

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL K. LANGWORTHY, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 119
No. 69812
PA(adv)-185

Decision No. 33211-C

Appearances:

Michael K. Langworthy, appearing on his own behalf.

H. Elizabeth Kennebeck, Assistant Legal Counsel, P. O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on the Respondent's request to dismiss the matter for lack of prosecution and/or abandonment of the claim. The final date for submitting written material was September 7, 2011.

Solely for the purpose of ruling on the motion in a manner that conforms with the requirements of Sec. 227.47(1), Stats., the Commission has rendered the following Findings of Fact that are based upon what appear to be uncontested matters as well as a liberal construction of the information set forth in the Appellant's submissions.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT¹

1. During the relevant time period, the Appellant has been employed by the Department of Corrections as a captain at Taycheedah Correctional Institution.
2. By letter dated April 6, 2010, he was notified of a 10-day suspension.

¹ Findings 1 through 11 are identical to those findings set forth in the Commission's Order Reopening Appeal issued on January 26, 2011. DOC (LANGWORTHY), DEC. NO. 33211-A (WERC, 1/2011).

3. Appellant filed an appeal of the suspension with the Commission on April 26, 2010.

4. A member of the Commission's staff convened a pre-hearing conference with the parties, via telephone, on June 28, 2010, scheduled a hearing for September 9, and supplied the parties with Prehearing Conference Memorandum via email. Appellant participated without an attorney.

5. On August 29 and 30, the parties requested, via email, postponement of the hearing for separate reasons. The Appellant cited discovery difficulties and referenced "my counsel" in his written request.

6. By email dated August 30, 2010, the Commission staff attorney who was to conduct the hearing wrote the parties that the proceeding had been cancelled, and informed them:

I suggest that once the documents Mr. Langworthy requested are provided, we hold another conference call to reschedule. Also[,] Mr. Langworthy, please advise Ms. Kennebeck and myself of the identity and contact information of anyone representing you in this matter.

7. By email dated December 7, 2010, the staff attorney wrote the Appellant:

In reviewing this file I see that there has not been any activity on this case for over three months. According to the preceding correspondence, [you] were to notify me when you had received the information you were seeking and were also to provide Ms. Kennebeck and myself with the identity of your representative, if any. At that point we would reconvene the scheduling conference and set a new date for hearing. Please advise as to the status of this matter at your earliest convenience. If I do not hear from you by December 17, I will assume you no longer intend to pursue this matter and will close my file.

7. Once Appellant filed his appeal, all of the correspondence described above was exchanged using Appellant's Department of Corrections email address.

8. By order dated January 7, 2011, the Commission dismissed the appeal upon the following premise:

Michael K. Langworthy having filed a State civil service personnel appeal with the Wisconsin Employment Relations Commission and the Appellant having, on December 17, 2010, requested that the appeal filed herein be withdrawn; and the Commission being satisfied that the appeal should be dismissed

9. Appellant had been off work since mid-November 2010. He did not notify the Commission of that fact until January 10, 2011. He was on administrative leave at that time.

10. Appellant did not receive the December 7, 2010 email prior to January 10, 2011.

11. By January 10, 2011, email from his home address, Appellant formally requested that the Commission reopen his appeal.

12. By Order dated January 26, 2011, the Commission reopened the appeal and in a separate order of the same date, designated John R. Emery as the hearing examiner.

13. The parties initially scheduled a prehearing conference, to be held via telephone, for February 17. At Respondent's request, the conference was rescheduled for March 9, 2011.

14. During the March 9 prehearing conference, the parties agreed to hearing dates of June 6 and 7, 2011.

15. On March 23, Respondent's attorney wrote that a necessary witness would not be available on the scheduled hearing dates and requested new dates. Langworthy did not object. By April 25, the hearing had been rescheduled to 8:30 a.m. on Monday, June 27, 2011, with continuation dates of June 29 and 30. By letter dated June 20, 2011, DOC filed copies of possible exhibits for the hearing and named 29 potential witnesses.

16. By email received at approximately 9:00 a.m. on Thursday, June 23, Langworthy asked to reschedule the hearing "as [I] have some other issues including family and medical that just have come up." In a responsive email of the same date, the hearing examiner notified the parties that he would convene a telephone conference at 1:30 p.m. that day "so that Mr. Langworthy can explain his situation in more detail and I can then determine how to proceed."

17. Langworthy did not answer his telephone for the 1:30 conference call. The hearing examiner informed the parties by email that the hearing remained scheduled to commence at 8:30 on Monday, and noted:

As I indicated in my earlier message, I will only postpone this case further for good cause shown. Therefore, in order to postpone the matter further Mr. Langworthy will have to contact me directly . . . and explain the basis for his request in detail, whereupon I will decide if cause for a postponement exists. If he does not contact me, the case will go forward on Monday, as scheduled.

Later the same afternoon, the examiner specified that the "deadline for contacting me with further information about the requested postponement is 4:00 pm tomorrow."

18. By June 24 email, Langworthy acknowledged that he had no conflict with participating at the hearing on June 27 but noted he had to make a court appearance at 9:00 a.m. on June 30. The examiner informed the parties that the hearing would proceed as

scheduled on June 27 and that they would discuss how to work around Langworthy's conflicting court appearance.

19. Langworthy did not appear for the 8:30 a.m. hearing on Monday, June 27 until 9:10 a.m., and indicated he had understood the hearing would commence at 9:00 a.m. The Examiner sought to commence the hearing later on that day, but the Appellant advised that due to work commitments he would be unable to do so. The parties then agreed to conduct a telephone conference on June 29 to reschedule the hearing.

20. On June 28, 2011, the Respondent's counsel scheduled a conference call for June 29 commencing at 9:00 a.m., and provided the Appellant and Examiner with the necessary call-in information to participate.

21. On June 29, 2011, the hearing examiner and Respondent's counsel called-in for the conference but the Appellant did not. Without the Appellant's participation, the Examiner and Respondent's counsel provisionally rescheduled the hearing for August 2 through 4, 2011, commencing at 8:30 a.m., in Fond du Lac. In an email and a separate letter dated June 29, the examiner provided written notice of the rescheduled hearing and advised Langworthy that he had to contact the examiner if the dates were unworkable.

22. In an email later on June 29, Langworthy wrote that he had expected to be called for the 9:00 conference, so he had not called in. He agreed to the new hearing schedule.

23. On August 2, 2011, the hearing examiner and Respondent appeared in Fond du Lac for the hearing scheduled to begin at 8:30 a.m. Langworthy again failed to appear. Respondent requested dismissal based on the Appellant's nonappearance. At 9:00 a.m. the Examiner attempted to telephone Langworthy and left him a voicemail message to either appear or explain his absence by 9:10 a.m. or the examiner would conclude that he did not wish to proceed and would advise the Commission to again dismiss the case. Langworthy did not appear or telephone the examiner by 9:15 a.m. so the examiner recessed the hearing.

24. Langworthy called the examiner at 9:30 a.m. on August 2. He explained that he did not appear at the hearing because he had forgotten about a medical appointment scheduled at the same time. He also explained he had learned of the conflicting appointment at 8:30 a.m. that morning, when contacted by the doctor's office.

25. Langworthy lives in Appleton. He did not explain why he was not already at the Fond du Lac hearing at the time of the call regarding his medical appointment.

26. By letter dated August 24, 2011, the examiner confirmed earlier communications that DOC sought dismissal of the appeal for failure to prosecute and set September 7 as the date by which the parties could file "any documentation on their own behalf, either supporting or contesting the motion."

27. Appellant did not submit any material.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Langworthy lacks a clear and justifiable excuse for his course of action in this matter.
2. Dismissal is an appropriate sanction.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER²

Respondent's motion to dismiss is granted and the matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of November, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

² Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Corrections (Langworthy)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The Department of Corrections (DOC), which imposed the discipline that is the subject of this appeal, seeks dismissal for lack of prosecution and/or abandonment of the claim. The record establishes that during the course of this appeal, Langworthy failed to: 1) notify the examiner when he received certain information in response to a discovery request; 2) identify his representative (or indicate he had no representative); 3) apprise the Commission of his change of address; 4) timely seek postponement of the hearing scheduled for June 27, 2011; 5) participate in a telephone conference at 1:30 p.m. on June 23; 6) timely appear at the hearing scheduled to commence at 8:30 a.m. on June 27;³ 7) participate in a telephone conference at 9:00 a.m. on June 29; 8) appear at the hearing scheduled to begin at 8:30 on August 2, 2011; 9) timely respond to the examiner's 9:00 a.m. telephone message; 10) provide any reason he was not present at the hearing location at the time the August 2 hearing was scheduled to commence;⁴ and 11) respond to DOC's motion to dismiss the appeal for lack of prosecution.

The Commission applies the following analysis when considering a motion to dismiss for lack of prosecution:

The decision whether to dismiss a claim for lack of prosecution is discretionary with the Commission. However a case should not be dismissed for failure of prosecution unless the conduct of the party is egregious, and the party does not have a clear and justifiable excuse for its course of action. (Citations omitted.)

DWD (BEDYNEK-STUMM), Dec. No. 31332-A (WERC, 8/2005).⁵

³ Langworthy appeared at 9:10 for the 8:30 hearing.

⁴ While Langworthy suggests he learned at 8:30 a.m. on June 2 that he was scheduled for a medical appointment at that same time, he should have already been at the hearing at the time he learned of the conflicting appointment. His excuse for not appearing might have been sufficient if the hearing had been scheduled to begin at 9:00 but it has no relevance for an 8:30 start time.

⁵ Mr. Bedynek-Stumm:

failed to attend a prehearing conference that had been scheduled for April 7, 2005. After the examiner had written to direct him to more specifically explain the bases for his claim that the selection decision was illegal and an abuse of discretion, Bedynek-Stumm left a voice message for the examiner on April 18, stating he (Bedynek-Stumm) had misplaced his file and requesting a 50-day postponement of the hearing that had been scheduled for May 26. When the examiner scheduled another conference, on May 12th, to address Appellant's postponement request and to clarify the allegations underlying his appeal, he again failed to appear. Four days later, the Commission received a letter from him stating he had a "scheduling conflict" with the May 12th conference. His letter proposed a 5-month delay in the hearing date and stated he would be unable to respond to any discovery request for 4½ months. He also noted that the May 12th conference would have been "premature."

In the present matter, Appellant Langworthy has repeatedly failed to act timely and provide appropriate notice and information relating to his claim that his 10-day suspension was without just cause. Even assuming that he had some reason for some of his behavior, he clearly did not have a clear and justifiable excuse in every instance. Beginning just a few months after he filed his appeal in April 2010, Langworthy kept the Commission in the dark in terms of his email address, whether he had obtained discovery, and whether he had retained an attorney or other representative. He was late for various scheduled proceedings, did not provide advance notification that he would be late or absent and did not supply meaningful explanation for his conduct. He has not shown that he takes the appeal seriously or that his goal is anything other than to harass his employer or interfere with the administrative hearing process.

Langworthy, who has not bothered to respond to the Respondent's motion, "does not have a clear and justifiable excuse" for his conduct.

Langworthy's course of conduct is consistent and egregious. His actions provide ample support for the drastic remedy of dismissal.

Dated at Madison, Wisconsin, this 3rd day of November, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner