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EDWARD GERMAIN,

Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 91-0083-PC-ER

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INTERIM
DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to compel discovery. The respondent served interrogatories and a request to produce documents on complainant's counsel on December 16, 1991. On January 24, 1992, after complainant had failed to respond to the request, the respondent made an oral request that complainant respond to the requests. Respondent filed its motion to compel on February 27, 1992, when the complainant had still not responded in any manner to the discovery requests. In his brief on the motion to compel, the complainant argues that discovery is not available to a party to a Fair Employment Act claim during the investigative stage of the proceeding.

In §PC 4.03, Wis. Adm Code, the Commission's rules provide that: "All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats." There is no language in the Commission's rules which would act to prevent a party to a complaint from carrying out discovery during the investigation phase. However, the complainant contends that the Commission's rule is limited by the Fair Employment Act and the Wisconsin Administrative Procedure Act to bar such discovery.

Complaints against state agency employers under Wisconsin's Fair Employment Act are received and investigated by the State Personnel Commission. Section 111.375(2), Wis. Stats. With regard to complaints against state agencies, the Commission has the same powers and duties as the Department of Industry

Labor and Human Relations as detailed in Section 111.39, Wis. Stats.

Under Section 111.39, Wis. Stats., the Commission is empowered to receive and investigate complaints of discrimination under the WFEA. OAG 117079, 12/11/79. The statutes provide the Commission with an ample range of powers and mechanisms for obtaining the information necessary for a thorough investigation. Sections 111.39(2) and 101.02, Wis. Stats. (See also Section PC 2.01(1), W.A.C.). The WFEA provides for contested case hearings of discrimination complaints, Kropiwka v. DILHR, 87 Wis. 2d 709, 275 N.W.2d 881, 884 (1979), but only after the Commission has investigated the complaint and is unsuccessful at eliminating the probable discrimination through conference, conciliation and persuasion is it empowered to notice the complaint for hearing. Section 111.39(4)(b), Wis. Stats; see, Section PC 2.07(2), W.A.C. The Commission may, by rule, provide for discovery by parties to a contested case up to the extent allowed under Chapter 804, Wis. Stats. Section 227.45(7), Wis. Stats.

Under the Administrative Procedures Act, c 227, Stats., a controversy does not become a contested case until a hearing is requested or noticed. Sections 227.01(3), 227.42, 227.44, Wis. Stats., and 227.45(7), Wis. Stats; Daly v. Natural Resources Board, 60 Wis. 2d 208, 208 N.W.2d 839, 844 (1973). A hearing cannot be requested unless the right to do so is accorded by statute. Town of Two Rivers v. State DNR, 105 Wis. 2d 721, 315 N.W.2d 377, 381 (1981). Under the Wisconsin Fair Employment Act, a hearing may not be noticed or requested until after an initial determination has been issued following an investigation (absent agreement of the complainant).

* * *

The statutory scheme of the Wisconsin Fair Employment Act treats the investigatory and contested-case hearing phases of the processing of a complaint as separate and distinct. Section 111.39, Wis. Stats. This is because the foremost purpose of the WFEA is to eliminate discrimination through a low-cost, voluntary, informal and non-adversarial approach wherever possible. Section 111.31, Wis. Stats. This approach is promoted by utilization of neutral investigation, conference, conciliation and persuasion first, before the dispute has escalated and the parties have polarized and hardened themselves into adversarial postures. (Citations omitted.)

The term "contested case" is defined in §227.01(3), Stats., as follows

"Contested case" means an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing

required by law, a substantial interest of a party is determined or adversely affected by a decision or order. There are 3 classes of contested cases....

Because cases filed with the Commission fall within neither the definition of a "class 1 proceeding" or a "class 2 proceeding" under §227.01(3)(a) and (b), Stats., they are class 3 proceedings.

Pursuant to §227.45(7), Stats, the Commission has the authority to issue administrative rules relating to discovery:

In any class 2 proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon motion by a party or by the person from whom discovery is sought in any class 2 proceeding, and for good cause shown, the hearing examiner may make any order in accordance with s. 804.01 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *In any class 1 or class 3 proceeding, an agency may by rule permit the taking and preservation of evidence*, but in every such proceeding the taking and preservation of evidence shall be permitted with respect to a witness:

(a) Who is beyond reach of the subpoena of the agency or hearing examiner;

(b) Who is about to go out of the state, not intending to return in time for the hearing;

(c) Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing; or

(d) Who is a member of the legislature if any committee of the same or the house of which the witness is a member is in session, provided the witness waives his or her privilege.
(Emphasis added)

The question raised by complainant's argument is whether the entire proceeding which results from the filing of a FEA complaint with the Commission is properly designated a "contested case" or whether only so much of the proceeding which occurs after a hearing has been noticed fills the statutory definition of "contested case."

Nothing in the statutory definition limits it to only certain portions of the complaint proceeding. The process described in §111.39, Stats., is of one proceeding, commenced by a single filing or allegation of discrimination. The proceeding typically will include an investigative phase but at the conclusion of that phase, the complainant has a right to a hearing either on the merits of the complaint or on the issue of probable cause. While it is true that a FEA case

may be dismissed if a complainant fails to timely request a probable cause hearing after the issuance of a "no probable cause" initial determination, dismissal can also occur prior to this point if the complainant has failed to respond to correspondence, thereby indicating an unwillingness to pursue the claim. If a "probable cause" initial determination is issued, and conciliation fails, the matter proceeds to hearing without any further request for hearing from the complainant. The definition of a contested case must be read as including a proceeding which provides an opportunity for a hearing as is provided for when a complaint is filed under the FEA. Under the complainant's theory, no discovery would be permitted prior to a prehearing conference, when the hearing notice is provided to the parties.

The case law cited by the complainant does not support the contention being advanced. In Daly v. Natural Resources Board, 60 Wis. 2d 208, 208 N.W.2d 839, 844 (1973), certiorari denied 94 S.Ct. 883, 414 U.S. 1137, 38 L.Ed. 2d 763, the court was asked to determine whether a particular proceeding before the DNR was a legislative hearing or a contested case. The court described certain elements which define a contested case:

From the statute it is clear that three elements must appear before the proceeding becomes a contested case. First, there must be a hearing required by law.... Second, the legal rights, duties or privileges of one party must have been determined or adversely affected by the proceeding... Third, the assertion of those rights, duties or privileges must have been denied or controverted by another party to the proceeding. 60 Wis. 2d 208, 216-17.

While this portion of the Daly decision references elements which "must appear *before* the proceeding *becomes* a contested case," this language should not be interpreted as referring to a particular sequence of events. The quoted language simply refers to conditions which must occur *at some point* during a proceeding in order for that proceeding to fit the definition of "contested case." This conclusion is clear because one of the elements, described as the "legal rights... of one party [which] must have been determined or adversely affected by the proceeding," cannot be determined "by the proceeding" until a decision has been rendered, which is sometime after the conclusion of the hearing. Yet, the hearing is the focal point of the contested case proceeding by which the party's rights are determined. It certainly cannot be said that a

contested case doesn't commence until the hearing has ended and a decision rendered.

The other case relied upon by the the complainant is Town of Two Rivers v. State DNR, 105 Wis. 2d 721, 315 N.W.2d 377, 381 (1981). In Two Rivers, the court held that a person who already has standing to demand a legislative-type hearing regarding site feasibility for solid waste disposal sites has a right to change the hearing to a contested case hearing if they meet statutory criteria specified in what is now §227.42¹ for obtaining a contested case hearing. The Two Rivers decision is inapplicable here because the Fair Employment Act already provides for a contested case hearing in §111.39(4)(a), Stats.

The Commission's rules are written so as to permit a complainant to apply for a protective order if the circumstances are such that discovery is inappropriate or should be limited §804.01(3), Stats. In situations where a complaint is vague, prompt discovery by the respondent may serve to clarify the complainant's allegations so that the respondent may preserve evidence necessary for its defense.

¹Pursuant to §227.42, Stats:

(1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

(a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;

(b) There is no evidence of legislative intent that the interest is not to be protected;

(c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

(d) There is a dispute of material fact.

ORDER

Respondent's motion to compel is granted.

Dated: May 14, 1992 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURETHY, Commissioner


GERALD F. HODDINOTT, Commissioner