STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION;
Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS; and
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case Nos. 99-0001, 0026-PC-ER

RULING
ON
REQUEST
TO CALL
WITNESS

These matters are scheduled for hearing from September 27 through October 1, 1999. The issues for hearing include the following:

> 3. Whether the alleged practice of appointing individuals identified by the respondent (sic) Office of the Governor to 1998 and 1999 vacancies in the positions of Director and Deputy Director, Office of Performance and Evaluation, had a disparate impact on racial minorities.[1]

Pursuant to §PC 4.05(1), Wis. Adm. Code, and in a letter dated June 21, 1999, the complainant asked the Commission to issue appearance letters to 23 individuals, including Governor Thompson. Complainant's request was the subject of a telephone conference held on August 13, 1999. During the conference, the parties agreed to the issuance of appearance letters to 14 individuals and complainant withdrew his request for the remaining individuals except for Governor Thompson. Respondents opposed complainant's request to name Governor Thompson as a witness and the parties filed written arguments. In his written argument, complainant proposed an alternative to in-person testimony by the Governor: Complainant proposed the Governor answer 79

[1] Issue 3 was written before the Commission granted a motion to dismiss the Office of the Governor as a respondent in these matters.

written questions while under oath, and that his answers be "audio taped or audio-visually taped and transcribed before the hearing."

Complainant initially identified the Office of the Governor as a respondent in these matters, arguing that the Governor was a proper party in regard to issue 3. However, in a ruling on May 10, 1999, the Commission dismissed the Governor as a party with the following comment:

> Although the statutory underpinnings of the executive branch of state government provide for the appointment of the Secretary of DOA by the Governor with confirmation of the appointment by the State Senate (§§15.05(1)(a), 15.10, Stats.), the Governor has no statutory role in the appointment of the civil service employees of the Department of Administration. In addition, the Office of the Governor would not be a necessary party for the granting of effective relief were complainant to prevail here since the appointment at issue was made by DOA. Although, as above, the role of the Office of the Governor in regard to the filling of vacancies in the positions described in issue 3. could be relevant to the question of pre-selection by DOA, the possession of such potentially relevant evidence alone does not require the Office of the Governor to be a party to this action.

DOA Secretary Bugher has been issued an attendance letter and, presumably, will testify.

Respondents support their position by citing various cases involving requests to take depositions of high-ranking public officials. In *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 309 N.W.2d 28 (Ct. App., 1981), the Court of Appeals held:

> [A] highly placed state official who seeks a protective order should not be compelled to testify on deposition in his official capacity unless a clear showing is made that the deposition is necessary to prevent prejudice or injustice. In determining whether to grant an official's motion for a protective order, the trial court should consider, among other things, such factors as the effect on government business if the official must attend a deposition and the likelihood that the alternative procedure provided by sec. 804.05(2)(e), Stats., will provide the party seeking discovery with the information sought.

In *Beloit*, the case was remanded to the trial court to analyze relevant factors when determining whether the State was required to produce the secretary of the Department of

Natural Resources for a deposition arising from the imposition of a forfeiture for violating Wisconsin's solid waste disposal laws where, in an affidavit, the DNR secretary denied firsthand knowledge of defendants' waste disposal operations and alleged violations and went on to name the DNR employe responsible for issuing solid waste disposal licenses.

In *Warzon v. Drew*, 155 F.R.D. 183 (E.D. Wis. 1994), an employe of Milwaukee County alleged her termination was in retaliation for having commented on the operation of the Milwaukee County Health Care Plan. The plaintiff sought to depose the Governor and the Secretary of the Department of Administration in order to determine whether there was an agreement with a named defendant so that the County Executive of Milwaukee County would "remain neutral" should the Milwaukee Mayor challenge the Governor in the 1994 election. Plaintiff did not claim to have any personal knowledge that such a deal was actually made. Instead, she stated she was told about the deal by a co-employe, Mr. Hawkins. The court held:

> In general, high ranking government officials enjoy limited immunity from being deposed in matters about which they have no personal knowledge. The immunity is warranted because such officials must be allowed the freedom to perform their tasks without the constant interference of the discovery process. Before the involuntary depositions of high ranking government officials will be permitted, the party seeking the depositions must demonstrate that the particular official's testimony will likely lead to the discovery of admissible evidence and is essential to that party's case. In addition, the evidence must not be available through an alternative source or via less burdensome means. . . .
>
> Whether Mr. Hawkins did or did not tell Ms. Warzon about the existence of any deal is a matter within the knowledge of Mr. Hawkins--not the Governor or the Secretary. When deposed, Mr. Hawkins denied any knowledge of a deal between Mr. Drew and the Thompson administration and denied making a statement to Ms. Warzon about the alleged deal.
>
> That Ms. Warzon has been unable to obtain any direct evidence to corroborate her "deal" theory does not entitle her to interrogate the Governor and the Secretary. This is especially true in this case where the record discloses that deposing the Governor and the Secretary would not

> yield any testimony to corroborate Ms. Warzon's "deal" theory. The Governor and the Secretary each submitted an affidavit asserting that the arrangement described by Ms. Warzon was never reached nor discussed. Aside from unsubstantiated hearsay, Ms. Warzon has not produced any evidence to the contrary. 155 F.R.D. 183, 185-86 (citations omitted)

The Vermont Supreme Court reached a similar result in *Monti v. State*, 151 Vt. 609, 563 A.2d 629 (1989), relating to a request by a former State of Vermont employe to depose the Governor of Vermont as part of a civil action against the State for wrongful discharge:

> We hold . . . that the party requesting the deposition make a particularized showing of need for the deposition, i.e., that it is necessary to prevent prejudice or injustice to the party requesting it.
>
> In applying this standard, trial courts should weigh the necessity to depose or examine an executive official against, among other factors, the substantiality of the case in which the deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures provide the information sought. 151 Vt. 609, 613-14

In the present case, complainant seeks to have the Governor testify at hearing, rather than merely taking his deposition as part of the discovery process. The analysis summarized in *Beloit Concrete Stone*, *Warzon*, and *Monti*, is equally relevant in determining whether the complainant's request to have the Governor testify should be granted. The question posed is whether the complainant has clearly shown that the Governor's testimony, either in person or by tape-recorded responses to 79 questions posed by complainant, is "necessary to prevent prejudice or injustice." *Beloit Concrete Stone*, (above). The examiner concludes that complainant has failed to make such a showing.

In his written arguments, complainant does offer numerous and general unsubstantiated observations/allegations regarding the Governor's role with respect to the vacancies that serve as the basis for the complaint. For example, complainant contends:

> It is undisputed that for last six years Thompson/Governor has used illegal solicitations on State appointing authorities to appoint people into career executive positions for his personal gain and aggrandizement. Records show that Thompson/Governor's solicitations, on State agency heads to appoint his preferred people, has broadened tremendously since 1994. The present State Department of Administration's and former Department of Industry Labor and Human Relations' (DILHR's) responses to interrogatories revealed that Thompson/Governor has turned the classified positions into his personal property that he can "dish out" to pepole of his liking regardless of the provisions under Sections 230.41 and Chapter 230.43 of Wisconsin Statutes. Thompson/Governor pre-selects people into classified positions rendering the merit recruitment, selection or appointment laws into classified positions a sham. However, this practice has had disparate impact on racial minorities. Thompson/Governor has to be stopped continuing such illegal solicitations.

Respondents have countered with specific references to respondents' responses to complainant's discovery requests:

> Balele had applied for the positions of Director and Deputy Director in the Office of Performance and Evaluation in 1998 and 1999. Balele alleges that after being informed that he had not been selected for these positions, he was told by unnamed DOA officials that the persons hired had been "pre-selected" by DOA Secretary Mark Bugher under a directive from the Governor's Office. He alleges that between 1994 and 1997, many Department Secretaries, including Bugher, had been ordered by the Governor's Office to hire white people who were favorites of the Governor. In its response to Balele's Interrogatory No. 14, DOA states that Balele was not appointed to the Director or Deputy Director positions in 1998 because he was "not the most qualified individual for the position." DOA also states in Response to Interrogatory No. 15 that Balele was not appointed to the Director's position in 1999 because he "was not a career executive employe and was thus not eligible in 1999 because the position was filled through a career executive reassignment."
>
> DOA responded to several other interrogatories submitted by Balele as follows:
>
> > 24. How often in the last three years has the Governor's Office asked Secretary Bugher to hire individual (sic) into classified positions?

Response: Upon information and belief, the Governor's Office has not asked Secretary Bugher to hire individuals into classified positions.

25. Did the staff from the Governor's office contact Bugher to appoint persons recommended by the Governor into any classified position when Bugher was at DOR?

Response: No

26. Have Bugher been contacted by the Governor to appoint persons recommended by the Governor into any classified positions during the time Bugher has been at DOA?

Response: No. The Governor has on occasion recommended or acted as a reference for applicants utilizing the normal civil service procedures.

27. Have staff from the Governor's office contacted Bugher to contact Departmental Secretaries to appoint persons recommended by the Governor into any classified positions during the time Bugher has been at DOA in 1996 through 1998?

Response: No.

66. Has Bugher been asked by the Governor's officials to find classified jobs for Governor's (sic) Thompson's favorite people when Bugher was at the DOR?

Response: No.

67. Has Bugher been asked by the Governor's office to find classified jobs for Governor's (sic) Thompson's favorite people during the time Bugher has been at the DOA.

Response: No.

Furthermore, in response to the Balele's request for admissions, the DOA (1) denied that people were hired into classified positions on the basis of recommendations from the Office of the Governor (Response to Request for Admission No. 1); (2) denied that Secretary Bugher had been instructed by the Governor's Office to appoint Ms. Noyes for the position of Deputy Performance Evaluation Office (Response to Request

for Admission No. 17); (3) denied that Secretary Bugher had been instructed by the Governor's Office to appoint Ms. Noyes for the position of Performance Evaluation Office in 1998 (Response to Request for Admission No. 18); and (4) denied that Bugher had been asked by the Governor's office to hire people recommended by Governor Thompson in various classified positions in 1999 (Response to Request for Admission No. 19). In response to Balele request that DOA produce copies of all email and all correspondence between the Governor's office and Bugher's Office related to the positions of Director, Performance Evaluation Office in 1999, DOA denied that any such documents exist (Response to Requests for Production of Documents No. 2).

Complainant has simply failed to show that Governor Thompson played a role in the hiring decisions that are the subject of this complaint. In light of the Governor's status as a high ranking government official, complainant has not established a sufficient basis for requiring the Governor to testify, either in person or via the alternative procedure requested by complainant.

ORDER

For the reasons outlined above, complainant's request for a letter requiring Governor Thompson to testify at the hearing in the above matter, either in person or via recorded testimony, is denied.

Dated: September 7, 1999 STATE PERSONNEL COMMISSION

KURT M. STEGE, Hearing Examiner

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