

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ROBERT LYONS, *
 *
 Appellant, *
 *
 v. *
 *
 DEPARTMENT OF HEALTH *
 AND SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 79-81-PC *
 *
 * * * * *

DECISION
 AND
 ORDER
 ON
 MOTION

NATURE OF THE CASE

This matter is before the Commission as an appeal of a denial of a unilateral (non-contractual) grievance at the third step. On April 23, 1979, the appellant filed an "Emergency Motion to Stay Further Request and Disciplinary Action Pending Commission Hearing." By order dated April 24, 1979, the Commission appointed the undersigned as hearing examiner to hear this motion and further directed that pursuant to §227.09(3)(a), Stats., the decision by the examiner of the motion be the final decision of the Commission. A hearing on the motion was held on April 25, 1979, at which both parties appeared by counsel. The findings set forth below are based on matter which appears to be undisputed and are limited to the purpose of deciding this motion.

FINDINGS OF FACT

1. The subject matter of the non-contractual grievance filed by appellant was a reprimand of the appellant by his supervisor.
2. The reason for the reprimand was the refusal of the appellant, a physician employed by the Division of Health, Bureau of Quality

Compliance as a medical consultant, to comply with a directive to perform a consultation or on-site evaluation of the medical care and services received by a deceased patient (an apparent "brittle" diabetic) at the Portage County Home.

3. As set forth in his appeal to the Commission filed March 23, 1979, the appellant refused this assignment because he did not feel qualified, with a radiology background, to have performed such a consultation and gathered information to present to the State Board of Medical Examiners, and he felt that such a consultation should be performed by a specialist in internal medicine.

4. The appellant has been given the same assignment he previously refused, to be performed by April 27, 1979.

CONCLUSION OF LAW

The Commission lacks the power to take the action requested by this motion.

OPINION

As a basis for this motion the appellant argues that since receiving the reprimand that was the subject of the grievance and this appeal he had received a request to perform the assignment for which he has already been disciplined and which is the subject matter of this appeal. He alleges that compliance with the request would compromise his position that the discipline was without just cause, would violate his professional ethics and medical judgment, and would subject him to further discipline prior to an opportunity to be heard before the Commission. The motion asks that the request be cancelled or that any discipline be postponed pending the hearing of this appeal.

Counsel for respondent argues that the Commission lacks authority to grant this motion.

It is the general rule in Wisconsin that:

" ... an agency or board created by the legislature has only those powers which are either expressly conferred or which are, by necessity, to be implied from the four corners of the statute under which it operates The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted." Racine Fire and Police Comm. v. Stanfield, 70 Wis. 2d 395, 399, 234 N.W. 2d 307 (1975).

See also State ex rel Farrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W. 2d 529 (1971):

" ... any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority."

There is no express statutory provision which gives the Commission the power to grant what functionally amounts to a preliminary injunction as requested by this motion. It is significant that the legislature by explicit enactment has given the Wisconsin Employment Relations Commission the authority to make interlocutory orders pending final determination of matters pending before it. See §111.07(4), Stats. (1977). This express statutory grant to another agency performing somewhat similar adjudicative functions constitutes a strong argument against finding an implied grant of similar authority in this Commission. Furthermore, no precedent has been found in this or other jurisdictions for the exercise of this type of power in the absence of an appropriate statutory grant.

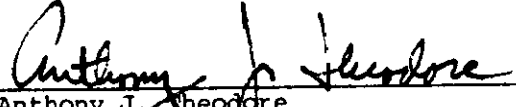
An argument possibly could be made that the Commission has inherent authority to issue an interlocutory order if it were necessary to protect

its jurisdiction. However, the agency action sought to be enjoined here would not appear to have the effect of preventing the exercise of such jurisdiction as may exist over the instant appeal.

ORDER

The appellant's "Emergency Motion to Stay Further Request and Disciplinary Action Pending Commission Hearing," filed April 23, 1979, is denied.

Dated: April 26, 1979. STATE PERSONNEL COMMISSION



Anthony J. Theodore
For the State Personnel Commission

AJT:jmg

4/26/79