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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CHEN, PING, **Petitioner,** **vs.** **DEPARTMENT OF LABOR, Commonwealth of the Northern Mariana Islands, acting through JOAQUIN A. TENORIO, Secretary of Labor,** **Respondent.**	**Civil Action No. 04-0240** **ORDER GRANTING MOTION TO DISMISS FOR FAILURE TO PROSECUTE**

THIS MATTER came for a hearing on August 20, 2009, at 1:30 p.m. in Courtroom 223A on Respondent Department of Labor's Motion to Dismiss for Failure to Prosecute. Assistant Attorney General Eli Golob represented Respondent Department of Labor (hereinafter "DOL"). Counsel Stephen Woodruff represented Petitioner Chen Ping (hereinafter "Petitioner"). After considering the oral and written arguments of the parties, legal authorities, and the material facts, the Court renders its final ruling on the matter.

For the reasons discussed below, DOL's motion is hereby GRANTED.

I. SYNOPSIS

On May 28, 2004 Petitioners filed a Complaint in this action seeking judicial review of an Administrative Order on Appeal issued by the Secretary of Labor. On September 3, 2004, an Order Setting Procedural Guidelines was issued. Thereafter, Petitioner took no action which moved this case forward.

On January 19, 2005 DOL moved to dismiss for lack of prosecution because Petitioner had taken no action since the Procedural Guidelines had been issued but DOL subsequently withdrew their motion based on an agreement with Counsel Woodruff. The parties agreed to propose and commit to a new procedural schedule by January 31, 2005. On February 14, 2005, Counsel Woodruff sent a Memo to then DOL counsel, Assistant Attorney General Jeanne Rayphand, wherein he stated that he had completed the review of the record in this case but due to "printer difficulties" Counsel Woodruff could not produce a notice of completion to file with the court. Counsel Woodruff requested that DOL provide him, and file with the court, copies of certain documents. DOL provided the documents. Thereafter, Petitioner did not comply with the Procedural Guidelines as promised when DOL withdrew their motion to dismiss nor did Petitioner take any further action in this matter.

Thus, on August 26, 2005, DOL again moved to dismiss the case for failure to prosecute. Petitioner did not file an Opposition until the day of the hearing on the matter which was November 3, 2005. In July, 2007, the Motion to Dismiss was denied but the Order stated that the "Court is tempted to dismiss it *sua sponte* on its own analysis of Plaintiff's nonaction for the past two years. . ." Petitioner was directed to file a notice of completion of handling of the record on or before July 25, 2007 and a status conference was set for July 26, 2007. The Court stated that "[f]ailure to strictly follow this order shall result in the immediate dismissal. . ."

On July 25, 2007, Petitioner filed a Motion for Continuance but the motion was not filed pursuant to the Rules of Civil Procedure and the Motion was returned to Petitioner. Counsel for Petitioner did not appear at the Status Conference. The Court set another status conference for August

9, 2007. Finally, on July 30, 2007, five days after the deadline dictated in by the Court's July, 2007 Order, Petitioner filed a Certificate of Completion of Record.

On August 15, 2007, Petitioner filed a Statement of Undisputed and Disputed facts. On August 21, 2007 a second Order Setting Procedural Guidelines was issued. On August 28, 2007, DOL filed its Statement of Undisputed Facts and Opposition to Petitioner's Statement of Disputed Facts.[1]

Almost two years later, Petitioner has taken no further actions. The Court, *sua sponte*, issued an Order setting a status conference on February 26, 2009 to determine whether or not the case should remain an active file. Thereafter, on July 1, 2009, DOL filed the instant Motion to Dismiss and Petitioner filed an untimely opposition on August 20, 2009. Besides the untimely Opposition which fails to address the law, Petitioner has done nothing to move this matter forward since August 15, 2007.

II. DISCUSSION

Involuntary dismissal is within the discretion of the court but is disfavored and should be granted sparingly. *Bishop v. Lewis*, 155 F.3d 1094, 1096 (9th Cir. 1998). Commonwealth Rule of Civil Procedure 41(b) provides:

> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.
>
> (2) (A) At the end of each calendar year, the clerk shall prepare a list of all cases pending in the court, other than criminal cases, in which no action was taken by any party during the preceding two years. The clerk shall then mail notice to all persons who have entered an appearance in such a case that, subject to

[1]Petitioner's Opposition states that Defendants filed no response to Petitioner's Statement of Facts and that Defendants are in default and, therefore, the appropriate remedy is not dismissal on Defendants' motion but entry of judgment in Petitioner's favor. Petitioner is mistaken.

> the provisions of subparagraph ©), below, the case will be dismissed without further notice 30 days after the sending of the notice.

When considering a motion to dismiss for failure to prosecute, a court should consider the following five factors:

(1) the public's interest in expeditious resolution of litigation;

(2) the court's need to manage its docket;

(3) the risk of prejudice to the defendants;

(4) the public policy favoring disposition of cases on their merits; and

(5) the availability of less drastic sanctions.

Wabol v. Villacrusis, 2000 MP 18 ¶ 9 (citing *Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986)).

Petitioner fails to address the five factors applied in this jurisdiction when considering a motion to dismiss for failing to prosecute. However, Petitioner argues that this case is on track for settlement and that DOL prepared settlement documents and forwarded them to Petitioner but withdrew the settlement offer before the deal could be finalized. Further, according to Petitioner, in the weeks prior to DOL filing their most recent motion to dismiss, the parties were engaging in ongoing communications and the case was back on track for settlement. The argument, however, is unsupported by details regarding *when* the settlement negotiations took place, *when* DOL made Petitioner an offer, *when* DOL retracted their offer, or what communication has recently taken place. Moreover, according to DOL, earlier this year DOL informed Counsel Woodruff that if he did not respond to settlement offers within 30 days, the offers would be withdrawn. After failing to finalize settlement, DOL withdrew their offers. Vague, undetailed claims of settlement negotiations without any evidence, dates, or affidavits to prove the assertion cannot overcome Petitioner's unreasonable delay in moving this matter forward.

(1) The Public's Interest in Expeditious Resolution of Litigation & (2) The Court's Docket

"[T]he public's interest in expeditious resolution of litigation always favors dismissal." *Chong v.*

Kamoshita, Civ. No. 91-0264 (N.M.I. Sup. Ct. April 30, 2004)(Order Granting Defendant's Motion to Dismiss for Failure to Prosecute at 3) (citing *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). "In addition to the interest of the public, the court has an interest and an obligation to manage its own docket." *Id*. The interest of the public and the court's need to manage its docket are often analyzed together. *See, e.g., Id.* at 3; *see also Moneymaker v. CoBen (In re Eisen),* 31 F.3d 1447, 1452 (9th Cir. 1994).

Although Rule 41 is not a steadfast rule which determines when a case has or has not been inactive for too long, it provides a benchmark when considering this Court's interest in managing its docket. More than five years have passed since Petitioner filed the Complaint. In the meantime, DOL has filed two motions to dismiss based on Petitioner's failure to prosecute. According to DOL, DOL withdrew one motion to dismiss on the condition that Petitioner comply with agreed upon deadlines, yet Petitioner did not. Moreover, more than two years have passed since Petitioner's last filing in this case.

Every time a status conference is scheduled and continued, the Court's docket is unduly burdened. Further, this Court has already spent an unreasonable amount of time issuing two procedural orders thereby delaying other issues before the Court. Additionally, this Court has already ruled on one motion to dismiss and was burdened with the filing of an additional motion to dismiss just to have the motion subsequently withdrawn in an attempt to accommodate Petitioner. All of these actions burden the Court's calendar and in turn, delay other cases on the docket.

Petitioner has continued to disobey and disregard the procedural orders although opposing counsel, and this Court, have attempted to move this case forward. Given the length of time this case has been inactive without progress towards resolution and the Court's obligation to manage its caseload, the first two factors weigh heavily in favor of dismissal of this case.

(3) The Risk of Prejudice to DOL

"A finding of unreasonable delay gives rise to a presumption of injury to the defendants which

will, in and of itself, justify dismissal if not rebutted." *Tudela v. Miah et al*., Civ. No. 97-1149D (N.M.I. Sup. Ct. April 12, 2002) (Order Granting Defendants' Motion to Dismiss at 3) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). "The failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure." *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651 (9th Cir. 1991) (quoting *Air West, Inc*., at 524).

Although the unreasonable delay in this matter justifies a finding of prejudice, actual prejudice exists. More than five years have passed since the Complaint was filed and more than two years have passed since Petitioner's last filing. DOL has been obligated to file multiple motions to dismiss, to appear at multiple status conferences, and to request additional guidance from the court because of Petitioner's ongoing delay in moving this case forward. Moreover, after such a length of time, it must be assumed that witnesses - and perhaps even the Petitioner - are no longer available. A review of the record reveals that DOL has graciously attempted to accommodate Petitioner's inability to adhere to deadlines. Therefore, not only does Petitioner's unreasonable delay give rise to a presumption of injury, DOL has suffered actual injury as a result of the delay. This factor weighs heavily in favor of dismissing the case.

(4) The Public Policy Favoring Disposition of Cases on Their Merits

"In determining whether dismissal is warranted, courts weigh the public policy favoring disposition of a case on its merits against plaintiff's delay and prejudice suffered by the defendant." *Tudela v. Miah et al*., Civ. No. 97-1149D (N.M.I. Sup. Ct. April 12, 2002) (Order Granting Defendants' Motion to Dismiss at 6) (citing *Moneymaker,* 31 F.3d at 1454). The Court is aware of the need to determine cases on their merits, however, Petitioner has a responsibility to the Court and to DOL to move this case forward. Sometimes, for valid reasons, civil court cases take years to fully adjudicate. However, this is not the case in this matter. Without providing a reasonable explanation, Petitioner has

allowed this case to sit on the Court's docket for years without any meaningful progress. Here, public policy is not outweighed by Petitioner's delay and the prejudice to DOL.

(5) The Availability of Less Drastic Sanctions

There is no requirement that the court consider every feasible alternative to dismissal, however, the court must explore reasonable and possible alternatives to dismissal. *Wabol*, 2000 MP at ¶ 13 (citing *Anderson v. Air West, Inc*., 542 F.2d 522, 525 (9th Cir. 1977)). When the trial court does not indicate that alternative sanctions were considered and found inappropriate, a dismissal is more difficult to sustain. *Id.* at ¶ 11,12 (citing *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir. 1987)). However, "[u]nder egregious circumstances, it is unnecessary (although helpful) for a trial court to discuss why alternatives to dismissal are infeasible." *Tudela*, at 6 *(*citing *Moneymaker*, 31 F.3d at 1455). "Furthermore, a court's warning of the possibility of dismissal for a party's lack of diligent prosecution can satisfy the 'consideration of alternatives' requirement." *Chong*, at 5 (quoting *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992)).

DOL argues that Plaintiff's delay of almost two years in prosecuting this action constitutes "egregious circumstances" and, therefore, a discussion of alternatives to dismissal is not necessary. Although two years is not a great passage of time amounting to egregiousness, the Court finds that the additional circumstances in the procedural history of this case are egregious. Further, the Court has twice warned of the possibility of dismissal. First, in its Order, dated July 17, 2007, and second, its Order Setting Status Conference, dated January 28, 2009. Petitioner was cautioned years ago that the continued failure to move this case forward would result in dismissal. Further, Petitioner was warned in no uncertain terms that the failure to abide by deadlines within the procedural order would result in dismissal. Nonetheless, the case remained stagnant. Seemingly, threats of dismissal did not sufficiently motivate Petitioner to move this matter forward in a timely fashion. Thus, it seems improbable that additional warnings or sanctions would prompt Petitioner to move this case forth.

III. CONCLUSION

The Court recognizes the harsh realities of dismissing cases without determining the merits and prefers not to dispose of cases before litigants have their day in court. However, Petitioner has been given multiple opportunities to avoid this result yet has been unable or unwilling to move this matter forward in a meaningful and significant manner. The languid approach of Petitioner in this matter unfairly prejudices Respondents and unnecessarily burdens this Court's docket. After multiple warnings and threats which resulted in unchanged conduct, this case would likely remain dormant if the Court permitted it to remain on the docket.

For the foregoing reasons, this Court GRANTS Respondent Department of Labor's Motion to Dismiss for Failure to Prosecute.

So ORDERED this 13th day of October, 2009.

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David A. Wiseman, Associate Judge