

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION, and JOHN C. WINKLER,	:	
	:	
Complainants,	:	Case XLIII
	:	No. 23771 MP-913
vs.	:	Decision No. 16717-A
	:	
GREEN COUNTY (SHERIFF'S DEPARTMENT),	:	
	:	
Respondent.	:	
	:	

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ORDER GRANTING MOTION TO SUBSTITUTE COUNSEL AND RESCHEDULE HEARING

A complaint of prohibited practice having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Thomas L. Yaeger, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats.; and the Examiner having conducted two days of hearing in the matter on January 4, and 5, 1979, at Monroe, Wisconsin; and on January 5, 1979, counsel for the parties having agreed to continue said hearing to January 16, 17 and 18, 1979; and the Respondent, through counsel, having filed with the Examiner on January 11, 1979, a motion to substitute counsel and postpone hearing; and the Complainants having opposed said motion; and the Examiner having considered said motion and being fully advised in the premises and satisfied that Respondent's motion should be granted;

NOW, THEREFORE, it is

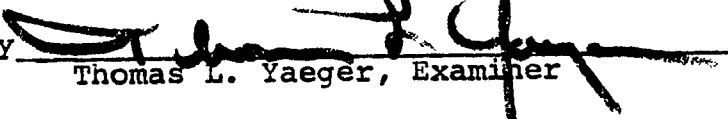
ORDERED

1. That Respondent's motion to substitute Counsel and postpone hearing in the above-entitled matter be, and the same hereby is, granted.

2. That hearing in the above-entitled matter is rescheduled to February 14, 15 and 16, 1979, at 9:30 a.m. in the Green County Courthouse, Monroe, Wisconsin. 1/ All subpoenas, previously issued by the undersigned in the above-entitled matter, requiring the appearance of certain persons before the Wisconsin Employment Relations Commission on January 4 and 5, 1979, are continued to February 14, 15 and 16, 1979. It is the responsibility of the party who has anyone under subpoena to notify said person of the date, time and place for appearance in order that their appearance be assured.

Dated at Madison, Wisconsin this 12th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Thomas L. Yaeger, Examiner

1/ The undersigned has selected these dates with the understanding that by on or about January 24, 1979, the parties will be in receipt of the transcript of proceedings already held in the instant matter.

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION  
TO SUBSTITUTE COUNSEL AND RESCHEDULE HEARING

On January 10, 1979, Corporation Counsel for Green County, who had theretofore appeared on behalf of the Respondent, advised the undersigned that he would be withdrawing from the case and that new counsel was being retained by Respondent. The following day, January 11, 1979, the firm of Melli, Shiels, Walker & Pease, filed a motion with the Examiner to substitute counsel and postpone hearing. Respondent avers that Corporation Counsel's testimony may be required, a factor which was unknown until the second day of hearing, and that under Wisconsin law <sup>2/</sup> once an attorney learns he ought to be called as a witness on behalf of his client, he must withdraw. The motion also seeks to postpone any further hearing herein until at least ten (10) days following receipt of transcript of proceedings already held, in order to allow substituted counsel an opportunity to become familiar with the issues and record so as to afford Respondent adequate representation.

Complainants, on January 11, 1979, after receiving Respondent's motion, filed a statement in opposition thereto. Complainants argue that inasmuch as the predominant portion of their case relative to the first cause of action herein, which involves the discharge of two employees, is already completed, it is of utmost importance that the proceedings be completed and the issue of their discharge be decided expeditiously. Further, Complainants contend that Respondent's request for delay is open-ended and excessive, that such delay is not reasonable or necessary, and that it would be very prejudicial. To avert any delay in the continuation of these proceedings and obviate the need for Corporation Counsel to withdraw as Respondent's counsel, Complainants propose to stipulate that they will not illicit any further testimony concerning material and relevant remarks made by Corporation Counsel during times material to the instant dispute and strike any such evidence from the record.

Section 256.27(3), Wis. Stats., provides that counsel cannot be substituted without the party and attorney's consent unless good cause for doing so has been established.

(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.

However, Section 256.27, Wis. Stats., pertains to practice in Wisconsin courts of record. The Commission, as an administrative agency, is not a court of record. Procedural matters concerning the conduct of hearings before the Commission are rather governed by the provisions of Section 227, Wis. Stats., and Commission rules adopted pursuant thereto.

The Commission has no rule concerning the substitution of counsel in a matter pending before it. However, Section 227.09(1)(g), Wis. Stats., and Wis. Adm. Code Section ERB 10.18(7) and (9), empowers the Examiner to rule upon the subject motion to substitute counsel. In determining whether to grant or deny said motion the Examiner has determined that the principles enunciated in Section 256.27(3), Wis. Stats., would likely be adopted by the Commission were it to adopt a rule governing said matter. Thus, the Examiner has relied upon them in ruling on the subject motion.

Although a signed consent to substitution has not been presented to the Examiner, it is unnecessary where, as here, the reason advanced for the

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<sup>2/</sup> Code of Professional Responsibility, Section 2, Disciplinary Rules 2-110.

substitution clearly obviates the need for written consent. Wisconsin law 3/ requires counsel's withdrawal under the circumstances present herein, thereby presenting cause. In any event, Corporation Counsel advised the undersigned orally that the County Board approved of the substitution and he did not advise he was opposed. Finally, there is no reason to conclude that this is a dilatory tactic perpetrated by Respondent.

The Wisconsin Supreme Court has previously determined that an absolute right to substitution of attorneys during the pendency of litigation in courts of record does not exist, and that a substitution may be denied where it would unduly interfere with the administration of justice or unduly prejudice the other party. 4/ Herein, while Complainants' allege that both undue delay and prejudice would result were the motion granted, the undersigned is not in agreement. The delay occasioned by granting the motion will be minimal and, in addition, the remedial powers reposing with the Commission are such that the undersigned sees no prejudice resulting to Complainants as a consequence of granting the motion. 5/

The Examiner has rescheduled the instant proceedings to February 14, 15 and 16, 1979, pursuant to counsel's motion, and upon the representation of the Court Reporter herein that the transcript would be available to the parties on or about January 24, 1979. The motion to reschedule is a reasonable one under the circumstances present. Furthermore it is in conformity with Wis. Adm. Code section ERB 10.12(1) and was received two days prior to the date set for continued hearing. 6/

ERB 10.12 Particular motions. (1) To RESCHEDULE HEARING. Motion to reschedule hearing shall set forth (a) the grounds for same, (b) alternate dates for rescheduling, (c) the positions of all other parties. Except for good cause shown any motion for rescheduling must be received at least 2 days before the date set for hearing.

Dated at Madison, Wisconsin this 12th day of January, 1979.

By

  
Thomas L. Yaeger, Examiner

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3/ Code of Professional Responsibility, Section 2, Disciplinary Rules 2-110.

4/ Estate of Ainsworth, 52 Wis 2d 152 (1970); Lorchester v. Lorchester, 52 Wis 2d 804, 808 (1971).

5/ The Examiner has chosen to disregard the stipulation proposed by Complainants concerning testimony of Corporation Counsel because it is obviously made upon the assumption that counsel would not be substituted but for the apparent need for Corporation Counsel's testimony. In view of the present circumstances, and the fact that no cause need be shown to substitute counsel when the attorney of record consents, further delay might result were the Examiner to deny the motion and thereafter, Respondent refile same with accompanying written consent. Even then, there would be no basis for denying the motion.

6/ The parties had agreed on January 5, 1979, to continue the matter to January 15, 16 and 17, 1979.