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Executive Director, ASSOCIATION  
OF CAREER EMPLOYEES (ACE),

Appellant,

v.

Secretary, DEPARTMENT OF  
ADMINISTRATION, and Admini-  
strator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,

Respondents.

Case No. 94-0069-PC

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RULING ON MOTION  
FOR  
PROTECTIVE ORDER  
AND TO  
QUASH SUBPOENAS

This matter is before the Commission on respondents' motion for a protective order to quash administrative subpoenas to the Secretary, Department of Administration (DOA), James R. Klauser, and the Administrator, Division of Merit Recruitment and Selection (DMRS), Robert J. Lavigna, to compel attendance at a hearing in the above-captioned matter, pursuant to §§804.01(3)(a), Stats., and PC 4.03, Wis. Adm. Code. Briefs were filed by the parties.

**BACKGROUND**

On May 9, 1994, the Executive Director of the Association of Career Employees (ACE), Wynn Davies, appellant, filed with the Commission an appeal of personnel decisions made by the Administrator of the Division of Merit Recruitment and Selection (DMRS) and by the Secretary of the Department of Administration (DOA) involving the recruitment and selection of Larry Swoboda as Executive Director of the National and Community Service Board (NCSB), a project position in the state classified civil service.

Subsequently, after the parties agreed to the issues in this case and a companion case, Case No. 94-0060-PC, filed May 4, 1994, the respondents moved for dismissal. By order dated October 24, 1994, the Commission dismissed Case No. 94-0060-PC for failure to state a justiciable claim and dismissed a portion of this appeal, which "relate(d) to the creation of the classified civil service position" for lack of subject matter jurisdiction.

In a prehearing conference held October 28, 1994, the parties agreed that the remaining issue in this appeal is:

Whether the National and Community Service Board Director project position was appropriately filled in accordance with state classified civil service laws and rules.

A hearing on this issue was set for February 20 and 21, 1995, and discovery as provided by ch. 804, Stats. was to end December 10, 1994. ACE took no discovery action during this appeal.

On January 25, 1995, ACE requested the Commission issue administrative subpoenas to several state employees, including DOA Secretary Klauser and DMRS Administrator Lavigna, requiring their appearance at the hearing. At a status conference held January 30, 1995, at respondents' request, respondents informed ACE it would seek an order from the Commission quashing ACE's request for subpoenas to DOA Secretary Klauser, DER Secretary Jon Litscher, DMRS Administrator Lavigna, and DOA Division Administrator Nathaniel Robinson. ACE agreed that respondents would be permitted to provide affidavits from Klauser, Litscher, Lavigna and Robinson, which ACE would review and consider as an alternative to these proposed witnesses being called to testify at the hearing.

ACE accepted the Litscher and Robinson affidavits, rejected the Lavigna affidavit, and prior to submittal, informed DOA it would not accept an affidavit of Secretary Klauser in lieu of his personal appearance at the hearing.

On February 13, 1995, respondents filed a motion to quash subpoenas for Klauser and Lavigna to appear at the hearing, which was followed by a brief by ACE on February 15, 1995, in opposition.

The Commission held a status conference on February 17, 1995. The parties were advised that pleadings and arguments regarding the issue of Klauser and Lavigna as necessary witnesses needed clarification. ACE was requested to submit a new or amended petition for subpoenas for the subject witnesses with more particulars, and the parties were provided a schedule for written responses and replies.

The following discussion is based on the pleadings, documents and arguments, including amendments, of the parties.

## DISCUSSION

The respondents claim the subpoenas should be quashed because under state and federal law protective orders are granted to high-ranking state officials to avoid annoyance, embarrassment or harassment, and undue burdens on their time. In support of this contention, respondents make the following arguments:

1. The proposed witnesses' testimony is cumulative and unduly repetitious or irrelevant and immaterial, and the protections afforded government officials in discovery proceedings should logically be extended to Commission hearings.

The grounds of this argument are that compulsory process is not an absolute, Magee v. State, 187 So. 2d 274, 279 (Ala. 1966); Marbury v. Madison, 1 Cranch (5 U.S.), 137, 2 L. Ed. 60; State v. Groppi, 41 Wis. 2d 312, 164 N.W. 266 (1969); State v. Beloit Concrete Stone Co., 103 Wis. 2d 506, 309 N.W. 2d 28 (Ct. App. 1981) and that §PC 4.03, Adm. Code, essentially follows the principle established in these cases; that Secretary Klauser and Administrator Lavigna are high-ranking governmental officials; that their testimony will be cumulative and repetitious because subordinate officials have been delegated the duties and responsibilities of recruitment and selection at issue in this matter; that political motivations attributed by ACE to Klauser and Lavigna in the Swoboda selection do not implicate §§230.18 or 230.20, Stats., because these statutes pertain to discriminatory and patronage abuses; that Klauser and Lavigna do not seek to avoid testifying on relevant and material matters and have done so by providing affidavits (Exhibits 3, 4 and 7) with respondents' initial brief; and that the Commission has authority to "accommodate the witnesses' concerns under §PC 5.03, Adm. Code, which gives the Commission discretion in the manner witnesses may provide testimony.

2. The nexus between appellants' allegations of statutory and rule violations and the subject witnesses' knowledge is insufficient to overcome protections accorded high-ranking government officials.

The grounds of this argument are that §§230.01(2), 230.05(2) and 230.06(1)(a) and (b), Stats., set forth general policy, powers and duties of the DMRS administrator (Lavigna) and authority conferred on the appointing authority (Klauser) in civil service matters, all of which were delegated to subordinate officials with direct knowledge of matters at issue; that

§§230.14(1), 230.15(1), 230.15(3), 230.16(2), 230.17(2), 230.18, and 230.25, 230.06(1)(h) and 230.27(2k), Stats., provisions regarding appointments, applications and examinations, applicants' rights, certification, veteran and affirmative action responsibilities, all were responsibilities delegated to subordinates who performed these duties at issue (Exhibits 8 and 9, affidavits of Olson and Garza) and that neither Secretary Klauser nor Administrator Lavigna have direct knowledge about these matters.

In opposing respondents' motion to quash, ACE claims that DOA Secretary Klauser and DMRS Administrator Lavigna are named parties in this case who violated the civil service laws in subchapter II, Chapter 230, Stats., when Larry Swoboda was selected to a project position of Executive Director of NCSB. ACE's specification of statutory provisions and rules violated by Klauser and Lavigna consist of seventeen statutes and rules. They are: §§230.01(2) (Lavigna), 230.05(2)(a) (Klauser and Lavigna), 230.05(2)(b) (Lavigna), 230.05(7) (Klauser and Lavigna), 230.06(1)(a), (b) and (h) (Klauser), 230.14(1) (Klauser and Lavigna), 230.15(1) and (3) (Klauser and Lavigna), 230.16(2) (Lavigna), 230.17(2) (Lavigna), 230.18 (Klauser and Lavigna), 230.20(1) and (2) (Klauser and Lavigna), 230.25(1) (Lavigna), 230.27(1) (Klauser and Lavigna), 230.27(2k) (Klauser), Stats., and ER-MRS 34.03(1)(a)-(f), Wis. Adm. Code. These statutes and rules delineated and argued by ACE pertain to the responsibilities of the DMRS administrator and appointing authorities in implementing recruitment, selection and appointment of state classified civil service positions, including the project position at issue.

In this connection, ACE argues that Klauser has relevant information because he was the appointing authority who was primarily responsible for the selection of Swoboda for the NCSB position. ACE alleges Klauser never considered any person other than Swoboda for the position and treated Swoboda favorably because of his political affiliations.

Regarding Lavigna as a subpoenaed party who could give relevant information, ACE argues that Lavigna, in his affidavit dated February 13, 1995, states that he and DMRS Policy Advisor Jesus Garza discussed in some detail DOA's project appointment request and the applicable rules. ACE alleges that Lavigna, like Klauser, failed to carry out his duties and permitted the appointment of Swoboda based on personal preference and political considerations.

ACE next argues that Klauser and Lavigna are subject to the "universal duty" to attend, testify and be cross-examined, and that they cannot be excepted from this duty on the basis of an assertion of constitutional, common law or statutory privilege. In support, ACE cites *Witness §1 & 2*, 81 Am Jur 2d 37 & 38; §905.01, Wis. Stats.; *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 2d 190, 202, 248 N.W. 2d 433 (1977); *State v. Migliorino*, 170 Wis. 2d 576, 588, 489 N.W. 2d 678 (1992); and *Wikrent v. Toys "R" Us Inc.*, 179 Wis. 2d 297, 393, 507 N.W. 2d 130 (1993). These cases involve physician-patient privilege and when it gives way, and hold that privilege in Wisconsin is purely statutory.

In addition, ACE argues that subpoenas may not be quashed when a witness is able to give relevant evidence. *State v. Gilbert*, 109 Wis. 2d 501, 505, 326 N.W. 2d 744 (1982), and that none of the cases cited by respondent support a claim of privilege.<sup>1</sup>

The right to compulsory process stems from the Sixth Amendment and gives an accused in a criminal proceeding the right to offer testimony of witnesses in his defense. However, as observed in *State v. Groppi*, 41 Wis. 2d 312, 323, 164 N.W. 2d 266 (1969), "a defendant does not have an unqualified right to subpoena witnesses." Here, this case involves an administrative proceeding. Like criminal proceedings, it is fundamental to a fair trial that persons may be compelled to testify. This right to examine witnesses, which is basic to the judicial system, is derived from the authority of the adjudicative body. The attorney's power to subpoena is done in the name of the court, and only the presiding judge has the power to determine whether a person will be compelled to testify as a witness. The same holds true in this body's administrative proceedings. Only the Commission has the power to determine whether a person will be compelled to testify as a witness.

The issue in this case is whether the National and Community Services Board Director project position was appropriately filled in accordance with state classified civil service laws and rules. It is within this context that this decision is made in conjunction with information from the file of record and after consideration of the parties' briefs, exhibits and affidavits. On this basis,

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<sup>1</sup> *Magee v. State*, 187 So. 2d 274, 279 (Ala. 1966); *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 2 L. Ed. 60; *State v. Groppi*, 41 Wis. 2d 312, 164 N.W. 2d 312, 164 N.W. 266 (1969); *State v. Beloit Stone*, 103 Wis. 2d 506, 309 N.W. 2d 28 (Ct. App. 1969).

the hearing examiner grants respondents' motion in part and denies it in part and does so for the following reasons.

Recognizing that due process of law requires a party's right to compel the attendance of persons to testify, if necessary, to his or her case, the question is whether the testimony of DOA Secretary Klauser and DMRS Administrator Lavigna is material and necessary to appellant's case.

Regarding DOA Secretary Klauser as a witness, the following observations apply:

As head of the Department of Administration, Secretary Klauser devotes the vast majority of his time developing the biennial budget and capital budget of state government. His other duties include supervision of budgeting, accounting and reporting to the Legislature. Matters involving the filling of civil service positions are delegated to the department's Division of Administrative Services. The tasks performed by DOA relating to filling the position at issue here were performed by DOA's Bureau of Personnel Director Peter Olson. Secretary Klauser's participation in this process was limited to advancing Mr. Swoboda's name as a candidate for the NCSB position and formally appointing him to the position at the conclusion of the hiring process.

ACE argues that Klauser as a named party and head of DOA, has the responsibility and critical knowledge regarding the processing of this position selection, but it is clear that Peter Olson was delegated that responsibility. ACE also argues that Klauser violated §§230.18, 230.20(1) and (2), Wis. Stats. In general, these statutes prohibit discrimination against a person on the basis of political or religious opinions or affiliations or membership. However, appellant would still have to show that Klauser played a significant enough role in the subject process to render his testimony necessary and material and, as concluded above, appellant has failed to do this.

Also, it is noted that ACE did not make use of the two-month discovery procedure. Later, after initially agreeing to consider an affidavit from Klauser, ACE rejected Klauser's proposal to prepare an affidavit out of hand. The issuance of subpoenas must be in accordance with the spirit and intent of the law. Clearly, subpoenas cannot serve for an inquisitional purpose. Renny Sportswear, Inc., 1983 N.Y.S. 2d 125 (1959).

Based on the information provided by the parties, it is concluded that Secretary Klauser's testimony is not material or necessary. Therefore,

respondents' request for a protective order regarding this witness is appropriately granted. See Claudia v. Scully, 982 F. 20798 (2nd Cir. 1992), US v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193 (1982).

DMRS Administrator Robert Lavigna, like Secretary Klauser, made certain delegations of his responsibilities to subordinates as provided by law. Responsibility for administering state agency requests to fill project positions was, along with various other functions, delegated to DMRS Policy Advisor Jesus Garza.

The DOA request for approval to staff the position in question was received from Olson by Garza. After reviewing DOA's request and discussing it with Olson, Garza recommended approval to fill the position on a project basis to Administrator Lavigna. After Lavigna discussed the applicability of criteria relevant to the request with Garza, he approved it. Garza also made recommendations and received approval from Lavigna for the specific recruitment and selection procedures used by DOA.

Based on the affidavits of Lavigna and Garza, both were involved in discussions and decisions which resulted in the approval of DOA's request. Lavigna's role and level of active participation appear substantial enough to render him a necessary witness and it is so concluded. Respondents' request, therefore, for a protective order regarding this witness is denied.

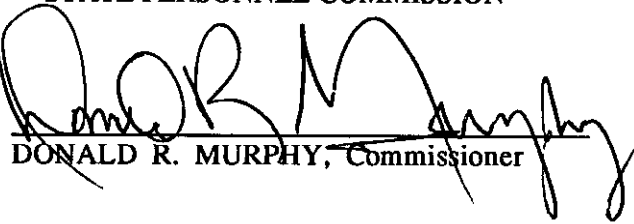
ORDER

Respondents' motion for a protective order quashing subpoenas compelling the appearance of Secretary Klauser and Administrator Lavigna at the hearing on this matter is granted for Secretary Klauser and denied for Administrator Lavigna.

Dated: June 26, 1995

STATE PERSONNEL COMMISSION

DRM:rcr

  
DONALD R. MURPHY, Commissioner