STATE OF WISCONSIN PERSONNEL COMMISSION

ROGER E. ALFF,

Appellant,

v.

SECRETARY, Department of Revenue,

Respondent.

Case Nos. 78-227-PC
78-243-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

These are consolidated appeals pursuant to §230.44(1)(c), Stats., of a suspension and a discharge. These cases are before the Commission on the respondent's "Motion to Dismiss for Failure to Comply with Order to Make Appeal Letter more Definite and Certain and Alternative Motion" filed March 1, 1979, and "Motion to Quash Subpoena and Notice of Taking Deposition" filed April 16, 1979. These motions involve procedural issues and the facts relating to these issues appear to be undisputed and are based on papers filed by the parties.

FINDINGS OF FACT

1. In an Interim Decision dated January 18, 1979, the Commission denied a motion by respondent to dismiss case no. 78-227-PC on the grounds that the appeal letter violated §PB 1.01(2), WAC, as to the specific information set forth in that subsection.

2. In the same Order the Commission granted appellant's motion for consolidation of the above-captioned cases and the respondent's alternative motion for a more definite statement of appeal, noting

that it could be construed as equivalent to a set of written interrogatories.

3. On January 29, 1979, the appellant submitted a "Response to Order Granting a More Definite Statement," containing the following substantive statements:

> "Whereas the Department of Revenue (DOR) has requested the following information of the Appellant:
> 1. The facts which form the basis of the appeal;
> 2. The reasons why the Appellant feels the act appealed was improper; and
> 3. The relief sought;
> Whereas the Personnel Commission, by Interim Decision dated January 18, 1979, has ordered the Appellant to furnish said information;
> NOW, THEREFORE, Said information is provided forthwith.
> I. FACTS FORMING BASIS OF APPEAL.
> The Appellant was employed for many years in the Department of Revenue and was promoted to Bureau Chief, Bureau of Municipal Audit, on or January 1, 1970. By letters dated October 6, 1978, and November 6, 1978, Appellant was suspended and discharged. Both actions were without 'just cause.' Accordingly, both actions were timely appealed.
> II. REASONS WHY APPELLANT FEELS SUSPENSION AND DISCHARGE IMPROPER.
> All the allegations in both the letters of suspension and discharge are denied--they are not true.
> Even if the allegations contained in said letters are true, they do not constitute 'just cause' for the action taken.
> III. RELIEF SOUGHT.
> Reinstatement to the position of Bureau Chief, Bureau of Municipal Audit, with restoration of all lost wages and fringe benefits."

4. On March 1, 1979, the respondent filed a "Motion to Dismiss for Failure to Comply with Order to Make Appeal Letter More Definite and Certain and Alternative Motion."

5. On April 4, 1979, the appellant noticed the taking of deposition of Sylvan Leabman, Administrator, Department of Revenue, Division of State/Local Finance, for April 17, 1979.

6. On April 5 or 6, 1979, service of a subpoena dated April 4, 1979,

with respect to the attendance of Mr. Leabman at the aforesaid deposition, was attempted by leaving a copy with his secretary.

7. On April 16, 1979, the respondent filed a "Motion to Quash Subpoena and Notice of Taking Deposition."

8. On April 16, 1979, the Commission directed the postponement of the Leabman deposition until after the decision of the preceding motions.

CONCLUSIONS OF LAW

1. The appellant failed to effect personal service of his April 4, 1979, subpoena, on Mr. Leabman.

2. The appellant's "Response to Order Granting a More Definite Statement" filed January 29, 1979, was not in sufficient detail as contemplated by the Commission's January 18, 1979, Interim Decision.

3. Dismissal of appellant's appeal is not appropriate.

4. The appellant may proceed with his discovery.

OPINION

Section PB 2.02, WAC, provides in part: "Parties shall have available substantially all the means of disclosure that are available to parties to judicial proceedings as set forth in Chapter 804, Wis. Stats. ...." In the Interim Decision dated January 18, 1979, the Commission noted that the respondent's alternative motion for a more definite statement of appeal could be construed as equivalent to a set of written interrogatories and directed the appellant to respond.

Construing the information sought by appellant as set forth at pages 3 and 4 of his "Motion to Dismiss and Alternative Motion for More Definite Statement" as written interrogatories, the appellant's response

filed January 29, 1979, lacks sufficient detail to constitute an adequate response. Therefore, the appellant should be required to make a more specific response.

With respect to the motion to quash subpoena and notice of taking deposition, it appears from the affidavit filed by the respondent, which has not been contested by the appellant, that there was a defect in service of the subpoena on April 5 or 6, 1979, and therefore it should be quashed on the ground that it was not personally served on Mr. Leabman

However, the Commission does not agree with the additional ground advanced by respondent, see "Motion to Quash Subpoena and Notice of Taking of Deposition:"

> "The subpoena and notice should be quashed since they are unreasonable. The appellant seeks to discover more facts relative to the charges in these proceedings, yet he has not given the respondent a specific statement as to the facts and reasons for his appeal.
>
> * * *
>
> It is unreasonable to compel the respondent to submit to discovery before the appellant gives a specific statement why he disputes the discipline, since the respondent may wish to object to the relevance and materiality of questions at such depositon but would be unable to do so without a specific statement delineating the matters at issue."

Section 804.01(2)(a), Wis. Stats. (1977), provides as to scope of discovery:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party .... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Section 804.01(4) provides with respect to the sequence and timing

of discovery:

> "Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

Section 804.05(1), Stats. provides that depositions may be taken at any time "after commencement of the action."

The Judicial Council Committee's Note - 1974, set forth in the Wisconsin Statutes Annotated with respect to §804.01 at pp.195-196, contains the following comment:

> "Sub. (2)(a) provides a uniform, broad rule of relevancy with respect to information sought by discovery methods authorized in Sub. (1). It is incorporated by reference into other discovery statutes e.g., §804.08(2), 804.09(1) and 804.11 (1). It replaces the more restrictive relevancy rules found in §269.57(1), §889.22. The liberal scope of discovery rule is necessary in light of the limited function of the pleadings under Chapter 802.
>
> * * *
>
> Sub.(4) recognizes that there is no need to establish rules of priority for discovery in most cases. If such rules are necessary in a particular case, an appropriate protective order under Sub. (3) may be sought."

See also Graczyk, <u>The New Wisconsin Rules of Civil Procedure</u>, Chapter 804, 59 Marquette L. Rev. 463 (1976):

> "Section 804.01, adopting nearly verbatim the language of Federal Rule 26, is the important general provision which governs all of the specific discovery rules which follow. It also codifies the judicial limitations which had been placed upon the scope of discovery under the former practice.
>
> Subsection (1) makes explicit that the frequency of use of the particular discovery devices, either singly or in combination, is to be limited only by a prior protective order under subsection (3). This provision should be read in connection with subsection (4), allowing the use of discovery devices in any sequence unless the court for cause orders otherwise.

> Subsection 2(a) is identical to Federal Rule 26(b). It provides a uniform, broad requirement of relevance to the subject matter which under the former practice characterized only the scope of discovery through oral depositions and written interrogatories. It is incorporated by reference into other discovery statutes, for example, sections 804.08(2), 804.09(1) and 804.11(1) and replaces the more restrictive language of some of the former rules. Under former section 269.57, a party could discover documents and other property 'containing evidence relating to the action,' and under former section 889.22, a party could demand that his opponent admit 'the existence of any specific fact or facts material in the action.'
>
> The criterion of materiality or admissibility is replaced with a concept of relevance which is substantially broader than relevance in an evidentiary sense. For purposes of discovery, 'relevant' matters need only be reasonably calculated to lead to the discovery of admissible evidence,' a phrase which should be construed with great liberality. Moreover, this liberal scope of discovery rule is particularly appropriate to a procedure which employes the notice pleading provisions of Chapter 802."

* * *

> "Subsection (4) recognizes that in most cases there is no need to establish rules of priority for discovery. This provision, taken verbatim from Federal Rule 26(d), was added to the federal rule in 1970 to abolish a judicially recognized 'priority rule' which permitted the party who first noticed a deposition to take it before his opponent could undertake discovery in any form. This subsection leaves it to the parties themselves to work out a mutually acceptable discovery schedule or, if necessary, to seek an appropriate protective order under section 804.01(3)." (emphasis added)

The respondent's argument:

> " ... the respondent may wish to object to the relevance and materiality of questions at such deposition but would be unable to do so without a specific statement delineating the matters at issue,"

runs afoul of the broad scope of discovery reflected by the foregoing citations. A party is not entitled to object to questions asked in a deposition on the same comparatively strict grounds of admissibility, including relevancy and materiality, as it would at a hearing on the

merits. Furthermore, §804.05(4)(b), Stats., provides that "Evidence objected to shall be taken subject to the objection."

While the respondent is entitled to discover the details of the appellant's case, as reflected in the Interim Decision dated January 18, 1979, the respondent is not entitled to have this information before appellant commences his discovery.

The respondent has asked that the Commission dismiss this appeal on the grounds that the appellant has not complied with the Commission's January 18, 1979 order to respond to the respondent's motion to make more definite and certain. Under the circumstances the Commission does not believe that this extreme sanction is warranted.

ORDER

1. The respondent's "Motion to Dismiss for Failure to Comply with Order to Make Appeal Letter More Definite and Certain," filed March 1, 1979, is denied.

2. The respondent's "Alternative Motion" filed March 1, 1979, is granted in part and the appellant is directed to construe the subparagraphs numbered 1), 2), and 3), set forth at pages 3 and 4 in the respondent's "Motion to Dismiss and Alternative Motion for More Definite Statement" filed December 13, 1978, as written interrogatories, and to respond to them in the manner provided by §804.08, Wis. Stats., no later than 30 days after the date of service of this decision.

3. The appellant's "Notice of Taking Deposition" and "Subpoena," dated April 4, 1979, with respect to the deposition of Sylvan Leabman on April 17, 1979, are quashed on the ground of improper service of said subpoena. However, the appellant is free to proceed with discovery as set forth in this decision.

Dated: May 23, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley, Chairperson

Edward D. Durkin, Commissioner

Charlotte M. Higbee, Commissioner

AJT:jmg

5/10/79