STATE OF WISCONSIN PERSONNEL COMMISSION

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RANDALL J. GIBAS,

Appellant,

v.

DEPARTMENT OF JUSTICE

Respondent.

Case No. 92-0247-PC

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RULING ON MOTION FOR CONTINUANCE OF HEARING

This matter is before the examiner on appellant's motion for continuance of hearing, which the appellant filed on August 19, 1993. The parties have filed briefs. The underlying facts relating to this motion do not appear to be in dispute.

This case involves an appeal pursuant to sec. 230.44(1)(c), Stats., of respondent's termination of appellant's employment as a Special Agent 5, effective March 30, 1992. The letter that provided notice of termination, dated March 27, 1992, alleged six acts of misconduct as the basis for the discharge. One of these was that appellant had violated one of respondent's policies by placing the barrel of a pistol in his mouth, placing the pistol on another agent's temple and leg, and telling her to take off her clothes. This same alleged conduct was the subject of a criminal complaint filed in Calumet County Circuit Court on January 17, 1992, charging the appellant with a violation of sec. 941.20(1)(c), Stats., "Endangering safety by use of dangerous weapon."

The criminal charge originally was scheduled for trial on November 10, 1992, and the hearing on this appeal was scheduled for February 8-11, 1993, so that it would occur after that trial. However, the trial subsequently was rescheduled for May 25, 1993, and the hearing on this appeal was rescheduled for September 13, 14, 16, and 17, 1993, at appellant's request and in the absence of objection. This date was later changed to October 4-8, 1993, at respondent's request and in the absence of objection.

In the meantime, appellant moved to have the criminal charge against him dismissed on the basis of prosecutorial misconduct. A hearing was held on this motion on May 18, 1993, and the court granted the motion from the bench, setting forth its decision as follows:

> I am satisfied and find that during the course of prosecution of this case, subsequently to that charging decision, DOJ had an independent problem and agenda of its own concerning the employment of Mr. Gibas that their continued involvement with respect to submitting correspondence to the D.A.'s office, conferring with prospective witnesses, handicapping or hindering prospective witnesses and exerting influence on the prosecution of this case, subsequent to that independent charging document genuinely influencing the case, it unlawfully taints the prosecution. It is a violation of the defendant's right of due process and on that ground and on the motion of the defense, the defense motion to dismiss on that ground is granted. This case is dismissed with prejudice.
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> Transcript of hearing, p.82.

The criminal charge was dismissed on June 7, 1993, and the order was appealed. This matter is still pending in the Court of Appeals.

Appellant's attorney in the criminal matter submitted an affidavit in support of this motion which includes the following:

> 22. Should the District Attorney be successful in his appeal, the Criminal Case would be remanded back to Calumet County Circuit Court for a jury trial on the merits of the criminal charge.
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> 23. So long as the Criminal Case remains pending and there is a possibility that it may be tried on the merits, anything that appellant may say in connection with the Administrative Appeal could be used against him at any such trial. This is true not only of any statements he may make directly relating to the allegations contained in paragraph 4 of the Termination Letter [the gun incident], but also any statements he may make with respect to any of the other charges contained in the Termination Letter, since I am informed and believe that the District Attorney may seek to introduce evidence of such other occurrences in any trial in the Criminal Case as so-called Whitty evidence pursuant to Whitty v. State, 34 Wis. 2d 278 (1967).

* * *

> 25. I have advised the appellant that anything that he may say concerning any of the charges set forth in the Termination Letter may be potentially incriminating in the Criminal Case, either as direct evidence concerning the charged conduct or as Whitty evidence, and have advised him and will continue to advise him to refuse to answer any questions concerning all such matters pursuant to his constitutional privilege against self-incrimination.

Appellant now seeks to postpone the hearing pending final resolution of the criminal matter. Appellant argues that there is good cause for the postponement because if the hearing proceeds prior to the disposition of the criminal matter, he will be constrained from being able to testify fully because of concerns that his testimony will be used against him in a criminal trial, and that to proceed under these circumstances would deprive him of due process and would "reward" respondent for the "misconduct" of its agents, as found by the circuit court in its ruling granting the motion to dismiss the criminal charge.

Pursuant to sec. PC 5.02(1), Wis. Admin. Code, a request for a hearing continuance is to be directed to the hearing examiner, who may grant the request "upon a showing of good cause and after consideration of any hardship on the other parties." The decision "[w]hether to postpone or continue a hearing is committed to the sound discretion of the agency. Theodore Fleisner, Inc. v. ILHR Dept., 65 Wis. 2d 317, 326, 222 N.W.2d 600, 606 (1974)." Argonaut Ins. Co. v. LIRC, 132 Wis. 2d 385, 389, 392 N.W.2d 837 (Ct. App. 1986).

In U.S. v. Certain Real Property, 751 F. Supp. 1060 (E.D.N.Y. 1989), the court noted that there was conflicting authority with respect to the question of whether there is a constitutional right to a stay of civil proceedings when a person is faced with:

> [T]he Hobson's choice of answering the complaint and the Government's interrogatories [in the civil proceeding], thereby waiving their Fifth Amendment right not to incriminate themselves and prejudicing the defense of criminal actions against them, or refusing under the Fifth Amendment to answer the complaint and interrogatories, in which case their property will be forfeited.

751 F. Supp. at 1061.

However, the court went on to state that "it is undisputed that a district court has the discretion to issue such a stay, upon consideration of the particular circumstances of the case." 751 F. Supp. at 1062 (citation omitted). The court cited Brock v. Tolkow, 109 F.R.D. 116, 119 (E.D.N.Y. 1985) with repect to the reasons for granting such a stay:

> "A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter . . . and is even more appropriate when both actions are brought by the government.
>
> 'The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.' " (citation omitted)

While the foregoing cases involved parallel criminal and civil court proceedings, the same principles have been applied with respect to criminal court proceedings and parallel administrative proceedings, see, Afro-Lecon, Inc. v. U.S., 820 F.2d 1198 (Fed. Cir. 1987) (appeal before General Services Administrative Board of Contract Appeals).

Neither party has cited any Wisconsin precedent on the question of whether due process requires a stay of these proceedings. Because it appears that this is an appropriate case for the exercise of the discretionary authority provided by sec. PC 5.02(1), Wis. Admin. Code, to postpone this hearing regardless of whether appellant is constitutionally entitled to it, the examiner will not attempt to resolve the constitutional question.

The decision of a motion of this nature "involves a balancing of interests." Digital Equipment Corp. v. Currie Enterprises, 142 F.R.D. 8, 12 (D. Mass. 1991) (citation omitted). In Afro-Lecon, although the court explicitly held that "[t]he constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings," 820 F.2d at 1202 (citation omitted), it held that it was necessary to make a "case-by case determination of

whether to grant a stay of civil proceedings," id. (citations omitted), and discussed Fifth Amendment considerations that can enter into this decision:

> "Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it."

Afro-Lecon, 820 F.2d at 1203 (citations omitted) In the instant case, the affidavit of appellant's counsel in the criminal matter provides the basis for a conclusion that proceeding with this administrative appeal at this time would have the effect of undermining his Fifth Amendment rights. This provides a strong argument for postponing this proceeding until after the resolution of the criminal matter, when appellant will no longer be faced with this problem. See, Brock, 109 F.R.D. at 120. ("But even if the defendant's dilemma does not violate the Fifth Amendment or due process, it certainly undercuts the protections of those provisions, and a court can exercise its discretion to enable a defendant to avoid this unpalatable choice when to do so would not seriously hamper the public interest.") (footnote omitted)

Another factor to be considered is the court's admonition in Afro-Lecon that the strongest possible case for deferral of civil proceedings is "where there is specific evidence of agency bad faith or malicious government tactics," 820 F.2d at 1203. In the criminal proceeding in Calumet County, the circuit court made a finding that respondent's "conferring with prospective witnesses, handicapping or hindering prospective witnesses and exerting influence on the prosecution . . . unlawfully taints the prosecution." (Transcript of May 18, 1993, motion hearing, p. 82.) But for this finding and the appeal of the order dismissing the complaint, presumably the criminal

trial would have been held as scheduled and this motion would have been unnecessary.

Another factor cited in Brock to be considered is that it is not the government but the appellant who initiated this appeal and who is seeking its postponement. This factor is not particularly significant here, because under the state civil service code, an employe can be discharged without the right to a formal hearing,[1] as is afforded by sec. 230.44(1)(c) and 230.45(1)(a), Stats., unless he or she initiates such an appeal. Therefore, filing a sec. 230.44(1)(c), Stats., appeal is the only way an employe can exercise the right to have a formal administrative hearing at which the employer has the burden of proving, by a preponderance of the evidence, that there is just cause for discharge, Reinke v. Personnel Board, 53 Wis. 2d 123, 133, 191 N.W.2d 833 (1971). Under such circumstances, appellant's role as the party who nominally initiated this proceeding is not a factor to be weighed against his request for a stay of proceedings. See, Afro-Lecon, 820 F.2d at 1206. ("In most cases, however, a party 'voluntarily' becomes a plaintiff only because there is no other means of protecting legal rights. . . . [We] decline to accept the wooden plaintiff-defendant distinction.") (citation omitted)

As noted in U.S. v. Certain Real Property, 751 F. Supp. at 1062, the decision of this motion also requires consideration of the public interest involved in delaying resolution of this appeal. Respondent cites the problems of losing access to witnesses, many of whom are not state employes, fading memories, and mounting back pay liability. There are means of preserving testimony and taking witnesses' statements, which can alleviate to some extent the former considerations. While the accrual back pay liability is also a legitimate consideration, this is not a case where there is some kind of imminent threat to public health and safety, see, Brock, 109 F.R.D. at 120 (stay of proceedings granted in action brought against pension fund trustees for violation of fiduciary obligations under the Employee Retirement Income

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[1]Pursuant to Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545, 84 L.Ed.2d 494, 506, 105 S.Ct. 1487 (1985), an empoye such as appellant would be constitutionally entitled to a limited pre-termination hearing that is not required to be "a full adversarial evidentiary hearing."

Security Act of 1974 (ERISA) in absence of "a tangible threat of immediate and serious harm to the public at large.") These considerations of harm to the public interest by a postponement are outweighed by the erosion of appellant's constitutional rights that would result if this proceeding were not stayed, and by the judicial findings of respondent's misconduct in connection with the criminal proceeding.

ORDER

Appellant's motion for continuance filed on Augst 19, 1993, is granted, and the hearing on the merits scheduled for October 4-8, 1993, is postponed, and any deposition of appellant in this matter is stayed, until after the final disposition of the related criminal charges against complainant in Calumet County Circuit Court.

Dated: September 10, 1993

Anthony J. Theodore
Hearing Examiner

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