

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE COUNTY DEPUTY SHERIFFS' ASSOCIATION,	:	
	:	
Complainant,	:	
	:	Case XXIX
vs.	:	No. 18236 MP-389
	:	Decision No. 12973-B
COUNTY OF RACINE,	:	
	:	
Respondent.	:	
	:	

ORDER DENYING MOTION FOR DISMISSAL

The above-named Complainant having filed a Complaint of prohibited practices with the Wisconsin Employment Relations Commission on August 21, 1974; and the Commission having appointed Marshall L. Gratz, as Examiner, to make and issue findings of fact, conclusions of law and orders in the matter; and the Examiner, on September 4, 1974, having served the parties with a Notice of Hearing providing for a hearing date of September 19, 1974; and on September 18, 1974, Complainant's Counsel, Mr. Jay Schwartz, by his secretary, Ms. Janet Henrickson, having telephonically communicated a Motion to Reschedule Hearing to the Examiner and to Respondent's Counsel and Respondent's Counsel having indicated in response to the Examiner's September 18, 1974 phone call to him, that Respondent opposed said Motion; and upon the aforesaid Janet Henrickson's agreement on behalf of Complainant to reimburse Respondent for any witness fee or witness fee traveling expenses incurred by Respondent as a result of the rescheduling of the hearing pursuant to Complainant's Motion and to reduce said Motion to writing and to serve same upon Respondent and the Examiner, the Examiner, on September 18, 1974 indicated by telephone to both parties that said Motion was granted; and the Examiner on September 19, 1974 formally issued his Order Granting Motion to Reschedule Hearing with an Accompanying Memorandum; and on September 23, 1974, Respondent having filed a Motion requesting an order dismissing the Complaint for the reasons that Complainant orally made its Motion for adjournment contrary to Wisconsin Administrative Code, Section ERB 10.11(1) and Section ERB 10.12(1) and that the Examiner was without authority under ERB 10.01,

10.18(6) or any other provision of the Wisconsin Administrative Code to waive requirements of said Commission rules; and the Examiner having considered Respondent's Motion for Dismissal; and being satisfied that said Motion should be denied;

NOW, THEREFORE, it is

ORDERED

That the Motion for Dismissal filed by Respondent in the above matter on September 23, 1974, shall be, and hereby is, denied.

Dated at Milwaukee, Wisconsin, this 25th day of September, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION FOR DISMISSAL

In support of its Motion, Respondent asserts ". . . that substantial legal error on the part of Complainant and the Hearing Examiner has so infested the instant prohibitive [sic] practice charge that justice demands dismissal." Respondent further argues that ". . . in reality, no Motion [to Reschedule Hearing] was before the Examiner or the Commission" since

- (1) Complainant's attorney Schwartz' secretary lacked requisite legal standing to enter an appearance or, therefore, to file a motion on behalf of Complainant in that there is no express provision in Constitution, statute or administrative code authorizing her so to do; and
- (2) the phone request herein was contrary to the requirements of ERB 10.09, 10.11(1) and 10.12(1) and the Examiner is without authority to waive such requirements.

Respondent argues further that since no valid Motion was before the Examiner or the Commission, none could have been granted and the September 19, 1974 hearing must not have been rescheduled; that Respondent appeared at the appointed place and time for the September 19, 1974 hearing, but that Complainant failed to do so, forfeiting its opportunity to prove its case (citing ERB 10.13[4]); and that the Complaint ought therefore be dismissed on its merits.

Respondent cites Wisconsin Constitution Art. VII, Sec. 20 ^{1/}, Sec. 256.27, Wis. Stats. ^{2/} ^{3/} and ERB 10.13(3) ^{4/}, finds therein no

^{1/} Rights of suitors. SECTION 20. Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice.

^{2/} 256.27 Appearance by attorney. (1) AUTHORIZED. Every person of full age and sound mind may appear by attorney in every section or proceeding by or against him in any court except felony actions, or may, at his election, prosecute or defend the same in person.

(2) SERVICE OF NOTICE. Upon the service of notice of appearance or retainer generally, by an attorney for any party, any other party may file such notice and have the appearance of such party entered as of the time when such notice was served.

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express authorization of Ms. Henrickson's phone request and concludes that her conduct was, therefore, contrary to law and ineffective.

In that regard, ERB 10.13(3) expressly authorizes a party to ". . . appear by counsel . . ." at hearing and ERB 10.09 calls for documents to be signed by ". . . an attorney or representative of

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(3) SUBSTITUTION OF ATTORNEYS. No order for the substitution of an attorney for a party shall be made without consent signed by such party and his attorney; or for cause shown and upon such terms as shall be just, and on such notice as the court or judge shall direct.

3/ In connection with its reliance upon Sec. 256.27, Respondent argued as follows:

". . . If, in fact, the Hearing Examiner was accepting the request of the legal secretary as an appearance, then there exists some rather serious complications as noted in Wisconsin Statutes, Sec. 256.30. With respect to the Hearing Examiner, this becomes important under Wisconsin Statutes, Sec. 939.31. The error in the instant case is that the Hearing Examiner, without any first-hand knowledge or written pleading, accepted as legally appropriate, a Motion made by the Legal Secretary. The Secretary was without standing before the Hearing Examiner or the Commission; . . ."

Section 256.30 defines as a misdemeanor certain conduct involving the practice of law without a license and Section 939.31 defines the inchoate crime of conspiracy. In that neither the Complaint, Answer nor Respondent's Motion for Dismissal herein give the Examiner a basis for the assertion of jurisdiction to determine whether violations of Section 256.30 or 939.31 have taken place herein, an analysis of the above-quoted portion of Respondent's Memorandum is not presented herein.

4/ RIGHTS OF PARTIES AT HEARING. Any party shall have the right to appear by counsel or by any other qualified representative to present his case by oral, documentary, or other evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts. Any party shall be entitled, upon request, to a reasonable period for oral argument at an appropriate time during the hearing.

record for the party." ^{5/} The instant phone request came to the Examiner from a woman representing herself to be Janet Henrickson, secretary to Attorney Schwartz and authorized by Mr. Schwartz to request an order rescheduling the September 19, 1974 hearing. She explained that Mr. Schwartz was engaged in critical negotiations in a secret location and that she was uncertain of her ability to initiate communications with Mr. Schwartz. In a second conversation with the Examiner, Ms. Henrickson indicated that she had attempted to locate Mr. Schwartz when Corporation Counsel Flynn indicated opposition to her request but that she was unable to locate Mr. Schwartz and therefore was forced to make the request herself on Mr. Schwartz' behalf. Under those unusual circumstances, it can reasonably be said that the Motion for Rescheduling of Hearing submitted by Ms. Henrickson on behalf of Attorney Schwartz was submitted by Complainant's "counsel" and "attorney of record" within the meaning of ERB 10.13(3) and 10.09(4) construed liberally to effectuate the purposes of the Municipal Employment Relations Act (MERA). ^{6/}

The Examiner relies upon the reasons set forth in his September 19, 1974 Memorandum for waiving certain requirements of ERB 10.11(1) and 10.12(1). In arguing that the Examiner is without authority to waive such requirements, Respondent argues that the term "Commission"

^{5/} ERB 10.09 provides in pertinent part as follows:

"Form of documents other than correspondence:

. . .

(4) SIGNATURE. The original of each document filed shall be signed by an attorney or representative of record for the party, or in case of a party not so represented, by the party himself, or by an officer of the party if it is a corporation or an unincorporated association."

^{6/} See ERB 10.01, which provides in pertinent part as follows:

"These rules govern the conduct of all proceedings involving municipal employment relations before the Wisconsin employment relations commission and before fact finders, appointed pursuant to commission action, in municipal employment disputes. These rules shall be liberally construed to effectuate the purposes and provisions of subchapter IV of chapter 111, Wis. Stats. The commission, or fact finder, as the case may be, may waive any requirements of these rules unless a party shows prejudice thereby."

in ERB 10.01 refers only to the agency "as a group" and not to those individuals designated or appointed by the Commission to conduct hearing and to issue findings of fact, conclusions of law and order in a matter. Noting that the Commission as a group is the reviewing authority for Examiner Findings, Conclusions and Orders, Respondent argues that

"An Attorney is not acting as the Commission or its facsimile when he performs the function of a Hearing Examiner. To challenge that theorem would be to acknowledge the meaninglessness of an Appeal before the same person who wrote the initial Opinion. An Appeal must produce an opportunity for an independent and fresh review."

It appears to the Examiner that such "independent and fresh" Commission review of examiner cases would be better achieved if the Commission were to review an entire record without having previously participated in rule waiver situations which may have developed before the examiner's issuance of Findings, Conclusions and Orders. In that event, the Commission would review examiners' decisions to waive rules free of concerns for consistency with its own prior determinations on such questions. Then, if the Commission found the Examiner's waiver of a rule requirement constituted error, the Commission could reverse, remand or take other appropriate remedial steps. ^{7/} To preclude examiners from exercising the waiver authority set forth in ERB 10.01 would make impossible their exercise of the power, provided in ERB 10.18(7), to independently determine procedural requests arising prior to their issuance of Findings, Conclusions and Orders. Such a construction of "Commission" in ERB 10.01 is, therefore, to be avoided in order to effectuate the underlying purposes of MERA which include provision of a fair and speedy prohibited practice forum. ^{8/}

^{7/} See, Sec. 111.07(5)-(6), Wis. Stats.

^{8/} See, Sec. 111.70(6) which provides as follows:

"DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter."

Finally, even if ERB 10.13(4) 9/ were applicable to a situation where, as here, no hearing was in fact convened, it would not apply herein so as to preclude Complainant from introducing further evidence in contravention of Respondent's pleaded denials because, in view of the Examiner's telephonic announcement to the parties that the September 19, 1974 hearing would be rescheduled, it cannot be said that Complainant was a "party failing to appear and participate after due notice" (Emphasis added)

For the foregoing reasons, the attached Order Denying Respondent's Motion for Dismissal was issued.

Dated at Milwaukee, Wisconsin, this 25th day of September, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

9/ EFFECT OF FAILURE TO APPEAR. Any party failing to appear and participate after due notice shall be deemed to have waived the rights set forth in subsection (2) above, to admit the accuracy of the uncontradicted evidence adduced by the parties present, and shall, unless good cause be shown, be precluded thereafter from introducing any evidence controverting any contentions or allegations. The commission or individual determining the matter may rely on the record as made.