

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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ANDREW BASINAS,

Appellant,

v.

SECRETARY, Department of Health and
Social Services,

Respondent.

Case No. 77-121

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INTERIM DECISION
OF THE HEARING EXAMINER

Before:

NATURE OF THE CASE

This case involves an appeal of a career executive reassignment pursuant to s. Pers. 30.10(2), W.A.C. The appellant has filed a motion for reinstatement on April 10, 1978, and the parties have filed briefs which raised certain collateral issues. Further procedural background will be set forth in the following findings, which are based on matter which appears uncontested in the file to date and which are limited to the purpose of deciding the aforesaid motion and collateral issues.

FINDINGS OF FACT

1. The appellant filed an appeal with the Board on June 9, 1977, pursuant to s. Pers. 30.10, W.A.C., of his reassignment by the respondent appointing authority under the aegis of the Career Executive Program.

2. Following certain procedural matters which are set forth in detail in the findings of fact contained in a Personnel Board Opinion and Order dated November 15, 1977, (copy attached) which are incorporated by reference as if fully set forth, the respondent filed a motion to dismiss for failure to prosecute on September 26, 1977, which was denied by the Board in the aforesaid decision and order.

3. On November 17, 1977, the appellant filed a motion to enjoin and restrain the respondent from filling the position of Human Services Administrator 4, Bureau of Institutions, until the completion of the appeal proceedings.

4. At a prehearing conference and hearing on the aforesaid motion held December 6, 1977, the appellant indicated that he did not wish to proceed with the aforesaid motion at that time but was willing to have it held in abeyance. The respondent objected to the Board's jurisdiction on the grounds that the right of appeal contained in s. Pers. 30.10, W.A.C., was an illegal attempt to expand the Board's jurisdiction beyond the limits set by statute; and, further, that the appellant had not made sufficient allegations to invoke the Board's jurisdiction under s. Pers. 30.10, W.A.C. A hearing was scheduled tentatively for February 22 and 23, 1978, by stipulation.

5. Following the submission of briefs by the parties, a proposed decision was issued January 17, 1978, pursuant to s. 227.09(2), Stats. Neither party filed objections and the proposed decision, overruling the objection to subject matter jurisdiction and determining the issues for hearing and the allocation of burden of proof, was adopted by the Board. See Opinion and Order dated February 20, 1978, a copy of which is attached hereto and incorporated by reference as if fully set forth.

6. In the meantime the parties agreed to and the examiner approved, on February 27, 1978, the rescheduling of the hearing from February 22 and 23, 1978, to March 29 and 30, 1978.

7. Depositions of the respondent, and the appellant were taken, by stipulation, on February 22, 1978, and March 2, 1978, respectively.

8. By letter of March 7, 1978, the appellants attorney advised the Board he would not be ready to proceed on March 29 and 30, 1978, and requested a continuance to May 17 and 18, 1978, advising that the respondent had no objection to the request.

9. By letter of March 9, 1978, the examiner granted the continuance.

10. On April 10, 1978, appellant filed motions requesting his reinstatement on the grounds that the respondent has interfered with the investigation being conducted by the his attorneys by refusing to permit employes to answer questions of an investigator working for appellant's attorney, and for two substantive reasons relating to alleged illegaties in the transaction in question. The moving documents also contained a notice that the appellant intended to and did challenge the constitutionality of the Career Executive Program, and an affidavit in support.

11. On April 17, 1978, appellant filed a request to have the aforesaid motions decided before evidentiary hearing on the merits.

12. On April 26, 1978, another prehearing conference was held at which the respondent indicated that he did not dispute the factual accuracy of the aforesaid affidavit in support of the motion for reinstatement. The examiner directed that the question of reinstatement based on the two substantive grounds stated in the motion would be deferred for decision following the hearing on the merits, and that the parties file briefs on the questions raised by the first ground for the motion.

13. In addition to filing briefs and supporting documentary material with respect to the motion to reinstate, the parties have requested the following:

- a. The respondent has moved in its May 4, 1977, brief that the appeal be dismissed for lack of jurisdiction.

- b. The appellant in a letter filed May 2, 1978, stated that he was not ready for hearing because "the investigation has been forced to effectively cease on or about April 1, 1978."
- c. The appellant in a motion filed May 2, 1978, requested a Board order identifying (as a "transfer", "demotion", or "reallocation," etc.) the personnel transaction which triggered the appeal, alleging that such information was "necessary and vital prior to evidentiary hearing in order to adequately prepare."

14. The nature of the restrictions placed on respondent's employees' cooperation with the appellant's investigation of this case have been as set forth in a memorandum from respondent's attorney Kristiane Randal to certain of respondent's employees, dated April 3, 1978, as follows:

"A law clerk from Mr. Graylow's office recently contacted Ed Buchler to request an interview regarding his knowledge of the Basinas transfer. Inasmuch as any information provided to Mr. Graylow's officer prior to the hearing can be used at the hearing to impeach a witness's testimony, I would like all prehearing contacts to be in writing, not oral interviews. If you are contacted, please advise Mr. Graylow's office that you will not answer questions except for written interrogatories or formal depositions. Notify me of any such contact."

15. Several of respondent's employees were sent written questions in letter form by appellant's attorney's investigators, and responded in writing within two weeks.

16. Several of respondent's employees refused, as a result of the directive set forth in finding 14, above, to submit to oral interviews with said investigator.

CONCLUSIONS OF LAW

1. The hearing examiner pursuant to s. 227.09(1), Stats., has the authority to enter orders dealing with the discovery issues raised by appellant's motion

for reinstatement, to enter orders regarding the scheduling of hearing, and to enter orders deferring decisions on substantive matters until after the hearing on the merits.

2. The respondent's prohibition of verbal discussion of this case by its employes with the appellant's attorney's investigator is an inappropriate interference with appellant's hearing preparations.

3. The substantive questions related to the various motions referred to in the findings are appropriately deferred for final decision by the Board.

4. The appellant has had and will have sufficient time to prepare for this hearing, now scheduled for May 17 and 18, 1978, and it should not be continued.

OPINION

It was indicated at the April 26, 1978, prehearing conference that an effort would be made to submit this matter for decision by the Board at its May 8, 1978, meeting. The absence of one of the Board members has made a quorum unavailable on that date and has required the rescheduling of the meeting to May 16, 1978. However, the provisions of s. 227.09(1), Stats., give the hearing examiner authority to:

- "d. Take depositions or have depositions taken when permitted by law.
- e. Regulate the course of the hearing.
- f. Dispose of procedural requests or similar matters."

The examiner has the authority to deal with non-substantive procedural and discovery matters and the scheduling of the hearing.

The respondent argues that because the Board has provided in s. P.B. 2.02, W.A.C., that "parties shall have available substantially all the means of discovery that are available to parties to judicial proceedings as set forth in chapter 804, Wis. Stats.," that the Board did not grant to parties "the right to any additional modes of discovery not included in chapter 804."

"Nowhere in chapter 804 is a party given the right simply to ask informal questions of either a party or a witness. The only way a witness may be compelled to answer questions under chapter 804 is by subpoenaing that witness for deposition." Respondent's brief filed May 2, 1978, pp. 2-3.

In the opinion of the examiner the Board's adoption of the discovery provisions of chapter 804 were not designed to and do not prevent parties from utilizing informal investigative techniques such as the interviewing of prospective witnesses. The availability of a formal deposition procedure provides a party with a tool to compel the pre-hearing divulgence of the information possessed by incooperative or unwilling witnesses. The respondent's statement that the only way a witness may be compelled to answer questions under chapter 804 is by formal desposition begs the question of whether the respondent may prevent witnesses in his employment, who have not on this record been shown to be unwilling, to participate in these interviews.

In the opinion of the examiner the Board has ample authority under the provisions of s. 16.05 and chapter 227, and more particularly under s. 227.09(1), Stats., to regulate this facet of prehearing practice. Aside from the argument that the Board lacks authority to take action in this area, the respondent has not cited any interest of the state that is served by preventing agency employes from discussing this matter with the appellant's investigators. The memorandum

cited in finding 14 does state this rationale: "Inasmuch as any information provided to Mr. Graylow's office prior to the hearing can be used at the hearing to impeach a witness's testimony, I would like all prehearing contacts to be in writing, not oral interviews."

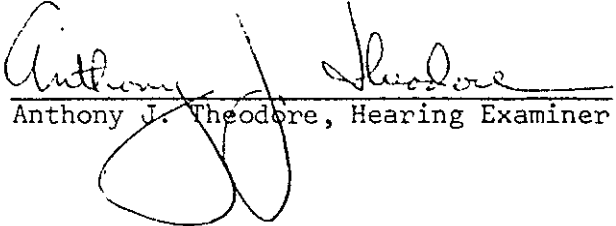
There are a number of means that would serve this end besides a flat ban on interviews. The respondent could provide that an attorney or other representative be present during the interview or that the interview be recorded. On the other hand, the prohibition on oral interviews imposes an additional burden and expense on the appellant. 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 interviews with its employees would seriously handicap the ability of many people to prepare for hearing.

With respect to the appellant's contention that he is not ready for hearing, the parties originally agreed on December 6, 1977, to a hearing on February 22 and 23, 1978. The matter was continued to March 29 and 30, 1978, and again continued to May 17 and 18, 1978. While the respondent has restricted appellant's ability to interview witnesses, the appellant has had the opportunity to conduct formal discovery and to obtain the witnesses' written answers to questions. There are still 9 days from the date of this order to the beginning of the hearing. In the opinion of the examiner the hearing should not be postponed any further.

ORDER

1. Decision of all outstanding motions and objections is deferred until after the hearing on the merits.
2. The respondent is directed to take action not inconsistent with this decision to cease prohibiting its employes from participating in oral interviews regarding the subject matter of this appeal with the appellant on his agents.
3. The hearing on the merits will proceed as previously scheduled on May 17 and 18, 1978.

Dated this 8th day of May, 1978.



Anthony J. Theodore, Hearing Examiner