

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-G

Appearances:

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

Peter Richter, Attorney, Stroud, Willink & Howard, LLC, 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, Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) against Wingra Redi-Mix, Inc. (herein "Respondent-Employer") alleging that Respondent-Employer committed unfair labor practices in violation of the Wisconsin Employment Peace Act (WEPA). Specifically, he alleged that the Union representing employees of Respondent-Employer arbitrated a grievance involving him under a collective bargaining agreement between Respondent-Employer and the Union. He alleges that the arbitrator ordered his reinstatement, with back pay and benefits. He alleged that the Union and Respondent-Employer thereafter entered into an "agreement" on that remedy which the Respondent-Employer breached. The Complainant alleged that this conduct violated Sec.111.06(2)(c), Stats., which provision solely relates to violations of WEPA committed by employees and their representatives. The remedy he sought included a request for an order requiring the Respondent-Employer to comply with the agreement by having the Respondent-Employer repay Complainant's unemployment account. The Union was not named as a party in the complaint.

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The records of the Commission indicate that Examiner Raleigh Jones had discussions with the Union, identified as Teamsters Local 695, and that the Union declined to participate in proceedings on this complaint. Stroud, Willink & Howard, LLC notified the WERC that it was appearing for Respondent-Employer by letter dated June 15, 2000. Examiner Jones tentatively set the matter for hearing on November 9, 2000, but the hearing was never held. Instead, the matter was held in abeyance at Complainant's request for over 3 years. Ultimately, Respondent-Employer moved to dismiss the matter because of the delay. Examiner Jones issued an order dismissing the matter on February 15, 2005. The basis for the order was his conclusion that Complainant had abandoned the complaint. That order was reversed by the WERC, by order dated May 27, 2005. The Commission reassigned the matter to the Undersigned for hearing, by a separate order dated July 7, 2005.

This Examiner issued a notice of hearing on July 7, 2005, in the above-entitled matter for a hearing to be held on August 15, 2005, (a date agreed upon by the parties). Respondent-Employer filed a motion to dismiss the complaint on July 11, 2005. The Examiner denied the motion to dismiss with leave to renew at the close of Complainant's case, by order dated July 21st, 2005. Complainant issued a subpoena to Scott Soldon, attorney for the Union, who had reviewed the Union's actions in negotiating with respect to the post-arbitration back pay issue. Attorney Soldon filed a motion to quash upon presentation of non-privileged documents. The Examiner granted that motion. Respondent sought Commission review of the Examiner's decision to deny its motion to dismiss. The Commission dismissed the interlocutory appeal by order dated August 9, 2005.

The Examiner conducted an in-person pre-hearing conference pursuant to Section 227.44(4), Stats, with the parties on August 23, 2005. He issued a written summary the same day. During the course of that pre-hearing conference, Complainant made a number of arguments in support of his complaint, but amended his position as a result of the discussions and the stipulation as to documents. The parties stipulated to the issues in dispute and stipulated to many of the facts. The Examiner renewed his prior decision treating the complaint as amended to allege that the Union violated its duty of fair representation in the negotiation of the verbal settlement agreement. The prior decision also treated the complaint as being amended to allege that the verbal settlement agreement was void because the Union allegedly violated its duty of fair representation. The Examiner granted Respondent the right to file a motion to dismiss the complaint based on the issues of failure to prosecute and improper amendment. Near the end of the conference, Complainant became visibly angry and stated: "Forget the whole thing." He then left before the end of the conference and, when asked to stay by the Examiner, insisted on leaving. The Examiner included with his summary of the pre-hearing conference the following notice:

THE EXAMINER WILL DISMISS THIS CASE UNLESS COMPLAINANT FILES WITH THE WERC, COPY TO OPPOSING PARTY, A REQUEST TO PROCEED WITH FIFTEEN (15) DAYS OF THE DATE OF THIS LETTER. "

[The Examiner notes that Mr. Klema indicated that he will be unavailable during the month of September. If Mr. Klema requests an extension of time to make a decision as to whether to proceed, copy to opposing party, the Examiner will grant a thirty day extension.]

The Examiner received no response to the notice until Mr. Klema sent a letter to the Examiner which was received September 28, 2005. The letter basically continued the discussions which occurred at the pre-hearing, but did not otherwise request that the matter proceed. In response thereto, the Examiner held a telephonic pre-hearing conference on September 29, 2005, which he summarized by letter the same day. The Examiner denied Complainant's request to have time to think over whether he wanted to proceed. Complainant raised a question as to how he could prove his case without Attorney Soldon as a witness. The Examiner explained the procedures by which he might prove his case and thereupon Complainant expressed a desire to proceed. The Examiner also warned Complainant that the Examiner would dismiss the case, if Complainant again failed to comply with the Examiner's procedural orders, particularly time limits. The Examiner extended the time by which Respondent would be allowed to file its motions until October 20, 2005. Respondent filed its motions on October 19, 2005. One basis of the motion was that the Complainant had been abandoned. The Examiner issued his decision denying the motions on November 15, 2005. The Examiner ordered a final telephonic pre-hearing conference for November 30, 2005, and that the hearing be held as scheduled on December 6, 2005. The Examiner held the telephonic pre-hearing. During the course of the pre-hearing conference Respondent sought to clarify what the issues were for hearing and reserved the right to argue that the back pay which Complainant received was more than he should have been paid under the award. Complainant again became upset when he learned that Respondent would be permitted to make that argument. Complainant again stated that there was no justice, that he had wanted to handle the matter this way rather than another way, and that the Examiner should just "forget the whole thing." He then hung up the telephone. Thereafter, the Examiner issued a written confirmation of the pre-hearing conference on November 30, 2005, which, among other things, provided that he viewed Complainant's conduct as a withdrawal of the complaint and that the hearing was cancelled. Mr. Klema returned the Examiner's confirmation un-opened with a statement: "Return to Sender." He also hand-delivered a letter to the Examiner stating:

". . . I NEVER ONCE ASK (SIC) YOU TO VOID THE SETTLEMENT AGREE MENT (SIC). I WANT WERC TO INFORCE (SIC) THE FULL BACK PAY. I NEVER MISS LED (SIC) YOU AT ANY TIME ON THIS. THE UNION AND THE COMPANY HAVE NOT ABIDED BY THE ARBITRATOR (SIC) DECISION. . . . I GUESS BINDING MEANS IF THE TWO DECIDE NOT TO ABIDE BY IT THEY DON'T HAVE TO. . . . I am going to have to drop my case. To you everything is just a mistake. You can tell Mr. Richter the case is over, but he didn't win. I can not defend myselfe (sic). I do not have the capability or the money to keep going. I do not even under stand (sic) your languag (sic)."

Handwritten at the bottom of the letter is the notation: "CASE OVER"

Based upon the foregoing, and the record as a whole, the Examiner concludes that the complaint in this matter is withdrawn and, therefore, issues the following:

ORDER

The Complaint filed herein is dismissed.

Dated at Madison, Wisconsin, this 6th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

