STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LANCE S. DAVENPORT, Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT (ART RAINWATER AND JUNE GLENNON) AND MADISON TEACHERS INC. (JOHN MATTHEWS), Respondents.

Case 306
No. 67017
MP-4353

Decision No. 32139-B

Appearances:

Ms. Heidi S. Tepp, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703, appearing on behalf of the Madison Metropolitan School District.

Mr. Richard Thal, Lawton & Cates, Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53703-2965, appearing on behalf of Madison Teachers, Inc.

Mr. Lance S. Davenport, 625 North Blackhawk Avenue, Madison, Wisconsin 53705, appearing on his own behalf.

ORDER SETTING ASIDE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, REMANDING THE MATTER FOR ADDITIONAL HEARING AND SUBSTITUTING EXAMINER

On July 18, 2008, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Madison Teachers, Inc. had not breached its duty of fair representation to Complainant Lance S. Davenport by refusing the arbitrate two grievances and thus had not committed a prohibited practice within the meaning of Sec. 111.70(3)(b) 1, Stats. Given his conclusion that Respondent Madison Teachers, Inc. had not breached its duty of fair representation as to the two grievances, the Examiner did not exercise jurisdiction over

Complainant Davenport's allegation that Respondent Madison Metropolitan School District had violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70 (3)(a) 5, Stats. Given the foregoing, the Examiner dismissed Complainant Davenport's complaint.

On August 6, 2008, Complainant Davenport filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07 (5) and 111.70 (4) (a), Stats. Respondents' filed written responses to the petition and the period for Respondent Davenport to file a reply expired on September 12, 2008.

Having reviewed the record and being fully advised in the premises, the Commission is satisfied that Complainant Davenport was not given sufficient opportunity to testify at the hearing and thus that the record in the matter is incomplete. In such circumstances, the Commission is persuaded that the Examiner's Findings of Fact, Conclusions of Law and Order must be set aside as they were based on a less than complete record and the matter should be remanded to an examiner for the taking of Davenport's testimony and any rebuttal evidence that Respondents elect to produce.

NOW, THEREFORE, it is

ORDERED

1. The Examiner's Findings of Fact, Conclusions of Law and Order are set aside.

2. The complaint is remanded for additional hearing.

3. The order appointing Stuart D. Levitan as examiner in this matter is set aside and Peter G. Davis is hereby appointed to conduct hearing and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70 (4)(a) and 111.07, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER SETTING ASIDE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, REMANDING THE MATTER FOR ADDITIONAL HEARING AND SUBSTITUTING EXAMINER

In his petition for review, Complainant Davenport asserts both that "The hearing itself did not fulfill fair and impartial due process" and that the Examiner erred as to the conclusions he reached based on the evidence presented. We look first at Davenport's "fair and impartial due process" arguments.

Davenport's "fair and impartial due process" contentions reflect an asserted misunderstanding on his part of the role of a Commission examiner and of the procedure that is followed prior to and during a prohibited practice hearing. In this regard, Davenport asserts the Examiner "refused to conduct any preliminary hearing", "refused my request for an adjournment or continuance", "refused to attempt the subpoena of key evidence. . . ." and that the absence of testimony from Davenport "was his (the Examiner's) call at days end. He stated that I would 'get to write a brief.'"

The Wisconsin Employment Relations Commission has several resources that are available to anyone with questions as to how a prohibited practice complaint will be processed-including the role of the examiner and the responsibility each party has to be prepared to present the evidence at the hearing through witnesses and exhibits. A pamphlet with such information is available free of charge from the Commission's offices and can also be accessed on the Commission's website. Commission employees are available to answer such questions telephonically or by e-mail. In addition, pre-hearing conferences involving all parties and the examiner assigned to the complaint provide an excellent opportunity for questions regarding the hearing process to be resolved.

Particularly where, as here, a party is not represented by an attorney, it is clearly a best practice for the examiner to affirmatively provide an unrepresented party with a copy of the Commission's pamphlet regarding the processing of complaints and to conduct a pre-hearing conference during which any procedural questions can be answered. The record does not reveal whether Davenport received a copy of the complaint pamphlet or whether a pre-hearing conference was held. However, in the final analysis, litigants before the Commission, including those who are unrepresented, bear the ultimate responsibility for learning about the complaint process and being prepared to present their case during a hearing. Thus, as a general matter, it remains within an examiner's discretion to hold litigants accountable for the extent of their understanding or lack thereof of complaint procedures.

Applying the foregoing to Davenport's assertions of Examiner error, as discussed below, we find all but one of his "fair and impartial due process" contentions to be without merit.

Davenport contends the Examiner erred by failing to conduct a preliminary hearing as to his complaint. Contrary to Davenport's apparent assumptions, Commission complaint procedures do not include a "preliminary hearing." As Davenport experienced, Commission complaint hearings provide all parties with their opportunity to present relevant evidence to the impartial hearing examiner who then proceeds to issue a written decision determining whether a law the Commission administers has been violated. Thus, the Examiner did not err by failing to conduct a preliminary hearing and any strategic decisions Davenport may have made based on his misunderstanding of Commission procedures are ultimately Davenport's responsibility.

Davenport alleges the Examiner erred by failing to subpoena certain witnesses and information and then failing to grant his request for a continuance so that he could compel absent witnesses to be present and testify. As the Examiner properly advised Davenport at the commencement of the hearing, a Commission examiner in a complaint proceeding serves as a neutral decision-maker and thus does not provide advocacy services to any party. If a Commission examiner were to determine which witnesses should appear at a complaint hearing and subpoena those witnesses to testify on the behalf of a party, the examiner would be serving as an advocate. It was Davenport's responsibility to subpoena any witnesses that he wanted to be present and potentially testify at the complaint hearing. Where, as here, a litigant asks for a continuance based on a misunderstanding as to how the subpoena process works and/or who would be present to testify at the hearing, an examiner has broad discretion when determining whether to grant or deny such a request pursuant to their Sec. 227.46, Stats., responsibilities to preside over a hearing. If the Examiner had granted the request for continuance, he would not have erred. However, because it is ultimately the litigant's responsibility to understand the Commission's complaint procedures, the Examiner did not err by denying Davenport's request for a continuance.

Lastly, Davenport complains about the fact that he did not testify at the hearing. We have previously held that an examiner does not have an affirmative obligation to advise an unrepresented litigant that they can present evidence through their own testimony. UNITED AUTO WORKERS LOCAL 72, DEC. NO. 29431-C (WERC, 7/03) However, a review of the record indicates that Davenport twice (Tr. at 17 and 182) expressed his intent to testify during the hearing. In such circumstances, when the hearing is drawing to close and no such testimony has been presented, we conclude it is an examiner's affirmative responsibility to ask the litigant if he wishes to testify and to allow him to do so if he so desires. By doing so, an examiner is not acting as an advocate for the litigant but rather fulfilling their responsibilities to afford a party the opportunity to "present evidence" , "regulate the course of the hearing", and preside over the hearing "in an impartial manner" [1]- much as an examiner does when

[1] Section 227. 44 (3), Stats. provides that in a complaint proceeding:

> (3) Opportunity shall be afforded all parties to present evidence and to rebut or offer countervailing evidence.

Section 227. 46 (1) (e), Stats. gives the examiner presiding at a hearing with the obligation to:

reminding/asking a litigant if they wish to offer an exhibit which has been marked but which a litigant may have forgotten to offer.

Given the foregoing, the Examiner's failure to ask Davenport at the conclusion of the hearing if he wished to testify (where he had previously indicated he wished to do so) was an error. That error will be corrected by reopening the record for the sole purpose of allowing Davenport to present his testimony and the opportunity for the other parties to present any rebuttal evidence.

Because the record is not complete, we have set aside the Examiner's decision and thus have no need to comment on Davenport's contentions regarding the merits of the decision issued by the Examiner. A new examiner decision [2] will be issued based on the evidence and argument already presented and the evidence and argument presented at the reopened hearing and in any briefs that follow. Any party dissatisfied with that new examiner decision can then file a petition for review with the Commission.

Dated at Madison, Wisconsin, this 15th day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

(e) Regulate the course of the hearing.

Section 227. 46 (6), Stats., requires that:

(6) The functions of persons presiding at a hearing . . shall be performed in an impartial manner.

[2] Davenport contends that Examiner Levitan is "disqualified as an impartial decision maker." We disagree. With the sole exception noted above, the Examiner acted properly and we have no doubt about his ability to serve as the impartial decision maker if the matter were remanded to him for additional hearing and decision. However, under the circumstances, we conclude it is appropriate to avoid any claim of partiality and thus have substituted Examiner Davis for Examiner Levitan.

gjc
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