

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GEORGE MUDROVICH, Complainant,

vs.

D.C. EVEREST AREA SCHOOL DISTRICT, Respondent.

Case 53
No. 57582
MP-3522

Decision No. 29946-C

Appearances:

Mr. George A. Mudrovich, 826½ Steuben Street, Wausau, Wisconsin 54403, appearing on his own behalf.

Ruder, Ware & Michler, S.C., by **Attorney Ronald J. Rutlin**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Respondent.

**ORDER DENYING MOTION TO PERMIT COMPLAINANT TO CONDUCT
DEPOSITIONS PRIOR TO THE HEARING**

On May 26, 1999, Complainant filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the Respondent had violated Secs. 111.70(3)(a)1 and 3, Stats., by the administration recommending Complainant's layoff and the school board members approving the same and rejecting Complainant's application for full-time employment, in part, due to Complainant's protected, concerted activity. On August 1, 2000, Coleen A. Burns was appointed by the Commission to act as Examiner in this case. On August 9, 2000, Complainant filed a Motion to Permit Complainant to Conduct Depositions Prior to the Hearing. On August 31, 2000, Respondent filed a Response to this Motion. Having considered the argument of the parties, and the record as a whole, the Examiner makes and issues the following

Dec. No. 29946-C

ORDER

Complainant's Motion to Permit Complainant to Conduct Depositions Prior to the Hearing is denied.

Dated at Madison, Wisconsin, this 13th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

D. C. Everest School District

**MEMORANDUM ACCOMPANYING ORDER DENYING COMPLAINANT'S
MOTION TO CONDUCT DEPOSITIONS PRIOR TO THE HEARING**

On August 9, 2000, Complainant filed a Motion to Permit Complainant to Conduct Depositions Prior to the Hearing. On August 31, 2000, Respondent filed a Response requesting that this Motion be denied.

Under ERC 10.15 and ERC 20.15 of the Wisconsin Administrative Code, upon application and for good cause shown, an Examiner may permit the testimony of witnesses to be taken by deposition in the manner prescribed by and subject to the provisions of ch. 887, Stats. As Examiner Nielsen has previously stated, a review of the Commission's case law reveals that "good cause" for ordering a deposition is more than simply a legitimate reason. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28909-A (11/96).

The Commission has refused to order a pre-hearing deposition where the testimony being sought, if not privileged, could be obtained through an adverse examination of the witness. CITY OF GREEN BAY, DEC. NO. 10722-A (WERC, 2/72). Subsequent Examiners have also considered the availability of witnesses for hearing to be a significant factor in determining whether or not there is good cause to order pre-hearing depositions. STATE OF WISCONSIN, DEC. NO. 21980-A (SCHIAVONI, 6/87); NORTHEAST WISCONSIN TECHNICAL COLLEGE, SUPRA.

The Commission has found good cause for pre-hearing discovery where the Commission was concerned that, without pre-hearing discovery, the hearing would be "unnecessarily protracted and the record will be unduly burdened." MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 18408-A (WERC, 10/81). In reaching this decision, the Commission clearly indicated that pre-hearing discovery was an exception, rather than the rule.

As Examiner Nielsen recognized in NORTHEAST WISCONSIN TECHNICAL COLLEGE, SUPRA, pre-hearing discovery is likely to enhance case preparation and/or shorten the hearing. Thus, for pre-hearing discovery to be the exception, rather than the rule, in prohibited practice proceedings, it must be concluded that neither enhancement of case preparation, nor the shortening of hearing, is sufficient, in and of itself, to provide "good cause" to order pre-hearing discovery.

To support the conclusion that a prohibited practice hearing would be "unnecessarily protracted" by the absence of pre-hearing discovery, the record must demonstrate that pre-hearing discovery would significantly shorten the hearing process. It is not evident that the pre-hearing discovery requested by the Complainant would significantly shorten the hearing process. Indeed, it is likely that the pre-hearing discovery requested by the Complainant would do nothing more than replace a day of hearing with a day of depositions.

When determining whether or not pre-hearing discovery is necessary, Examiners have considered the complexity of the case. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-C (SCHIAVONI, 2/84); NORTHEAST WISCONSIN TECHNICAL COLLEGE, SUPRA. Limiting pre-hearing discovery to cases of extraordinary complexity would be consistent with the Commission's determination that pre-hearing discovery is the exception, rather than the rule. Additionally, the more complex the case, the more likely it would be that pre-hearing discovery would relieve the record of "undue burdens," such as irrelevant or repetitious evidence.

Complainant wishes to depose certain teachers because he believes that these teachers do not wish to volunteer pertinent information, but would speak the truth when deposed under oath. There is no reason to believe that an oath taken during a deposition is more compelling than an oath taken at hearing. Complainant's "right to get at the truth" is not compromised by having teacher witnesses testify at hearing.

Complainant does not wish to be "surprised" at hearing. The Commission, however, has never found avoidance of "surprise" to be "good cause" for pre-hearing depositions in a prohibited practice proceeding. A party who has good cause to argue "surprise," may seek an adjournment of hearing and/or request additional days of hearing.

In summary, the instant case is not one of extraordinary complexity. Complainant has not shown that the depositions sought by Complainant would significantly shorten the hearing process or significantly "unburden" the record. Nor has Complainant demonstrated that the witnesses that he seeks to depose are unavailable for hearing.

The present case provides no exception to the general rule that discovery is not available in a prohibited practice proceeding before the Commission. Complainant has not shown good cause to depose any witness prior to hearing. Accordingly, Complainant's Motion to Permit Complainant to Conduct Depositions Prior to Hearing is denied.

Dated at Madison, Wisconsin, this 13th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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