

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FELICIANO YNOCENCIO, JR., Complainant,

vs.

UNITED AUTO WORKERS LOCAL 72, Respondent.

Case 1
No. 56679
Ce-2191

Decision No. 29431-C

Appearances:

Mr. Feliciano Ynocencio, Jr., 5210 Admiralty Avenue, Racine, Wisconsin 53406, appearing on his own behalf.

Murphy, Gillick, Wicht & Prachthausen, by **Attorney George F. Graf**, Blue Mound Centre, 22370 West Bluemound Road, Suite 204, Waukesha, Wisconsin 53186, appearing on behalf of United Auto Workers Local 72.

ORDER AFFIRMING EXAMINER'S
ORDER DISMISSING COMPLAINT

On March 4, 2003, Examiner Karen J. Mawhinney issued an Order Dismissing Complaint in the above matter because Complainant had offered no evidence in support of his allegations against Respondent.

On March 20, 2003, Complainant filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats.

The Respondent filed a statement in opposition to the petition on May 15, 2003.

Dec. No. 29431-C

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Order Dismissing Complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of July, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING
EXAMINER'S ORDER DISMISSING COMPLAINT

The Memorandum accompanying the Examiner's Order accurately recites the history of this case as follows:

This complaint was filed more than four years before the hearing in the matter took place. The Examiner gave the Complainant ample opportunity to get legal representation when he requested such and gave the Complainant sufficient time to prepare for a hearing. At times, the complaint lay dormant until the Examiner wrote the parties to ask for the status of the matter. The file will show that on August 27, 1998, the Commission appointed me as Examiner and I wrote the parties asking for hearing dates in November of 1998. On September 1, 1998, Attorney William Whitnall wrote stating he needed more information regarding the complaint in order to represent the Complainant. On September 23, 1998, the Examiner wrote to the parties and noted to Attorney Whitnall that there were no notes in the file that were available to anyone from any prior mediation efforts.

On October 2, 1998, the Examiner offered a couple of new dates for a hearing in October and November of 1998. The Respondent accepted the October date. On October 21, 1998, the Examiner wrote the parties asked if they would be available on November 24, 1998, for a hearing, and on November 18, 1998, notified them that there was not enough time to send a notice and do the matters necessary for a hearing on November 24, 1998. The Examiner then asked Attorney Whitnall for his available dates for a hearing.

On January 28, 1999, the Examiner wrote to Attorney George Graf, who represented the Respondent at all stages in this proceeding, that the Complainant informed her that Attorney Whitnall was no longer representing him and that he was still looking for an attorney. On April 21, 1999, the Examiner wrote the Complainant and Attorney Graf and enclosed a copy of a booklet about the WERC complaint process. The Examiner also offered the assistance of her supervisor, Marshall Gratz, in order to avoid ex parte communications with the Complainant. The file was inactive from April 21, 1999, until the Examiner wrote the parties on January 31, 2000, asking about the status of the case. Attorney Graf responded on February 3, 2000, asking that the case be dismissed for lack of prosecution. Complainant Ynocencio wrote the Examiner on February 7, 2000, notifying her that he needed an extension until August 7, 2000, because his parole was revoked and he was scheduled for release in July

of 2000. On May 8, 2000, the Examiner wrote the parties to notify them that she would hold Attorney Graf's Motion to Dismiss for Lack of Prosecution in abeyance until Complainant Ynocencio was available for a hearing, and then Mr. Ynocencio should advise her after he is released when and if he had arranged for counsel and when he was available for a hearing. On June 6, 2000, the Complainant notified the Examiner that he was able to go forward with his case.

On March 26, 2001, the Examiner wrote the parties asking about the status of the case. On April 2, 2001, the Complainant wrote Attorney Graf asking for discovery materials. On April 9, 2001, Attorney Graf wrote the Examiner that the Respondent still believed the matter should be dismissed for want of prosecution. On April 16, 2001, the Complainant wrote the Examiner asking that the case not be dismissed.

On March 7, 2002, the Examiner wrote the parties asking about the status of the case. On March 22, 2002, the Examiner received an Application for Order to Compel Discovery from the Complainant. On March 25, 2002, the Examiner notified Attorney Graf of such Motion and asking if he wished to file a brief on the Motion. Attorney Graf responded on March 27, 2002, stating that he did not have a copy of the Motion. On March 28, the Examiner wrote the parties noting that the parties would have up to April 26th to file any other motions, and the Respondent filed a Motion to Dismiss on April 24, 2002. On May 21, 2002, the Examiner denied both the Complainant's Motion to Compel Discovery and the Respondent's Motion to Dismiss and asked for a hearing date for September of 2002.

On July 12, 2002, the Examiner asked about a hearing date for October 1, 2002, and asked for a hearing location. On that same date, Attorney Graf wrote asking whether the matter had been set for hearing and proposed a location of Kenosha where the UAW has a hall. Attorney Graf then responded on July 22, 2002, stating that most of October would be available for a hearing although October 3rd was booked. On August 9, 2002, the Examiner wrote the parties suggesting October 11, 2002, for a hearing and notified them that Kenosha would be a good location if there were an acceptable place available. On August 20, 2002, Attorney Graf wrote that the Respondent would be available on October 11, 2002, in Kenosha. On September 10, 2002, Attorney Graf wrote asking if the hearing was scheduled for October 11, 2002, and advising that the Union Hall could be used if no other site was available in Kenosha. On September 17, 2002, the Examiner wrote the parties asking the Complainant to notify her whether he could make the hearing date of October 11, 2002.

On September 27, 2002, the Examiner wrote Attorney Graf and Complainant Ynocencio advising them that the hearing date of October 11, 2002, would be postponed and that Attorney Michelle Danielson said she was looking over the Complainant's case and making a decision on whether she would represent him in the matter. On October 30, 2002, the Examiner wrote Attorneys Graf and Danielson and the Complainant, confirming her conversation with Ms. Danielson regarding Ms. Danielson's representation of the Complainant, and that Ms. Danielson would be filing a motion in the near future. The Examiner asked that such motion be filed by November 6, 2002. No such motion was filed and the Examiner had no more conversations with Attorney Danielson, despite leaving telephone messages with her. On November 19, 2002, the Examiner wrote Attorneys Graf and Danielson and the Complainant to establish another hearing date of either February 14 or March 7 in 2003. Attorney Graf responded on December 9, 2002, stating that February 14, 2003, was available. On December 12, 2002, the Examiner wrote Attorney Danielson urging her to make herself and her client available for a hearing on February 14, 2003, and giving her some of the history of communications that appears above. The Examiner received no response.

On January 24, 2003, the Examiner sent the Notice of Hearing on the Complaint establishing the date of February 14, 2003, for the hearing with the location at the UAW Union Hall, 3615 Washington Road, Kenosha, Wisconsin. In a letter accompanying the Notice of Hearing, the Examiner cautioned Attorney Danielson and Complainant Ynocencio that the case would either go forward on that date or be dismissed.

The Examiner's Memorandum also accurately summarizes as follows what occurred at hearing:

Complainant Ynocencio appeared on the hearing on February 14, 2003. He objected to the location of the Union Hall for a hearing site because it was not a neutral site. He asked for the hearing to be delayed and rescheduled. He made the following statement at the hearing:

Yes, my complaint is the Union refused to go through the third step on a grievance procedure, which is against the guidelines and rules of the Union. They've done it many times for other people. They've done it for murderers. They done it for one person specifically twice by the name of Juan Hurta, who

has been to prison twice for cocaine dealing. They did it for John Matera, who went to prison for coming off cocaine. They did it for many people.

The excuse they used for me is – the excuse, the board member, I forget his name. Anyways, I will get his name. My lawyer has all the information, but they've used that 1979 memo from the International Union to the Local Union to say that they don't have to go to the third step for me, which they've done on numerous occasions for other people.

So right there is prejudice toward me by the Union, which has no right to be prejudiced for me, because at the time I was working for Local 72, I was a good Union member. I even donated money to Mr. Drew's campaign back in the early '80's when he was fighting the company – him and his fellow workers who took the company to court. I was one of the people that donated money to his cause, and they're in violation of my Union rights.

They have been in violation of my Union rights ever since I come to them for help. They told me that the company said no. They said take it further, take it all the way through the steps.

So my conclusion is that they are in conspiracy with the company for me not to get my job back. They've done it many times. They go through the whole grievance procedure, and they can take it to arbitration, which they refused to go to the third step, which is why I filed the complaint against them.

They have no way to back out of this, because it states in the book that my lawyer has, my Union book, that they have to go through the steps. Yet for me, they refuse.

For one reason, they didn't give me no reason, other than they got a memo from the International in 1979 saying they didn't have to. Now that was the end of it. That's my complaint.

The Examiner then asked the Complainant if he wished to call any witnesses, and he did not. When the Examiner told the Complainant that he needed some evidence to prove his allegation, he stated that his attorney had the evidence, and that if he got a delay, he would prove that the Union has gone to the third step of the grievance procedure for other people but has shown bad faith towards him. The Examiner then notified the parties that she was not going to give the Complainant another delay.

The hearing transcript reflects that the hearing concluded as follows:

EXAMINER MAWHINNEY: Mr. Ynocencio, I'm sorry, I think because you have come without an attorney and started this case without an attorney, the WERC has been especially lenient in trying to give you extra time to either get an attorney or bring your case forward. We may not have been so lenient in other cases where people have had representation. We would not have tolerated these inordinate delays in this case that has gone on now for the past four-and-a-half years.

So, therefore, I'm going to deny any further delays. I believe you've had adequate notice for many years to bring your case forward or to have it dismissed, and those are the options. I don't really have anything more I can add to that, I guess. If you would like to say something at this time, this is your opportunity.

MR. YNOCENCIO: Yes. The reason I've had a problem with lawyers is – the reason is of financial difficulties. That the Union is mainly at fault with not getting my job back in 1997 when I came out of the penitentiary. That's number one.

Number two, I've been having problems with lawyers. I paid this lawyer over \$1,500, and she didn't show up. That's nobody fault's, but that's between me and my lawyer. I also would like for the record, I'm going to appeal these procedures today. That's why I put that motion in. I would like a copy of the transcript.

EXAMINER MAWHINNEY: You will receive a copy of the transcript, and you will receive notice of your appeal rights and your time limits to file those appeal rights.

MR. YNOCENCIO: Okay. Thank you.

EXAMINER MAWHINNEY: All right. Mr. Graf, do you have anything to add?

MR. GRAF: I take it you're dismissing the case? I think if he's got anything else to present today, you ought to do it. Have you got anything else you want to present today, sir?

MR. YNOCENCIO: I stand on what I just said, sir.

MR. GRAF: Okay. Then I move to dismiss.

EXAMINER MAWHINNEY: Well, I will issue an order of dismissal formally in written form, and that will come out to both parties; and that will give you an opportunity to appeal that. All right?

MR. YNOCENCIO: Okay.

MR. GRAF: Fair enough.

MR. YNOCENCIO: That's fair. I would also like to state that you have been awful fair for me these past four years, and I would like to thank you for it.

EXAMINER MAWHINNEY: I appreciate that. If there's nothing further, this hearing will be closed.

MR. YNOCENCIO: Thank you.

MR. GRAF: Thank you.

(Proceedings closed at 10:35 a.m.)

In his petition for review, Complainant states the following grounds for his appeal:

I am appealing my case 1 - No. 56679 - Ce-2191 on the grounds that it was not held (hearing) on a natural (sic) ground, but at the Union hall that I was suing, Local 72 - in Kenosha.

I was also without my file, and my attorney never showed up, nor did she notify me or anyone else that she was no longer my attorney, she did not answer my phone calls, so I had no way to get my files. At my meeting with her she told me she had no office and I met her at restraint. (sic)

As to the issue of whether the Examiner erred by conducting the hearing at the Respondent's hall, we are satisfied that she acted within the range of discretion granted to the Commission and its examiners by Sec. 111.07(2), Stats., which states ". . . hearings may be

held at such places as the commission shall designate.” The record reflects that the Respondent offered the hall as a potential hearing site, that the Examiner accepted that suggestion, and that there was no objection from Complainant until the day of hearing. There is no evidence that the hearing site in fact inhibited or intimidated Complainant. Therefore, we reject the Complainant’s claim that the Examiner erred by conducting the hearing at the Respondent’s hall.

As to the issue of whether the Examiner erred by refusing to postpone the hearing and dismissing the complaint, we are also satisfied that she did not err.

By the following letter dated January 24, 2003, the Examiner clearly (and reasonably, given the history of the case) advised Complainant that no further postponements would be granted and that the complaint would be dismissed if Complainant or his representative did not present evidence at the February 14, 2003 hearing:

Please find enclosed a copy of the Notice of Hearing on Complaint. Please take note that the hearing is scheduled for February 14th and no more delays are acceptable. I have tried to obtain concurrence in the date from the Complainant but have had no response. I have sent letters and left phone messages. Because this case is (sic) now been lingering for more than four years, it either goes forward to hearing on February 14th or it will be dismissed. If neither Ms. Danielson nor Mr. Ynocencio present the case on that date, I will dismiss it.

Given this warning from the Examiner, Complainant knew or should have known that he had more than two weeks to recover any material he had provided to his attorney and that he needed to be prepared to present evidence in support of his complaint on February 14, 2003. Given this warning, when Complainant did not present any evidence on February 14, 2003, the Examiner did not err by denying Complainant’s request for a postponement and dismissing the complaint.

When reaching this result, we emphasize that this is not a circumstance in which Complainant believed (or asserts on review that he believed) that he had presented evidence in support of his complaint when making his opening statement. The Examiner clearly advised Complainant that he needed to present evidence to support the allegations he had made through

his complaint. He did not do so. While the Examiner could have advised the Complainant that he could present evidence in support of his complaint by testifying on his own behalf, the absence of such advice does not provide persuasive grounds for setting aside the Order Dismissing Complaint.

Given the foregoing, we affirm the Examiner.

Dated at Madison, Wisconsin, this 11th day of July, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner