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 *
 ROGER E. ALFF, *
 *
 Appellant, *
 *
 v. *
 *
 SECRETARY, Department of Revenue, *
 *
 Respondent. *
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 Case Nos. 78-227-PC & 78-243-PC *
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DECISION
 AND
 ORDER

NATURE OF THE CASE

These are consolidated appeals of a suspension and a discharge, which are before the Commission on the following motions by the appellant:

1. For an order granting the appellant's immediate reinstatement; or
2. For an order quashing the testimony of Sylvan Leabman, and/or
3. For an order directing the quashing of any contract entered into by the Department of Revenue pursuant to a certain quotation request, or, alternatively, for an order prohibiting the testimony of any contractor complying with the quotation request;

filed June 6, 1979, and the following motions by the respondent:

For an order quashing the appellant's Subpoena and Notice of Taking of Deposition dated May 30, 1979, and in the alternative to bar discovery until the appellant files an appeal letter required by law;

filed June 8, 1979.

OPINION

The respondent's motion to quash the subpoena and notice of taking deposition with regard to the deposition of Mr. Leabman is based on two grounds. The first ground is that "The statutes prohibit discovery in administrative proceedings." Respondent's motion dated June 8, 1979.

Section PB 2.02, WAC, which applies to proceedings before the Commission pursuant to the transitional provisions of Chapter 196, Laws of 1977, more specifically s. 129(4m), provides:

Parties shall have available substantially all the means of discovery that are available to parties to judicial proceedings as set forth in chapter 804, Wis. Stats., to the extent that the same are not inconsistent with or prohibited by these rules or the Wisconsin Statutes or the Wisconsin Administrative Code. Whenever chapter 804 refers to resort to a court, as, for example, for an order compelling discovery, resort shall be had to the board rather than to a court.

Respondent argues that s. 227.08(7), Stats. (1977), limits any "discovery" in administrative proceedings to the taking and preservation of evidence with respect to witnesses who are or are likely to be unavailable to testify at the hearing.

Section PB 2.02, WAC, was promulgated pursuant to authority set forth in s. 16.05(1)(a), Stats. (1975):

- (1) The board shall:
 - (a) Adopt rules necessary to carry out this section.*

This statute provided authority for the board to adopt rules regulating the procedures in the processing of appeals. In the opinion of the Commission, the grant of authority provided by this statute authorized the

*This language was re-enacted by the legislature as s. 230.45(1)(i), Stats. (1977), see s. 122, chapter 196, Laws of 1977

The respondent cites a decision by a hearing examiner in the Department of Health and Social Services in a class 2 proceeding denying a motion to compel answers to written interrogatories, which includes the following statement: "Prior to the enactment of ch. 414 of the Laws of 1975 statutory discovery procedures for court actions did not apply to proceedings before administrative agencies. State ex rel Thompson v. Nash, 27 Wis. 2d 183." In the matter of the Master Plumber's License of Carol E. Bischel, Decision and Order dated November 1, 1978.

The key distinction between the Bischel matter, State ex rel Thompson v. Nash, and the instant case is that the agencies involved in the former matters had not provided by rule for discovery. It does not follow from the quoted statement from Bischel that agencies cannot by rule provide for prehearing discovery. In fact, State ex rel Thompson v. Nash, implies that discovery might be had under an appropriate rule, see discussion, 27 Wis. 2d at 191-193, and the concurring opinion at p. 195.

Also, as was noted above, the legislature provided in s. 129(4m), chapter 196, Laws of 1977, that the "rules of the personnel board promulgated under section 15.05(1)(a), 1975 Stats., ... shall remain in full force and effect" It may well be said that this explicit action by the legislature constitutes approval of s. PB 2.02. Compare Sharon Herald Co. v. Granger, 97 F. Supp. 295. 302 (W.D. Pa. 1951) (affirmed, 195 F. 2d 890):

A regulation of the treasury interpreting a provision of the revenue laws is deemed, upon subsequent re-enactment of the law in the same terms, to have received legislative approval

The respondent's second ground is that:

no 'appeal' has been filed within the meaning of s. 230.44(1)(a), Stats. 1977 and Sections PB 1.01(1) and (2),

The respondent takes the position that the appellant should not be allowed to proceed with discovery until he submits a more detailed and specific notice of appeal. However, the appellant's ability to respond in detail may well be impaired by an inability to conduct discovery.

For these reasons the respondent's motion and alternative motion for a protective order will be denied.

The appellant's first motion is for an "order granting the appellant's immediate reinstatement." The authority for this is questionable since the remedial provisions of s. 230.44(4)(c), Stats. (1977), contain the proviso "after conducting a hearing on an appeal" It may be that in a given case there might be circumstances which would provide a basis for an order of temporary reinstatement pending a final hearing, but on this record the Commission cannot perceive a basis for such an order.

The appellant's second motion is for an order quashing the testimony of Mr. Leabman. The Commission does not believe that this action is warranted on the record to date, but does note that such action might be ordered as a sanction for refusal to submit to discovery depending on the facts and circumstances of a particular situation.

The appellant's third motion seeks an order directing the quashing of any contract entered into by the Department of Revenue pursuant to the quotation request in question or the denial of the testimony of the contractor. The appellant has not suggested what laws or rules are violated by the department's proceeding in this manner, and the Commission is not aware of any.

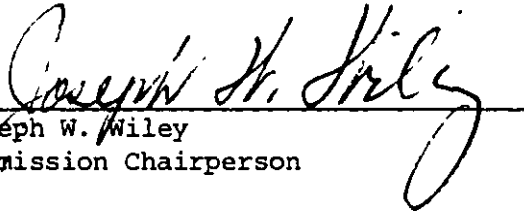
For these reasons the appellant's motions will be denied.

Since the respondent's motions for protective orders will be denied,

ORDER

The appellant's motions filed June 6, 1979, for orders granting immediate reinstatement, quashing the testimony of Mr. Leabman, and directing the quashing of any contract entered into pursuant to a certain quotation request, or for an order prohibiting the testimony of any contractor complying with the quotation request, filed June 6, 1978, and the respondent's motions for an order quashing the appellant's subpoena and notice of taking of deposition dated May 30, 1979, and in the alternative to bar discovery until the appellant files an appeal letter required by law, are denied.

Dated: June 13, 1979. State Personnel Commission


Joseph W. Wiley
Commission Chairperson


Edward D. Durkin
Commissioner


Charlotte M. Higbee
Commissioner

AJT:skv

6/13/79