

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANIS COTTRELL, Complainant,

vs.

**MILWAUKEE PUBLIC SCHOOLS and
MILWAUKEE DISTRICT COUNCIL 48**, Respondents.

Case 341
No. 55257
MP-3311

Decision No. 29494-A

Appearances:

Podell, Ugent, Haney & Delery, by **Attorney Carolyn Delery**, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of Milwaukee District Council 48.

Attorney Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, City Hall, Room 800, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Public Schools.

Larraine McNamara-McGraw, by **Attorney Cynthia L. Manlove**, 324 East Wisconsin Avenue, Suite 1200, Milwaukee, Wisconsin 53202, appearing on behalf of Janis Cottrell.

ORDER REVERSING EXAMINER'S ORDER DISMISSING COMPLAINT

On December 2, 1998, Examiner Sharon A. Gallagher issued an Order Dismissing Complaint in the above matter. The Order confirmed that on November 19, 1998, the Examiner had orally granted a Motion to Dismiss due to lack of prosecution of the complaint.

On December 22, 1998, Complainant filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's Order pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.

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Complainant filed a brief in support of the petition on February 1, 1999. Respondent Milwaukee Public Schools filed a responsive brief on February 22, 1999. No reply brief was filed and the record was closed March 1, 1999.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Order Dismissing Complaint is reversed.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Milwaukee Public Schools

**MEMORANDUM ACCOMPANYING ORDER REVERSING
EXAMINER'S ORDER DISMISSING COMPLAINT**

The Examiner's Decision

The text of the Examiner's Order is as follows:

Janis Cottrell having, on June 3, 1997, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondents had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 3 and 111.70(3)(b)1 of the Municipal Employment Relations Act by (Milwaukee Public Schools) discharging Complainant and by (Milwaukee District Council 48) failing to fairly represent Complainant; after holding the case in abeyance pending processing of Complainant's underlying grievance from July 24, 1997 until March 20, 1998, hearing was tentatively scheduled for May 26 and 29, 1998 but Complainant requested that the case be heard in July, 1998. Due to the unavailability of a key Employer witness in July, 1998, the hearing was scheduled (with agreement of all parties) for August 3 and August 4, 1998, and a Notice of Hearing was sent to all parties. On July 27, 1998, Complainant advised she had never received the Notice of Hearing, Complainant having changed her mailing address and failed to advise the Wisconsin Employment Relations Commission or the parties thereof. Hearing was then postponed and rescheduled for November 19 and 20, 1998, with agreement of all parties, and a Notice of Postponement thereon was sent to all parties. After close of business November 17, 1998, Complaint's (sic) niece requested a postponement of the hearing herein because Complainant had recently hired a new attorney (Manlove) to represent Complainant. On November 18, 1998, the Examiner spoke with Attorney Manlove who stated that although Complainant had asked Manlove to represent her, Manlove did not represent Complainant and Manlove would not attend the November 19 hearing, as Complainant had not paid Manlove's retainer. The examiner then attempted to get Respondents to agree to a postponement, but this could not be done as Respondent Union's attorney was out of town and could not be reached. The Examiner advised Complainant that the November 19, 1998 hearing would be held as scheduled unless Complainant's attorney faxed the Examiner and the parties a Notice of Appearance. The Examiner also urged Complainant to attend the hearing without counsel. The Examiner told Complainant the Examiner would entertain a Motion to Dismiss on November 19th if Complainant did not attend. No Notice of Appearance was received.

On November 19, 1998, the hearing was convened at 10:00 a.m. Respondents were present but Complainant failed to appear either personally or by her attorney. The Examiner put a full account of the history of this case &

summarized herein) on the record and invited Respondent's attorneys to comment. Both attorneys commented and moved to dismiss the complaint for lack of prosecution, stating their reasons therefor on the record. The Motion was granted by the Examiner on the record.

THE PETITION FOR REVIEW

Complainant's petition states in pertinent part:

1. Complainant Cottrell requested a postponement of the hearing scheduled for 11/19/98, as she was without legal counsel despite her efforts to retain an attorney.

2. Complainant informed hearings (sic) examiner Gallagher, at the time of her request for a postponement, that she intended to retain Cynthia Manlove, but would not have the fee necessary to do so until December 1, 1998.

3. Cynthia Manlove faxed a letter to Ms. Gallagher stating that she believed it was Complainant's intent to retain her on December 1, 1998 to represent her in the above referenced case.

4. Although she was told the case might be dismissed on 11/19/98, the Complainant did not know that her case would be dismissed if she failed to show up at the hearing on 11/19/98.

5. The case had been postponed on three prior occasions, once at the request of the Respondent, with no adverse consequences to Complainant's case.

6. At the time of the hearing, Complainant did not know if her request for a postponement had been granted or denied.

7. Complainant did not feel she would be able to adequately represent herself at the hearing.

8. No harm to the Respondent would have resulted if the request for a postponement had been granted.

9. The Complainant's right to a due process hearing on the merits of her case was denied by dismissal of her case.

Therefore, the Complainant respectfully requests that the Commission remand the case for a full hearing on the merits.

POSITIONS OF THE PARTIES

Complainant

Complainant asserts the Examiner's Order should be reversed and the complaint should be scheduled for hearing on the merits.

Complainant argues that the legitimacy of the Examiner's Order should be measured against Wisconsin law applicable to a trial court's dismissal of a lawsuit for failure to prosecute. Relying on this body of law, Complainant contends: (1) her conduct in failing to attend the hearing was justifiable and not egregious; and (2) adequate notice was not given that the sanction for failure to attend would be dismissal of the complaint.

Citing *TRISPEL V. HAEFER*, 89 WIS.2D 725 (1979), Complainant contends dismissal is only appropriate when a party's conduct is egregious because there is no clear and justifiable excuse for the failure to appear. Complainant alleges she did not attend the hearing because she did not feel she could adequately represent herself and because she was in the process of retaining legal counsel. Therefore, Complainant argues her conduct was not egregious and that a justifiable excuse was provided to the Examiner prior to dismissal.

Citing *NEYLAN V. VORLAND*, 124 WIS.2D 85 (1985), Complainant asserts that "fundamental fairness and due process" entitled her to adequate notice that dismissal would result if she failed to appear. Complainant argues that being advised by the Examiner that she would entertain a motion to dismiss did not provide adequate notice.

Given the foregoing, Complainant asks for reversal of the Examiner's Order.

Respondent Milwaukee Public Schools

Respondent urges the Commission to affirm the Examiner.

Respondent contends Complainant's failure to appear was egregious because it reflected: "open defiance" of the Examiner's repeated urgings that she attend the hearing; "contempt" for the proceeding Complainant had initiated; and "extraordinary disregard" for the time and effort of opposing parties in preparing for the case. Respondent further argues that Complainant's excuse for failing to attend is neither clear nor justifiable because Complainant lied about having an attorney and waited until the "eleventh hour" before having her niece contact the Examiner.

Respondent contends that Complainant had adequate notice of the consequences for failure to appear. Respondent asserts no reasonable person could be surprised the complaint was dismissed after being forcefully informed by the Examiner that a motion to dismiss would be entertained if they failed to appear.

Given the foregoing, Respondent Milwaukee Public Schools asks that the Examiner be affirmed.

Respondent District Council 48

Respondent District Council 48 did not file written argument.

DISCUSSION

We concur with the parties' view that Wisconsin law in the TRISPEL and NYLAND decisions provides a good analytical framework for deciding this case. Applying that framework, we reverse the Examiner. We do so because we are satisfied that Complainant had a justifiable excuse for her failure to attend the hearing.

Two days prior to hearing, Complainant sought a postponement asserting her recently obtained lawyer (Attorney Manlove) was unavailable for the hearing. The day before the hearing, the Examiner received a facsimile transmission from Manlove with stated:

I am writing this letter on behalf of Janis Cottrell. She recently contacted me about possibly representing her at the WERC trial that is scheduled on November 19-20, 1998.

She has asked that I contact you to request a postponement of the trial to enable her to pursue legal representation. At this time, Ms. Cottrell has not formally retained me but I believe it is her intent to retain me in the near future.

We conclude that a verifiable and likely successful effort to obtain legal counsel clearly constitutes a justifiable excuse for seeking a postponement and for failing to appear when the request for postponement is denied. Under such circumstances set forth above, we are persuaded that there was a sufficient probability of obtaining legal representation to warrant granting a postponement.

Therefore, we reverse the Examiner and the complaint will be scheduled for hearing.

Dated at Madison, Wisconsin this 11th day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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