

STATE OF WISCONSIN
TAX APPEALS COMMISSION

NIKKI JANISH
Apartment 11
417 Donald Drive
Burlington, WI 53105,

DOCKET NO. 04-I-255

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

DIANE E. NORMAN, COMMISSIONER:

This matter was heard by the Commission on August 24, 2005, in Madison, Wisconsin. Petitioner, Nikki Janish, failed to appear in person or by any representative. Respondent, Wisconsin Department of Revenue ("respondent"), appeared by Acting Chief Counsel Lili Best Crane, who introduced exhibits and moved to dismiss on the basis that petitioner has failed to prosecute her appeal.

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

MATERIAL FACTS

1. By notice dated August 9, 2004, respondent issued an assessment of additional income taxes to petitioner in the total amount of \$2,949.66. The assessment disqualified petitioner from the Earned Income Credit for the years 2000, 2001, 2002, and 2003 and adjusted petitioner's Homestead Credit for 2003 because respondent had

received information that she had only paid one-half of the rent for that year.

2. Petitioner filed a timely petition for redetermination of the assessment on August 26, 2004.

3. Respondent issued a Notice of Action to petitioner denying the petition for redetermination, dated October 25, 2004.

4. On October 29, 2004, petitioner filed a timely petition for review with the Commission.

5. In a Notice dated February 17, 2005, the Commission set this matter for a telephone scheduling conference on April 19, 2005. Included in the Notice was the following statement:

. . . AT LEAST ONE WEEK PRIOR to the time stated in this notice, you or your representative shall notify the Commission (in writing or by telephone) of the area code and telephone number where you or your representative can be reached for the telephone conference. If the Commission is unable to reach you or your representative by telephone, the conference will proceed, and the petition for review will be subject to dismissal, pursuant to Wis. Stat. §§ 802.10(7) and 805.03. (Emphasis in original.)

6. At the telephone scheduling conference held on April 19, 2005, petitioner informed the Commission and respondent that she would provide information to respondent regarding her husband's residence for the period under review to resolve this matter.

7. By agreement of the parties during the April 19, 2005 telephone scheduling conference, and in its Status Conference Memorandum and Order dated April 20, 2005, the Commission set another telephone status conference for June 7, 2005.

8. Petitioner failed to participate in the June 7, 2005 telephone status

conference.

9. In a Status Conference Memorandum and Order dated June 8, 2005, the Commission scheduled another telephone status conference for July 12, 2005. This Memorandum and Order was mailed to petitioner and contained the following Order:

Petitioner shall provide to the Commission a telephone number where she can be reached and available for the scheduled telephone status conference set for **July 12, 2005 at 11:30 a.m.**, or the Commission will consider a motion to dismiss this matter by respondent. (Emphasis in original.)

10. The Commission held the July 12, 2005 telephone status conference and used the same telephone number for petitioner that it used for the April 19, 2005 telephone scheduling conference. Petitioner failed to provide the Commission with any other telephone number, and failed to participate in the July 12, 2005 telephone status conference.

11. On July 13, 2005, the Commission sent petitioner a Notice by certified mail, return receipt requested, scheduling a hearing in this matter on August 24, 2005, at 10:00 a.m., in Madison, Wisconsin. The Notice reads, in part:

YOU ARE FURTHER NOTIFIED That all witnesses who are to testify must be present at the designated time and place and all parties must have with them at that time all exhibits intended to be presented. **The petitioner is required to appear in person** unless the personal appearance requirement has been waived by stipulation with counsel for the Department of Revenue. (Emphasis in original.)

12. On August 8, 2005, the certified mail envelope containing the hearing notice was returned by the United States Postal Service, stamped 'RETURN TO SENDER – UNCLAIMED - UNABLE TO FORWARD.'

13. On August 9, 2005, the Commission sent the hearing notice to

petitioner by ordinary mail, which mail was not returned to the Commission.

14. Petitioner failed to appear at the August 24, 2005 hearing.

15. Counsel for respondent did not waive the personal appearance requirement of petitioner at the hearing, and moved to dismiss petitioner's petition for review under Wis. Stat. § 805.03 for failure to prosecute.

APPLICABLE WISCONSIN STATUTES

805.03 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. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

RULING

After participating in the initial April 19, 2005 telephone scheduling conference in this matter, petitioner has failed to comply with the orders of the Commission. Petitioner failed to participate in a June 7, 2005 telephone status conference, a date which she agreed to and which was scheduled in an April 20, 2005 Status Conference Memorandum and Order. Petitioner was then required by a June 8, 2005 Order of the Commission to participate in a telephone status conference on July 12, 2005, but she failed to participate. Further, petitioner was required by the Commission to appear at a hearing on August 24, 2005. She failed to appear at the hearing, and she did not contact the Commission to explain why she was unable to appear. Petitioner's

inaction demonstrates a clear failure to prosecute her petition under Wis. Stat. § 805.03. Respondent has therefore shown good cause for granting its motion to dismiss.

ORDER

Respondent's motion is granted, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 4th day of November, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"