

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS**

State of Minnesota, by
Dolores Fridge, Commissioner,
Department of Human Rights,

Complainant,

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vs.

FINAL ORDER

Tim McPherson and Katherine
McPherson d/b/a Continental
Telemarketing,

Respondents.

On July 20, 1998, the Administrative Law Judge issued Findings of Fact, Conclusions, and an Order in this matter ordering Timothy and Katherine McPherson, jointly and severally, to pay \$18,959.36 in damages to the charging party, Jenny Gunsallus. That Order also directed the Department to submit an itemized list of its hearing costs to the Administrative Law Judge within 15 days. The Administrative Law Judge further directed Mr. and Mrs. McPherson to interpose any objections they might have to the hearing costs claimed by the Department.

On July 30, 1998, Timothy and Katherine McPherson filed a motion for reconsideration requesting the Administrative Law Judge to set aside his Findings of Fact, Conclusions, and Order of July 20, 1998, to re-open the hearing record, and to permit them to assert defenses to the merits of the Department's complaint. The Department filed its list of hearing costs on August 3, 1998. It requested reimbursement of \$1,121.40 in costs assessed to it by the Office of Administrative Hearings through June 30, 1998, plus any such charges assessed for the month of July, 1998. Indicating that it was seeking to limit any financial hardship alleged by Mr. and Mrs. McPherson, the Department did not seek reimbursement for any of its attorney's fees.

The Department has not filed a response to the McPhersons' motion for reconsideration, and they, on the other hand, have not filed any objections to the reasonableness of the Department's claim for hearing costs.

Andrea Mitau Kircher, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, represents the Department in this

matter. Timothy McPherson, 1306 Fifth Street, Stillwater, Minnesota 55082, and Katherine McPherson, 10198 101st Street, Stillwater, Minnesota 55082, are representing themselves, and neither is represented by an attorney.

NOTICE

Under Minnesota law,^[1] this Order is the final decision in this contested case proceeding. The Commissioner of the Minnesota Department of Human Rights or any other person aggrieved by this decision may seek judicial review of this decision in the way specified in the Minnesota Administrative Procedure Act.^[2]

ISSUES

(1) Whether the Administrative Law Judge should set aside the Findings of Fact, Conclusions and Order of July 20, 1998, and provide Timothy and Katherine McPherson with a new hearing on the merits of the Department's Complaint;

(2) Whether the hearing costs that the Department is claiming are reasonable; and

(3) Whether payment of those costs would impose a financial hardship on Timothy and Katherine McPherson.

Based on the evidence in the administrative record and in the records of all the hearings conducted in this contested case proceeding, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Administrative Law Judge adopts and incorporates into this Final Order all of the findings of fact contained in the Findings of Fact, Conclusions, and Order of July 20, 1998.

2. One excuse offered by Timothy and Katherine McPherson for failing to file a notice of appearance, to answer the Department's complaint, and to appear at the hearing on the merits of the Department's claim was that they were distracted by other personal business that they considered more pressing at the time.^[3] The other excuse was that after the Washington County Sheriff served Timothy McPherson with a copy of the Notice of Hearing, he mistakenly scheduled the hearing on his own calendar for May 12, 1998, rather than May 7, 1998.^[4]

3. Timothy McPherson indicates that became aware on May 7, 1998, that he and his wife had failed to appear at the hearing in this matter that was held two days earlier. Nevertheless, neither of them attempted to communicate with the Administrative Law Judge until May 27, 1998, nearly three weeks later.

4. By letter dated July 31, 1998,^[5] the Department identified its hearing costs as being the costs charged to the Department by the Office of Administrative Hearings for conducting this contested case proceeding — namely, the sum of \$1,121.40 through June 30, 1998, plus any costs charged for the month of July, 1998. The Department declined to seek reimbursement for the cost of its attorney's fees.

5. The costs charged to the Department by the Office of Administrative Hearings for conducting this contested case proceeding during the month of July, 1998, is the sum of \$637.00. So the total hearing costs being claimed by the Department is the sum of \$1,758.40.

6. Timothy and Katherine McPherson have been separated for several months and are in the process of dissolving their marriage. They are contemplating filing bankruptcy. As the result of a breach of contract by one of their major customers, the business operations of Continental Telemarketing, which they had been operating as a proprietorship, ceased in June of 1997. Since then, Timothy McPherson has been unemployed for 10 of the past 13 months, and Katherine McPherson is employed in a position paying \$21,000 per year. Their home is in foreclosure, and a lender is repossessing one of their vehicles. They currently have personal debt in excess of \$500,000, and they are also indebted to the IRS for over \$40,000 for unpaid taxes. Although they successfully sued their customer on a breach of contract claim, the amount of the judgment is only sufficient to cover about a third of their personal debt, and the defendant is currently appealing that judgment.^[6]

7. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

8. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge adopts and incorporates into this Final Order all of the conclusions contained in the Findings of Fact, Conclusions, and Order of July 20, 1998.

2. Timothy and Katherine McPherson have not established a reasonable excuse for failing to file a notice of appearance, for failing to answer the Department's Complaint, or for failing to attend the hearing on the merits that the Administrative Law Judge conducted on May 7, 1998.

3. Timothy and Katherine McPherson did not act with due diligence to seek relief after they indicated they had become aware of their failure to appear at the May 7, 1998, hearing.

4. Further delays in bringing this matter to conclusion will prejudice the Department and the charging party because as time goes on, the greater the likelihood that Timothy and Katherine McPherson will be unable to pay all of the sums they owe to the charging party and to the Department.

5. Minnesota law^[7] requires an administrative law judge to

order a respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the department and the attorney general for all appropriate litigation and hearing costs expended in preparing for and conducting the hearing, unless payment of the costs would impose a financial hardship on the respondent. Appropriate costs include but are not limited to the costs of services rendered by the attorney general, private attorneys if engaged by the department, administrative law judges, court reporters, and expert witnesses as well as the costs of transcripts and other necessary supplies and materials.

Here, the Department is only claiming the sum of \$1,758.40, which represents the amount charged to the Department by the Office of Administrative Hearings for conducting this proceeding. The litigation and hearing costs claimed by the Department are appropriate and reasonable.

6. Payment of the costs claimed by the Department in this matter would impose a financial hardship on Timothy and Katherine McPherson.

7. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

8. The Memorandum that follows, as well as the Memoranda attached to the Administrative Law Judge's Order of June 30, 1998, and to his Findings of Fact, Conclusions, and Order of July 20, 1998, further explain the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates all of them into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. This Order is the **final decision** in this contested case proceeding and expressly incorporates and adopts the Administrative Law Judge's Order of July 20, 1998.

2. The Department's request for reimbursement of certain of its hearing costs is DENIED.

3. The motion of Timothy and Katherine McPherson for reconsideration is DENIED.

4. This Order is effective on the date it is signed by the Administrative Law Judge.

Dated this 24th day of August, 1998.

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

Motion for Reconsideration

The Minnesota Supreme Court has ruled that each of four criteria must be met in order to give a party relief from a final judgement or order. An administrative law judge should only grant that kind of relief where a respondent

(a) is possessed of a reasonable defense on the merits, (b) has a reasonable excuse for his failure or neglect to answer, (c) has acted with due diligence after notice of the entry of judgment, and (d) shows that no substantial prejudice will result to the other party.^[8]

Here, the Department attempted to serve Timothy and Katherine McPherson four times by certified U.S. Mail. The last attempt was on February 5, 1998, by certified letter addressed to them at 10198 — 101st Street North, Stillwater, Minnesota 55110-4908.^[9] Timothy McPherson testified that was one of their residences.^[10] That letter was delivered, but neither Timothy nor Katherine McPherson signed the receipt and returned it to the Office of the Attorney General.^[11] Over a month later, on March 10, 1998, the Washington County Sheriff's Office finally personally served Timothy McPherson at that same address.^[12] After being served both by certified mail and personally, Mr. and Mrs. McPherson did not file a Notice of Appearance, file an Answer to the Department's Complaint, or appear at the May 5, 1998, hearing, as the Notice of and Order for Hearing had instructed them to do. All these omissions violate the Office of Administrative Hearings' rules.^[13]

The only excuse for their inaction that Mr. and Mrs. McPherson have offered is that they were distracted by other personal business that they considered more pressing at the time. Because of those distractions, Mr. McPherson indicated that although the Washington County Sheriff had served him with the Notice of and Order for Hearing, he had mistakenly scheduled the hearing on his own calendar for May 12th rather than May 5th. He further stated that he became aware of that oversight on May 7th. He has never explained how he became aware of that oversight, nor has he explained why he and his wife did not acknowledge or respond to being served by certified mail in February, 1998. In short, they have not come forward with a reasonable excuse for their inattention to this matter.

Furthermore, even though Mr. McPherson apparently became aware that he and his wife had failed to appear two days after the hearing, neither of them attempted to communicate with the Administrative Law Judge until May 27th, when Timothy McPherson sent a letter requesting that the record be re-opened. The McPhersons have never offered a reason for that nearly two-week delay. This all goes to the third factor that the Minnesota Supreme Court indicated must be considered — namely, whether the McPhersons acted diligently after finding out they had missed the hearing. The Administrative Law Judge concludes that they did not.

Finally, the Administrative Law Judge must consider any prejudice that may result to the Department and the charging party from reopening the record and conducting a new hearing on the merits. At the hearing on their earlier motion to re-open the record, the McPhersons indicated that they are deeply in debt and are contemplating filing for bankruptcy. In other words, the passage of time only increases the likelihood that the Department and the charging party may not be able to obtain meaningful relief. Since the McPhersons have failed to establish three of the four prerequisites for relief from the final order here, their motion for reconsideration must be denied.

Hearing Costs

Since it has prevailed on the merits of this proceeding, Minnesota law allows the Department to recover all of its hearing costs, including attorney's fees, "unless payment of costs would impose a financial hardship on the respondent."^[14] Nevertheless, the Department is only claiming the \$1,758.40 in costs charged to it by this Office for conducting this proceeding. It is not claiming, for example, any of the attorney's fees charged to it by the Office of the Attorney General. Under the circumstances, the Administrative Law Judge concludes that the Department's reduced claim for hearing costs is more than reasonable. But the inquiry cannot end there.

In their motion for reconsideration, Timothy and Katherine McPherson made the following claims:

Our current status is such. Katherine and I have been separated for months and are in the process of dissolving our marriage, and filing bankruptcy. The loss of our business in June 1997 has ruined our financial position. I've personally been unemployed for 10 of the past 13 months. Katherine's employment position produces \$21,000. (sic) per year. Our home is in foreclosure, and the bank is in the process of repossessing our family vehicle. The loss of our family business was due to a breach of contract by a company which represented over 90% of our total company sales. We filed suite (sic), and won. The case is now in the appeals process. Our total outstanding personal debt is over \$500,000. secured with personal guarantee's (sic), we are also indebted to the IRS for over \$40,000. for unpaid taxes and the amount awarded by the courts is less than a third of this amount.

Even though the McPhersons did not submit this information in affidavit form, it is consistent with the testimony that Timothy McPherson gave under oath at the earlier hearing on his motion to re-open the record, and the Administrative Law Judge therefore concludes that these statements are substantially true. The Department has not challenged the McPhersons' statements about their financial condition. In fact, the Department cited Mr. and Mrs. McPherson's financial hardships as the reason for not claiming the cost of services rendered by the Office of the Attorney General. In view of

all this, the Administrative Law Judge concludes that paying the costs claimed by the Department would impose a financial hardship upon Mr. and Mrs. McPherson.

Minnesota law does not allow financial hardship as a defense to paying damages owed to a charging party. So, nothing in this Final Order should be interpreted as meaning that Timothy and Katherine McPherson are relieved of their obligation to pay Jenny Gunsallus the sum of \$18,959.36 in damages, as ordered in the Administrative Law Judge's Findings of Fact, Conclusions, and Order of July 20, 1998.

B. H. J.

^[1] Minnesota Statutes, section 363.071, subdivision 2. (Unless otherwise specified, all references to Minnesota Statutes are to the 1996 edition.)

^[2] Minnesota Statutes, sections 14.63 through 14.69.

^[3] Testimony of Timothy McPherson at the June 24, 1998, hearing on the McPhersons' motion to reopen the record (Testimony of Timothy McPherson).

^[4] *Id.*

^[5] Exhibit 5.

^[6] Testimony of Timothy McPherson; motion for reconsideration dated July 28, 1998.

^[7] Minnesota Statutes, Section 363.071, subdivision. 7.

^[8] *Kosloski v. Jones*, 203 N.W.2d 401, 403 (Minn. 1973).

^[9] Order of July 20, 1998, Finding of Fact No. 6.

^[10] Testimony of Timothy McPherson.

^[11] Order of July 20, 1998, Finding of Fact No. 6.

^[12] Order of July 20, 1998, Finding of Fact No. 7.

^[13] Minnesota Rules, part 1400.6000 (1997).

^[14] Minnesota Statutes, section 363.071, subdivision 7.