

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY,	)	
	)	
Employer.	)	
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MICHEAL R. JONES,	)	
	)	
Complainant,	)	CASE 12040-U-95-2830
	)	
vs.	)	
	)	DECISION 5739-B - PECB
AMALGAMATED TRANSIT UNION,	)	
LOCAL 587,	)	
	)	
Respondent.	)	ORDER OF DISMISSAL
	)	
_____	)	

On September 14, 1995, Micheal R. Jones filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Amalgamated Transit Union, Local 587 (union), had breached its duty of fair representation by aligning itself in interest against him.<sup>1</sup> Jones used the complaint form promulgated by the Commission. Instructions on the back side of that complaint form included the following:

G. BURDEN OF PROOF: The Commission and its Examiner maintain an impartial role in the proceedings:

WAC 391-45-270 HEARINGS--  
NATURE AND SCOPE. Hearings shall be public and shall be adversary in nature, limited to matters concern-

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<sup>1</sup> On the same day, Jones filed a complaint charging unfair labor practices against King County. The charges against the employer were docketed as Case 12041-U-95-2831, and were consolidated for processing with the case against the union. Jones withdrew the case against the employer on June 6, 1996.

ing the unfair labor practices alleged in the complaint. **The complainant shall prosecute its own complaint and shall have the burden of proof.** It shall be the duty of the examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice so as to obtain a clear and complete factual record on which the examiner and commission may discharge their duties under these rules: PROVIDED, HOWEVER, That **such duty of the examiner shall not be construed as authorizing or requiring the examiner to undertake the responsibilities of the complainant with respect to the prosecution of its complaint or of the respondent with respect to the presentation of its defense.**

[Emphasis by bold supplied.]

Jones listed himself as residing at a Seattle address, and he named Fred Hopkins of the Strong & Kydd law firm as his attorney.

A computer-generated "Notice of Case Filing" was issued on September 18, 1995, listing the names of the employer, complainant, and respondent, and their respective representatives. That document included the following:

Notices, correspondence and orders will be served by the agency only on the parties and their representatives as listed in the docket records of the Commission. Any additions or corrections to the information set forth below should be forwarded to the Commission, in writing, as soon as possible.

Copies of the "Notice of Case Filing" are routinely served on all of the parties and representatives named in the notice.

Jones filed a hand-written document on October 6, 1995, notifying the Commission that his attorney would be Mitchell A. Riese, instead of the Strong and Kydd firm. A computer-generated "Record

of Appearance" was issued to the parties and their representatives on October 11, 1995, reflecting that change.<sup>2</sup>

On December 7, 1995, the Executive Director issued a preliminary ruling pursuant to WAC 391-45-110,<sup>3</sup> finding that a cause of action existed with respect to several issues outlined in the complaint as filed, but requesting an amended complaint to clarify certain matters. That letter was sent to Riese, and a copy was sent to Jones.

On December 20, 1995, Riese withdrew as attorney for Jones and David B. Richardson filed a notice of appearance as attorney for Jones. A "Record of Appearance" reflecting the change was issued on that date. The time for filing an amended complaint was extended, at Richardson's request. Richardson filed an amended complaint on January 31, 1996.

A new preliminary ruling letter was issued on March 4, 1996, again finding that a cause of action existed with respect to several allegations.<sup>4</sup>

On March 27, 1996, Martha M. Nicoloff of the Commission staff was designated as Examiner. On April 15, 1996, the Examiner notified the parties that a telephone prehearing conference would be convened to make arrangements for a hearing.

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<sup>2</sup> The "Record of Appearance" form lists all parties and their respective representatives. It includes the same statement concerning additions and corrections as is found in the "Notice of Case Filing", as quoted above.

<sup>3</sup> At that stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

<sup>4</sup> That document was inadvertently mailed to Riese, but the error was discovered and Richardson was served with a copy on March 14, 1996.

On April 22, 1996, the Examiner conducted a telephone conference call with counsel for the union, counsel for the employer, and Richardson. At that time, two potential sets of hearing dates were identified, one in July 1996, and another in October and November 1996. A hearing was not scheduled at that time, due to other procedural issues brought forward by the parties.

On April 25, 1996, counsel for the union notified the Examiner that his client wished to proceed with a hearing as expeditiously as possible. He requested that the hearing be scheduled for the dates in July of 1996 that had been identified by the parties.

On April 30, 1996, Richardson notified the Examiner that Jones had been engaged in an employment search in Alaska and Colorado,<sup>5</sup> but that Jones had left for Japan that morning after having been unsuccessful in obtaining employment in Alaska and Colorado. Richardson indicated that Jones' employment prospects in Japan were said to be "very good", and that Jones would probably be unavailable for the July hearing dates. Under the circumstances, Richardson requested that the hearing be set for the dates in October and November 1996 that had been identified by the parties. Richardson also notified the Examiner that King County and his client had reached a settlement in the companion case.

No official withdrawal of the case against the employer was forthcoming. On June 12, 1996, the Examiner requested further information regarding the status of the related cases. The Examiner simultaneously notified the parties that the hearing would not proceed in July of 1996.

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<sup>5</sup> At some unspecified time, the Commission was provided with an address for Jones in Colorado.

On June 21, 1996, Richardson withdrew the complaint against the employer. An order was issued to close that case.<sup>6</sup>

On June 26, 1996, Richardson notified the Commission of his intent to withdraw as attorney for Jones, effective July 8, 1996. At that time, he also filed notice of a claimed lien against any settlement proceeds or judgment in the case, and provided the Commission with Jones' last known address in Japan.

In a letter issued on August 12, 1996, the Examiner notified the parties of her intent to hold the hearing in this matter on October 29, 30, and 31, 1996. Those dates were among the October-November dates which had been agreed upon during the telephone conference call held in April 1996. The Examiner requested that she be notified within 14 days, if those dates were no longer appropriate. That letter was sent to Jones at the address in Japan which had been provided by Richardson.

No objections were received concerning holding the hearing on October 29, 30 and 31, 1996. On September 19, 1996, a notice was issued setting the hearing for those dates. The notice was sent to Jones at an address in Colorado, but was returned by postal authorities as undeliverable. A copy of that notice was sent to Richardson, because of the lien he had filed in the matter, and he responded on September 25, 1996. Richardson reiterated the address in Japan he had supplied previously, and supplied a second address for Jones in Japan.

On September 30, 1996, the notice of hearing issued on September 19, 1996 was re-issued, by mailing to Jones at both of the addresses in Japan that were provided by Richardson. Neither of those mailings has been returned as undeliverable.

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<sup>6</sup> King County, Decision 5576 (PECB, 1996).

On October 14, 1996, an amended notice of hearing was issued which confirmed the hearing dates established by the notices issued in September, and also established the specific location for the hearing. Copies of that notice were sent to Jones at both of the addresses in Japan. Neither of those mailings has been returned as undeliverable.

On October 18, 1996, the Examiner received a telefacsimile transmission sent by Jones from Japan. Jones indicated that he had, in fact, received the documents issued on September 30, 1996, and that he was "trying to make special arrangements to be present at up coming hearings, but its not for certain". Jones continued:

I sent documents to Attorney Peter Francis and asked him to look into things in case of my absence. [sic] Im [sic] not sure if he has contacted your office or not. [Address and telephone number for Francis omitted.]

Jones also provided an address "care of Laura Bray" in Japan, as well as another address for mailing materials to him in Japan.<sup>7</sup>

On October 22, 1996, the Examiner contacted Peter Francis at the telephone number provided by Jones. Mr. Francis informed the Examiner that he was not counsel for Jones in this proceeding, and that he had so informed Jones two or three weeks previously.

Later on October 22, 1996, the Examiner sent a telefacsimile transmission to Jones, in care of Laura Bray at the telefacsimile number in Japan that Bray had provided. The Examiner therein notified Jones of the results of her conversation with Peter Francis, and further informed Jones:

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<sup>7</sup> On October 22, 1996, the Examiner received a telefacsimile transmission from Laura Bray, requesting that the Examiner confirm receipt of the documents faxed by Jones, and also providing a telefacsimile number in Japan for a reply to that inquiry.

Please be aware that you or your representative must appear at the time of hearing prepared to put on a case as the complainant in this matter. If you are unable to be there, and have no representative, then you must contact opposing counsel Clifford Freed to request a continuance. If Mr. Freed opposes a continuance, you would need to make a timely request to me, and show me good cause why that request should be granted. If you or a representative do not appear at the time of hearing, and no continuance has been granted, it is likely that the matter will be dismissed for lack of prosecution.

It appeared that the Examiner's telefacsimile transmission was successfully completed.<sup>8</sup> Nothing further was heard or received from Jones prior to the scheduled hearing.

The Examiner and the respondent appeared on October 29, 1996, at the time and place scheduled for the hearing in this matter. Neither Jones nor any individual claiming to be his representative appeared. The respondent thereupon moved for dismissal, and the Examiner granted the motion. An order of dismissal was issued on the morning of November 4, 1996.

At approximately 3:30 p.m. on November 4, 1996, Jones appeared in person at the Commission's Olympia office. At that time, he spoke with a member of the Commission staff other than the Examiner, was provided with a copy of the amended notice of hearing issued on

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<sup>8</sup> The document was transmitted by the secretary to the Executive Director of the Commission, who made a note on the telefacsimile transmission cover sheet, as follows: "I reached Laura Bray's answering machine recording [as instructed] and pressed START. There were no problems with the transmission."

October 14, 1996, and was provided with a copy of the dismissal order issued by the Examiner earlier that day.<sup>9</sup>

On November 7, 1996, Jones filed materials with the Examiner under cover of an envelope that was mailed within the United States but bore a return address matching the "care of Laura Bray" address in Japan. Jones therein requested modification or withdrawal of the dismissal order on several grounds:<sup>10</sup>

\* Jones provided somewhat contradictory statements concerning his arrangements with legal counsel. In a cover letter in which he acknowledged receipt of the Examiner's telefacsimile transmission of October 22, 1996, Jones wrote:

When I mentioned Mr. Peter Francis, I didnt mean to imply that he would definitely be my representative. I was hoping that our years of being acquainted as we've had, maybe he would asist [sic] in some way, in case of my absence but that didnt occur as I found out.

In the motion itself, Jones wrote: "I had no idea Mr. Francis wasn't going accept this case. Thats why Im requesting this consideration from the Commission and defendants counsel."

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<sup>9</sup> The envelope mailed on November 4, 1996 to Jones in Japan was returned to the Commission on November 26, 1996 under cover of a letter from Jones' former landlord, stating that Jones no longer resided at that address.

<sup>10</sup> Although Jones cited WAC 391-95-260, which would be applicable to a non-association dispute, the Examiner has processed the motion under WAC 391-45-330, which reads:

On the examiner's own motion or on the motion of any party, the examiner may set aside, modify, change or reverse any findings of fact, conclusions of law or order at any time within ten days following the issuance thereof, if any mistake is discovered therein: Provided, however, That this section shall be inoperative after the filing of a petition for review with the commission.



\* Jones stated he had made "every possible effort" to get to the hearing, but he did not provide details of any travel arrangements or any difficulties encountered.

\* Jones stated he was unaware of the hearing location until November 4, 1996, but he did not indicate having made any effort to ascertain that information on or prior to October 29, 1996.

\* Jones asserted that he had never before requested a delay of the hearing in this matter, and requested a 90-day continuance in order to retain new legal counsel.

Jones placed several telephone calls to the Commission office on or about November 12 and 13, 1996, apparently from the San Francisco area. During a telephone conversation on November 13, 1996, the Examiner asked Jones to provide an address for service of papers upon him. Jones informed the Examiner that he was attempting to obtain a local address, telefacsimile service, and/or voice messaging service, but had not yet been able to do so. Jones indicated that the telefacsimile number in Japan remained the most viable means of contacting him.

On November 13, 1996, counsel for the union advised the Examiner that he had been served with the request for modification or withdrawal of the dismissal order, and asked for time to respond to that request before the Examiner ruled. That request was granted. Because of the time requirements of WAC 391-45-330, an order vacating the November 4, 1996 dismissal order was issued on November 14, 1996, in order to allow the Examiner time to consider the complainant's motion and arguments by the union.<sup>11</sup>

The union filed its argument on November 18, 1996. It contends that Jones had ample notice of the hearing date, that Jones was provided with clear and unequivocal instructions as to his options

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<sup>11</sup> King County (Amalgamated Transit Union, Local 587), Decision 5739-A (PECB, 1996).

concerning the hearing and as to the likely result should he not appear at the hearing, and that the notice indicating the location of the hearing was sent to the address Jones provided. The union points out that there is no evidence that Jones made any attempt to determine the location of the hearing, if indeed he did not know it. The union asserts that WAC 391-45-330 only allows an order to be set aside upon the discovery of an error, or upon grounds of newly discovered evidence, and that neither of those circumstances has occurred in this case.

Jones thanked the Examiner for vacating the dismissal in a tele-facsimile transmission received from Jones on November 22, 1996.<sup>12</sup> Jones stated, further, "I didn't quite understand that up until the hearing date that I could have requested a continuance." Jones also indicated that he would need to establish an "alternative temporary fax", but "please continue as you have".

The Examiner has considered the rules of the Commission, the history of this case, and the arguments of both parties. In view of all the circumstances, it is the judgment of the Examiner that:

1. The complainant has been remiss in failing to keep the agency informed of his whereabouts while this case has been pending, so that he bears responsibility for any difficulties in serving documents upon him.
2. The complainant acknowledges knowing that a hearing had been scheduled for October 29, 1996.
3. The complainant knew or reasonably should have known that he needed to appear, either in person or by a representative, on the date set for the hearing, in order to present evidence and undertake the prosecution of his complaint.

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<sup>12</sup> That transmission did not indicate its point of origin.

4. The complainant knew or reasonably should have known that his failure to appear at the scheduled hearing without good cause, or to arrange for a continuance of the scheduled hearing, could result in dismissal of his case.

The Examiner finds that the order of dismissal issued on November 4, 1996 was not based upon any error.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-captioned matter is hereby DISMISSED.

DATED at Olympia, Washington, this 3rd day of December, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARTHA M. NICOLOFF, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.