

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

STEVEN G. BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 90-0097-PC-ER
90-0162-PC-ER

* * * * *

RULING
ON
MOTIONS

On December 17, 1992, complainant filed a Notice of Motion and Motion in Limine in relation to Case No. 90-0097-PC-ER to the effect that:

The Complainant . . . moves the Personnel Commission, pursuant to Admin. Code Sec. PC 1.08, for a determination that the Complainant, Steven G. Butzlaff, is competent to testify as to transactions and communications with Julius Grulke, now deceased, and that Respondent, Department of Health and Social Services, has waived any protection of Sections 885.16 and 885.17, Stats., with regard to said transactions and communications, by serving, after the death of Julius Grulke, interrogatories upon the Complainant regarding said transactions and communications.

On February 4, 1993, respondent filed a Notice of Motion and Motion in Limine and Objection to Complainant's Submission of Answers to Interrogatories Contrary to Sections 885.16 and 885.17, Stats., in relation to Case No. 90-0097-PC-ER to the effect that:

. . . the Respondent . . . moves the Personnel Commission, pursuant to Wis. Adm. Code Sec. PC 1.08, for a determination that the Complainant, Steven B. Butzlaff, is incompetent to testify as to transactions and communications with Julius Grulke, now deceased, and an order precluding the submission of such testimony under sections 885.16 and 885.17, Stats.

Please take further notice that the Respondent objects to the Complainant's submission with Complainant's Brief in Support of Motion in Limine of Complainant's Answers to Respondent's

Second Set of Interrogatories And Request for Production of Documents insofar as such answers contain testimony, and are offered as testimony, in respect to any transaction or communication by the Complainant personally with Julius Grulke, now deceased, on the grounds that the complainant is incompetent to present such testimony under sections 885.16 and 885.17, Stats. In particular, the Respondent objects to the Complainant's reference on page eight of his brief to his characterization of his conversations with Julius Grulke in his answers to the interrogatories. Respondent further objects on the same grounds to any other or future submission by the complainant of his answers to interrogatories two, eight, nine, and ten, or any other interrogatory answers which contain testimony in respect of his transactions or communications with Julius Grulke as testimony in this action.

On February 24, 1993, respondent filed a Motion in Limine in relation to Case No. 90-0162-PC-ER to the effect that:

. . . the Commission . . . preclude the complainant from testifying as to communications and transactions between himself and his former supervisor Julius Grulke, now deceased, for the reason that the complainant is incompetent to offer such testimony under secs. 885.16 and 885.17, Stats.

The following Findings of Fact are based on the contents of the existing files in these cases and appear to be undisputed:

1. Case No. 90-0097-PC-ER is a complaint alleging discrimination/retaliation under the Family and Medical Leave Act in regard to complainant's termination by respondent from his position as a Security Officer 3 at the Mendota Mental Health Institute. To support this allegation, complainant has offered statements allegedly made to him during his initial employment interview and during the course of his employment by Julius Grulke, his first-line supervisor. This complaint was filed with the Commission on June 15, 1990.

2. Case No. 90-0162-PC-ER is a complaint alleging discrimination/retaliation under the Family and Medical Leave Act, Whistleblower retaliation, Occupational Safety and Health retaliation, Fair Employment Act retaliation, and sex discrimination in regard to complainant's termination from the above-referenced position and in regard to certain conditions of employment while in this position. To support these allegations, complainant has offered

statements allegedly made to him during the course of his employment by Julius Grulke, his first-line supervisor. This complaint was filed with the Commission on October 16, 1990.

3. Complainant first became aware, or had reason to believe, that Mr. Grulke was suffering from terminal cancer in or around November of 1991.

4. At least as of July 29, 1992, Mr. Grulke was capable of standing and conversing with other individuals.

5. Mr. Grulke died on October 28, 1992.

6. Complainant has been represented by counsel in Case No. 90-0097-PC-ER since at least June 22, 1990.

7. At no time prior to Mr. Grulke's death did complainant or respondent attempt to preserve Mr. Grulke's testimony.

8. On November 12, 1992, respondent served on complainant in Case No. 90-0097-PC-ER Respondent's Second Set of Interrogatories and Request for Production of Documents. Interrogatory 8. stated as follows:

With regard to your conversation with Julius Grulke after Grulke's return from his fishing trip, which you refer to on page 5 of Exhibit A, identify all witnesses to the conversation other than you and Julius Grulke, identify any notes you took of the conversation, and identify any persons with whom you have discussed this conversation.

The Exhibit A referred to in this interrogatory was a letter prepared by complainant and directed to one of the Commission's equal rights investigators on or around October 29, 1992, in the course of the Commission's investigation of Case No. 90-0162-PC-ER. None of the other interrogatories in the above-described set referred to a conversation between complainant and Mr. Grulke. Some of the complainant's answers to such interrogatories refer to conversations between complainant and Mr. Grulke.

Respondent argues that the "Dead Man's Statute," i.e., §885.16, Stats., precludes the receipt into evidence at hearing complainant's testimony relating to conversations he had with Mr. Grulke prior to his death.

Section 885.16, Stats., states as follows, in pertinent part:

No party or person in his own behalf or interest, . . . shall be examined as a witness in respect to any transaction or communication by him personally with a deceased . . . person in any civil action or proceeding, in which the opposite party

derives his title or sustains his liability to the cause of action from, through or under such deceased . . . person, . . . unless such opposite party shall first, in his own behalf, introduce testimony of himself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates.

Since an administrative hearing before the Commission is not a "civil proceeding" within the meaning of §885.16, Stats., this provision of the statutes is not strictly applicable to such hearings. This conclusion is further buttressed by the language of §227.45(1), Stats., to wit:

227.45 Evidence and official notice. In contested cases:

(1) Except as provided in s. 19.52(3), an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. The agency or hearing examiner shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

In this provision, the Legislature makes clear that in an administrative hearing such as that conducted by the Commission, statutory rules of evidence, such as that embodied in §885.16, Stats., shall not be binding.

However, simply because the Commission is not bound by an evidentiary rule does not mean that it is required to disregard it in determining whether or not certain evidence be admitted as part of the hearing record or in determining the weight to be accorded admitted evidence. The rules of evidence which govern judicial proceedings exist at least in part to identify evidence which is inherently unreliable and to prevent a decision from being based in whole or in part on such evidence. This general policy, in particular as it relates to hearsay, applies as well to quasi-judicial proceedings, as the Wisconsin Court of Appeals recognized in State ex re. Henschel v. DHSS, 91 Wis. 2d 268, 228 N.W. 2d 618 (1979). In this decision, the Court of Appeals stated:

Although evidentiary rules may be relaxed somewhat at a revocation hearing, *State ex rel. Prellwitz v. Schmidt*, 73 Wis. 2d

35, 242 N.W. 2d 227 (1976), they cannot be relaxed to the point where a parole violation may be proved entirely by unsubstantiated hearsay testimony.

Section PC 5.03(5), Wis. Adm. Code, states as follows:

(5) EVIDENCE. As specified in s. 227.45, Stats., the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted, and immaterial, irrelevant or unduly repetitious testimony shall be excluded. The hearing examiner and the commission shall give effect to the rules of privilege recognized by law. Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

In the instant case, complainant intends to offer into evidence his testimony relating to the substance of unwitnessed conversations he allegedly had with Mr. Grulke. This testimony will be offered by complainant as direct evidence of an intent by Mr. Grulke to discriminate/retaliate against complainant. This testimony will suffer from the evidentiary limitations recognized by the Legislature through the "Dead Man's Statute." The primary such limitation applicable here is the inability of the respondent to examine the declarant, Mr. Grulke, in order to rebut complainant's testimony as to their alleged conversation. This is also one of the limitations which serves as the basis for the rules of evidence relating to hearsay, i.e., the inherent inequity of receiving evidence into the record as to statements made by an individual who the opposing party does not have an opportunity to question as to these statements.

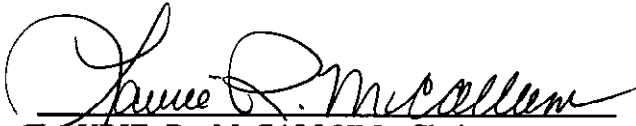
However, the lost opportunity here was something that respondent should have anticipated and taken action to address. Respondent was aware that Mr. Grulke was terminally ill. Respondent was also aware, as the result of statements made by complainant in his charges of discrimination and in his other communications with the Commission, that complainant intended to use the substance of his alleged conversations with Mr. Grulke as part of the proof of his cases. Despite this awareness, respondent took no action to preserve Mr. Grulke's testimony prior to his death. Although respondent argues that this responsibility was complainant's since complainant has the burden of proof, this does not follow. To so conclude would require complainant to preserve the testimony of an adverse witness.

The Motions in Limine and the Objections to Complainant's Submission of Answers are denied. The testimony of complainant as to the substance of the alleged conversations he had with Mr. Grulke referenced above will be allowed although the limitations discussed above as to its evidentiary value will limit the weight it will be accorded in the decision of these matters.

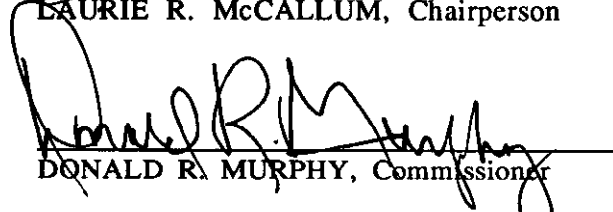
ORDER

Respondent's Motions in Limine and Objections to Complainant's Submission of Answers are denied. Complainant's Motion in Limine is granted to the extent consistent with this ruling.

Dated: April 2, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner