

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 TERRY C. FRANK, \*  
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                   Appellant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
 \*  
                   Respondent. \*  
 \*  
 Case No. 83-0173-PC \*  
 \*  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission as a consequence of the respondent's motion to dismiss. The basis for the motion was respondent's contention that appellant had failed to exchange her witness list and exhibits as required by Commission's rule. That motion was granted by the hearing examiner, thereby concluding the administrative hearing, although the parties were then permitted to reargue the matter by brief. The examiner subsequently issued a proposed decision and order that again would have granted the motion. The appellant filed written objections to the proposed decision and the Commission also heard oral arguments. Based on those arguments and the entire record before it, the Commission rejects the proposed decision and order for the reasons outlined below.

1. At a prehearing conference held on May 16, 1984, a date of Tuesday, October 9, 1984, was scheduled for a hearing on the merits of the appellant's appeal arising from the denial of reinstatement. The appellant was represented at the prehearing by an attorney from the same law firm as the appellant's attorney of record. The prehearing conference report, a copy of which was mailed to the appellant's attorney of record, includes the following statement:

The parties are reminded that pursuant to §PC 2.01, WAC, all additional exhibits and names of witnesses must be served on the opposing parties and filed with the Commission more than 2 working days before the day established for hearing, or will be subject to exclusion.

The relevant portion of s. PC 2.01, Wis. Adm. Code provides:

[N]ames of witnesses and copies of exhibits must be submitted more than 2 working days before the commencement of the hearing or will be subject to exclusion, unless good cause for the failure to comply is shown.

During the afternoon of Thursday, October 5, 1984, respondent delivered copies of its proposed exhibits and the names of potential witnesses to the office of appellant's attorney but not to the Commission. Until he actually received the documents from the respondent at approximately 5:30 p.m., appellant's attorney had been unaware of the disclosure requirements in s. PC 2.01, Wis. Adm. Code.

Between 8:00 and 8:30 a.m. on Friday, October 5, 1984, the appellant hand-delivered a letter to respondent's office containing a list of witnesses to be called and exhibits to be offered. The respondent had anticipated appellant's witnesses and exhibits. Respondent conceded that neither surprise nor prejudice occurred as a result of appellant's failure to submit the information earlier. No copy of the letter was provided to the Commission. Appellant concedes that there was no "good cause" for the failure to meet the three working day requirement.

At the commencement of the hearing on October 9, 1984, the respondent moved to dismiss on the grounds that the appellant had failed to comply with s. PC 2.01, Wis. Adm. Code, that appellant's evidence must be excluded, and therefore, that the appellant failed to sustain her burden of proof.

The parties have offered different interpretations of the language of s. PC 2.01, Wis. Adm. Code. They agree that if disclosure is made at least

three working days prior to hearing, exclusion is inappropriate. They also agree that where good cause is established for not meeting the three day requirement, exclusion is also inappropriate. The disagreement lies in those cases, such as the present one, where it is undisputed both that there was a failure to meet the time requirement and there was not good cause established for such failure. Respondent contends that under these circumstances, the Commission has no discretion and must exclude the evidence unless the opposing party has raised no objection. Respondent contends further that the phrase "or will be subject to exclusion" refers to the good cause determination, i.e., if good cause is not established, the evidence will be excluded, but if no objection is raised, even in circumstances where no good cause exists, the evidence may still come in. Appellant contends that the phrase "or will be subject to exclusion" contemplates an exercise of discretion by the Commission to determine whether, even in situations where there is no good cause for the failure to disclose, there is still sufficient basis for permitting the evidence to come in. Some of the factors that the Commission might consider here are:

(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order. Gill v. McGraw Elec. Co., Pa Super., 399 A. 2d 1095 (1979)

Both parties have offered reasonable constructions of the Commission's rule. However, Commission concludes that strong public policy considerations lean heavily in favor of the appellant's interpretation. The facts of this case argue strongly for the exercise of discretion by the Commission in these cases where no good cause for failure to disclose under the rule has been established.

The Commission's purpose is to hear appeals and complaints arising from various personnel transactions. Its authority has been carefully limited by the legislature to only a portion of the personnel transactions that regularly affect state employees. In order to carry out its responsibilities, the Commission has promulgated rules of procedure. These rules are designed to provide a procedural basis for the efficient and fair exercise of the Commission's authority. Specifically, s. PC 2.01, Wis. Adm. Code, is designed to force parties to prepare their case before the hearing examiner asks for their opening statements. The disclosure rule also has the beneficial effect of making it possible to anticipate the evidence (and therefore the arguments) that will be advanced by the opposing parties. The rule is especially important to unrepresented appellants with respect to both of those purposes outlined above.

In order to be consistent with the underlying purpose of the rule, s. PC 2.01, Wis. Adm. Code, must be interpreted to provide for a three step analysis of a party's disclosure or nondisclosure of evidence. The first steps concern whether the disclosure requirements were met and whether there was good cause for any failure of compliance. At the third level of analysis, the Commission will exercise its discretion by considering factors such as those listed in Gill v. McGraw Elec. Co., supra.

In the present case, one can conclude that the appellant's counsel should have been aware of the disclosure rule. It is also established, however, that there was less than one hour out of the normal workday where appellant's counsel had respondent's list of witnesses and respondent's counsel did not have appellant's list. It is established that the respondent had anticipated the appellant's case and suffered neither surprise nor prejudice as a consequence of the one-hour delay. Permitting the appellant

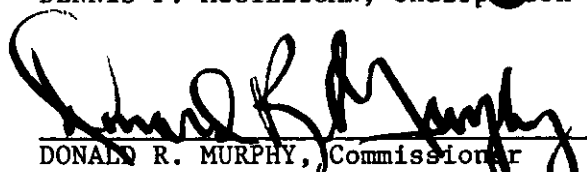
to have proceeded would not have engendered any disruption of the Commission calendar. There is no inference that appellant's counsel willfully failed to disclose in an attempt to gain some advantage. The record also shows that neither party "submitted" the lists of witnesses and exhibits to the Commission. A review of the entire rule indicates that the parties are responsible for both "filing [with the Commission] and exchange[ing with the opposing party]" their exhibits and witness lists. Where both parties have failed to meet the disclosure rule, the Commission would be troubled by an approach that would result in dismissal of the appellant's case but without sanction against the respondent.


ORDER

Appellant's motion for reconsideration of the examiner's order dismissing the appeal is granted and that order is vacated. The parties will be contacted by a representative of the Commission for the purpose of scheduling a date on which the hearing may be reconvened.

Dated: March 13, 1985 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner

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