

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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ADRIAN J. AND GLORIA M. DUKE,

DOCKET NOS. 96-I-78,  
02-I-65,<sup>1</sup>  
02-I-141,  
AND 03-I-256

Petitioners,

vs.

**RULING AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**DAVID C. SWANSON, COMMISSIONER:**

These matters come before the Commission on a motion filed by respondent, Wisconsin Department of Revenue (“Department”), to dismiss the petitions for review based on petitioners’ failure to comply with the Commission’s orders and failure to prosecute their appeals pursuant to Wis. Stat. § 805.03 and Wis. Admin. Code § TA 1.39. Petitioners were represented in proceedings before the Department and Commission by the law firm of O’Neil, Cannon, Hollman, DeJong S.C. (“O’Neil Firm”) until that firm was excused from further representation in these matters by

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<sup>1</sup> Although Docket Nos. 02-I-65 and 02-I-141 could have qualified as small claims, the Commission treats them as large claims because the Department determined under Wis. Stat. § 73.01(1)(b) that they involve a matter of statewide significance.

Commission Order dated June 27, 2006.<sup>2</sup> Petitioners now appear *pro se* and have filed a response to the Department's motion. The Department is represented by Attorney Robert C. Stellick, Jr., who has filed a brief and affidavit dated October 20, 2006 in support of the motion, a letter in reply to petitioners' response, and affidavits dated October 31, 2002 (filed November 4, 2002) and October 2, 2003 (filed October 3, 2003).

Having considered the entire record, the Commission hereby finds, rules and orders as follows:

### **JURISDICTIONAL FACTS**

#### **Docket No. 96-I-78**

1. By notice dated June 19, 1995, the Department issued petitioners an assessment of income tax in the amount of \$27,609.03 for tax years 1989 through 1994. This assessment primarily relates to income petitioners received from the federal civil service retirement system that petitioners claim is exempt from Wisconsin income tax.
2. Petitioners filed a petition for redetermination dated July 12, 1995.
3. The Department issued its Notice of Action on January 12, 1996 denying the petition for redetermination.
4. Petitioners filed a timely petition for review with the Commission.

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<sup>2</sup> Docket Numbers 96-I-78, 02-I-65 and 02-I-141 generally involve assessments issued to petitioners for failure to include amounts received from the federal civil service retirement system in their Wisconsin income for Wisconsin income tax purposes. Docket Number 03-I-256 involves an assessment issued to petitioners for failure to file a Wisconsin income tax return for tax year 1995, which they claim was not required because their federal pension income was exempt from Wisconsin income tax. The O'Neil Firm represented these petitioners (and a number of others) before the Commission in a variety of cases involving federal retiree pension benefits, and negotiated a general settlement with the Department of these types of cases on March 10, 2005. Petitioners elected to pursue their cases outside of the settlement, and the O'Neil Firm withdrew from representing them as of June 27, 2006. These cases then were consolidated for review by the Commission.

**Docket No. 02-I-65**

5. By notice dated August 24, 1998, the Department issued petitioners an assessment of income tax, interest and penalties totaling \$1,986.57 for tax year 1997. This assessment primarily relates to income petitioners received from the federal civil service retirement system that petitioners claim is exempt from Wisconsin income tax.

6. Petitioners filed a petition for redetermination dated September 11, 1998.

7. The Department issued its Notice of Action on March 11, 2002 denying the petition for redetermination.

8. On May 3, 2002, petitioners filed a petition for review with the Commission, which they amended on September 19, 2002.

**Docket No. 02-I-141**

9. By notice dated December 1, 1997, the Department issued petitioners an assessment of income tax in the amount of \$2,246.95 for tax year 1996. This assessment primarily relates to income petitioners received from the federal civil service retirement system that petitioners claim is exempt from Wisconsin income tax.

10. Petitioners filed a petition for redetermination dated December 10, 1997.

11. The Department issued its Notice of Action on June 10, 2002 denying the petition for redetermination.

12. On June 25, 2002, petitioners filed a petition for review with the Commission.

**Docket No. 03-I-256**

13. By notice dated January 24, 2000, the Department issued petitioners an assessment of income tax, interest, penalties and fees totaling \$6,876.55 for tax year 1995 based on petitioners' failure to file a Wisconsin income tax return for that year.

14. Petitioners filed a petition for redetermination dated February 24, 2000, which they supplemented on March 7, 2003, arguing that they were not required to file a 1995 Wisconsin income tax return because their federal pension income was exempt from taxation in Wisconsin.

15. The Department issued its Notice of Action on August 25, 2003 denying the petition for redetermination.

16. On September 15, 2003, petitioners filed a petition for review with the Commission.

**MATERIAL FACTS**

17. Gloria M. Duke ("Mrs. Duke") has represented petitioners in these proceedings since June 27, 2006, when the Commission issued its Order relieving their previous representatives from the O'Neil Firm from their continued representation (the "June 27, 2006 Order").

18. The June 27, 2006 Order set a telephone status conference for July 24, 2006 and stated in part:

If petitioners fail to participate in the telephone status conference, the Commission shall issue an order dismissing the petitions for review on the basis of petitioners having failed to prosecute the petitions, and the matters shall be closed.

19. Mrs. Duke appeared at the July 24, 2006 telephone status conference. At the conference, Mrs. Duke stated that both petitioners had hearing difficulties and requested that all communications related to these cases be made in writing, although Mrs. Duke responded to questions when asked. Attorney Stellick suggested that the parties could communicate in person at conferences held in Madison, or by using a friend or relative to relay the discussion to petitioners, or by using email or a telephone relay system for the deaf and hearing impaired. However, Mrs. Duke did not agree to use any alternative methods of communication, and instead terminated the conference without the Commission's permission by hanging up the telephone.

20. On July 31, 2006, the Commission issued an order which stated in part:

Petitioners must either prosecute their claims before the Commission or have their appeals dismissed by the Commission. In order to proceed on petitioners' appeals, it is essential that the Commission be able to contact petitioners by telephone, if they do not wish to appear in person in Madison, Wisconsin, for conferences.

Accordingly, it is

#### **ORDERED**

1. **No later than August 21, 2006**, petitioners or their representative shall notify the Commission whether or not they intend to pursue their appeals or wish to withdraw their petitions for review with the Commission.
2. If petitioners wish to pursue their appeals, they or their representative shall inform the Commission **no later than August 21, 2006** how the Commission may contact them by telephone. Petitioners have a

telephone number and telephone, which they presumably use. If they have a telephone service for the hearing impaired, they shall instruct the Commission how to use such service to contact them.

3. Alternatively, petitioners shall inform the Commission **no later than August 21, 2006** as to three dates and times when they would be available by telephone with a friend or relative to assist them in communicating with the Commission and Attorney Stellick. After confirming the availability of the Commission and Attorney Stellick, the Commission will select one date and time, and shall then issue a notice setting another telephone status conference in these cases.
4. If petitioners fail to comply with the terms of this order by the August 21, 2006 deadlines set forth above, the Commission shall dismiss their appeals for failure to prosecute and failure to comply with Commission orders.

(Emphasis in original.)

21. On August 9, 2006, the Commission received a letter from petitioners apologizing for hanging up during the July 24, 2006 status conference. However, petitioners included no additional explanation or information regarding how they intended to communicate with respondent or the Commission in order to continue these proceedings.

22. On August 14, 2006, the Commission issued an order scheduling a telephone conference in this case for September 19, 2006, which stated in part:

1. A **telephone status conference** in these matters will be held on **September 19, 2006, at 11:30 a.m. (C.S.T.)**.
2. Petitioners or their representative shall participate in the telephone status conference on September 19, 2006.

3. **No later than September 12, 2006**, petitioners or their representative shall inform the Commission of a procedure whereby the Commission may contact them by telephone. If petitioners have a telephone service for the hearing impaired, they shall instruct the Commission on how to use such service to contact them for the September 19, 2006 telephone status conference.
4. If petitioners do not have a telephone service for the hearing impaired, they shall have a friend, relative, or representative assist them in communicating with the Commission and Attorney Robert C. Stellick, Jr., at the telephone status conference on September 19, 2006.
5. If either party is unable to participate in the September 19, 2006 telephone status conference, that party shall so inform the Commission **no later than September 1, 2006**, and the Commission shall reschedule the conference.
6. If petitioners wish to appear in person in Madison, Wisconsin, rather than participate by telephone, they shall so inform the Commission **no later than September 1, 2006**.
7. If petitioners fail to comply with the terms of this Order, their appeals shall be dismissed.

(Emphasis in original.)

23. On September 19, 2006, the Commission held the telephone status conference, at which Mrs. Duke appeared. Prior to and at the conference, petitioners did not attempt to avail themselves of any of the options for participating in the conference listed in the Commission's Order dated August 14, 2006. At the conference, Mrs. Duke insisted that the Commission accept petitioners' position without a hearing or briefing and demanded that all communications related to these cases be made in

writing. Mrs. Duke also reiterated that both petitioners had hearing difficulties but appeared to participate in the conference without any outside assistance. Without the Commission's permission, Mrs. Duke again terminated the conference by hanging up the telephone.

24. On October 20, 2006, the Department filed its notice of motion and motion to dismiss the petitions for review based on petitioners' failure to comply with the Commission's orders and failure to prosecute their appeals pursuant to Wis. Stat. § 805.03 and Wis. Admin. Code § TA 1.39, with a supporting brief and affidavit.

25. On November 1, 2006, the Commission ordered briefing on the Department's motion and set December 1, 2006 as the due date for petitioners' response.

26. On December 22, 2006, petitioners filed their response to the Department's motion approximately three weeks late. Petitioners did not send a copy of their response to Attorney Stellick, as directed by the Commission's Order dated November 1, 2006. In substance, petitioners' response merely restates their conclusion that the federal pension benefits at issue were exempt from Wisconsin income tax, with copies of certain documents attached as proof of their claims. Petitioners' response does not address the claimed failure to file a return at issue in Docket No. 03-I-256, nor does it address the Department's motion or its bases.

27. On January 4, 2007, Attorney Stellick filed a reply to petitioners' response with attachments, which describes the Department's bases for denying petitioners their claimed exemptions.



28. Since December 22, 2006, petitioners have not filed any additional response to the motion, nor have they contacted the Commission by any means.

### RULING

Wisconsin Statutes § 805.03 provides as follows:

**Failure to prosecute or comply with procedure statutes.** For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. . . . .

Wisconsin Statutes § 804.12(2)(a) provides for a number of sanctions for failure to prosecute or comply with procedure, including dismissal of the action or proceeding. In addition, Wis. Stat. § 802.10(7) states that "[v]iolations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03."

Petitioners remain convinced that their positions in these cases are correct on the merits, although they have never addressed the merits of the Department's counter-arguments. Unfortunately, the Commission will not reach the merits of either side's arguments in these cases, because petitioners' repeated failures to abide by the Commission's orders and procedures make it impossible to do so.

The Commission has repeatedly attempted to accommodate petitioners' claimed hearing difficulties, as set forth in previous orders quoted above, but petitioners have refused to comply with those orders. The Department also has

suggested a number of alternative means of communication to accommodate petitioners, all of which petitioners have rejected. Petitioners' former counsel, the Department and the Commission have provided numerous opportunities for petitioners to pursue their appeals before the Commission, but to no avail.

On July 24, 2006 and again on September 19, 2006, Mrs. Duke, petitioners' representative, initially participated in but then terminated telephone status conferences scheduled by respective orders of the Commission by hanging up the telephone. Such behavior does not constitute an appearance at a conference, and the Commission therefore treats these incidents as failures to appear. In addition, petitioners were ordered to respond to the Department's motion to dismiss their petitions, yet failed to respond to the substance of that motion in any way. In sum, petitioners have failed to abide by the Commission's orders and have failed to prosecute their appeals.

Accordingly, the petitions for review are dismissed in these cases for failure to follow the Commission's orders and petitioners' failure to prosecute their appeals.

**IT IS ORDERED**

The Department's motion is granted, and petitioners' petitions for review are dismissed.

Dated at Madison, Wisconsin, this 18th day of June, 2007.

**WISCONSIN TAX APPEALS COMMISSION**

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Diane E. Norman, Acting Chairperson

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David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"