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ASSOCIATION OF CAREER EMPLOYEES,
an unincorporated association,
WYNN DAVIES AND LLOYD RIDDLE,

Appellants,

v.

Secretaries, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES, DEPARTMENT
OF TRANSPORTATION, DEPARTMENT
OF CORRECTIONS, DEPARTMENT OF
REVENUE; Administrators, DIVISION
OF EMERGENCY GOVERNMENT, DIVI-
SION OF MERIT RECRUITMENT AND
SELECTION; and Commissioners,
OFFICE OF THE COMMISSIONER OF
INSURANCE and OFFICE OF THE COM-
MISSIONER OF TRANSPORTATION;

Respondents.

Case No. 92-0238-PC

* * * * *

RULING ON
MOTION FOR
EXPENSES

BACKGROUND

This matter was initiated in Dane County Circuit Court in February 1992. By Memorandum Decision dated February 11, 1992, that court ordered appellants to pursue relief before the Commission. On March 29, 1993, the Commission dismissed claims against respondents for lack of jurisdiction. The matter returned to the court of origin and was concluded. Subsequently, in reviewing this file for closing, it was determined that a motion by respondents for discovery expenses had not been formally decided.

FACTS

On April 21, 1992, appellants brought their claim challenging the validity of certain project position hiring decisions under state civil service rules. A prehearing conference was held June 22, 1992, where several deadlines were established including a discovery completion deadline of December 11, 1992, and a hearing on January 19-22, 25-29, 1993. Various motions by the parties intervened, including motions to dismiss, and on December 12, 1992, the parties agreed to postpone the several hearing dates in

April starting on April 7, 1993. All discovery was to be completed by March 8, 1993. At that time Charles D. Hoornstra, Assistant Attorney General, and David J. Vergeront, Attorney, DMRS, were counsel for respondents.

Subsequently, Hoornstra withdrew and the respondents used in-house counsel. Later, respondents Department of Transportation (DOT) and Office of the Commissioner of Transportation (OCT) obtained outside counsel.

On March 4, 1993, respondents DOT and OCT brought a motion for costs under §804.12(1), Stats. It provides:

Award of expenses of motion: 1. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

The motion for expenses was predicated on allegations that appellant Wynn Davies failed to comply with a subpoena duces tecum commanding him to bring to his deposition (1) a listing of the names, business or residence addresses, and business or residence telephone numbers of all ACE members, officers, directors and employees, (2) correspondence relating to an allegation and issues raised in the Request for Relief, (3) all written public records requests submitted with respect to any project appointment, whether or not that appointment was subject to their litigation, (4) documents relating to any of the matters on which examination was requested to ACE, and (5) any and all other documents supporting the allegations contained in the Request for Relief. Specifically, respondent asserted that at the deposition March 1, 1993, Davies acknowledged the existence of documents responsive to paragraphs 2, 3 and 4 of the subpoena, but failed to produce them on his belief they were not relevant.

On March 8, 1993, a telephone status conference was held with the parties. There appellant agreed to provide an accounting of all written public record requests submitted with respect to project appointments, a listing of documents appellants had provided respondent in response to the subpoenas and a list of the ACE Board of Directors. There was, in fact, an extension of the discovery deadline.

By letter dated March 12, 1993, appellant complied with the March 8th agreement and requested respondents to advise them of any additional concerns about the subpoenaed correspondence and documentation. The matter was resolved. On March 22, 1993, appellant filed a brief opposing respondents' motion for costs and respondents submitted a reply brief on March 30, 1993.

DISCUSSION

Briefly stated, respondents assert that appellants were not justified in failing to comply with its deposition notice and subpoena duces tecum and that the costs for the motion to compel discovery should be granted pursuant to §804.12(1)(c), Stats.

In response, appellants argued that the Commission never granted the motion; ACE's opposition to the motion was substantially justified; and other circumstances existed making an award of expenses unjust. Appellants argued there was a "genuine dispute" over certain requested documents and in such instances the courts, citing Pierce v. Underwood, 487 U.S. 552, 565 (1980), declined to award expenses. Appellants also argued that at Davies' deposition, after respondent limited their request in paragraph 4 of the subpoenae, ACE agreed to provide respondents copies of its constitution and by-laws as well as all newsletters which referred to the litigation.

In rebuttal, respondents principally argued that during the status conference appellants never requested denial of the motion but instead attempted to justify their failure to make discovery, and that the Commission did not need to grant the motion because appellants did not oppose it.

The record establishes that this period was intense. At the status conference held January 21, 1993, the Commission proposed an issue for hearing; hearing dates commencing on April 7, 1993, were established; respondents agreed to inform incumbents of positions at issue; appellants agreed to confer with DMA/DEG and OCT to establish new discovery closing dates; and a status conference was scheduled for March 15, 1993. On January 28, 1993, the Department of Revenue (DOR) filed a motion to dismiss. The following day the Office of the Commissioner of Insurance (OCI), the Department of Health and Social Services (DHSS), and the Department of Corrections (DOC) filed motions to dismiss, and on February 2, 1993, the Division of Merit Recruitment and Selection (DMRS) joined in those motions. On

February 11, 1993, having recently retained outside counsel, respondents DOT and OCT filed motions for extension of time to move to dismiss and motions to dismiss. Respondents' request for extended time was agreed to by appellants. Appellant was to respond to all respondents' motions for dismissal by March 4, 1993. It was within this context that the March 8, 1993, status conference with appellants and DOT and OCT was held.

The purpose of the March 8th telephone status conference, which was not recorded, was to resolve any disputes between the parties without going to hearing and disrupting the schedule for hearing the merits of the case. The matter was resolved informally, negating the need for a hearing on the motion and subsequent findings and decision. That same day, the Commission held a status conference with appellants and another respondent to resolve a motion for a protective order. The Commission's purpose there was the same as in this case. However, the matter was not resolved informally. There was no factual dispute and an order was issued without hearing.

As pointed out, respondents' motion to compel discovery was resolved informally. No order was necessary and none was issued. Informal resolution of motions was the practice during the course of this matter and with few exceptions the parties made it work. Given this background and record, it would be inconsistent to award motion expenses.

ORDER

Respondents' motion for expenses is denied.

Dated: October 24, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

DRM:rcr