STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM C. GOEHRING,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 92-0735-PC

INTERIM RULING

This matter is before the Commission because of a dispute relating to appellant's request that his expert witness be provided an opportunity to meet with two of respondent's employes.

The appeal arises from the decision not to hire the appellant for the position of State Quality Control Supervisor in the respondent's Division of Economic Support, Bureau of Economic Assistance. In April of 1993, the appellant identified Professor George Hagglund as his expert witness in this matter. In a letter to the Commission dated May 27, 1993, Prof. Hagglund asked how he should request the opportunity to conduct a job analysis of the position in question. A staff member at the Commission responded by directing the request be made through the appellant to respondent's attorney. The appellant then submitted a request to the respondent which generated the following response:

> You asked that the Department of Health and Social Services agree to your request to have Professor George Hagglund (from the University of Wisconsin Extension Office) conduct a "position analysis" by interviewing independently the Director of the Office of Quality Assurance, and the Supervisor of Quality Assurance Field Operations, in the Division of Economic Support.
>
> The Department declines your request. There is no legal obligation on the Department to permit such interviews, and they would take a significant amount of time of these employees away from their job duties. In addition, it is my opinion that your request is, at least in part, motivated by a desire to distract or harass supervisors of the Division of Economic Support.

The appellant subsequently asked that the Commission to "take whatever action is necessary" to ensure that a meeting take place and his discovery rights respected. A representative of the Commission convened a telephone conference with the parties but the dispute was unresolved.

To the extent the appellant characterizes his request for the meetings as a discovery request,[1] the request would have to fit within the scope of §804.01, Stats.:

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission....

Of the various forms of discovery provided for in ch. 804, the appellant's request most closely approximates a deposition upon oral examination, a procedure described in §804.05. That section sets forth a notice requirement and also describes how a deposition is to be recorded. There is no indication here that the appellant has provided the notice described in the statute or was prepared to have the deposition recorded.[2] The appellant's request for meetings with two of respondent's employes was not a discovery request.

The remaining question is whether a respondent has a right to refuse to make its employes available to an appellant when the appellant has requested a meeting with respondent's employes as part of appellant's investigation or preparation for hearing and when the request is not a formal discovery request.

In Marlett v. Wis. Personnel Board, Dane County Circuit Court #134-443, 5/24/72, the court considered the contention that petitioner was denied due process in the preparation of his discharge appeal because his former subordinates were directed not to talk to petitioner's representatives during working hours, "making the preparation of the case inordinately difficult."

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[1]Pursuant to §PC 4.03, Wis. Adm. Code, the appellant "may obtain discovery and preserve testimony as provided by ch. 804, Stats."

[2]Correspondence received from Prof. Hagglund dated September 13, 1993, supports the conclusion that the request for the meetings was never considered by the appellant to be a request for scheduling a deposition. Prof. Hagglund's letter explains how he has never been required to "gather information in a deposition process" in order to perform a job analysis.

> These witnesses were informed that they were not to talk to the petitioner's representatives during working hours. This was certainly a reasonable request. Working time should be devoted to work. These witnesses were never directed, however, to refrain from discussing the case with petitioner's investigators outside of work. If they refused to cooperate with Mr. Marlett's representatives, they did so as a matter of choice. The Department was under no duty to require the employees to discuss the case during working hours, and had no authority to direct them to discuss or not to discuss the case during non-working hours. The petitioner was afforded the benefit of the power of subpoena, and he has failed to show how his case was prejudiced by requiring the presence of his witnesses in this manner.

More recently, the Attorney General issued an opinion on the narrower issue of whether a state agency could insist on the presence of legal counsel when making agency personnel available for interviews conducted by Commission equal rights officers. 70 OAG 167 After noting that the Commission possesses the power to investigate complaints of employment discrimination, the Attorney General concluded that the agency may insist on the presence of legal counsel during investigatory interviews:

> An employer has the right to require an employe to do employer assigned work during work time and not do anything else; "working time is for work," National Labor Relations Bd. v. Essex Wire Corp., 245 F.2d 589, 593 (9th Cir. 1957); Beth Israel Hospital v. N.L.R.B., 437 U.S. 483, 510 (1978)(Powell concurring).

The Attorney General's Opinion and the court's ruling in Marlett are sandwiched around decisions by the Commission, and its predecessor, the Personnel Board, in Basinas v. DHSS, 77-121, 5/8/78, and Dziadosz v. DHSS, 78-32-PC, 2/15/80, which held that the employing agency had improperly prevented informal interviews of prospective witnesses. In the former case, the decision, issued under the signature of the hearing examiner, offered the following policy rationale:

> There are a number of means that would serve this end [of responding to respondent's concern that the information could be used for impeachment purposes] besides a flat ban on interviews. The respondent would provide that an attorney or other representative be present during the interview or that the interview be recorded. On the other hand, the prohibition on oral interviews imposes an additional burden and expense on the ap-

> pellant. Further, the policy impact beyond the confines of this case of such a restriction is substantial. There are no provisions under current law for the reimbursement of legal fees and expense to appellants with cases before this Board. Many appellants pursue their appeals without the aid of counsel. Under these circumstances, a blanket prohibition by the employer of all informal oral interview with its employes would serious[ly] handicap the ability of many people to prepare for hearing.

Since the issuance of the Basinas decision, the passage of the Equal Access to Justice Act in 1985 has significantly undercut the above policy rationale in that attorney's fees and costs associated with a proceeding before the Commission are now recoverable by a successful appellant before the Commission. In addition, nothing prevents an appellant from contacting prospective witnesses while they are off of work, and seeking their agreement for an evening or weekend interview. An appellant may also use formal discovery procedures.

The Commission concludes that it is properly within an employing agency's discretion to decline an appellant's request to meet with agency employes during working hours as part of the preparation of the appellant's case.

ORDER

Appellant's request that the Commission take action to require that a meeting take place between appellant's expert witness and respondent's employes is denied.

Dated: September 24, 1993 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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