STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

BRENDA LYONS,

Appellant,

v.

Chairperson, WISCONSIN GAMING COMMISSION,

Respondent.

Case No. 93-0206-PC

* * * * * * * * * * * * * * * * *

RULING ON RESPONDENT'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY

BACKGROUND

On Tuesday, March 1, 1994, a telephone conference was held upon appellant's request to discuss compliance with respondent's notice for complainant's deposition in Madison on March 9, 1994. Appellant's representative received notice of the deposition on behalf of appellant on February 25, 1994. The hearing was scheduled to begin on March 15, 1994, and to continue on March 17 and 18, 1994.

The hearing examiner's first question to respondent's attorney during the conference was why he waited until so close to hearing to depose appellant. Appellant's representative stated it was not the date which was objectionable, rather it was the location of the deposition in Madison. Appellant preferred that the deposition occur in Oshkosh where she resides and attends school. The hearing examiner ruled that the deposition scheduled for Madison was within the 100-mile radius allowed under s. 804.05(3)(b)1., Stats., and, therefore, the deposition would go forward as scheduled unless the ruling changed after oral argument scheduled for March 8th, to address appellant's request for a protective order. Appellant's representative assured that appellant would be available for the scheduled deposition in the event that the motion for a protective order were denied. This ruling was reduced to writing and mailed to the parties on March 1, 1994.

Oral arguments occurred as scheduled on March 8, 1994, and such proceeding was tape recorded. Each party prior to the oral arguments submitted written arguments on appellant's request for a protective order and

was provided an opportunity for oral argument. The examiner ruled that the appellant did not show "good cause" for entering a protective order, within the meaning of s. 804.01(3), Stats.

During oral argument on March 8, 1994, appellant's representative for the first time stated that his client would not be available for deposition the following day, despite the contrary promise made in the prior week. The reason given for unavailability was appellant's school schedule which the examiner already had ruled was insufficient reason for failing to attend the deposition, as noted in the hearing examiner's letter ruling dated March 1, 1994. At the close of respondent's arguments, respondent's representative requested denial of appellant's requested protective order and further indicated that if appellant elected not to appear the following day, respondent would move for whatever sanctions were available including contempt. Appellant's representative responded: "What are you going to do? Put her in jail?" The hearing examiner warned that appellant's failure to appear at the scheduled deposition could result in dismissal of her case.

Respondent's attorney telephoned the hearing examiner late afternoon (about 3:00 p.m.) on March 8, 1994, stating that appellant would agree to appear at deposition the following day only by telephone. A conference was held with both parties about 20 minutes later. The examiner expressed her impression that the request for telephone deposition at such late time appeared to be an attempt to avoid the impact of the prior rulings. The examiner ruled that good cause within the meaning of s. 804.05(8), Stats., was shown for the deposition to be required in person and not by telephone.; and that the timing of the request for telephone attendance occurred too late to be considered reasonable notice, within the meaning of s. 804.05(8), Stats.

Respondent contended that good cause for requiring appellant's in-person attendance existed in that respondent felt it important to observe appellant's demeanor and to ensure that she was not "coached" in her answers. Respondent further indicated that it planned to use documents at the deposition in its questioning of appellant. Appellant's representative offered to drive the documents to Oshkosh that evening, but it was unclear whether respondent had those documents available on such short notice. An additional

reason given for the ruling was the examiner's perception that the most recent request was an attempt to avoid the effect of the prior rulings.

At the close of the afternoon telephone conference, appellant's representative stated that appellant would not appear the following day. The examiner replied that the decision on whether to appear was appellant's choice.

On March 9, 1994, at about 9:15 a.m., respondent's attorney telephoned the hearing examiner to report that appellant did not appear for the deposition. Her representative was present, so oral arguments were taken on respondent's motion for sanctions and such arguments were preserved by the court reporter. Respondent requested and argued that dismissal was the appropriate sanction. Appellant's representative urged adoption of the following alternative sanction: a) convert the first day of hearing on March 15, 1994, to appellant's in-person deposition date and b) hold the hearing as scheduled on March 17 and 18, 1994. One fact recited by appellant's representative in support of the alternative sanction was that respondent's attorney had agreed sometime on March 8th, to a deposition by telephone but later changed his mind and pressed for the in-person deposition. This statement was unrefuted by respondent.[1] The examiner reserved ruling until a set time (12:30 p.m.) the same date, at which time the ruling was given orally to the parties.

RULING

Parties are expected to be reasonable during the discovery process and to work out disputes whenever possible without involving the hearing examiner. Appellant's representative is schooled as an attorney and has been a member of the State Bar for about 6 or 7 years. He should have realized it was respondent's right to depose his client and that such deposition was reasonable as scheduled in Madison. Yet he continued to press the issue of deposition in Madison even though he should have known that his argument had little merit under the 100-mile limitation in s. 804.05(3)(b)1., Stats.

---

[1] This was the first time the examiner recalls being told of respondent's changed position on the deposition by telephone. The fact could have been recited during the conference call in the afternoon of March 8th, but the examiner did not hear it if it was stated

Also of concern to this examiner is her need to rely on representations made by or on behalf of parties. The quasi-judicial administration system cannot run smoothly without such reliance. Appellant's representative on March 1, 1994, assured appellant's attendance at the March 9th deposition apparently without first checking with his client.

In short, the examiner felt if appellant's representative had reviewed his position dispassionately he should have realized that his client, the person who filed this appeal, would be expected to appear at deposition in Madison. He should have realized that the three hearings on these issues and the delay of complainant's deposition were unnecessary. Imposition of sanctions are appropriate under all the circumstances recited above, but the question remains what sanctions are suitable here.

Sanctions which deprive appellant of a meaningful hearing (such as the sanction of dismissal or a ban of appellant's testimony) may appear too harsh where, as here, the examiner is uncertain whether appellant shared in the objectionable conduct noted above. Therefore, lesser sanctions were imposed, as detailed below.

The examiner orally entered the following ruling:

1. Appellant's in-person deposition will be taken, as suggested this morning by her representative, in Madison on March 15, 1994.
2. No hearing will be held on March 15, 1994, in order to accommodate the changed deposition date.
3. The hearing will be held on March 17 and 18, 1994.
4. The delayed start of hearing does not affect the deadline for exchange of witness lists and exhibits which still must be exchanged before 4.30 p.m. on March 10, 1994. The only exception being for new information uncovered at deposition which could not be collected by the current exchange deadline.
5. Costs up to $500, may be assessed, after opportunity for hearing, against appellant's representative in his capacity as a union employe representing appellant's interests in this case.[2] Costs contemplated under this ruling include all allowable expenses related to the deposition scheduled for March 9, 1994, at which appellant did not appear; as well as allowable expenses associated with the rescheduled deposition of March 15, 1994, including the costs of obtaining an

---

2 The wording here was chosen to honor the request of appellant's representative that the order make clear the sanction is against his employment situation rather than against him personally.

expedited transcript. The procedure and costs allowed under s. 804.12(1)(c), (2) and (4), *Stats., shall apply.*
6. At the conclusion of hearing on March 18, 1994, the examiner will establish a schedule for respondent to submit its claimed costs and for appellant's representative to reply to the claimed costs either in writing or by hearing (at the election of appellant's representative). The examiner has delayed addressing the costs issue to enable the parties to concentrate on preparation for hearing which commences next week.

The examiner cautioned that, if appellant did not appear in person for the rescheduled deposition on March 15, 1994, the hearing examiner would cancel the hearing and would recommend to the full Commission that appellant's case be dismissed for lack of prosecution as shown by repeated failure to appear for her deposition. Appellant's representative stated in reply that he could foresee no reason why she would not be able to attend because the new date was a previously-scheduled hearing date. Whether appellant's representative checked with his client before suggesting the alternative sanction adopted here is unclear.

The parties agreed to accept the oral ruling to be followed in writing at a later time. The examiner explained that the written ruling would be delayed because the Commission's word-processing printer is in the repair shop. This ruling was drafted, however, on March 9, 1994, shortly after issuing the oral ruling.

FUTURE PROCEEDINGS

CHANGE OF HEARING LOCATION. After reading of the oral ruling on March 9, 1994, the parties agreed to a change of hearing location as follows. The hearing on March 17 and 18, 1994, will be held at the Commission's offices located in room 1004, 131 W. Wilson Street in Madison, Wisconsin. The parties agreed to notify their witnesses of the changed location.

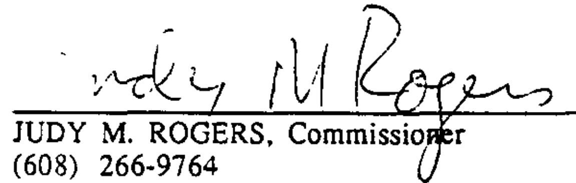
DELAY IN STARTING THE HEARING ON MARCH 17, 1994. Shortly after issuing the oral ruling on March 9, 1994, respondent's attorney called to request that the hearing on March 17, 1994, be delayed from starting at 9 a.m., to starting at 1 p.m. The examiner expressed concern over such delay unless appellant's representative agreed to the change and unless both parties felt the hearing could be completed in 1 and 1/2 days. Respondent's attorney called back shortly thereafter and indicated that appellant's representative

agreed to the delayed start of hearing on March 17th, and both parties agreed the hearing could be completed in 1 and 1/2 days.

ORDER

The respondent's motion for sanctions is granted in part and the hearing dates and location are modified, as detailed in this ruling.

Dated March 11, 1994.



JUDY M. ROGERS, Commissioner
(608) 266-9764

cc: Michael Plaisted
Ken Artis