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MARJORIE KOZICH,
 Appellant,

v.

President, UNIVERSITY OF
 WISCONSIN SYSTEM, and
 Administrator, DIVISION OF
 PERSONNEL,
 Respondent.

Case No. 81-77-PC

* * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on respondent's objection to the Commission's issuance of letters requesting two UW employes to appear at a hearing on respondent's motion for a protective order.

This case was originally filed with the Commission on March 23, 1981. On May 21, 1981, the Commission issued an Order dismissing the appeal for lack of subject matter jurisdiction. On judicial review the case was remanded to the Commission for a hearing on the jurisdictional question.

Prior to the scheduled jurisdictional hearing, the appellant served interrogatories on the respondent and also sought to depose George W. Wirtanen and Myrna Traver-Larson, both of whom are employes of respondent University. While the interrogatories have apparently been answered, respondent objected to the taking of depositions and requested the Commission to enter a protective order to prevent the taking of the depositions. Respondent argued that "in view of the limited purpose of the (jurisdictional) hearing, the discovery sought constitutes annoyance, embarrassment, oppression and an undue burden and expense to the respondent." In response to respondent's request, a hearing on the motion for protective order was scheduled.

In a letter dated April 30, 1982 and received by the Commission on May 3, 1982, the appellant requested that the Commission issue subpoenas for Wirtanen and Traver-Larson requiring their attendance at the hearing on the motion for protective order. On May 11, 1982, and pursuant to authority found in s.230.44(4)(b), Wis. Stats., the Commission issued letters to both Wirtanen and Traver-Larson requesting them to appear at the hearing. In a subsequent letter to the Commission, respondent objected to the issuance of the letters requesting the witnesses to appear, and suggested that the letters be withdrawn. Both parties were given an opportunity to file briefs or statements in support of their position.

The letters in question were issued pursuant to s.230.44(4)(b), Wis. Stats., which provides, in part:

An employe shall attend a hearing under this subsection and testify when requested to do so by the commission.

Because the principal effect of such a letter is the same as serving a subpoena, it also would appear to be appropriate to analyse the issuance of a letter in the same way that a subpoena might be analysed.

In civil actions, the statutory basis for obtaining an order quashing a subpoena is found in s.805.07(3), Wis. Stats:

Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, the court may (a) quash or modify the subpoena if it is unreasonable and oppressive ...

The appellant suggests that there are three purposes for having the witnesses testify at the hearing on respondent's motion for a protective order;

1. To test the veracity of the allegations and accusations made by the Respondent in its Motion and Letter, and
2. To examine as adverse witnesses within the limited scope of the hearing [on respondent's motion for protective order] to be held on July 11, 1982 before the Commission, and
3. To make certain motions the Appellant has reserved the right to make.

In support of the first identified purpose, appellant cites Board of Regents v. Roth, 408 US 564, 92 S. Ct. 2701, 33 L. Ed 2d 548 (1972), as providing her the right to refute charges that have been made by the respondent that appear to reflect negatively on appellant's reputation and integrity. The particular "charge" referred to by the appellant is the allegation in respondent's motion that the "discovery sought constitutes annoyance, embarrassment, oppression and undue burden and expense." The Commission is powerless to expand the scope of the instant appeal beyond its original parameters. Because the first purpose identified by the appellant would improperly expand the scope of the proceedings, it must be discounted as offering a basis for retaining the letters requiring attendance.

The second purpose identified by the appellant is for testimony as to facts relating to the appropriateness of the protective order. After balancing the respective interests involved, the Commission concludes that the letters requesting Mr. Wirtanen and Ms. Traver-Larson to appear at the hearing on the motion for protective order should be withdrawn. This conclusion reflects the inconsistency that would result if the two employes were required to attend the hearing but were later granted protection from being deposed. At the same time, it is apparent that the appellant's interests can be adequately protected by the submission of an affidavit indicating what appellant would anticipate the witnesses to testify to if respondent's motions were denied. If the appellant is unable to anticipate their testimony, she should submit an affidavit to that effect and indicate why it is impossible to anticipate the testimony.

The final purpose noted by the appellant for allowing the witnesses to testify is to support certain unidentified motions. The appellant has the right to make motions at the scheduled hearing. However, depending on the nature of the motions, testimony may be unnecessary or inappropriate. Even if testimony is found to be

appropriate, the respondent will have to be provided with sufficient opportunity to prepare and to present testimony opposing the motions. Under these circumstances, it would be inappropriate to require the witnesses to attend the scheduled hearing on the mere possibilities that form the basis for the third argument offered by the appellant.

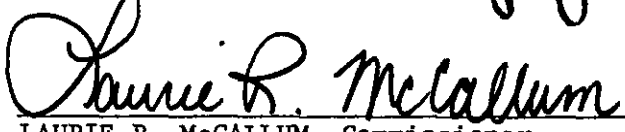
ORDER

Respondent's objection to the issuance of letters requiring the attendance of Mr. Wirtanen and Ms. Traver-Larson at the hearing on respondent's motion for protective order scheduled for June 11, 1982 is sustained, and the letters are ordered withdrawn. Appellant is directed to submit an affidavit in lieu of the witnesses' testimony.

Dated: June 7, 1982

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

KMS:ers

Parties

Marjorie Kozich
P.O. Box 256
Middleton, WI 53562

Robert O'Neil
President, UW System
1700 Van Hise Hall
1220 Linden Dr.
Madison, WI 53706