, respondent was to provide complainant "any necessary account information" within 10 days of the date of the order and the complainant was given 30 days thereafter to tender payment.

Respondent filed an affidavit in support of its motion reciting the following facts, which have not been disputed by complainant. On September 13, 1999, counsel for respondent faxed an accounting of attorneys' fees and costs to complainant's counsel, well within the 10-day period imposed in the Second Ruling. Complainant's 30-day period to tender payment ended on October 13, 1999 – a deadline he failed to meet. Respondent received no contact from complainant or his attorney. On October 15, 1999, respondent's attorney sent another letter by fax and by first class mail to complainant's attorney reminding her that complainant violated the Second Ruling by failing to make the ordered payment. In the same letter, respondent provided complainant another opportunity to make payment by close of business on October 20, 1999, and stated if such extension was not honored respondent would "formally bring this matter" to the Commission's attention. As of the date of the affidavit (October 27, 1999), respondent still had heard nothing from complainant or his attorney. Respondent incurred additional expenses in the amount of \$1,665, in bringing the present motion. Complainant raised no objection regarding the reasonableness of these additional expenses.

Complainant's attorney filed arguments in opposition to the present motion but without supporting affidavits. It is alleged in these arguments that complainant "has not had the resources to take care of the obligation" but "is willing to work out a payment arrangement with Respondent so that his obligation can be met." Complainant provided no explanation of why he previously did not contact respondent about his obligation to pay costs. Respondent questions the representation that complainant lacks the necessary resources to comply with the

Commission's order noting that he has received a regular income throughout these proceedings and remains employed at DOR.

CONCLUSIONS OF LAW

1. The Commission has discretionary authority to dismiss a claim for a complainant's failure to comply with a Commission order when such failure constitutes either bad faith or egregious conduct.

2. Complainant's failure to comply with the Second Ruling's order to pay costs constitutes bad faith.

3. The Commission lacks authority to award costs to respondent for costs associated with the present motion.

OPINION

Respondent's present motion requests the Commission to impose sanctions for complainant's failure to comply with the order to pay costs imposed in the Second Ruling. The sanctions sought by respondent include dismissal with prejudice and reimbursement for costs associated with bringing the present motion. Complainant opposes the motion.

Complainant first argues as shown below (p. 1, letter argument dated November 15, 1999):

Dismissal is an appropriate sanction for failure to cooperate in discovery, pursuant to 804.12. However, in this case, the Commission chose to take the lesser sanction of awarding costs, and not dismissal, as the appropriate sanction for Mr. Allison's failure to appear for his deposition. The Commission cannot, and should not, further sanction Mr. Allison for this one-time, already sanctioned behavior.

This argument is rejected. Respondent is requesting dismissal not as an additional sanction for complainant's failure to appear at his deposition but for the separate failure to comply with the Commission's order to pay costs.

The next question raised by complainant is whether the Commission has the power to dismiss a case for failure to pay costs awarded under §804.12(4), Stats. The Commission answers this question in the affirmative.

The Commission has default powers conferred by §227.44(5), Stats., as noted below in pertinent part (emphasis added):

Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or *default*. In any proceeding in which a hearing is required by law, if there is no such hearing, the agency or hearing examiner shall record in writing the reason why no such hearing was held, and shall make copies available to the interested persons.

The Commission has exercised its default powers under §227.44(5), Stats., where the complainant's conduct demonstrates a failure to prosecute. Examples follow. In *Siewert v. DOT*, 98-0220-PC-ER, 6/30/99, the Commission dismissed the case where complainant failed to show good cause for her failure to follow directions from Commission staff to perfect her complaint. In *Behnke v. UW-Madison*, 89-0135-PC-ER, etc., 7/7/94, rehearing denied, 8/18/94; the Commission dismissed the case where, over the course of more than 16 months, the complainant without good reason failed to respond to letters from Commission staff asking him to indicate when he would be available for a prehearing conference. In *Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98, aff'd by Dane County Cir. Ct., *Oriedo v. Wis. Pers. Comm. et al.*, 98-CV-0260, 12/11/98, the Commission dismissed the case where the complainant without good cause failed to appear at hearing. In *Moss v. DNR*, 87-0028-PC-ER, 1/13/88, the Commission dismissed the case where the complainant failed to respond to a certified letter within 20 days. The first three listed cases involved the Commission's exercise of default powers conferred by §227.44(5), Stats., while the fourth case involved operation of §111.39(3), Stats.

The Commission has exercised its default powers under §227.44(5), Stats., where a party fails to comply with a Commission order. Such cases previously have been raised in the context of a failure to comply with an order to compel discovery. Examples of cases in this category follow. In *Mosley v. DILHR*, 93-0035-PC, etc., 6/21/94, the Commission dismissed

the case where complainant alleged disability discrimination but refused to comply with an order to permit discovery of her medical records. In *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98, the Commission dismissed the case due to complainant's bad faith refusal to attend his deposition (and for other conduct). In *Balele v. DER & DMRS*, 98-0145-ER, 12/3/99, the Commission dismissed the case due to complainant's inadequate compliance with a discovery order and respondent was awarded expenses by ruling dated 2/28/00.

Wisconsin courts have provided guidance of the standard to be used when considering whether dismissal would be an appropriate sanction for failing to comply with a court order. In *Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 535 N.W.2d 65 (Ct. App. 1995), rev. denied, 537 N.W.2d 573 (1995), the Court of Appeals stated as shown below:

Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary. *Trispel v. Haefer*, 89 Wis. 2d 725, 732, 279 N.W.2d 242, 245 (1979). In *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859, 865 (1991), our supreme court held that dismissal is appropriate only where the noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse. Hudson contends that under *Johnson*, the trial court may only dismiss a complaint if the noncomplying party's conduct is both egregious and in bad faith. Therefore, Hudson argues that because its failure to comply with the defendants' discovery demand was an inadvertent error, the trial court was without authority to dismiss its complaint. We conclude *Johnson* holds that a trial court may dismiss a party's complaint where the party's conduct is either egregious or in bad faith. Because we conclude that the underlying facts do not support a finding that Hudson's conduct was in bad faith or so serious and persistent that it could be classified as egregious, we conclude the trial court erred by dismissing Hudson's complaint.

. . . [I]t is readily understood that bad faith by its nature cannot be unintentional
. . .

If the noncomplying party's conduct, though unintentional, is so extreme, substantial and persistent that it can properly be characterized as egregious, the trial court may dismiss the action . . .

Id. at 542-3.

The *Hudson Diesel* standard for judicial proceedings is not *per se* applicable to an administrative proceeding such as this, see *Verhaagh v. LIRC*, 204 Wis. 154, 161, 554 N.W.2d 678 (Ct. App. 1996). However, the Commission has looked to court proceedings for guidance and has recognized that given the less formal nature of administrative proceedings, it would be inappropriate to utilize any stricter rule than the standard used by courts, see *Gabay v. DMRS & DOC*, 90-0410-PC, 10/1/92. The Commission finds that complainant's failure to comply with the Second Ruling's order to make payment constitutes bad faith under the *Hudson Diesel* standard. This conclusion is supported by the undisputed facts that complainant did not even contact respondent about his obligation to pay costs by October 13, 1999, the deadline established in the Second Ruling for complainant to tender payment, and that complainant has provided no explanation for such failure. Even if it were true that his financial circumstances necessitated a payment plan rather than full payment within 30 days, he had an obligation to notify respondent of his situation well in advance of the October 13th deadline so that payment arrangements could be made. His failure to make any contact with respondent is reminiscent of complainant's prior failure to recognize his obligation to attend the deposition – the conduct at the core of the present controversy.

Respondent requested, as an additional sanction, an order for complainant to pay the fees and costs expended in presenting its current motion. It is true that the Commission previously awarded costs in this case for the complainant's failure to appear at his deposition. The present circumstances, however, differ significantly.

The Commission has the authority to award costs for a complainant's discovery failure. The Commission has the express power under s. 277.44(7), Stats., to promulgate rules to permit discovery. Section PC 4.03, Wis. Adm. Code, is the Commission's rule which allows discovery as provided by Ch. 804, Stats. The Commission's resulting authority to impose sanctions (including an award of costs) as permitted by Ch. 804, Stats., is limited to the context of discovery and (as discussed below) may not be extended to other circumstances.

In *Tatum v. LIRC*, 132 Wis.2d 411, 392 N.W.2d 840 (1986), the Court of Appeals determined that the Labor, Industry and Review Commission (LIRC) lacked authority to award attorney fees for the filing of a frivolous employment discrimination claim because neither Ch.


227, Stats., nor the Wisconsin Fair Employment Act, expressly or impliedly authorized such an award. While the Commission has such authority to award costs for failure to comply with a discovery order, it does not have such authority to award costs for a party's failure to comply with an order to pay costs. Accordingly, respondent's motions for costs associated with bringing the present motion is denied.

ORDER

Respondent's motion to dismiss is granted and this case is dismissed. Respondent's motion for attorney fees and costs related to the present motion is denied

Dated: March 21, 2000.

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 (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