

**JAMES STEINKE,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF NATURAL  
RESOURCES; Secretary, DEPARTMENT  
OF EMPLOYMENT RELATIONS**

*Respondents.*

Case No. 02-0052-PC

**RULING ON  
APPELLANT'S MOTION  
FOR SANCTIONS**

This matter is before the Commission on appellant's request for sanctions filed via a December 5, 2002, email:

I would like to request that sanctions be imposed on the DNR for respondent's failure to comply with your order dated November 4, 2002. . . . It was agreed that DNR would issue a written decision no later than November 29, 2002, on the status of my revised position description . . . As of today . . . that letter still has not arrived.

In a December 11, 2002, email, counsel for respondent filed via email the following:

The decision was faxed to the Personnel Commission and Mr. Steinke on December 4th. As a result, the Department was three business days late in meeting the deadline created by the Commission. For that, I do apologize. As I stated in our conference call, the original draft of the response was inadequate and the classification specialist was redirected to prepare a more thorough response. The final draft was given to me on the 4th and was immediately sent to the parties. Since the 29th was the day after Thanksgiving and during the hunting season, I can only assume that this matter was not given the priority it deserved. I personally don't believe sanctions are warranted for the short delay and no harm to the appellant has occurred by virtue of our lack of due diligence. In fact, without this response from the Department, the appellant does not have a cause of action since there were no prior decisions or denials to be appealed. Again, my apologies.

In a December 16, 2003, email, appellant specified that he wanted DNR deemed in default and his reclass to be granted.

In *Gabay v. DMRS & DOC*, 90-0410-PC, 10/1/92, the Commission noted that a default judgment in judicial proceedings usually is justified only if the party in question has engaged in "bad faith or egregious conduct." (citation omitted) In *Verhaagh v. LIRC*, 204 Wis. 2d 154, 161, 554 N. W. 2d 678 (Ct. App. 1996), which involved a workers compensation proceeding where the employer filed an answer three days late and the employee wanted a default judgment, the court held:

Because of the limited application of the rules of civil procedure to the administrative agencies . . . we reject Verhaagh's contention that the appropriate legal standard to be applied by LIRC in determining whether to grant his motion for a default order is based upon a finding of surprise, mistake or excusable neglect. Rather, the agency is entitled to exercise its discretion based upon its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness.

In this case, respondent has not demonstrated excusable neglect for its failure to meet the deadline, but there is no indication of any bad faith or willfulness on DNR's part. There also is no indication of any prejudice to appellant by the short delay in receiving the decision. The deadline DNR missed was not created by statute or rule, but rather by an order of the Commission. Granting a default judgment would be an excessive sanction in this situation.

If this were a judicial proceeding, a court would have the option of imposing a lesser sanction such as assessing costs on the motion or imposing a fine. This administrative agency has no authority to take such a step. Cf. *Dept. of Transportation v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N. W. 2d 545 (1993). However, DNR is admonished for failing to comply with the Commission's order.

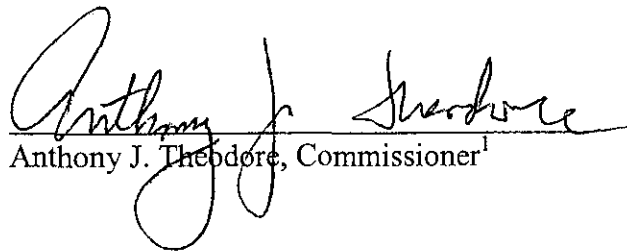
ORDER

Appellant's motion for a default judgment filed December 5, 2002, is denied. Respondent is admonished for its failure to comply with the Commission's order.

Dated: January 24 2003

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STATE PERSONNEL COMMISSION

  
Anthony J. Theodore, Commissioner<sup>1</sup>

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<sup>1</sup> Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1079)