

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JEFF HOLUBOWICZ,

 Complainant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

 Respondent.

Case Nos. 90-0048-PC-ER
 90-0079-PC-ER

* * * * *

DECISION
AND
ORDER
ON
MOTION
TO COMPEL
DISCOVERY

This matter is before the Commission on respondent's motion to compel discovery filed August 2, 1990. Respondent asserts that it noticed a deposition of complainant for July 31, 1990, at 9:00 a.m. and complainant failed to appear after having informed respondent's counsel on July 30th that he would not appear and that he would not appear for a deposition during work hours unless he was paid for the time involved.

In his response to the motion, complainant asserts that he sought classification regarding his pay status from Kurt M. Stege of the Commission staff in a conference call involving respondent on July 30, 1990, but did not say he would not attend the July 31st deposition, which respondent cancelled for its own reasons. He also asserts he had a conflicting order from his employer to operate a laundry truck on July 31st. Therefore, there is a conflict with regard to the factual issue of the cause of the cancellation of the July 31st deposition. While this issue apparently cannot be resolved on the present record without an evidentiary hearing, it seems clear from complainant's response to respondent's motion that he is of the opinion that he is not required to attend depositions during work hours unless he is in pay status. Therefore, the Commission will proceed to address the motion at least from the standpoint of future discovery.

Depositions in these proceedings are provided by §PC 4.03, Wis. Adm. Code:

All parties to a case before the Commission may obtain discovery and preserve testimony as provided by ch. 804, stats.

Through this rule, the Commission in effect has adopted by reference the provisions of Chapter 804, Stats., "Civil Procedure - Depositions and Discovery." There is no authority in Chapter 804 for the proposition that a party/employee is entitled to be in pay status when being deposed by his or her opposing party/employer. There also is no authority in Chapter 804 for the proposition that any party is entitled to payment or compensation of any kind when being deposed by another party.

The Commission's rules address the pay status of witnesses and parties under certain conditions at §PC 1.13, Wis. Adm. Code:

Pay status for state employe parties and state employe witnesses in commission cases. (1) PAY STATUS OF STATE EMPLOYE PARTIES. State civil service employes who, as parties, are interviewed as part of commission investigations or appear at prehearing conferences, conciliation sessions, oral arguments or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s.20.916(8), Stats.

(2) PAY STATUS OF STATE EMPLOYE WITNESSES. State civil service employes who are interviewed as part of commission investigations or attend hearings, whether held in person or via telephone, as witnesses shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s.20.916(8), Stats., unless the hearing examiner or the commission determines that their testimony was or would have been irrelevant, immaterial or unduly repetitious.

These rules provide that employe parties are to be in pay status at certain specific proceedings -- commission investigations, prehearing conferences, conciliation sessions, oral arguments and hearings. Attendance at depositions is not one of those enumerated proceedings, and therefore it must be concluded that the rule does not encompass attendance at depositions as a proceeding with respect to which an employe is entitled to be in pay status pursuant to the rule.

Therefore, since there is nothing in either Chapter 804, Stats., or the Commission rules that would require that complainant be in pay status or otherwise be compensated while being deposed, it must be concluded that he cannot insist on being in pay status as a precondition of being deposed.

Complainant makes a number of arguments that rely on other sources of authority. He asserts that under the Fair Labor Standards Act (FLSA) he is "entitled to wages for my ordered work activities on company property." He also contends that denial of compensation "would constitute discipline without

due process in denying full time work and payment as my conditions of employment." Respondent denies that his attendance at a deposition is in any way a work activity ordered by the employer.

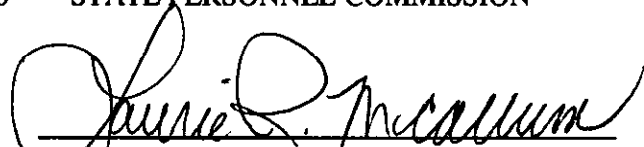
The Commission is not in a position to resolve this area of dispute. The Commission's rule governing the pay status of employe parties and witnesses, §PC 4.03, Wis. Adm. Code, does not cover attendance at depositions. For the Commission to go beyond the parameters of its own rule structure and attempt to determine whether respondent's failure to carry complainant in pay status either violates the FLSA or constitutes an improper disciplinary action would involve the Commission in matters beyond the scope of its statutory authority. This subject matter involves wages, hours and conditions of employment, see §111.91(1), Stats., and pursuant to §111.93(3), Stats., the provisions of a collective bargaining agreement "shall supersede the provisions of civil service and other applicable statutes ... related to wages, fringe benefits, hours and conditions of employment." Complainant's concerns about denial of salary or improper discipline would have to be raised under the collective bargaining agreement or with the appropriate regulatory agency.

ORDER

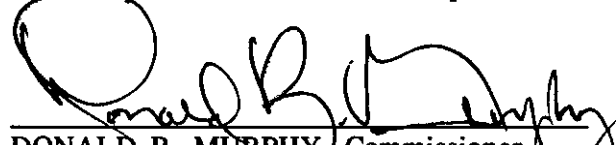
Respondent's motion to compel discovery filed August 2, 1990, is granted to the extent that complainant is ordered to comply with any notice of deposition that may be served in the future.

Dated: August 22, 1990

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner