

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

Law office of Michael S. Sorgen, by Amy R. Levine,
Attorney at Law, appeared on behalf of the complainant.

Frank and Rosen, by Clifford Freed, Attorney at Law,
appeared on behalf of the union.

This case comes before the Commission on a petition for review
filed by the complainant, seeking to overturn a dismissal order
issued by Examiner Martha M. Nicoloff.¹

BACKGROUND

On September 14, 1996, 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

¹ King County, Decision 5739-B (PECB, 1996).

itself in interest against him.² Jones listed his own address as "454 Maple Leaf Pl NE #5, 3145 35 Ave S., Seattle, WA 98144", and listed Strong E. Kydd as his attorney.

On October 11, 1995, Jones filed a letter listing Mitchell A. Riese as his attorney. The Commission's docket records were changed accordingly.³

By letter of December 7, 1995, Executive Director Marvin L. Schurke advised Riese and counsel for the union that the complaint did not state a cause of action. A 21-day period was allowed for the filing of an amended complaint.

On December 20, 1995, Mitchell A. Riese filed a notice of withdrawal as the complainant's attorney. On that same date, David B. Richardson filed a notice that he was now representing Jones. The Commission's docket records were changed to reflect Richardson as Jones' attorney.

On January 31, 1996, Richardson filed an amended complaint.⁴ In a preliminary ruling letter issued March 4, 1996, the Executive

² 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.

³ On that correspondence, Jones showed his own address as "3145 35 S. Seattle, WA 98144", and showed the same phone number as that listed on the complaint. The "454 Maple Leaf Pine #5" component of that address was not deleted from the Commission's docket record at that time.

⁴ The amended complaint again showed Jones' address as "3145 - 35th Avenue S., Seattle, WA 98144".

Director found that the amended complaint stated a cause of action, and set a 21-day period for the filing of an answer.⁵ By letter of March 27, 1996, the parties were advised that Martha M. Nicoloff was designated Examiner.

On April 15, 1996, Examiner Nicoloff wrote to Richardson, stating she would be conducting a telephone conference call to set a hearing date, time and place. A copy of that letter was sent to Jones, at "454 Maple Leaf Pl NE, #5, 3145 35th Ave S., Seattle, WA 98144". Such a conference call occurred on April 22, 1996.⁶

On April 30, 1996, Richardson filed a letter requesting the hearing be held on "the October dates we had selected". The letter shows a copy was sent to Jones.

By letter of June 12, 1996, Nicoloff summarized the April 22, 1996, conference call, and requested a reply within 14 days regarding the scheduling of hearing dates. That letter was sent to Richardson, with a copy to Jones at the address of record. The copy sent to Jones was returned to the Commission, and then re-sent to Jones at "3145 35th Ave. S., Seattle, WA 98144". The letter may have again been returned by the post office with forwarding information, inasmuch as the Commission's records were changed to 3336 Franklin Street, Denver, CO 80205-3905. The letter was re-sent to the Denver address on July 15, 1996, but was returned with a post office notation of, "Moved, left no address, unable to forward, return to sender."

⁵ After an error in the letter's address was brought to the Executive Director's attention, a copy was properly sent to Richardson.

⁶ According to a handwritten note in the file, October 29, 30, 31 were discussed as possible hearing dates.

Richardson withdrew as Jones' attorney on June 26, 1996, and informed the Commission that Jones' last known address was: "3-22-14, Nishi-Ikebukuro, Toshima-Ku, Tokyo 171, Japan".

On August 12, 1996, Examiner Nicoloff wrote to the parties, advising that the hearing would be scheduled for October 29, 30 and 31, 1996, unless the Examiner received notice within 14 days as to why such dates were no longer appropriate. The letter was sent to Jones at the Japan address supplied by Richardson in his June 26, 1996 letter.

A Notice of Hearing was issued on September 19, 1996, indicating that the hearing was to be held on October 29, 30, and 31, 1996, but without specifying a location. That notice was mistakenly sent to Jones at the Denver address,⁷ and to Richardson.⁸

On September 25, 1996, Richardson informed the Commission of a more recent address for Jones in Japan: "Tokyo English Center, 4-21-3, Kajinocho, Koganei City, Tokyo 184, Japan".

On September 30, 1996, Examiner Nicoloff sent copies of the September 19, 1996, notice of hearing to Jones under cover of the following letter:

On September 19, 1996, the Public Employment Relations Commission issued a notice of hearing in the above-referenced case. A copy of the notice was forwarded to you at an address

⁷ It appears that the Commission's docket records were not changed to reflect the address given for Jones in Richardson's June 26, 1996 notice of withdrawal.

⁸ Richardson had filed a lien on the proceeds of any settlement or remedial order in this case, so his name was properly left on the Commission's docket record.

in Colorado, which now appears to have been wrong.

In order to rectify the situation, I am sending copies of the notice to you at two addresses in Japan, given by attorney David Richardson.

Please advise our office as to your correct mailing address so that future correspondence may reach you in a more direct manner.

On October 14, 1996, Examiner Nicoloff issued an amended notice of hearing, specifying that the hearing was to be held on October 29, 30 and 31, 1996, at the Law Offices of Frank and Rosen, 12th Floor, Hoge Building, 705 Second Avenue, Seattle, WA. Copies were mailed to Jones at the most recent address in Japan, and to Richardson.

On October 18, 1996, Examiner Nicoloff received a telefacsimile transmission from Jones, in which he stated he had received Nicoloff's letter of September 30th, and that he had been "trying to make special arrangements to be present" at the hearing, but was not certain he would be able to appear. Jones stated he had asked Peter Francis to be his legal counsel, and he provided an address and phone number for Francis. On the front page of that letter, under a "Mailing address preferably" heading, Jones listed: c/o Laura V. Bray, 4-27-12 Ikebukuro, Juko Mezon #5A, Toshima-Ku, Tokyo #171.⁹

On October 22, 1996, Examiner Nicoloff received a telefacsimile transmission from Laura V. Bray, requesting confirmation of the receipt of the documents sent by fax on October 18th. Bray

⁹ Jones also listed the address: MAEJI 2-2-17, URAWA-SHI, Saitama Ken, Japan. In the body of the letter, Jones showed as his "address for mail": MAEJI 2-2-17 Saitama-Ken Saitama Urawa-Shi Japan.

indicated that her "fax # is also my phone # so just press start when the answer machine picks up".

Later on that same day, October 22, 1996, Nicoloff responded by both telefacsimile transmission and letter to Jones, in care of Laura Bray, as follows:

We received a "fax" document from you on October 18, 1996, regarding the charges filed in the above-referenced case and the hearing scheduled in that matter.

As you know, hearing is scheduled in your case for October 29, 30, and 31, 1996. In your "fax", you indicated that you had been trying to make arrangements to be at that hearing, but were uncertain as to whether you would be able to do so. You also indicated that you had requested Peter Francis to be your legal counsel. I telephoned Mr. Francis today at the telephone number which you provided, and he has indicated to me that he is not your legal counsel, and that he has so informed you.

Please be aware that you or your representative must appear at the time of the 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 to show me good cause why that request should be granted. **If you or a representative do not appear at the time of the hearing, and no continuance has been granted, it is likely that the matter will be dismissed for lack of prosecution.**

[Emphasis by bold supplied.]

A note made by the Clerk of the Commission on the telefacsimile cover sheet indicated that she had reached Laura Bray's answering

machine and started the fax machine, and that there were no problems with the transmission. Nothing further was received from or on behalf of Jones at that time.

Examiner Nicoloff opened the hearing as scheduled on October 29, 1996, at the 12th floor, Hoge Building, 705 Second Avenue, Seattle. Clifford Freed appeared on behalf of the union. Neither Jones nor any representative of the complainant appeared at the hearing. The union moved for dismissal of the case. Examiner Nicoloff granted the motion, based on the lack of appearance, the lack of request for a continuance, and the failure to present a case-in-chief.

Nothing further was heard or received from Jones prior to November 4, 1996, when the Examiner issued a formal order of dismissal confirming her October 29, 1996 ruling.¹⁰

On November 7, 1996, Jones filed a written request for reconsideration of the order of dismissal. On November 14, 1996, Examiner Nicoloff vacated the order of dismissal to allow her time to consider the arguments of the parties on the issue.¹¹

Upon considering the arguments advanced by both parties on the question of reconsideration, Examiner Nicoloff found no error in the previous order of dismissal. She issued another order of dismissal on December 3, 1996.¹²

¹⁰ King County, Decision 5739 (PECB, 1996). In a letter dated November 4, 1996, Jones indicated he had visited the Commission's office after the order was issued, and had received a copy on that date.

¹¹ King County, Decision 5739-A (PECB, 1996).

¹² King County, Decision 5739-B (PECB, 1996).

On December 26, 1996, the complainant petitioned for review, thus bringing the case before the Commission.

DISCUSSION

The September 19, 1996 Hearing Notice

Lack of a Fixed Location -

The complainant argues that WAC 391-45-170, WAC 10-08-040 and 391-08-001 contemplate a formal notice of hearing, that WAC 391-45-170 requires a notice of hearing to specify a time and place, and have attached a copy of the complaint, and that the notice issued on September 19, 1996 did not satisfy the requirements because it did not include a location for the hearing. A review of the record shows, however, that Jones was not prejudiced by the September 19th notice.

The amended notice of hearing issued on October 14, 1996, designated a location for the hearing, and it was sent to Jones at the most recent address in Japan. The amended notice was mailed 15 days prior to the hearing, fully complying with the time requirements of RCW 34.05.434. The Commission had previously informed the complainant of the hearing dates, which were, in fact, the dates proposed by the complainant.¹³ The lack of a location in the September 19, 1996 hearing notice should not have prevented Jones

¹³ On April 30, 1996, Jones' attorney requested the hearing be held on "the October dates we had selected." On August 12, the Examiner sent a letter to the parties advising that the hearing would be held on October 29, 30, and 31, 1996. That letter was sent to Jones at the latest address which Jones' attorney had supplied.

from attending the hearing, requesting a clarification of the location, or making a timely request for a continuance.

Lack of Attached Complaint -

The complainant argues that the September 19, 1996 hearing notice was defective because a copy of the complaint was not attached to the notice. Again, however, we are unable to conclude that the complainant has been prejudiced in this case.

The hearing notice clearly states that "A copy of the complaint is attached hereto". If no copy of the complaint was attached to the copy received by Jones, he clearly made no timely objection to the alleged defect.

We are additionally unable to conclude that any prejudice would have resulted from the lack of a complaint in this case, since the document was one Jones had originated in the first place.

Improper Address -

The complainant argues that the September 19, 1996 notice was not sent to the most current address of the complainant on file with the Commission. That error was cured on September 30, 1996, when Nicoloff sent copies of the notice of hearing to Jones to the two Japan addresses she had been provided by Richardson. Jones subsequently acknowledged receipt of the September 30, 1996 letter.

Delayed Receipt of October 14, 1996 Hearing Notice

Jones argues that he did not receive the October 14, 1996 hearing notice until after the hearing, as he was en route from Japan. The fact he was not available to receive the notice does not make the notice defective, however.

The procedural rules regarding hearing notices do not require a party to receive the documents, only that an agency "serve" the documents "upon all counsel and representatives of record and upon unrepresented parties or upon their agents designated by them or by law". Under WAC 10-08-110, service is complete upon deposit in the mail.

We also conclude that no prejudice resulted from the complainant's failure to receive the October 14, 1996 hearing notice. Four days after the amended notice of hearing was issued, Jones faxed a letter to Examiner Nicoloff regarding the case, and stated he was attempting to make arrangements to be at the hearing. He clearly was responding to the materials issued on September 30, 1996. When Laura Bray requested a response to that fax on October 22nd, it is reasonably inferred that she was doing so on behalf of Jones, as Jones' October 18th letter listed Bray's address under "Mailing address preferably". It can also be assumed that Jones would have received the letter Nicoloff faxed to Bray that same day. The Examiner's letter of October 22nd clearly set forth Jones' alternatives in the event he was unable to be at the hearing. Jones did not reply to the October 22 letter, or take action for a continuance. Jones clearly knew the scheduled hearing dates.

Even with knowledge that the hearing was to commence on October 29, there is no claim or record of any effort by Jones to contact the Commission from October 22 until November 4, 1996.¹⁴ Thus, the fact that he did not receive the October 14th hearing notice containing the location of the hearing had no bearing on the fact that he failed to appear.

¹⁴ The brief filed in support of Jones' petition for review states that he arrived in California on a flight from Japan "late on the [Thursday, October] 31st or early on [Friday] November 1st."

Jones' Contact with the Commission

The complainant argues that he diligently attempted to pursue his unfair labor practice complaint, and took numerous steps to maintain contact with the Commission, but that the Commission sent him letters and notices at old addresses which Jones had previously updated. The complainant argues that the Commission was remiss in updating its records as to the complainant's whereabouts, and its failure to do so jeopardized the case. The union argues that the complainant was derelict in attempting to preserve his rights or attend the hearing.

A review of the record shows that Jones did not have an attorney at the crucial time period. His third attorney in the case, David B. Richardson, withdrew on June 26, 1996. It was up to Jones to keep the Commission informed of his whereabouts. Between that date and October 18, 1996, however, the only information about addresses for Jones came from Richardson.

The Commission received notification on October 18, 1996, that Jones had asked Peter Francis to be his legal counsel. The Examiner telephoned Francis, however, and learned that Francis had not agreed to be the complainant's legal counsel. Thus, Jones continued to be without legal counsel through the date of the scheduled hearing.

Our rules do not require parties appearing before the Commission to be represented by legal counsel, but individuals proceed at their own peril, and are not excused from complying with procedural matters. While leniency towards a pro se litigant is sometimes appropriate, we must also be mindful of statutory requirements and

the rights of other parties.¹⁵ It was Jones himself who needed to monitor the case after June 26, 1996. Had Jones thought there might be a problem in receiving documents on a timely basis, or if he needed to know of the place of hearing before he could make travel arrangements, he should have so informed the Commission.

Research on agency-wide records indicates that Examiners and the Executive Director have routinely dismissed cases based on lack of prosecution. See, e.g., City of Seattle, Decision 789 (PECB, 1979); Spokane County, Decision 5146 (PECB, 1995); City of Seattle, Decision 4845-B (PECB, 1995); Wenatchee School District, Decision 5258-A (PECB, 1996). This case appears to be one of first impression before the Commission itself, as cases dismissed for lack of prosecution generally are not appealed. It is additionally unique because the complainant is coming in after failing to appear at a scheduled hearing and claiming, in essence, that it was not his intent that the case be dismissed. We cannot, however, allow parties to prosecute their cases at their own will and convenience. The record shows the complainant was provided opportunities to keep the case active, but did not avail himself of those opportunities. Any errors in relation to maintaining Jones' current address on file were harmless.

The Declaration of Clifford Freed

With its brief in opposition to the complainant's petition for review, the union submitted a "Declaration of Clifford Freed" which included reference to an unrelated case filed by Jones in the

¹⁵ See, Port of Seattle, Decisions 4394-B and 4395-B (PECB, 1992); North Thurston School District, Decision 4938-A (PECB, 1995); King County, Decision 2704-A (PECB, 1987); Tacoma School District, Decision 5337-B (PECB, 1996); King county, Decision 5595-A (PECB, 1996).

Superior Court for King County under the Washington State Law Against Discrimination, a case filed in United States District Court, an arbitration award in a grievance, and a case filed by Jones in Bankruptcy Court. We deem the material irrelevant to the issues in this case, and inappropriate for us to consider. We are making the decision in this case without a consideration of the declaration or the documents provided with it.

NOW, THEREFORE, it is

ORDERED

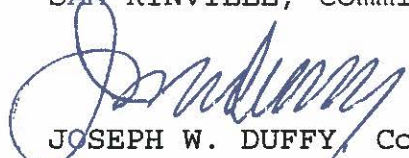
The Order of Dismissal issued by Martha M. Nicoloff in the above-captioned matter on December 3, 1996 is affirmed.

Issued at Olympia, Washington, on the 5th day of June, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner