STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| LOCAL 97, AFSCME, AFL-CIO<br>PRAIRIE HOME CEMETERY<br>EMPLOYEES,<br><br>Complainant,<br><br>vs.<br><br>PRAIRIE HOME CEMETERY,<br><br>Respondent. | Case 3<br>No. 34204 MP-1650<br>Decision No. 22316-B |

Appearances:

Lawton & Cates, Attorneys at Law, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703-3354, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainant.

Michael, Best & Friedrich, Attorneys at Law, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4286, by Mr. Jose Olivieri, appearing on behalf of the Respondent.

## ORDER SETTING ASIDE EXAMINER'S ORDER DISMISSING COMPLAINT AND REMANDING TO EXAMINER FOR FURTHER PROCEEDINGS

Examiner Edmond J. Bielarczyk, Jr. having, on February 22, 1985, issued an Order Dismissing Complaint wherein he dismissed a prohibited practice complaint filed by Local 97, AFSCME, AFL-CIO, Prairie Home Cemetery Employees against Prairie Home Cemetery because Local 97 failed to appear at a February 21, 1985 hearing on the matter; and Local 97 having timely filed a petition with the Commission seeking a review of said Order pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.; and the parties having filed written argument, the last of which was received June 20, 1985; and the Commission having considered the Examiner's decision and the parties' arguments and having concluded that the Examiner's Order should be set aside and that the complaint should be remanded to the Examiner for further proceedings;

NOW, THEREFORE, it is

ORDERED

1. That the Examiner's Order Dismissing Complaint is hereby set aside.

2. That the matter is hereby remanded to Examiner Bielarczyk for further proceedings consistent with this decision.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

## MEMORANDUM ACCOMPANYING ORDER SETTING ASIDE EXAMINER'S ORDER DISMISSING COMPLAINT AND REMANDING TO EXAMINER FOR FURTHER PROCEEDINGS

### The Examiner's Decision

The Examiner issued an Order Dismissing Complaint on February 22, 1985, with no accompanying memorandum. The Order recited, in pertinent part, that Complainant had been served by certified mail with a copy of the Notice of Hearing; that the Examiner made two unsuccessful telephonic attempts to contact the Complainant immediately prior to convening the hearing on February 21, 1985; and that the Examiner thereafter commenced the hearing, and Respondent moved to dismiss the complaint given Complainant's absence.

### The Petition for Review and Affidavit

In its petition, Complainant asserts that the Commission should set aside the Examiner's Order and remand the complaint for hearing on the merits because Complainant's failure to appear was due to excusable neglect, because Complainant has a meritorious case to present, and because the interests of justice are served by such a remand.

Attached to the petition was an affidavit from Richard W. Abelson, the representative of Complainant who failed to appear at the February 21 hearing, asserting inter alia that he failed to mark his personal calendar for the date and hearing in question and was present before another Commission Examiner in another prohibited practices proceeding on the date in question.

### Position of the Union

The Union contends that the situation before the Commission is a case of first impression as to whether there are circumstances where the interests of justice warrant setting aside an Order dismissing a complaint because the moving party failed to appear for a scheduled hearing. It argues that in the two instances it could discover where complaints were dismissed for lack of prosecution, Painters Local Union No. 781, Dec. No. 2702 (WERB, 12/50) and J. I. Case Company, Dec. No. 15503-A (11/77), aff'd by operation of law, Dec. No. 15503-B (WERC, 12/77), the issue currently before the Commission was not presented because the moving party did not seek to present extenuating circumstances to explain the failure to appear. The Union notes, however, that in J. I. Case, the Examiner suggested that "in the interest of justice" the dismissal might be set aside if "Complainant immediately furnished the Commission with a substantive reason for his failure to appear."

The Union submits that the Commission should allow a moving party to obtain relief from the consequences of default where it can be shown by way of an offer of proof or otherwise that the moving party has a meritorious case to present and the failure to appear was not willful or the result of gross negligence. The Union argues that such a standard is appropriately easier to meet than that applied by the courts to either the moving or defending party, citing, Hedtcke v. Sentry Insurance Co., 109 Wis.2d 461 (1982) and Martin v. Griffin, 117 Wis.2d 438 (CtApp, 1983), or the "good cause" standard applied by the Commission and NLRB to responding parties who fail to appear, citing, Canaan Day Care Center, Dec. No. 18452-A (4/81), aff'd by operation of law, Dec. No. 18452-C (WERC, 5/81) and L. E. Beck & Son, Inc., 159 NLRB No. 134 (6/66). The Union asserts that such a lesser standard would accurately reflect the moving party's interest in proceeding if it is within his power to do so as opposed to the practical considerations and tactical advantages which delay represents for a responding party.

Under either the lesser standard which it proposes or the higher standard applied by the courts, the Union asserts that the Order dismissing the complaint should be overturned. It argues that the combination of events which led the

Union Representative Abelson to appear before Commission Examiner Jones instead of before Examiner Bielarczyk are unlikely to recur; that Abelson exercised ordinary care; and that the Union has demonstrated that it has a meritorious case to present. Should the Commission disagree, the Union asks that the policy of dismissal in such circumstances be applied prospectively only given the lack of guidance and/or warning to be derived from Commission decisions, rules or hearing notices.

Position of the Respondent Employer

The Employer contends that the appropriate standard to apply herein is one requiring the Union to show a substantive reason or good cause for the failure to appear. It asserts that such a standard would be consistent with the standard applied by the NLRB, citing, NLRB v. Aaron Convalescent Home, 194 NLRB No. 114 (1971); L. E. Beck & Son, Inc., supra, and Liquid Carbonic Corp., 116 NLRB No. 101 (1956), to whom the Commission has, on occasion, looked for guidance. Such a standard would also, in the Employer's view, be consistent with the legislative and administrative intent that complaints be processed quickly. The Employer contends that to allow unnecessary delay such as that caused by the Union in this case can only be justified by a good reason which goes beyond mere negligence. The Employer rejects the Union's assertion that moving parties should be held to a lesser standard than responding parties.

In the alternative, the Employer submits that at a minimum the Commission should adopt the "excusable neglect" standard applied by Wisconsin courts in Hedtcke, supra. It argues that neither inadvertence nor oversight are sufficient to meet this judicial standard, citing, Giese v. Giese, 43 Wis.2d 456 (1969) and Dugenske v. Dugenske, 80 Wis.2d 64 (1977). The Employer asserts that such a standard would adequately and appropriately protect not only the parties' interests in avoiding delay and additional expense but also the limited resources of the WERC.

The Employer urges that application of either of the foregoing standards to Abelson's conduct does not warrant the reopening of the case. Therefore, it asks that the Commission affirm the Examiner's Order.

Discussion

In our view, when it can be ascertained that a party has received notice of a complaint proceeding and that party fails to appear, the Examiner should make telephonic efforts to contact the missing party as was done in this case. Should such efforts fail, the Examiner may then properly, as he did here, entertain a motion to dismiss for lack of prosecution or may allow a party (most likely a moving party) to proceed ex parte to place facts in the record upon which the Examiner may dispose of the merits of the alleged statutory violation. However, we do not believe it appropriate for the Examiner to then issue a dispositional order in the matter without providing the missing party with an opportunity to allege that circumstances exist which warrant rescheduling the hearing or reopening the record. J. I. Case Co., supra, (dictum). Offering such an opportunity is warranted to avoid the manifest injustice which would exist if attendance at the hearing had become impossible due, for example, to an accident or unanticipated physical incapacitation. However, even where a party's inadvertence or oversight is responsible for the failure to appear, we believe that the interests of justice and the strong preference expressed by the Wisconsin courts for affording litigants a day in court and a trial on the issues are stronger than the countervailing interests in prompt adjudication and quality representation, 1/ and thus warrant rescheduling the matter or reopening the record. Only where the failure to appear is intentional or so recurrent as to represent an outright affront to the administrative process do we believe it appropriate to dismiss a complaint for lack of prosecution or to grant relief to a party based upon an ex parte record.

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1/ See, Dugenske, supra, at 70, and Hedtcke, supra, at 469 for a discussion of these competing factors.

Here, the Examiner did not provide the Union with an opportunity to allege that circumstances exist which warrant rescheduling the hearing. We have, therefore, remanded the matter to the Examiner for scheduling of a hearing where the Union shall be afforded the opportunity to establish that its failure to appear was unintentional and not part of a recurrent pattern. If the Union can establish same, it shall be allowed to proceed with proof on the merits. 2/

Dated at Madison, Wisconsin this 4th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

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2/ Of course, if a complainant's negligent non-appearance has the effect of exacerbating the employe's losses, the respondent can argue that the monetary relief for such losses, if any, should be reduced accordingly.