

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 16

DANE COUNTY

Nile A Ostenso, 0 12 00 11 20

Petitioner,

vs

ORDER TO DISMISS
Case No 00CV132

Personnel Commission, Department of
Natural Resources and Department of
Employment Relations,

Respondents.

On January 14, 2000, petitioner filed this action seeking review of a decision of the Personnel Commission. More than a year has passed and the petitioner has not caused a transcript of the Personnel Commission hearing to be filed in this action. Therefore this action is dismissed with prejudice.

Pursuant to §227.44(8), Stats the petitioning party is responsible for paying the expense of a transcript. In a letter dated February 7, 2000, General Counsel for the Personnel Commission Anthony Theodore informed petitioner Ostenso how to go about ordering the transcript. On September 20, 2000, this case was noticed on the Dismissal Calendar for October 16, 2000. The notice of hearing said that the motion to dismiss was for failure to prosecute. The notice further said that in order to have the matter removed from the dismissal calendar, Appellant Ostenso must show the court that he has made arrangements to have the transcript prepared and filed.

A Dismissal hearing was held on October 16 and continued on October 23, 2000. This court set a deadline of November 20, 2000

for Mr Ostenso to pay the full cost of the transcript, estimated at \$1500.00. The Court ordered that the case would be dismissed if that deadline was not met by Mr. Ostenso

Mr. Ostenso did not comply with that court order. Instead he sent \$600 to the transcriptionist "as initial payment" for the production of the transcript (See Ostenso letter of 11/13/00). Because the Commission indicated that neither it nor the transcriptionist objected to the arrangements made by Mr Ostenso, the court did not dismiss the action at that time. The Commission indicated the transcript should be available about January 15, 2001. By letter dated December 5, 2000, I notified the parties that no further extensions would be granted. The letter went on "If the transcript is not paid for in full within one week of Mr. Ostenso being notified it is ready, this matter will then be dismissed for failure to appropriately pursue it."

On December 28, 2000 I received a long, confusing letter from Mr. Ostenso regarding the transcript. In response I wrote to Mr. Ostenso: "If she [the transcriptionist] will have a problem completing the transcript in the very near future, she can contact the court directly " (Letter of January 2, 2001.) On January 29, 2001, counsel for the Personnel Commission wrote to the court:

Your honor, I must admit that my patience with this matter is at an end. I believe that Mr Ostenso has violated the court's October 23rd order because he did not pre-pay for the transcript, and because by his actions he has made the alternative arrangement fail.

The court next received a letter from Mr. Ostenso asking that I not dismiss the case. That was followed by another letter from Mr

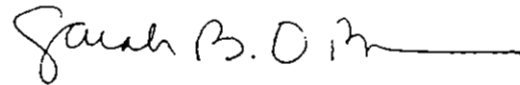
Ostenso on February 5, 2001 stating that the transcript would be completed and delivered to the Personnel Commission by February 16, 2001

As of February 19, 2001, the transcript was not received by the Personnel Commission. No further extensions will be granted as more than sufficient time has been allowed for petitioner to comply with his responsibility.

IT IS ORDERED that this case is dismissed with prejudice

DATED: February 20, 2001

BY ORDER OF THE COURT:



Sarah B. O'Brien
Sarah B. O'Brien, Judge
Circuit Court, Branch 16

cc Nile A. Ostenso
2023 Park Lawn Place
Middleton WI 53562

Atty. Jennifer Sloan Lattis
WI Department of Justice
123 W. Washington Ave.
PO Box 7857
Madison WI 53707-7857

NILE A. OSTENSO,

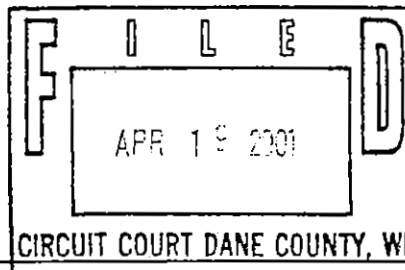
Petitioner,

v.

Decision and Order
Case No. 00-CV-0132

PERSONNEL COMMISSION, DEPARTMENT
OF NATURAL RESOURCES, and DEPARTMENT
OF EMPLOYMENT RELATIONS,

Respondents.



Petitioner, Nile Ostenso, moves for Relief from Judgment pursuant to Wis. Stat. §806.07(1)(a) and (1)(h). On February 20, 2001, this court dismissed with prejudice Ostenso's action seeking review of a Personnel Commission decision. The case was dismissed because Ostenso, after being provided numerous extensions, failed to cause transcripts of the Personnel Commission hearing to be filed as required under Wis. Stat. §227.44(8).

Wisconsin Statute §806.07(1)(a) and (h) provide:

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(h) Any other reasons justifying relief from the operation of the judgment.

Ostenso does not dispute that he failed to provide the required transcripts. Rather, he argues that his inability to

provide the transcripts was because the court and respondents share "some if not most of the burden for delays" in securing the transcripts. The court construes this contention as seeking relief under subsection (1)(a) on the grounds of "excusable neglect."

Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness. See Price v. Hart, 166 Wis. 2d 182, 194-95 (Ct. App. 1991). This court's February 20, 2001 decision and order summarizes in detail the court's and respondents' considerable efforts to provide Ostenso every opportunity to secure and pay for transcription of the Personnel Commission hearing. Ostenso's contention that "timeliness was out of his control" is simply not borne out by the record. It is the burden of one applying for relief from judgment to show that he comes within the statute's provisions. See Padek v. Thornton, 3 Wis. 2d 334, 338 (1958). Ostenso has failed to meet his burden of establishing excusable neglect entitling him to relief under subsection (1)(a).

Subsection (1)(h) allows relief for any other justifiable reasons. To obtain relief under this subsection, a moving party must establish extraordinary circumstances. See Johns v. County of Oneida, 201 Wis. 2d 600, 607 (Ct. App. 1996). In applying this test, the court must consider:

whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is

sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

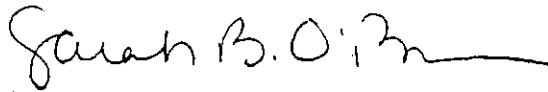
Id. at 608. Ostenso fails to show any extraordinary circumstances. The arguments and information he raises in his motion were already before this court when the case was dismissed. Ostenso's lack of diligence in preserving his right to judicial review formed the basis for that dismissal. He makes no showing suggesting that intervening circumstances exist giving rise to an inequity. Ostenso proceeded *pro se* by his own choice and was given numerous extensions and opportunities to arrange and pay for the required transcript. Ostenso was accorded sufficient time to comply with his responsibilities under Wis. Stat. §227.44(8). Here, the interest in finality of judgment outweighs the interest of deciding this particular case on its merits. Accordingly, Ostenso has failed to meet his burden of establishing extraordinary circumstances that would entitle him to relief from judgment under subsection (1)(h).

ORDER

For the reasons stated above and based on the record herein, petitioner's motion for Relief from Judgment pursuant to Wis. Stat. §806.07 is denied.

DATED: April 19, 2001

BY ORDER OF THE COURT:



Sarah B. O'Brien, Judge
Circuit Court, Branch 16

cc: Nile Ostenso
Jennifer Sloan Lattis, Ass't Attorney General