

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondents.

Case LXXXVI
No. 20135 PP(S)-36
Decision No. 14355-D

ORDER

Complaint of unfair labor practices having been filed by the Wisconsin State Attorneys Association, Inc., wherein said Association alleged that the Respondent Department of Administration, State of Wisconsin, and Respondent Peter Vallone have committed unfair labor practices within the meaning of Section 111.84(1)(a) and 111.84 (1)(d) of the State Employment Labor Relations Act; and hearing on said complaint having been set and then postponed indefinitely on two occasions 1/ and before any hearing had been held in the matter, the Respondents having filed a Motion to Quash a Subpoena issued on April 20, 1976 by Dane County Court Commissioner, Kenneth M. Orchard, for the purpose of taking the testimony of Governor Patrick J. Lucey relating in part to the instant proceeding; and the Commission being satisfied that since said Court Commissioner has not been authorized to issue said subpoena as it relates to the instant proceeding, rather than quashing that portion of the subpoena, that said portion of the subpoena should be declared null and void;

NOW, THEREFORE, it is

ORDERED

That that portion of the subpoena in question, as it relates to the instant proceeding is hereby declared null and void. 2/

Given under our hands and seal at the
City of Madison, Wisconsin, this 20th
day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

~~Morris Slavney~~ Chairman

Herman Torosian, Commissioner

- 1/ Decision No. 14355, 2/20/76 and Decision No. 14355-C, 4/14/76.
- 2/ The Commission's determination herein is premised on interpreting applicable statutes and rules of the Commission, and therefore we deem that no hearing is necessary. Therefore the Motion of Respondents for a hearing on the Motion to Quash is deemed denied.

MEMORANDUM ACCOMPANYING ORDER

The subpoena in question, a copy of which was attached to the Respondent's Motion, was issued by Kenneth M. Orchard, a Court Commissioner in and for Dane County, Wisconsin. The subpoena states that Governor Lucey is being subpoenaed to give evidence under the provisions of Section 804.05, Wisconsin Statutes, in the case of James Altman et al v. Dept. of Administration et al, (Dane County Circuit Court #150-154) and also in the instant proceeding before the Commission.

Court Commissioners are given authority under the provisions of Section 252.15(1), Wisconsin Statutes, to issue subpoenas and to "take depositions and testimony when authorized by law or rule or order of any court within its jurisdiction." It is the Complainant's theory that Court Commissioners are authorized by Sections 111.07(2)(b) and 101.02(14)(c), Wisconsin Statutes, to cause depositions to be taken in the case pending before the Commission, as well as in the case pending before the Court, since the Complainant is a "party" and is attempting to take a deposition of a witness "in the manner prescribed by law for like depositions in civil actions in circuit court."

It is the Respondent's theory that Court Commissioners are without authority to issue subpoenas in a proceeding before the Wisconsin Employment Relations Commission and that, additionally, under the regulations of the Commission, depositions may only be taken upon application to the Commission and upon good cause shown, which procedure was not followed in this proceeding before the Commission.

RELEVANT STATUTORY PROVISIONS AND REGULATIONS:

"252.15 Court commissioners; powers and duties.
(1) TESTIMONIAL POWERS. A court commissioner may issue subpoenas and attachments and other process to compel the attendance of witnesses; administer oaths and affidavits; take depositions and testimony when authorized by law or rule or order of any court within its jurisdiction; and certify and report said depositions and testimony."

"111.84(4) Any controversy concerning unfair labor practices may be submitted to the commission as provided in s. 111.07, . . ."

"111.07 Prevention of unfair labor practices.

. . .

(b) The commission shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by s. 101.02(14)(c). No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the commission on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the state of Wisconsin; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it; provided, that an individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

"101.02 Powers, duties and jurisdiction of department. It shall be the duty of the department, and it shall have power, jurisdiction and authority:

. . . .

(14)(c) The department or any party may in any investigation cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in circuit courts. The expense incurred by the state in the taking of such depositions shall be charged against the proper appropriations for the department."

"ERB 20.14 Hearing subpoenas. Any member of the commission or any individual authorized to take testimony, shall on behalf of the commission, on written application of any party, issue subpoenas, requiring attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents in their possession or under their control. Application for subpoenas may be made ex parte. The subpoena shall show on its face the name and address of the party, at whose request it was issued, and the proceeding involved.

. . . .

ERB 20.15 Depositions. Upon application and good cause shown, the commission or any individual authorized to take testimony, may order that the testimony of any person, including a party, be taken by deposition in the manner prescribed by and subject to the provisions of chapter 326, Wis. Stats. [now Chapter 887, Wis. Stats.]

. . . ."

DISCUSSION:

On February 27, 1976, the Commission received a Motion from the Respondents seeking an order quashing a subpoena issued by a Court Commissioner for the purpose of deposing Thomas King. Before acting on that Motion, a second Motion was filed on March 22, 1976, seeking an Order quashing a subpoena issued by a Court Commissioner for the purpose of deposing Robert H. Dunn. The Commission was not furnished a copy of the subpoenas in question and was unaware as to whether the subpoenas purported to be for the purpose of deposing the two witnesses with respect to matters relating to the pending proceeding before the Commission. The Commission's record did indicate that the subpoenas had not been issued by the Commission, or anyone authorized by the Commission to take testimony in this case. Therefore, on March 30, 1976, the Commission issued an Order denying the motions to quash the subpoenas applicable to Thomas King and Robert H. Dunn, on the basis that it lacked jurisdiction to quash said subpoenas.


Inasmuch as the subpoena in question purports, in part, to be for the purpose of deposing an individual with respect to possible evidence affecting the instant proceeding, it is appropriate to comment on that aspect of the subpoena. Under Section 111.07(2)(b), the Commission is given the power to issue subpoenas. In addition, depositions under subpoenas issued by the Commission may be taken "in the manner prescribed by Section 101.02(14)(c)". Section 101.02(14)(c) indicates that depositions may be taken "in the manner prescribed by law for like depositions in civil actions in circuit court". These two provisions, taken together, authorize the Commission or anyone

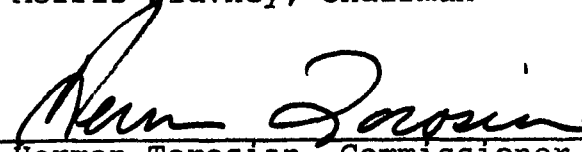
acting on its behalf, such as an Examiner, appointed under Section 111.07(5), to issue subpoenas for the purpose of deposing witnesses in a manner which is like the practice of deposing witnesses in civil actions in circuit courts. They do not, in the Commission's judgment, authorize the Courts or Court Commissioners to issue subpoenas for the purpose of deposing witnesses in an unfair labor practice proceeding before the Commission. 3/

Because of its concern that proceedings under Section 111.07, Wisconsin Statutes, and Section 111.84(4) of the State Employment Labor Relations Act, which are intended to be expeditious and readily available to non-lawyers, not be unduly delayed or complicated, the Commission has, by rule (ERB 20.15) adopted a requirement that a party show good cause why it should be allowed to depose a witness in a proceeding before it pursuant to the provisions of Sections 111.07 and 111.84(4). In this case, no such application was made, nor was any good cause shown to the Commission why the Complainant should be allowed to depose the witness involved. Consequently, the Commission wishes to make it clear that, to the extent that the subpoena in question, as it applies to the instant proceeding, contrary to the Complainant's theory, is not authorized by any law or rule administered by this Commission, and therefore is deemed null and void.

Dated at Madison, Wisconsin, this 20th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner

3/ This interpretation is consistent with the Wisconsin Supreme Court's decision under a similar statute administered by the Department of Revenue, State ex rel Thompson v. Nash, 27 Wis. 2d 183 (1964).