

APR 15 1983

STATE OF WISCONSIN

CIRCUIT COURT

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DANE COUNTY

WILLIAM P. ROWE,

MAY 25 1983

Petitioner,

Personnel

Commission

vs.

MEMORANDUM DECISION

WISCONSIN PERSONNEL COMMISSION,

Case No. 81CV4288

Respondent.

The petitioner (Rowe) seeks to overturn an order of the Personnel Commission dismissing his case on procedural grounds. The issue is whether the dismissal was proper, and Rowe has not persuaded me to the contrary.

Rowe applied for the position of bureau director at a state agency. Failing to get the job, he appealed to the Commission, claiming that there had been improper manipulation of the civil service examination scores. The agency sought to discover the name of the person who had allegedly told Rowe about the manipulation, and Rowe declined to provide the name, expressing concern that the "informant," a fellow state employee, might suffer retaliation if his or her identity became known. The Commission issued a protective order preventing any retaliation against the witness, but Rowe continued in his refusal. The agency renewed its discovery request and the Commission, noting the continuing effect of its non-retaliation order, directed Rowe to supply the name. After denying Rowe's request to be relieved from compliance with the order (on the basis that no good reason had been offered in support of the request), the Commission ordered him to comply with the earlier disclosure order. Rowe informed the Commission

that he still refused to disclose the name for fear of retaliation.

On July 22, 1981, the Commission found that Rowe was "in default," and dismissed his appeal. The decision was based on sec. 804.12(2)(a), Wis. Stats., which authorizes a court to dismiss an action (or render judgment by default) where a party fails to obey an order compelling discovery. The statute is incorporated into the Commission's rules by Wis. Adm. Code, sec. PC 2.02, and is applicable to its proceedings.

Rowe contends that the proceeding should not have been dismissed because the informant's testimony is unnecessary because statements of two other people (who "had heard" that the scores were manipulated) are available to prove the fact of manipulation. Hearsay evidence, however, is not admissible in an administrative hearing when direct evidence is available. Outagamie County v. Brooklyn, 18 Wis. 2d 303, 312 (1962). What Rowe asks is that the Commission accept his own hearsay allegations as true without any corroboration.

Rowe also suggests that the Commission should not have imposed the extreme sanction of dismissal because it had, on another occasion, shown leniency when the agency failed to comply with discovery requirements. Sec. 804.12, Stats., grants wide discretion to the tribunal as to the sanctions which may be imposed for violation of discovery orders, and a court may not substitute its judgment for that of the Commission on a matter of discretion. Sec. 227.20(8), Stats. I note, too, that the supreme court has condoned "the extreme sanction of dismissal" in situations where the refusal to comply is without merit or where there is evidence of bad faith. Furrenes v. Ford Motor Company, 79 Wis. 2d 260, 268 (1977). The Commission

made every effort to accommodate Rowe and was met with continued refusal to provide the information. The reasons underlying its order of dismissal were clearly stated by the Commission:

"Not only has the Commission issued a non-retaliation order in this case, but appellant has not offered a single piece of evidence that retaliation is likely or probably in the face of the Commission Order [prohibiting retaliation] of June 3, 1980. In contrast to appellant's unsubstantiated concerns about retaliation, respondent has well-argued concerns that he cannot carry out his duty to investigate allegations of civil service violations without the names of individuals with possible knowledge of such violations. In addition to these considerations, appellant has refused to acknowledge that discovery is a two-way process in which respondent is also entitled to ask for and receive information which is reasonably related to the preparation of his case." Commission's Order of April 23, 1981.

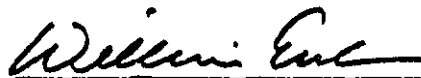
The Commission really had no other choice. The dismissal has a rational basis in law and will be affirmed. See Bliss v. ILHR Dept., 101 Wis. 2d 245, 247 (1982).

Counsel for the Commission may prepare the appropriate order.

Dated at Madison, Wisconsin, this 13 day of April,

1983.

BY THE COURT:



WILLIAM EICH
CIRCUIT JUDGE

cc: William H. Wilker
William P. Rowe