STATE OF WISCONSIN PERSONNEL COMMISSION

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CECIL HARRIS,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 84-0109-PC-ER
85-0115-PC-ER

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HEARING EXAMINER'S DECISION AND ORDER REGARDING DISCOVERY

This matter is before the examiner on respondent's motion for extension of time to respond to complainant's request for admissions filed on February 20, 1987, and on complainant's motion to compel response to complainant's second request for production of documents nos. 1 through 4 and to complainant's first request for production of documents no. 13, filed on February 9, 1987. The motions were heard on April 13, 1987.

RESPONDENT'S MOTION FOR EXTENSION

It appears from the file that the aforesaid request for admissions was served on respondent on January 16, 1987. Therefore, the time for responding (30 days after service, §804.11, Stats.) had run when the motion for extension was filed on February 20, 1987. Subsequently, on March 19, 1987, respondent filed a response to the request for admissions, admitting six of the eight requests.

Section 804.11(1)(b), Stats., provides, inter alia, that:

> ...[t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party

> requesting the admission a written answer or objection addressed to the matter....

Pursuant to 23 Am Jur 2d Depositions and Discovery §336, there is authority for the proposition that once the time for response has run, the matters involved in the request for admissions are deemed admitted as a matter of law. At that point, from a procedural standpoint it is no longer a question of whether the time for responding should be enlarged, but rather whether the party who failed to respond should be permitted to withdraw the admission.

In this case, counsel for respondent not only moved for enlargement of time to respond, albeit after the time had elapsed, he also moved alternatively at the motion hearing for leave to withdraw or amend the admission pursuant to §804.11(2), Stats.

In Schmid v. Olsen, 111 Wis. 2d 228, 330 N.W. 2d 547 (1983), which involved defendants' failure to respond, the court dealt with the matter pursuant to §804.11(2), Stats., as a question of whether the defendants should be permitted to withdraw the admission. However, the Court noted that the defendants had neither responded to the request nor moved for leave to withdraw or amend the admission.

In Bank of Two Rivers v. Zimmer, 112 Wis. 2d 624, 334 N.W.2d 230 (1983), the Court again addressed a failure to respond as an issue under §804.11(2), Stats., but again it must be noted that the defendants failed not only to respond to the request for admissions, but also to make any motion with respect thereto until after the entry of summary judgment based in part on the admissions.

Based on these cases, it appears to be unclear whether in Wisconsin a failure to respond should be dealt with only under §804.11(2), Stats. However, in the instant case, we reach the same result regardless of

whether this is considered as a request for enlargement of time to respond or as a request for leave to amend or withdraw admissions that have occurred as a matter of law.

Under the former heading, courts generally have looked to the criteria of excusable neglect, good faith, and prejudice to the opposing party in deciding whether to permit an enlargement of time. 23 Am Jur 2d Depositions and Discovery §§333-335. The representation of counsel for respondent that he was forced to leave his office abruptly for treatment of an illness, and that this led to confusion in his office which resulted in the failure to respond in a timely manner to the request for admissions, provides an adequate basis for a finding of excusable neglect. There is nothing to suggest bad faith. The only prejudice the complainant asserts is that if the enlargement is granted, he would have to prove what otherwise would be deemed admitted. This would appear to be true in virtually any case where admissions are avoided by permitting an enlargement of time, and in the absence of additional exacerbating circumstances such as a request for enlargement on the eve of hearing, which is not present here, this should not be considered prejudicial.

If this matter is seen as a request under §804.11(2), Stats., for relief from admissions that occurred as a matter of law, the criteria to be considered are set forth in the statute and were discussed by the Court of Appeals in Schmid v. Olsen, 107 Wis. 2d 289, 295-197, 320 N.W. 2d 18 (1982), rev'd in part on other grounds, Schmid v. Olsen, 111 Wis. 2d 223, 330 N.W. 2d 547 (1983), as follows:

> ... A court may permit withdrawal or amendment of an admission when the 'presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice

> the party in maintaining the action or defense on the merits.' ..." (emphasis in original) 107 Wis. 2d at 295.

With respect to the first criterion, Court then discussed the holdings in three cases, Warren v. Intl. Brotherhood of Teamsters, 544 F. 2d 334, 46 A.L. R. Fed. 810 (8th Cir. 1976); Pleasant Hill Bank v. United States, 60 FRD 1 (W.D. Mo. 1973); and Westmoreland v. Triumph Motorcycle Corp., 71 FRD 192 (D.C. Conn. 1976). The central thread of these holdings was that the admissions ran to the merits, and to uphold the admissions would produce an "unjustified suppression of the merits...." Pleasant Hill Bank v. United States, 60 FRD at 4.

As to the case before it, the Court held:

> In the present case, the trial judge stated that allowing the matter to stand admitted would not be appropriate. Liability was denied by the defendants in their answer and remained an issue throughout the litigation. By allowing Olsen to withdraw admission, the trial court granted full litigation of the liability issue. The trial court was in a superior position for determining whether liability was a genuine issue. We hold that the trial court's decision met the first test of sec. 804.11(2), Stats., and served presentation of the merits of the action. 107 Wis. 2d at 297.

In the case before the Commission, the two admissions the respondent did not admit are as follows:

> Request No. 7: The fact that complainant declined to take the position is the respondent's only defense to Case Nos. 84-0109-PC-ER and 85-0115-PC-ER.
>
> Request No. 8: The position of Scheduling Officer would have necessitated fewer physical confrontations with students than complainant's position as a YC-5.

These requests run to the merits of the cases, and the presentation of the merits would be subserved if the admissions were not allowed to be withdrawn.

As to the issue of prejudice, the party who obtained the admissions has the burden of proof, Schmid v. Olsen, 107 Wis. 2d at 297, and, again,

there has been no showing of prejudice beyond the need to prove these points at hearing.

Therefore, the respondent should be allowed to withdraw the admissions to request for admissions Nos. 7 & 8 and to substitute the responses that were filed on March 19, 1987.

MOTION TO COMPEL RESPONSE TO REQUEST FOR PRODUCTION

The second aspect of this matter involves the complainant's motion to compel a response to certain requests for production involving the notes of certain of complainant's supervisors made with respect to the complaints and the Commission's initial determination on probable cause. Respondent's counsel asserts that these documents were prepared for the DHSS Office of Legal Counsel for use in these legal proceedings.

The documents in question, which constitute communications between respondent's agents and his attorney, are protected by the attorney-client privilege. Complainant argues that the privilege was waived in the course of certain depositions, by the witnesses' testimony and by their voluntary production of certain of these documents.

As to the depositions, there were some statements as to the fact of having made the communications. This alone would not constitute waiver. Mitchell v. Superior Ct. (Shell Oil Co.), 691 P. 2d 642, 647-648, 37 Cal. 3d 591 (1984).

However, Ms. Meiers also testified that she had referred to the documents to refresh her recollection prior to the deposition:

> Q. Did T. Ellerbacker give you any documents that you could review prior to coming here to refresh your recollection?
>
> A. I looked at a letter from -- I think -- from the doctor or to the doctor, Dr. Bigalow, and I did scan that response to the initial determination... Meiers deposition, p. 73.

According to 81 Am Jur 2d Witnesses §228:

> ... where a client on the witness stand asks that letters to his attorney be produced to refresh his memory, he impliedly waives any privilege attaching to them.

The same result should be reached where a client uses privileged material to refresh his or her memory prior to a deposition. Such a result is suggested by Jacobi v Podevels, 23 Wis. 2d 152, 154, 127 N.W. 2d 73 (1964), where a witness on the stand indicated under cross-examination that he had refreshed his recollection earlier in the day by having read a statement he had given to his insurer. While it subsequently was determined he had misunderstood the question and had not in fact used the document to refresh his recollection, it is implied that had he done so, it would have amounted to a waiver of any privilege. Samaritan Health Services v. Superior Court, 690 P.2d 154, 142 Ariz. 435 (1984), is a case from another jurisdiction which holds exactly that.

Complainant's counsel also asserts that Mr. Miller produced certain of the documents in question in connection with a deposition. Respondent's attorney indicated that this may have occurred erroneously when different counsel was handling the deposition. However, to the extent that the controversy as to these documents has not been rendered moot, the privilege has been waived notwithstanding that disclosure may have been due to such inadvertence.

ORDER

1. Respondent's motion for extension of time in which to respond to complainant's request for admissions, filed February 20, 1987, is granted, and the time in which to respond is extended to March 19, 1987, when responses actually were filed; alternatively, respondent is granted leave pursuant to §804.11(2), Stats., to withdraw the admissions to said request and to make the response actually filed on March 19, 1987.

2. Complainant's motion to compel responses to certain requests for production, filed February 9, 1987, is granted in part and denied in part, and respondent is ordered to produce within 5 working days of the date of this order Ms. Meier's notes taken on the initial determination on probable cause in these cases, and any notes taken by Mr. Miller on the complaints filed in these cases and on the probable cause determination that have already been produced in connection with any depositions of Mr. Miller.

Dated: April 22, 1987 STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE
Hearing Examiner

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