STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JERRY M. KLEMA, Complainant,

vs.

WINGRA REDI-MIX, INC., Respondent.

Case 3
No. 58899
Cw-3670

Decision No. 31056-A

Appearances:

Jerry Klema, *pro se*, 4212 Oak Street, McFarland, Wisconsin 53558, appearing on his own behalf.

Peter Richter, Attorney, Stroud, Willink & Howard, 25 West Main Street, Suite 300, Madison, Wisconsin 53701-2236, appearing on behalf of Wingra Redi-Mix, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On May 22, 2000, Jerry M. Klema filed a complaint, *pro se,* with the Wisconsin Employment Relations Commission (WERC) against Wingra Redi-Mix, Inc. The complaint alleged that Wingra had committed an unfair labor practice within the meaning of Sec. 111.06(2)(c) of the Wisconsin Employment Peace Act. (WEPA). Specifically, the complaint alleged that the Company had violated a settlement agreement that the Company and Union had reached concerning his employment status following an arbitration decision involving same. Although it was not referenced in the complaint, the "Union" referenced in the preceding sentence was Teamsters Local Union No. 695. As a remedy, the complaint sought "compliance with the agreement by the Employer to repay my unemployment account."

After the complaint was filed with the WERC, it was initially assigned to Conciliator Thomas Yaeger. It can be inferred from the case file that Yaeger contacted the parties in the summer of 2000 and attempted to settle the dispute. Those settlement efforts were unsuccessful, so the case file was transferred (pursuant to internal WERC procedure) from the Conciliator to an Examiner. This transfer occurred in August, 2000. The Examiner who the case was assigned to was Raleigh Jones, a member of the Commission's staff.

[Note to the reader: The Examiner has decided to structure this decision so that some facts are included in this introductory section, while other facts are included in the Findings of Fact section. The rationale behind this structure will be addressed in the **DISCUSSION** section.]

The Examiner's phone logs in the case file indicate that in August, 2000, he (Jones) had eight phone calls with lawyers for Teamsters Local Union No. 695 and Wingra regarding this case. Those phone calls dealt with the following two topics: 1) whether the Teamsters Union was going to participate in the case as a named party and 2) whether either the Union or the Company was going to remove the case to federal district court. In late August, the Teamsters advised the Examiner that it would not be participating in this case. In late September, the Company advised the Examiner that it was not going to remove the case to federal district court. This meant that the litigation could proceed before the WERC.

After the Examiner learned that the Company was not going to remove the case to federal district court, he called Company lawyer Joseph Bartol on September 27, 2000 and inquired whether the Company was ready to schedule the case for hearing. Bartol answered in the affirmative. The Examiner and Bartol then came up with three potential hearing dates: November 8, 9 and 10, 2000. Bartol indicated he would check those dates out with the client. On October 2, 2000, Bartol called Jones back and said that all three of the proposed dates were acceptable to the Company. The Examiner tentatively selected November 9, 2000 at 9:00 a.m. as the hearing date at a site to be determined in Madison, Wisconsin.

On October 3, 2000, Jones called Klema and told him that the Company had decided it was not going to remove the case to federal district court, so the litigation could proceed before the WERC. Jones also told Klema that he and the Company were available for a hearing on November 9, 2000 at 9:00 a.m. at a site to be determined in Madison, Wisconsin. In that phone call, Klema indicated that November 9, 2000 was acceptable to him as a hearing date, but that he wanted to talk to a lawyer before the case was scheduled for hearing. Jones indicated acceptance with same. Klema also indicated that he did not know if he was going to be represented at the hearing or whether he was going to represent himself.

On October 10, 2000, Jones called Bartol and told him that the date of November 9, 2000 was acceptable to Klema, but that Klema wanted to talk to a lawyer before the case was formally scheduled for that date. Jones also told Bartol that Klema did not know if he was going to be represented at the hearing by an attorney or whether he was going to represent himself. Bartol then asked Jones about the timetable for filing an Answer to the complaint, and Jones indicated that the Company did not need to file an Answer until the case was formally scheduled for hearing.

On October 31, 2000, Jones called Bartol again and told him that he had not heard from Klema since October 3 and that the closer it got to November 9 without hearing from Klema, the less likely it was that the hearing would proceed on that date (i.e. November 9, 2000). Jones further indicated that if Klema did get a lawyer, and November 9 did not work for that lawyer, then the parties would find another mutually acceptable date.

On November 6, 2000, Bartol faxed the following letter to Jones:

November 6, 2000

VIA FACSIMILE

Mr. Raleigh Jones, Examiner
Wisconsin Employment Relations Commission
P.O. Box 7870
Madison, WI 53707-7870

Re: Jerry Klema v. Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670

Dear Mr. Jones:

You and I had tentatively set November 9, 2000 as the hearing date for the above-referenced matter. You were to get back to me once you heard from Mr. Klema as to whether this date was acceptable to him and his counsel. Pursuant to our telephone conversation last week, I understood that you have not heard from Jerry Klema yet as to the proposed hearing date. Accordingly, I understand that the hearing will not be held on November 9, 2000, that a new date will be set for the hearing, and that you will provide me with notice of the new hearing date.

Please feel free to contact Robb Kahl or me with any questions or comments you may have. Robb Kahl is an attorney in our office who will be assisting me in my representation of Wingra Redi-Mix at the hearing. Thank you again for keeping us updated in this matter.

Very truly yours,

STROUD, WILLINK & HOWARD, LLC

By: Joseph P. Bartol /s/
Joseph P. Bartol

JPH/bh

cc: Wingra Redi-Mix, Inc. (via facsimile)

On November 8, 2000, Jones sent the following letter to Klema:

November 8, 2000

Mr. Jerry Klema
4212 Oak Street
McFarland, WI 53558-9285

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Dear Mr. Klema:

Previously you and I talked about having your hearing on Thursday, November 9, 2000. The way we left it was that you were going to get back to me concerning whether that date worked for your legal counsel. I have not heard back from you about that date. As a result, no hearing will be held on November 9. When you are ready to schedule your complaint for hearing, contact me and we will look a new dates.

Enclosed is a letter I received from the Company's lawyer, Mr. Bartol.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0082G.28
cc- Mr. Joseph Bartol, Stroud, Willink & Howard, Attorneys at Law (No enclosure)

That same day (November 8, 2000) Jones received two phone messages from the office of Madison attorney William Haus. The phone messages indicated they were related to this case. Jones returned those calls and was told that Attorney Haus was representing Klema. Jones, in turn, told Haus that there was not going to be a hearing on the matter the next day (i.e. November 9). On November 14, 2000, Jones sent Haus the two letters reproduced above.

Jones never heard from Attorney Haus again regarding this case.

Over the next four months, there was no phone contact or written correspondence between Jones and any of the parties to this case.

. . .

The remaining facts have been compiled into the traditional Findings of Fact format.

. . .

As will be noted below, the Company has filed a Motion to Dismiss the complaint. No evidentiary hearing has yet been conducted in this matter. Additionally, the Company has not yet filed an Answer. Having considered the pleadings, as well as the arguments of the parties, I am satisfied that Respondent's Motion to Dismiss should be granted. Accordingly, I hereby make and issue the following Findings of Fact, Conclusions of Law and Order Granting Respondent's Motion to Dismiss.

FINDINGS OF FACT

1. Jerry M. Klema is an individual residing at 4212 Oak Street, McFarland, Wisconsin 53558-9285.

2. Wingra Redi-Mix is an employer located in Madison, Wisconsin. The Company's mailing address is P.O. Box 44284, Madison, Wisconsin 53744-4284.

3. Klema formerly worked for Wingra Redi-Mix and was in the bargaining unit represented by Teamsters Local Union No. 695.

4. On May 22, 2000, Klema filed an unfair labor practice complaint with the WERC against Wingra Redi-Mix. The complaint alleged that the Company had violated a settlement agreement that the Company and Union had reached concerning his employment status following an arbitration decision involving same.

5. On March 9, 2001, Klema contacted Jones by phone and told him that he wanted to schedule the complaint for hearing. Jones asked Klema if he (Klema) was represented by Attorney Haus, and Klema responded in the negative. Specifically, Klema said that Haus was "out of the picture" because he and Haus could not agree over Haus' compensation. Jones then asked Klema if he (Klema) was represented by another lawyer, and Klema again replied in the negative, but indicated he was searching again for a lawyer. Klema asked Jones if his case could continue to be held in abeyance, and Jones replied that he was not pushing Klema for a hearing. Jones indicated that he would send the Company's lawyer (Bartol) a letter indicating that Klema was still searching for a lawyer.

6. On March 12, 2001, Jones sent the following letter to Bartol:

March 12, 2001

Mr. Joseph Bartol
Stroud, Willink & Howard
Attorneys at Law
25 West Main Street, Suite 300
Madison, WI 53701-2236

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Dear Mr. Bartol:

On March 9, Mr. Klema called me and told me that he has not yet found an attorney to represent him in the above-captioned matter, but that his search for one continues.

Given his ongoing efforts to retain legal counsel, his complaint will continue to be held in abeyance.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0082G.28
cc- Mr. Jerry Klema

7. After the above-referenced letter was sent, the Examiner had no phone contact or written correspondence with any of the parties involved in this case for over three years. Additionally, the Examiner was not contacted during this time period by any lawyer acting on Klema's behalf. During that three-year period, the case file was dormant.

8. On July 6, 2004, Jones sent the following letter to Klema:

July 6, 2004

Mr. Jerry Klema
4212 Oak Street
McFarland, WI 53558-9285

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Dear Mr. Klema:

As you know, your complaint against Wingra Redi-Mix has been held in abeyance, at your request, while you sought legal counsel.

With this letter, I am notifying you that given the length of time that has elapsed since I heard from you (three years), I plan to dismiss your complaint unless you notify me to the contrary by Monday, July 26, 2004.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0082G.28
cc- Mr. Joseph Bartol, Stroud, Willink & Howard, Attorneys at Law

9. On July 14, 2004, Klema came to the WERC office unannounced and talked to Jones about the above-referenced letter. Mr. Bartol was not present during the conversation that ensued between the two (i.e. Klema and Jones). In that conversation, Klema told Jones that he had been unable to retain legal counsel because of the costs involved, but that he wanted his complaint against Wingra Redi-Mix to now proceed. Klema indicated that once the case proceeded, he would be representing himself. Jones told Klema that he would write Bartol and tell him the foregoing and propose hearing dates.

10. The next day (July 15, 2004), Jones sent the following letter to Bartol:

July 15, 2004

Mr. Joseph Bartol
Stroud, Willink & Howard
Attorneys at Law
25 West Main Street, Suite 300
Madison, WI 53701-2236

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Dear Mr. Bartol:

On July 14, 2004, Mr. Klema came to my office unannounced in response to my July 6 letter and talked to me. The purpose of this letter is to apprise you of what occurred.

First, Mr. Klema indicated that he had been unable to retain legal counsel because of the costs involved. Second, he indicated that he still wanted his complaint against Wingra Redi-Mix to go forward. Third, he indicated he would be representing himself in this matter. Fourth, after Mr. Klema told me the foregoing, I responded that I would write you a letter memorializing the foregoing and proposing dates for a hearing. Finally, Mr. Klema gave me two handwritten documents, copies of which are enclosed. In the first document, he requests a hearing. In the second document, he requests a subpoena. With regard to the second document (i.e. the subpoena request), I told him that after the case was scheduled for hearing, I would sign a blank subpoena and send it to him, but that it was his responsibility to have it (i.e. the subpoena) served.

In response to Mr. Klema's request for a hearing, I am offering the following dates: Thursday, September 9; Friday, September 10; Thursday, September 16; Friday, September 17 or Friday, September 24, 2004.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0082G.28
Enclosure

cc- Mr. Jerry Klema (No enclosures)

(NOTE: The enclosures referenced in this letter are not reproduced here because they are described in detail in the second paragraph of the letter).

11. On August 11, 2004, Jones sent the following letter to Bartol:

August 11, 2004

Mr. Joseph Bartol
Stroud, Willink & Howard
Attorneys at Law
25 West Main Street, Suite 300
Madison, WI 53701-2236

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Dear Mr. Bartol:

To date, I have not heard back from you regarding my letter of July 15, 2004 (a copy of which is enclosed). Please advise if any of the dates referenced therein work for you.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0082G.28
Enclosure
cc- Mr. Jerry Klema (No enclosure)

12. On August 17, 2004, Jones received a phone message from Attorney Peter Richter of the Stroud law firm regarding this case. The phone message indicated that Wingra was surprised by Klema's request for a hearing given the amount of time that had passed since the complaint was filed. Richter further indicated that he would be sending Jones a letter regarding this case.

13. On August 18, 2004, Richter sent the following letter to Jones:

August 18, 2004

VIA HAND DELIVERY

Raleigh Jones
Examiner
Wisconsin Employment Relations Commission
P.O. Box 7870
Madison, WI 53707-7870

Re: Jerry Klema vs. Wingra Redi-Mix
Case 3 No. 58899 Cw-3670

Dear Mr. Jones:

Thank you for your recent letters regarding Mr. Klema's request to proceed to a hearing in this matter. As I alluded to in my voice-mail message earlier this week, in light of the extended amount of time that has passed, your letters and Mr. Klema's request for a hearing certainly took Wingra Redi-Mix, Inc. ("Wingra") by surprise. If you recall, Mr. Klema's complaint in this matter was filed back in May of 2000 and has essentially been sitting idle for the past four and a half years. Furthermore, Mr. Klema's May 2000 complaint is based entirely on a settlement that was reached back in June of 1999. This matter was originally scheduled for a hearing to be held on November 9, 2000, but that hearing was apparently cancelled on November 8, 2000, when Mr. Klema failed to respond to your inquiry about whether he was ready to proceed. Apparently, Mr. Klema would now like to have this case brought to a hearing and you have therefore identified possible hearing dates in September. As I suggested in my message, Mr. Klema's request for a hearing caught Wingra off guard and Wingra is still in the process of reviewing all of its information in regard to the June 1, 1999 settlement upon which Mr. Klema's claim is based. Therefore, Wingra respectfully requests some additional time. If that is acceptable, please advise as to available dates in October and November.

Notwithstanding the foregoing request, Wingra would ask that you consider whether a hearing is warranted. As you know, Section 111.07(2)(a), Wis. Stats., provides that complaints are to be heard no more than forty (40) days after the filing of the complaint. Obviously, this complaint has not been heard within the prescribed forty-day period. Mr. Klema certainly had the right and opportunity to request that the hearing be postponed and rescheduled. However, it does not appear that Mr. Klema ever submitted a written request to postpone and reschedule the November 9, 2000 hearing. He certainly did not file any such motion or request within the two (2) day period mandated by ERC 10.12(1). At

this point, the only written request that has been submitted by Mr. Klema is the

July 14, 2004, letter which he apparently presented to you at the conclusion of your meeting with him on that same day. Because Mr. Klema did not previously file anything requesting an adjournment and rescheduled hearing, Wingra did not file a written objection. In light of the foregoing, Wingra must now formally object to Mr. Klema's written request to proceed with a hearing over forty (40) months after the originally scheduled hearing date and Wingra therefore respectfully submits that this matter should be dismissed. If you would like the parties to brief this matter, please advise.

Thank you for your careful consideration of the matters set forth herein and we look forward to your response.

Very truly yours,

STROUD, WILLINK & HOWARD, LLC

By: Peter J. Richter /s/
Peter J. Richter

PJR/gh

cc: Jerry Klema
Wingra Redi-Mix, Inc.

14. On August 26, 2004, the Commission formally appointed Jones to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. That same day, Jones sent the following letter to the parties:

August 26, 2004

Mr. Peter Richter
Stroud, Willink & Howard
Attorneys at Law
25 West Main Street, Suite 300
Madison, WI 53701-2236

Mr. Jerry Klema
4212 Oak Street
McFarland, WI 53558-9285

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Gentlemen:

Enclosed for each of you is a copy of the Order appointing me as Examiner in this case.

In Mr. Richter's letter of August 18, 2004, he asks that the complaint be dismissed due to the length of time that elapsed between the date originally blocked off for hearing (November 9, 2000) and Mr. Klema's recent request, over 3½ years later, for a hearing.

With this letter, I am directing Mr. Klema to show cause, in writing, why the complaint should not be dismissed on that basis (i.e. because of the length of time that elapsed between the date originally blocked off for hearing – November 9, 2000 – and Mr. Klema's recent request, over 3½ years later, for a hearing).

After I receive Mr. Klema's response, I will rule on the Employer's motion to dismiss.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc
G0082G.28
Enclosure

(Note: The enclosure referenced in this letter is not reproduced here because it was described in detail in the first sentence in the letter).

15. On September 1, 2004, Klema filed the following written response:

Wingra Redi Mix
Case No. 3 No. 58899 Cw-3670
Jerry Klema vs. Wingra Redi-Mix
August 30, 2004

Dear Mr. Jones:

When I paid for my hearing, I asked Mr. Thomas Yaeger specificaly if there was a time limit. I was told not that he was aware of.

According to the letter I have from WERC dated June 5, 2000 from Peter G. Davis states "The parties have a right to a hearing within 40 days after filing the complaint. This letter does not say that complaints are to be heard no more than 40 days after filing of the complaint. On Sept 25 2000 Mr. Jones you sent a letter to Mr. Bartol wanting to know if Wingra was going to move it to federal court. Which means Wingra's Attorneys are the one that delayed the hearing in the first place, from with in the 40 days.

Mr. Richter states that I failed to respond and my only written request was on July 14, 2004. That I never submitted a request for postponement and reschedule a hearing. If that is true then why does your letter say my complaint has been in abeyance, at my request, while I sought legal counsel. You oked my request. I think Mr. Richter has things confused.

Over the last 3 years I have had several attorneys contact Wingras attorneys to go back to the arbitrator about was awarded. When we contacted the arbitrator he said only if all three parties agreed. The union and the company worked togather aganst me because they both wanted me fired, and it was for something I didn't evan do. The arbitrator, said to have everything setteled by Apr 1, the union and the company waited untill June 4 so the arbitrator was out of the pictcher. When ever the union and there attorney was contacted they was very hostil toward me. They would go along with the company. With the union and there money and company and there money working against a blue collar worker with just what I work for. 5 years is a long time I agee, But I'am still trying to get what I was awarded.

In our Union contrat Artical 3 sec 1-c stats that the decision of the arbitrator shell be final and binding on both parties. But in my case there are 3 parties and I'am not counted. I have never agreed to a settlement agreement or signed a settlement agreement.

I have trouble putting words on paper to say what I really mean. I hope that what I tried to convey to you about why I do not feel, that this complaint not be dismissed. 5 years I've tried to get in a court room. So I hope my complaint is not dismissed.

Thank you for your time
truly yours

Jerry Klema /s/
Jerry Klema

There were three attachments to this letter. Those attachments are not reproduced here but instead are summarized. The first attachment was a letter dated June 5, 2000 by WERC General Counsel Peter Davis to the President of Wingra Redi-Mix informing him that Klema had filed an unfair labor practice complaint against the Company. That letter provided in pertinent part: "The parties have a right to a hearing within 40 days of the filing of the complaint." The second attachment was a letter dated September 25, 2000 that Jones sent to Bartol. That letter asked if the Company was going to remove the case to federal court. The third attachment was a document entitled "Article 3 – Grievance and Arbitration." On its face, that document does not indicate what it is taken from. The Examiner surmises from Mr. Klema's letter that the document just referenced is taken from the collective bargaining agreement that exists or existed between Wingra and Teamsters Local Union No. 695.

16. On September 9, 2004, Richter filed the following reply to Klema's response:

September 9, 2004

VIA HAND DELIVERY

Raleigh Jones
Examiner
Wisconsin Employment Relations Commission
P.O. Box 7870
Madison, WI 53707-7870

Re: Jerry Klema vs. Wingra Redi-Mix
Case 3 No. 58899 Cw-3670

Dear Mr. Jones:

Thank you for your September 2, 2004 letter and the correspondence attached thereto. I believe my client's position on the settlement of Mr. Klema's claim was made clear in my partner's (Joseph P. Bartol) July 18, 2000 letter to Thomas Yaeger, so I will not rehash those matters. I would, however, like to briefly address another issue that Mr. Klema raised in his August 30, 2004 response

("Response"). Mr. Klema's explanation for his delay is that he was unable to

retain counsel. However, in his Response, Mr. Klema states that over the past three years he has had several attorneys contact Wingra about the arbitrator's decision. While Mr. Klema certainly did not need to retain counsel to take action on the complaint he personally filed back in May of 2000, his Response indicates that he has in fact retained "several attorneys" since then. Accordingly, it does not appear that Mr. Klema has shown the requisite cause why this matter should not be dismissed.

Once again, thank you for your consideration and I await your written decision.

Very truly yours,

STROUD, WILLINK & HOWARD, LLC

By: Peter J. Richter /s/
Peter J. Richter

PJR/gh

cc: Jerry Klema
Wingra Redi-Mix, Inc.

17. On September 20, 2004, Jones sent the following letter to the parties:

September 20, 2004

Mr. Peter Richter
Stroud, Willink & Howard
Attorneys at Law
25 West Main Street, Suite 300
Madison, WI 53701-2236

Mr. Jerry Klema
4212 Oak Street
McFarland, WI 53558-9285

Re: Wingra Redi-Mix, Inc.
Case 3 No. 58899 Cw-3670
(Jerry Klema vs. Wingra Redi-Mix)

Gentlemen:

I am writing in response to one sentence contained in Mr. Richter's letter dated September 9, 2004. In the second sentence, Mr. Richter says:

> I believe my client's position on the settlement of Mr. Klema's claim was made clear in my partner's (Joseph P. Bartol) July 18, 2000 letter to Thomas Yaeger, so I will not rehash those matters . . .

My file does not contain that letter. I want to explain why.

When an unfair labor practice complaint is filed with the Wisconsin Employment Relations Commission, it is initially assigned to someone from our office who contacts the parties and attempts to settle the dispute. In this case, that person was Thomas Yaeger. It can be inferred from the file that Mr. Yaeger contacted Mr. Bartol about this matter in June, 2000, and that Bartol responded with a letter to Yaeger dated July 18, 2000. That is the letter referenced above wherein Bartol laid out Wingra's position. Ultimately, though, the matter did not settle, and the file was transferred from Yaeger to me. When the file was transferred, it did not include Bartol's July 18, 2000 letter. That was intentional. The WERC conciliator (i.e. the person who attempts to settle the complaint) does not include correspondence in the file which relates to settlement efforts. I refer to the following sentence in the letter to Wingra from the WERC dated June 5, 2000:

> Any settlement discussions will be held in strict confidence and thus will not be communicated to the Examiner who would be assigned to hear and decide the case if settlement does not occur or to the Commissioners who review any Examiner decision.

Thus, when I issue my ruling on the Company's motion to dismiss, it will not be based at all on Bartol's July 18, 2000 letter.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Examiner

REJ/gjc

18. Additional letters were subsequently exchanged between the parties, the last of which was received November 8, 2004.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. For the purposes of ruling on the Company's Motion to Dismiss, it is assumed that the Wisconsin Employment Relations Commission has jurisdiction over the allegations referenced in the complaint.

2. Mr. Klema's September 1, 2004 response to Examiner Jones' August 26, 2004 directive did not show cause for the three-year delay which occurred between the date his case was officially put in abeyance (March, 2001) and his request for a hearing in July, 2004.

3. By failing to show cause why his complaint should not be dismissed, Mr. Klema abandoned the prosecution of his complaint.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The Respondent's Motion to Dismiss is granted. The complaint is therefore dismissed.

Dated at Madison, Wisconsin this 15th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

WINGRA REDI-MIX, INC.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

The Company has filed a Motion to Dismiss the instant complaint. The basis for the Company's Motion is the length of time that elapsed between the date originally blocked off for the hearing – November 9, 2000 – and Klema's request, 3½ years later, for a hearing. The Company essentially alleges that the case should be dismissed for lack of prosecution. Klema disagrees.

DISCUSSION

The factual context for this decision is as follows. This case was filed with the WERC almost five years ago. As was noted in the prefatory paragraphs, there was a lot of activity in this case in the summer and fall of 2000. By October, 2000, it was decided that the Teamsters Union was not going to participate as a named party, and that the case was not going to be removed to federal district court. That same month, all the parties blocked off a date for the hearing, namely November 9, 2000. However, no hearing was held on that date because Klema told the Examiner he wanted to talk to a lawyer before the case was scheduled, and the date blocked off for the hearing came and went without any further word from Klema. Over the next four months, the Examiner had no contact with any of the parties to this case and nothing occurred. In March, 2001, Klema asked the Examiner if the case could continue to be held in abeyance while he searched for an attorney. The Examiner granted Klema's request and subsequently memorialized it in writing. In a letter dated March 12, 2001, the Examiner wrote: "Given his ongoing efforts to retain legal counsel, his complaint will continue to be held in abeyance." After that letter was sent, the file was inactive for more than three years. During that lengthy period, the Examiner had no contact with anyone about this case: not the Company; not Klema; not anyone acting on Klema's behalf. Given that lack of contact, the Examiner considered the case to be dormant and inactive. In July, 2004, the Examiner, acting on his own volition, sent Klema a letter that said in pertinent part: "With this letter, I am notifying you that given the length of time that has elapsed since I heard from you (three years), I plan to dismiss your complaint unless you notify me to the contrary. . ." In response to that letter, Klema came to the WERC office and told the Examiner that he had not been able to retain a lawyer, but that he wanted his complaint against Wingra to now proceed to hearing. Klema also indicated that once the case proceeded, he would be representing himself. The Examiner subsequently advised Wingra of the foregoing. When Wingra was advised that Klema now wished to proceed to hearing on his complaint, it (Wingra) objected to proceeding because 40 months had elapsed since the originally scheduled hearing date (i.e. November 9, 2000). After Wingra objected to proceeding with the hearing on the basis of Klema's delay, the Examiner directed Klema "to show cause, in writing, why the complaint should not be dismissed on that basis (i.e. because of the length of time that elapsed between the date originally blocked off for hearing – November 9, 2000 – and [his] recent request, over 3½ years later, for a hearing)."

The first matter which the Examiner has decided to address is which factual event from those just noted is going to be used for the purpose of ruling on the Motion to Dismiss. As the Examiner sees it, there are three events that could be used: 1) the date the complaint was filed (May 22, 2000), 2) the date originally blocked off for hearing (November 9, 2000), or 3) the date Klema's case was officially put in abeyance (March 12, 2001). The Examiner has decided to use the last event just referenced (i.e. the date Klema's case was officially put in abeyance) for the purpose of ruling on this motion. My rationale for picking that event over the others is simple: as the latest chronological event, it is the most advantageous to Klema.

Having so found, the next question to be answered is whether Klema has shown cause for the three year delay which occurred between the date his case was officially put in abeyance (March, 2001) and his request for a hearing in July, 2004. In plain terms, did Klema supply a good explanation for that long delay? I find he did not. Here's why. The delay in this case is attributable solely to Klema. None of the delay from March, 2001 forward is attributable to the Company. Once again, the case was put in abeyance at Klema's request so that he could find a lawyer to represent him in this case. Once that happened, either Klema or his lawyer was to notify the Examiner so that the case could be scheduled for hearing. It was Klema's responsibility to notify the Examiner, not the other way around, because the case was put in abeyance at Klema's request. The Examiner then waited and waited and waited to hear back from Klema. He never did. Over three years passed, and the Examiner never heard from Klema or anyone else who represented him. While Klema avers in his September 1, 2004 written statement that he "had several attorneys" contact Wingra regarding the arbitration award that involved him, none of those unnamed attorneys ever contacted the Examiner regarding his complaint before the WERC, or advised the Examiner that they represented Klema, or indicated that they wanted to proceed to hearing. Thus, even if Klema did retain "several attorneys" over the course of that three-year period, as he avers, none of them ever contacted the Examiner. In my view, that fact is of critical importance here because, as previously noted, that was the reason the Examiner agreed to Klema's request to put the case in abeyance (i.e. so that Klema could find a lawyer to represent him). Just so that it's clear, though, the Examiner did hear from one lawyer who represented Klema, namely William Haus, but that occurred in November, 2000, which was four months before this case was officially put in abeyance so that Klema could find a lawyer. Besides, Klema told the Examiner in March, 2001, that Haus was "out of the picture" because the two could not agree over Haus' compensation. Following the conversation just referenced, the Examiner did not hear from Klema until after he (Klema) received the Examiner's July 6, 2004 letter. That letter prompted Klema to contact the Examiner and ask that his case be scheduled for hearing. After the Company objected to going forward with a hearing because of the delay involved, the Examiner directed Klema to show cause why the case should now proceed to hearing after being held in abeyance for more than three years. Klema's response to that directive (i.e. Klema's written statement received September 1, 2004) falls short of the mark and does not show cause why his case should now proceed to hearing. It would be one thing if Klema had offered explanations in that statement which might justify why he did not contact the Examiner for over three years. However, no such explanations were offered in that document. That being so, I find that Klema has not shown cause for the three-year delay which occurred

between the date his case was officially put in abeyance (March, 2001) and his request for a hearing in July, 2004.

The next question is whether that delay warrants dismissal of the complaint. I find that it does. Here's why.

There is WERC case law which addresses the same type of factual situation as is involved here (i.e. where a case is filed and then, for various reasons, the Complainant fails to advance the litigation). The Commission's most recent decision involving dismissal of a complaint because of the Complainant's lack of prosecution is BENZING V. PARAPROFESSIONAL TECHNICAL COUNCIL (WEAC) & BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03). In that case, the Commission said:

> . . .Ultimately, we are persuaded dismissal for abandonment is appropriate due to our responsibility to the Respondents in this case, who were brought before us over three years ago and who since then have diligently tried to clarify and advance the litigation in a timely and appropriate fashion. We conclude that it would be unjust to impose upon them the burden and expense of defending so late in the game against claims that were neglected for long periods of time by Complainant Benzing even after he was specifically advised that his neglect had become an issue. (p. 16).

In that same decision, the Commission also said:

> While the Commission traditionally has interpreted its discretion narrowly when it comes to default orders, certain aspects of the Commission's procedures require that those default mechanisms be meaningful. Unlike some analogous forums, such as the National Labor Relations Board, 7/ the EEOC, 8/ and the Wisconsin ERD, 9/ our complaint procedures do not include an initial investigation or a preliminary probable cause determination regarding the merits of claims. Nor do the Commission's processes encompass routine depositions or rudimentary discovery such as might test the validity of a complainant's charges prior to trial. Rather, a charging party who files a complaint alleging cognizable prohibited practices under MERA is entitled to proceed directly to a formal evidentiary hearing, transcribed by a court reporter, and not infrequently involving multiple days of testimony. In fairness to respondents, therefore, and in order to preserve the Commission's increasingly more scarce resources, we allow pre-hearing motions to ferret out allegations that on their face fall outside the Commission's jurisdiction, are untimely, or are so vague that the respondent cannot prepare for hearing. In deciding such motions, we give latitude to complainants, especially those who are unrepresented, showing patience with missed deadlines, inarticulateness, lost documents, difficulty in being contacted, etc. Mr. Benzing himself has benefited from such latitude in this case and in the past, as shown in the Examiner's recitation of previous Benzing litigation.

> However, there comes a point when forbearance toward a *pro se* party clashes with a respondent's legitimate interest in clarity, preservation of evidence, and closure. In our view, this point was surpassed in the present case and dismissal is warranted. (NOTE: Citations omitted) (p. 20).

In the BENZING case referenced above, 14 months elapsed between the time the complaint was filed and the time the Respondent filed their motion to dismiss for abandonment/lack of prosecution. The Commission found that delay (i.e. 14 months) warranted dismissal of the case. The delay involved in this case is far longer than the delay involved in the BENZING case. The delay in this case, when measured in months, was 40 months. If a 14-month delay warranted dismissal in the BENZING case, the 40-month delay involved in this case likewise warrants dismissal.

In conclusion, it is held that Klema's failure to prosecute his case for over three years warrants its dismissal.

Dated at Madison, Wisconsin this 15th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
31056-A