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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.courts.state.wi.us

DISTRICT IV

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PERSONNEL COMMISSION

March 13, 2002

To:

Hon. Sarah B. O'Brien, Circuit Court Judge
City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3343

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

Judith A. Coleman, Circuit Court Clerk
City-County Bldg., Rm. GR-10
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3341

Jennifer S. Lattis
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

01-1217 Nile A. Ostenso v. Personnel Commission, Department of Natural Resources, and Department of Employment Relations (L.C. # 00-CV-132)

Before Vergeront, P.J., Deininger and Lundsten, JJ.

Nile Ostenso appeals an order which dismissed his petition for judicial review of a Personnel Commission order. Upon reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The Commission dismissed Ostenso's request for review of the Department of Natural Resources' reclassification of his position, and Ostenso sought judicial review. WISCONSIN STAT. § 227.44(8) (1999-2000)¹ requires a person who requests review of a Commission decision on reclassification to procure a record of oral proceedings. Ostenso wrote to the Commission and requested a transcript of testimony in his case. The general counsel for the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Commission informed Ostenso that under § 227.44(8), Ostenso must bear the cost of transcription.

Six months later, the circuit court put the case on its dismissal calendar for failure to prosecute. At the dismissal hearing, the circuit court agreed to give Ostenso an additional month to provide the transcript. Ostenso did not do so, and the circuit court ultimately dismissed the case some four months after the initial dismissal hearing. Ostenso moved the circuit court for relief from judgment, pursuant to WIS. STAT. § 806.07. The circuit court denied Ostenso's motion, and Ostenso appeals.

Ostenso argues that the circuit court: (1) displayed partiality toward the Commission when it ordered him to pay for a transcript prepared by the Commission's transcriptionist; (2) erroneously exercised its discretion when it dismissed his case for failure to prosecute; and (3) erroneously exercised its discretion when it denied his motion for relief from judgment. We reject these claims of error.

First, the circuit court did not show bias by requiring the Commission to produce and Ostenso to bear the expense of producing the transcript. WISCONSIN STAT. § 227.44(8) authorizes just such a result:

A stenographic, electronic or other record of oral proceedings shall be made in any class 2 or class 3 proceeding and in any class 1 proceeding when requested by a party. Each agency may establish rules relating to the transcription of the record into a written transcript and the providing of free copies of the written transcript. Rules may require a purpose for transcription which is deemed by the agency to be reasonable, such as appeal, and if this test is met to the satisfaction of the agency, the record shall be transcribed at the agency's expense, *except that in preparing the record for judicial review of a decision that was made in an appeal under s. 227.47(2) or in an arbitration proceeding under s. 101.143(6s) or*

230.44(4)(bm) *the record shall be transcribed at the expense of the party petitioning for judicial review.*

WIS. STAT. § 227.44(8) (emphasis added). Ostenso sought judicial review of a decision that “was made in an appeal under 227.47(2),” which in turn refers to decisions of the Secretary of Employment Relations under WIS. STAT. § 230.09(2)(a) or (d). The latter statute governs classification decisions, and Ostenso challenged the reclassification of his position.

Second, the circuit court did not err in dismissing Ostenso’s case for failure to prosecute. The decision to dismiss for failure to prosecute is within the discretion of the circuit court. *Hlavinki v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 392, 497, N.W.2d 756 (Ct. App. 1993). Ostenso’s repeated delays in obtaining a transcript gave the court sufficient reason to dismiss Ostenso’s action. Over a year had passed since the filing of the petition when the circuit court dismissed the action.

Finally, WIS. STAT. § 806.07 allows a court to relieve a party from a judgment for certain specified reasons. The decision whether to grant such relief is also within the discretion of the circuit court. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). Ostenso argues that the circuit court should have granted him relief under either paragraph (a) or (h) of WIS. STAT. § 806.07(1). Paragraph (a) allows the circuit court to grant relief for “[m]istake, inadvertence, surprise, or excusable neglect.” The court informed Ostenso on more than one occasion of the transcript requirement, and he had had extensive correspondence with the attorney general’s office regarding the provision of a transcript. The court did not err in determining that the dismissal judgment was not the product of mistake, inadvertence, surprise, or excusable neglect. Paragraph (h) is a catch-all provision allowing the circuit court to grant relief for “[a]ny other reasons justifying relief from the operation of the judgment.” To obtain

relief under paragraph (h), the moving party must show extraordinary circumstances. *Johns v. County of Oneida*, 201 Wis. 2d 600, 607, 549 N.W.2d 269 (Ct. App. 1996). Ostenso did not meet this burden, and thus the circuit court did not erroneously exercise its discretion in denying Ostenso's motion.

IT IS ORDERED that the circuit court's order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Cornelia G. Clark
Clerk of Court of Appeals