

6. OAH issued a Notice of Hearing and Telephone Conference on January 28, 2021, setting the matter for a telephone conference on February 5, 2021. The notice provided:

The purpose of the conference is to set the dates for the hearing and establish a schedule for hearing preparation. If a party does not attend the conference, the hearing schedule will be set without that party's participation. A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

The notice was sent to both parties at the addresses of record. Neither mailing was returned as undeliverable.

7. On February 5, 2021, Hearing Officer Judy Bovington convened a telephone conference in this matter at the appropriate date and time. The Hearing Officer left Bunton a message. NVMS appeared and requested that the scheduling conference be reset. The scheduling conference was reset to February 23, 2021. Chris Cook appeared on behalf of NVMS. Bunton again did not appear.

8. On February 25, 2021, the Hearing Officer issued a Scheduling Order in this matter that set the pre-hearing deadlines and contested case hearing date. The Scheduling Order was mailed to the parties at the addresses of record. Neither mailing was returned as undeliverable.

9. On April 28, 2021, NVMS moved for the dismissal of the matter based upon Bunton's failure to participate in any of the proceedings in this matter since he first filed the claim in February 2020. NVMS also pointed to additional information it submitted to the Department after the redetermination was issued that consisted of Bunton's actual time records. NVMS asserted those records demonstrate Bunton is due \$131.94.

II. ISSUE

Whether NVMS owes wages for work performed, as alleged in the complaint filed by Bunton, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Bunton received proper notice regarding the scheduling conferences and the scheduling order in this matter. Bunton also received NVMS's motion to dismiss.

Bunton did not respond. See Mont. Code Ann. § 26-1-602(24) (establishing a disputable presumption that a letter duly directed and mailed was received in the regular course of the mail). Bunton was also served by email.

2. Bunton has had no contact with either OAH or NVMS during the pendency of this proceeding.

3. Bunton has failed without good cause to participate in the proceedings initiated as a result of his claim.

4. Bunton is in default based upon his failure to participate in the proceedings and to abide by the orders of this tribunal.

5. Due to his failure to actively prosecute his claim, Bunton has failed to show that NVMS owes him unpaid wages for work performed during the period of his wage claim, other than the \$131.94 that NVMS has asserted since June 3, 2020 it does owe Bunton.

IV. DISCUSSION

This is a contested case proceeding pursuant to the Montana Administrative Procedures Act (MAPA) at Mont. Code Ann. § 2-4-601 et. seq and § 39-3-302. MAPA specifically provides that disposition may be made of any contested case unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603. Nothing in Title 39 or Title 2 prohibits imposition of a dismissal or default where a party fails to comport with any facet of a scheduling order, fails to respond to a tribunal's direct order, or fails to appear for a scheduled hearing. See also Montana Rule of Civil Procedure 41(b) ("Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal . . . operates as an adjudication on the merits.").

The Department has adopted the Attorney General's model rules, which provide in pertinent part, "[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law" (emphasis added). Admin. R. Mont. 1-3-213(1) and 24-2-101(1).

Bunton received proper notice with both the Notice of Hearing and Telephone Conference and the Scheduling Order that his appeal may be dismissed if he failed to actively prosecute his claim or otherwise abide by the orders of this tribunal. Bunton

has failed to appear for any conference, and has failed to have any contact with OAH. Bunton failed to respond to NVMS's motion to dismiss. It is therefore determined that Bunton is in default.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Bunton has failed to follow the orders of this tribunal as set forth in the Scheduling Order. Bunton is in default. Mont. Code Ann. § 2-4-603.

3. There has been no showing that NVMS's motion to dismiss should not be granted.

VI. ORDER

Based on the foregoing finding of facts and subsequent conclusion of law that Bunton is in default, the Department's redetermination is reversed. NVMS's motion to dismiss is granted on the merits of this matter. The hearing is vacated. NVMS is ordered to submit a cashier's check or money made payable to Bunton for \$131.94 to the Department of Labor and Industry, Employment Relations Division, Compliance and Investigations Bureau, P.O. Box 201503, Helena, MT 59620-1503.

DATED this 18th day of May, 2021.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ JUDY BOVINGTON
JUDY BOVINGTON
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.