

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TOMAH AREA SCHOOL NON-TEACHING	:	
EMPLOYEES, LOCAL 1947-B,	:	
WCCME, AFSCME, AFL-CIO,	:	
	:	Case 42
Complainant,	:	No. 41069 MP-2137
	:	Decision No. 25862-B
vs.	:	
	:	
TOMAH AREA SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

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Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainant.

Lathrop & Clark, Attorneys at Law, by Mr. Michael J. Julka, and Ms. Jill W. Dean, 122 West Washington Avenue, Suite 1000, P. O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS  
AND GRANTING MOTION TO EXTEND TIME TO  
AMEND COMPLAINT AND SETTING TIME TO FILE ANSWER

Tomah Area School Non-Teaching Employees, Local 1947-B, WCCME, AFSCME, AFL-CIO, hereinafter referred to as Complainant, having on September 9, 1988, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Tomah Area School District, hereinafter referred to as the Respondent, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 and 5 of the Municipal Employment Relations Act; and the Commission having, on January 27, 1989, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and the Respondent having, on September 21, 1988, filed a motion to comply and to make the complaint more definite and certain; and the Examiner having, on January 27, 1989, issued an Order directing Complainant to make the complaint more definite and certain and to file said amended complaint on or before February 7, 1989; and said Order having been received by Complainant on January 28, 1989; and Complainant having failed to submit an amended complaint on or before February 7, 1989; and Respondent having, on February 20, 1989, filed a motion to dismiss the complaint with prejudice; and the Complainant having, on March 3, 1989, filed a motion to extend time to amend complaint as well as an amended complaint alleging that its field representative misread and/or misconstrued the date for filing the amended complaint; and the Respondent having, on March 17, 1989, responded thereto; and the Examiner having reviewed the matter and the arguments of the parties concludes that there are insufficient reasons to dismiss the complaint;

NOW, THEREFORE, it is

ORDERED

1. That the Motion to Dismiss is denied.
2. That the Motion to Extend Time For Filing First Amended Complaint is granted.

3. That the Respondent shall file an answer with the Examiner and mail a copy to Complainant's counsel

Mr. Richard V. Graylow  
Lawton & Cates  
Attorneys at Law  
214 W. Mifflin Street  
Madison, WI 53703-2594

on or before April 25, 1989.

Dated at Madison, Wisconsin this 5th day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley  
Lionel L. Crowley, Examiner

TOMAH AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER  
DENYING MOTION TO DISMISS AND GRANTING  
MOTION TO EXTEND TIME TO AMEND COMPLAINT  
AND SETTING TIME TO FILE ANSWER

The Respondent bases its Motion to Dismiss on the Complainant's failure to amend its complaint or to timely request an extension of time to amend the complaint. It asserts that the Complainant had ample time to comply with the Order to Make Complaint More Definite and Certain such that Complainant arguably has chosen to ignore the Order. It submits that the defective complaint should be dismissed with prejudice.

In its Motion to Extend Time for Filing Amended Complaint, the Complainant asserts that the deadline of February 7, 1989 was not met because the field representative misread and/or misconstrued said date and seeks relief upon equitable principles from problems created by good faith, honest mistakes.

In its response, the Respondent opposes the Complainant's Motion for an Extension because it has not demonstrated good cause for such an extension as required by Wis. Adm. Code section ERB 10.08(3). The Respondent points out that the Complainant's reference to the rules of civil procedure, while providing guidance, do not support its contention for an extension because it has presented no affidavits or testimony in support of its motion. It insists that mere allegations or an offer of proof are not sufficient. The Respondent submits that even if the reason offered for the failure to meet the time limit is accepted as true, it does not constitute "excusable neglect". It notes that excusable neglect is neglect that might have been the act of a reasonably prudent person under the same circumstances and is not the same as neglect, carelessness or inattentiveness. Respondent argues that there was no "excusable neglect" in this matter and asks that the Complainant's motion be denied. The Respondent contends that the complaint should be dismissed with prejudice because Complainant failed to comply with the Commission's rules for initiating the complaint and failed to comply with the Order to cure such defects. The Respondent also submits that it appears it has an absolute defense based on the one year statute of limitations and no purpose would be served by a dismissal without prejudice so it requests dismissal with prejudice as well as appropriate relief.

Although the parties have both referred to the statutory rules of civil procedure and cases interpreting such statutory rules, such rules are not applicable to administrative proceedings. See Chapters 227 and 801, Stats.

The undersigned is of the opinion that certain principles enunciated by the Commission are applicable to the instant matter. In Prairie Home Cemetery, Dec. No. 22316-B (WERC, 1085), the Complainant failed to appear at a scheduled hearing on a complaint. After two unsuccessful attempts to telephonically contact the Complainant, the Examiner dismissed the complaint upon Respondent's motion. The Complainant's field representative had failed to mark his personal calendar for the date of the hearing. The Commission reversed the Examiner's dismissal and stated the following:

"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, and thus warrant rescheduling the matter or reopening the record. Only where the failure to appear is intentional or so recurrent so 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." (Footnotes omitted)

Although the facts of that case differ from the instant matter, it appears that the Commission refused to accept the judicial standard of "excusable neglect"

and allowed mere inadvertence or oversight for a failure to appear to warrant rescheduling of a hearing. The Commission stated that the failure must be intentional or so recurrent as to represent an outright affront to the administrative process. Application of these principles to the instant case seems appropriate. The Complainant failed to submit any affidavit as to the failure to amend the complaint by the date set in the Order Granting the Motion to Make More Definite and Certain, however Mr. Graylow's representation and offer of proof as to the reasons indicate that the failure to timely amend was not intentional and the failure to timely amend was not so recurrent as to constitute an affront to the administrative process. Thus, under the Commission's standards, it would appear that dismissal of the complaint would be inappropriate.

More on point is Western Wisconsin VTAE District, Dec. No. 14963-B (Schoenfeld, 11/76), where the Examiner issued an Order directing that the complaint be made more definite and certain and be filed with the Commission on or before October 29, 1976. The amended complaint was not filed with the Commission until November 4, 1976. The Examiner denied Respondent's motion to dismiss where sufficient cause (service on complainant three days before the due date) existed for the failure to timely file the amended complaint and the failure of Respondent to demonstrate any prejudice as a result of the late filing. In the instant case, the times between receipt of the Order and the due date for amendment as well as the date of the Complainant's Motion and the actual filing of the amended complaint are greater than those in the above noted case, however these time differences are not sufficient to require a contrary result in the present case. Respondent can argue that any costs associated with the delay due to Complainant's negligence can be offset against any monetary relief, if any, awarded. 1/ Thus, there is not a sufficient showing of prejudice such that the complaint should be dismissed for the failure to follow the Examiner's Order. Dismissal with prejudice would be a sanction for the failure to comply with the Examiner's Order. The Commission's normal remedial order is designed to cure rather than punish and based on equitable principles, the Examiner concludes that dismissal would be inappropriate.

Furthermore, Wis. Adm. Code section ERB 12.02(5)(a) permits the Complainant to amend the complaint at any time prior to the issuance of an order based on the complaint without a showing of good cause. Therefore, the undersigned has concluded that the Respondent's Motion to Dismiss be denied and the Complainant's Motion to Extend be granted. Inasmuch as the complaint has been amended, the Examiner has established a new date for the filing of the answer. The undersigned will contact the parties in the near future to establish a date for hearing.

Dated at Madison, Wisconsin this 5th day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley  
Lionel L. Crowley, Examiner

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1/ See Prairie Home Cemetery, supra, n. 2.