

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 May 2005

CASE NO.: 2005-STA-14

In the Matter of

KEVIN S. ROSE,
Complainant

v.

ATC VANCOM, INC.,
Respondent

RECOMMENDED DECISION AND ORDER DISMISSING CASE AND VACATING TRIAL

By pre-hearing order issued February 2, 2005, the hearing in this case, originally set to go forward on February 24, 2005 in Seattle, Washington, was continued to March 17, 2005 on request of Complainant. The February 2 Pre-hearing Order ordered Complainant to serve and file with me within three (3) days of receipt of my pre-hearing order "a pre-hearing statement of position, which shall briefly set forth the issues involved in the proceeding, the remedy requested, and a list of names and addresses of each witness the party expects to call and a summary of the testimony the witness is expected to furnish."

On February 16, 2005, I received an *ex parte* communication telefax from Complainant in the form of an eight page letter discussing his case and requesting that the Office of Administrative Law Judges provide him with an advocate representative to present his case at trial.

On March 3, 2005, I responded to Complainant by instructing him not to send correspondence to me on an *ex parte* basis and further stating to Complainant, in bold print, that "if you fail to comply with my pre-hearing order your case can be dismissed for lack of prosecution. Finally, my March 3 letter reminded Complainant to submit his pre-hearing statement, witness list, and exchange his exhibits with Respondent's counsel at the address listed in the March 3 letter in St. Louis, Missouri.

On March 7, 2005, Respondent filed a motion to continue the trial in this case based on the fact that Complainant had not filed his pre-hearing position statement as ordered by me and, as a result, Respondent argued that the parties could not be prepared to try this case on March 17, 2005. Respondent's counsel further represented that he contacted Complainant who did not object to and concurred with the request for a continuance and need for additional time.

By order issued March 14, 2005, this case was continued from March 17, 2005 to May 16, 2005 in Seattle, Washington. The March 14 Order also ordered Complainant to “immediately serve on Respondent and file with this Office his pre-hearing statement of position and witness lists.” All other deadlines referenced in the Pre-hearing Order issued February 2, 2005 were also extended accordingly for the continued hearing date. Complainant was strongly encouraged to make all efforts to retain an attorney for his representation in this case or be prepared to proceed without an attorney. The March 14 Order also stated that there would be no further continuances.

On May 12, 2005, Respondent served its Motion to Dismiss Or, In the Alternative, Motion to Extend trial Date (the “Motion to Dismiss”) repeating the procedural history of this case and arguing that because Complainant still had not complied with my February 2 pre-hearing Order by not providing Respondent or me with a pre-hearing statement of position or witness list, I should dismiss Complainant’s claim for lack of prosecution with prejudice. Alternatively, Respondent requests another continuance to allow Complainant further time to comply with my February 2 pre-hearing Order.

Under 29 C.F.R. Section 24.6(e)(4)(B), the Administrative Law Judge may, at the request of either party or on his own motion, issue a recommended decision and order dismissing a claim upon the failure of the complainant to comply with a lawful order of the Administrative Law Judge. 29 C.F.R. Section 24.6 (e) (4) (B). Furthermore, 29 C.F.R. § 18.6(d)(2)(v) also provides me authority to strike Complainant’s notice of appeal and request for hearing and render a recommended decision against him and dismissing his case for failure to comply with my February 2 pre-hearing Order.

This authority to dismiss a case also comes from my inherent power to control my docket and prevent undue delays in the disposition of pending cases. *See Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

I find that Complainant has failed to comply with my February 2 pre-hearing order and subsequent orders requiring Complainant to serve and file a pre-hearing statement of position, witness list and exchange exhibits. My March 3 letter to Complainant specifically informed him in bold print that if he failed to comply with my pre-hearing order his case could be dismissed for lack of prosecution. Finally, I find that any lesser sanction would be inadequate given the repeat orders and warnings ignored by Complainant to comply with my February 2 pre-hearing order and the two prior continuances.

Since Complainant has not complied with my February 2 pre-hearing order and has not submitted his pre-hearing statement of position, witness list or exchanged exhibits in advance of the May 16, 2005 trial in this matter, his complaint must be dismissed for lack of prosecution

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint filed by Kevin S. Rose under the provisions of Section 405 of the Surface and Transportation Assistance Act, 49 U.S.C. § 31105 be **DISMISSED**.

IT IS FURTHER ORDERED that the trial set in this case for May 16, 2005 in Seattle, Washington is **VACATED**.

A

Gerald Michael Etchingham
Administrative Law Judge

San Francisco, California

NOTICE:

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. See 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to the Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).