

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK BENZING AND CHARLES STOKES, Complainants,

vs.

**WISCONSIN EDUCATION ASSOCIATION COUNCIL
AND THE PARAPROFESSIONAL TECHNICAL COUNCIL**, Respondents.

Case 64
No. 55288
MP-3314

Decision No. 29852-A

Appearances:

Mr. Mark Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511, appearing on behalf of himself and Complainant Charles Stokes.

Attorney Mary Pitassi, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Respondents.

**ORDER DISMISSING COMPLAINT
AND AMENDED COMPLAINTS WITH PREJUDICE**

On March 28, 1997, Mark Benzing filed a complaint with the Wisconsin Employment Relations Commission which alleged that the Wisconsin Education Association Council and the Paraprofessional Technical Council had committed prohibited practices within the meaning of Secs. 111.70(3)(b)1 and 2, Stats. Thereafter, the complaint was held in abeyance for about three years while the parties attempted to settle the dispute. While the settlement efforts were ongoing, Benzing filed several amendments to his original complaint. The first amended complaint was filed with the Wisconsin Employment Relations Commission on May 29, 1998. Benzing contends that he filed a second amended complaint with the Wisconsin Employment Relations Commission around October 29, 1998, but that amendment is not contained in the Commission's case file and the Respondent avers it never received a copy of same. Benzing is the only named complainant on these two documents. Benzing filed another amended

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complaint with the Wisconsin Employment Relations Commission on November 15, 1999. This amendment differed from those that had preceded it in that it listed two complainants (Benzing and Charles Stokes) and was signed by both of them. At the time, Stokes was a co-worker of Benzing's. After that amendment was filed, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. When the matter was scheduled for hearing, the Examiner decided to list Stokes in the caption as a complainant for the case even though his involvement in same was limited to just the November 15, 1999 amended complaint. This is how both Benzing and Stokes came to be denominated as the complainants herein. When the case was subsequently scheduled for hearing, the Examiner spoke only with Benzing because he (Benzing) identified himself as the Complainants' representative. Additionally, the November, 1999 amended complaint did not list an address or phone number for Stokes. Consequently, Stokes' copies of the scheduling correspondence were sent to him in care of Benzing until the Examiner was able to obtain Stokes' address.

The first day of hearing in this matter was held on April 14, 2000, in Janesville, Wisconsin. Benzing attended the hearing and acted as the Complainants' representative. In that capacity he both testified and examined witnesses. Stokes did not attend the first day of hearing. A second day of hearing was held on April 26, 2000. Both Benzing and Stokes attended that hearing. Stokes' involvement that day was limited to testifying; he did not examine witnesses. A third day of hearing was held May 23, 2000. Prior to the start of that day's hearing, Stokes told the Examiner he would not be attending that day's hearing or any subsequent days of hearing. Stokes also told the Examiner that since he had finished testifying, he (Stokes) considered his involvement in the case to be finished. At the end of that day's hearing, arrangements were made for the hearing to resume on September 12 and 13, 2000. Benzing agreed to those dates. The reason the parties agreed to a four-month delay between hearing dates was because they anticipated that the remaining witnesses would be taking their vacations during the upcoming summer months, and they decided to schedule around the witnesses' vacations by resuming the hearing after school started again.

On May 25, 2000, the Examiner sent the following scheduling letter to Benzing, Stokes and Mary Pitassi (Respondent's Legal Counsel):

. . .

Enclosed is the formal notice that the hearing will continue on Tuesday, September 12, and Wednesday, September 13, 2000.

The reason I am sending this accompanying letter is to highlight that I set

the start time on those dates for 9:00 a.m. rather than 10:00 a.m.

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. . .

The formal notice which was enclosed provided thus:

NOTICE OF CONTINUED HEARING

PLEASE TAKE NOTICE that the public hearing scheduled by the Wisconsin Employment Relations Commission in the above-entitled matter has been continued to Tuesday, September 12 and Wednesday, September 13, 2000. The hearing will commence at **9:00 a.m. each day** and will be held in the Board Room of the Blackhawk Technical College, 6004 Prairie Road, County Trunk "G", Janesville, Wisconsin.

Dated at Madison, Wisconsin, this 25th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc

G0028G.28

cc: Mr. Mark Benzing
Mr. Charles Stokes, c/o Mark Benzing
Ms. Mary Pitassi, Legal Counsel, Wisconsin Education Association
Council
Professional Reporters, Ltd.

On September 12, 2000, the Respondents and their witnesses, the court reporter and the Examiner were present at the designated site at the designated time for the fourth day of hearing, but Benzing and Stokes were not. All the aforementioned then waited three hours for Benzing and/or Stokes to appear. Neither did. Thus, both failed to appear at the hearing. During this period, the Examiner searched the Employer's premises for them, to no avail. The Examiner also tried, without success, to call both of them. The Examiner called the two phone numbers he had for Benzing, but both numbers had been disconnected by the phone company. When the Examiner called Stokes' home number, an answering machine kicked in, whereupon the Examiner left a phone message inquiring whether Stokes or Benzing was going to appear at that day's hearing. The Examiner also checked the phone answering machine at his office to determine if either Benzing or Stokes had called and left a message asking for a postponement or explaining

their absence. Neither had. Respondents' representatives Mary Pitassi and Leigh

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Barker also checked their phone answering machines at their offices to determine if either Benzing or Stokes had called them. Neither had.

While the parties waited, the Examiner and the Respondents discussed whether to proceed with the hearing *ex parte*. After considering same, it was decided not to proceed *ex parte* with the Respondents' case in the Complainants' absence because of Respondents' concerns that their witnesses would all be recalled for cross-examination at a later date. The Respondents anticipated calling up to nine witnesses. As a result, no testimony was taken that day from any of the Respondents' witnesses.

At 12:00 Noon, the Examiner went on the record and summarized what had happened that morning. He then adjourned the hearing for the day and cancelled the hearing set for the next day, September 13. He then stated:

What will happen now is that the Examiner will write the Complainants inquiring as to the reasons for their absences from the hearing. The Examiner will subsequently decide whether good cause exists for their absences. If no good cause is found, the Examiner will dismiss the complaint and amended complaints with prejudice.

(Transcript, Volume 4, page 6).

...

On September 14, the Examiner sent the following letter to Benzing:

This letter confirms that you failed to attend the September 12 hearing on your complaint against WEAC. I was there, as was the court reporter, the Respondents and their witnesses. You, however, were not there. Mr. Stokes also was not there, but I expected his absence because he told me after he testified on the second day of hearing that he would not be attending any more of the hearing. I expected you to be present though because 1) you are the moving party (the Complainant) in this case; 2) you agreed to September 12 and 13 as the next hearing dates; and 3) I mailed you written notice on May 25 that the hearing would continue on September 12 and 13. Given the foregoing, your absence on September 12 was a surprise to me, as well as to the Respondents.

On the morning of September 12, the Respondents and I waited for you to show up from 9:00 a.m. to 12:00 Noon. During that time, I attempted without success to contact you by phone. Specifically, I called the two phone numbers I

had for you ((608) 362-9890 and (608) 363-8499), but both numbers had been

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disconnected. I also called my office to see if you had called and left a telephone message with me explaining your absence and/or requesting a postponement of the scheduled hearing. There was no such message.

We did not proceed with the hearing *ex parte* (by that, I mean without you). Thus, no testimony was taken that day from any of the Respondents' witnesses.

With this letter, I am notifying you that you are to file a written response with me explaining why you were absent and did not appear at the September 12 hearing. This written response is to be filed with me by October 6, 2000.

After the date just referenced has elapsed, I will decide whether you have shown good cause for your absence and your failure to appear at the September 12 hearing. If you show good cause for same, the hearing will be rescheduled. However, if you do not show good cause for your absence and your failure to appear at the September 12 hearing, your complaint will be dismissed for lack of prosecution.

I have mailed this letter to you via both regular and certified mail.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0032G.28

cc- Mr. Charles Stokes
Ms. Mary Pitassi, Legal Counsel, Wisconsin Education Association Council

On October 6, the Examiner received the following reply from Benzing:

Memorandum

To: Wisconsin Employment Relations Commission Examiner, Mr.
Raleigh Jones

Cc: Mr. Charles Stokes, Ms. Mary Pitassi

From: Mark Benzing

Date: September 29th, 2000.

Re: Mark Benzing and Charles Staokes v. WEAC/PTC, Case 64 No.
55288 MP-3314 Requested Written Response.

This letter is sent in response to your letter dated September 14th 2000 concerning my absence from the hearing held at Blackhawk Technical College, board room on September 13th 2000.

Examiner it is true that I in the past on May 15 2000 had agreed to the continuation of the above referenced matter at a hearing scheduled for September 12, 2000. Although in the past actions that I have been, a party of when a significant amount of time had elapsed. I had always received a confirmation of the hearing in a letter from the Examiner approximately two weeks before the hearing date.

In addition, after such a significantly amount of time had elapsed since the last hearing I was expecting a letter to come from your office. I can verify this fact through letters and communications I have received from examiners in other actions I was a party too. If it were not for the past practice, I would have without a doubt contacted you to confirm that the hearing would commenced as scheduled.

Also because my previous employer Blackhawk Technical College, in a disputed matter going before an arbitrator ending my employment last Spring. Which brought about chan of events the first and second week of September 2000. I had tons of bill collectors contacting me and my mortgage holder out of no were, was initiating and action that would have put me on the street with no place to live. I was also coordinating a settlement with my mortgage holder. And attempting to get my vehicle running so that I could have transportation to and from my future employment.

Mr. Stokes was with me on and off the first three weeks of September 11 2000. And would have contacted within an hour if he would have been telephoned on September 12 also.

Again since I had no dependable or reliable way to remind me of the hearing on September 12th (since so much time had elapsed and so much had took place) I was sincerely depending heavily on a communication from your office confirming the date of the scheduled hearing. As I had in the past actions when a significant amount of time had elapsed between hearings.

Also, I did remembered some of the communication that took place on April 14 prior to receiving your letter dated September 14. I did recall once school started back up. With September almost half over I had decided to contact your office. Before I was able to contact your office for the exacted date, I received your letter.

Moreover, at no time had I intended not to be present at the hearing. In addition, I sincerely apologize to all involved for the inconvyance my absent caused. If Mr. Stokes had been contacted by telephone I am sure I would have been present.

I will gladly pay a agreed upon percentage of the mileage and fees and cost that became due because of my absent. Moreover, under the circumstances I would like to request another hearing to be scheduled at the Respondent's and your conveyance.

Thank you for your attention.

Truthfully,

Mark Benzing /s/
Mark Benzing, Complainant

On October 17, the Respondents replied in writing to Benzing's letter. They asked that Benzing's request for rescheduling be denied.

Stokes did not file a response to any of the correspondence.

Based on the foregoing, the Examiner finds that Complainants Benzing and Stokes did not have good cause to be absent from the September 12 hearing. By their unexcused absences, they waived the right to continue and/or reschedule the hearing. The Examiner therefore makes and issues the following

ORDER

The complaint and amended complaints are hereby dismissed with prejudice.

Dated at Madison, Wisconsin this 15th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

**BLACKHAWK VOCATIONAL, TECHNICAL
AND ADULT EDUCATION DISTRICT**

**MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT
AND AMENDED COMPLAINTS WITH PREJUDICE**

Both Complainants Benzing and Stokes failed to appear at the September 12, 2000 hearing.

Stokes' absence that day was not a surprise to the Examiner because he had previously told me that he would not be attending any more of the hearing. Stokes had previously attended just one day of the hearing (namely, the second day), and on that day his capacity was limited to testifying; he did not examine witnesses.

Benzing's absence on September 12 was a surprise to the Examiner. I expected him to be present because 1) he is the moving party in this case and the representative for both himself and Stokes; 2) at the end of the third day of hearing he agreed that the hearing would resume on September 12 and 13; 3) I had mailed him two notices confirming that the hearing would continue on September 12 and 13; and 4) prior to the September 12 hearing, he had not called me to request a postponement.

Following his absence from the September 12 hearing, I directed Benzing to explain in writing why he was absent and did not appear at the hearing. In my letter, I indicated that after his explanation was received,

“ . . . I will decide whether you have shown good cause for your absence and your failure to appear at the September 12 hearing. If you show good cause for same, the hearing will be rescheduled. However, if you do not show good cause for your absence and your failure to appear at the September 12 hearing, your complaint will be dismissed for lack of prosecution.”

The reference in this letter to “good cause” essentially comes from ERC 10.13(2), Wis. Administrative Code. That section will be addressed later in this discussion.

Based on the rationale which follows, I find that Benzing has not shown good cause for his absence. In his letter explaining why he was absent from the September 12 hearing, Benzing essentially says that the reason he failed to appear was because he forgot about the hearing date. The Examiner finds that forgetting about a hearing date does not constitute sufficient cause to justify or excuse an absence. In so finding, it is expressly noted that I did not forget the hearing date, the Respondents and their witnesses did not forget, and the court

reporter did not forget. All of us were present on September 12 at the designated location and start time and were ready to proceed with the hearing. Since this was to be the fourth day of hearing, Benzing knew the hearing routine and had been able to take whatever steps he found necessary to remember and attend the first, second and third days of the hearing. He should have done so for the fourth day of hearing as well. As a justification for his absence, Benzing calls attention to the fact that he had a lot going on in his personal life in mid-September, 2000. The Examiner has no reason to dispute that assertion. However, the fact that Benzing had a lot on his proverbial plate at the time does not give him a free pass or entitle him to be held to a different standard than any other complainant would have faced if they had forgotten about a hearing. Rhetorically speaking, why should Benzing be held to a different or more lenient standard? Finally, Benzing asserts that in previous legal actions involving the WERC, he had received a reminder of the upcoming hearing from the Examiner approximately two weeks before the hearing, and implies that this Examiner should have done likewise. This Examiner does not send reminder notices to litigants, nor is he familiar with Commission examiners who do. While Commission examiners do send out scheduling notices, that happened here. On May 25, 2000, the Examiner mailed two hearing notices to all the parties informing them that the hearing was to continue on September 12 and 13, 2000. Benzing does not claim that he did not receive those notices. Benzing therefore had notice of the hearing date and agreed to same, so he should have been there. Neither the Examiner nor the Respondents were responsible for him being absent. He, and he alone, bears the responsibility for that. Since Benzing alone was responsible for the fact that no hearing on the complaint was held on September 12, the consequence for that action falls on him.

Turning now to Stokes, I find that he has not shown good cause for his absence either. It is noted at the outset that while Stokes' absence on September 12 was not a surprise to the Examiner, that does not mean his absence that day was excused or justified. To the contrary, it was an unexcused absence as were his absences on the first and third days of the hearing. When someone files a complaint with the Wisconsin Employment Relations Commission, one of their obligations as a complaining party is to attend the subsequent hearing which their complaint set in motion. While in this case Benzing was the original complaining party, Stokes became a co-complainant in the case when he signed the November, 1999 amended complaint. As a co-complainant, he should have attended the hearing. With the exception of the second day of hearing, he failed to do so. He voluntarily chose not to attend the hearing in which he was a complaining party.

Having found that Complainants Benzing and Stokes did not have good cause to be absent from the September 12 hearing, the focus now turns to what happens next. Benzing asks that the hearing be rescheduled. The section of the Commission's administrative rules that deals with the rescheduling of hearings is ERC 10.13(2). That section provides as follows:

(2) RESCHEDULING OF HEARING. Upon its own motion or proper cause shown by any of the parties, the commission, may prior to the opening of the hearing reschedule the date of such hearing.

This section allows hearings to be rescheduled, but does not guarantee it. ERC 10.13(4) then goes on to provide that under certain circumstances, “the rights set forth in sub. (2)” (to reschedule the hearing) can be waived. Section (4) provides in pertinent part:

(4) EFFECT OF FAILURE TO APPEAR. Any party failing to appear and participate after due notice shall be deemed to have waived the rights set forth in sub. (2). . .

Those are exactly the circumstances present here. Both Benzing and Stokes failed to appear for the September 12 hearing after due notice of same had been given to them. Section (4) provides that when these circumstances exist, the party who fails to appear at the hearing “shall be deemed to have waived the rights set forth in sub. (2)” (to reschedule the hearing). Since the Complainants failed to appear at the September 12 hearing, there is no longer a due process requirement to continue and/or reschedule the hearing to accommodate them. In so finding, the Examiner has assumed that if the hearing was rescheduled as Benzing requests, the Complainants probably would show up the next time. The problem with this scenario is that it gives them a totally free pass for failing to appear at the September 12 hearing. Said another way, it imposes no consequence whatsoever on them for being no-shows at the September 12 hearing and wasting considerable time and resources of the Respondents, their witnesses, the court reporter and the Examiner. Under these circumstances, the Examiner finds that a sanction against the Complainants is warranted. The sanction which the Examiner finds warranted is to not continue and/or reschedule the hearing.

In conclusion, the Examiner finds that by failing to attend the September 12 hearing, Complainants Benzing and Stokes abandoned the complaint and amended complaints and waived their right to have the hearing on same continue. Under these circumstances, there is no due process requirement to continue and/or reschedule the hearing. Accordingly, the complaint and amended complaints are hereby dismissed with prejudice.

Dated at Madison, Wisconsin this 15th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc

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