

JUDY OLMANSON,
Petitioner,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

INTERIM
EVIDENTIARY
RULING
BY EXAMINER

Case Nos. 97-0106-PC, 97-0183-PC-ER

The respondent requests that additional portions of a deposition of a witness be placed into the record. The request is premised on §804.07(1)(d), Stats., which provides:

If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other part.

At hearing in these matters, petitioner presented her case first.¹ At the commencement of the hearing, the examiner granted the respondent's request to briefly cross-examine witnesses called by petitioner and then to recall those witnesses during presentation of respondent's case in chief. After calling various witnesses, petitioner offered specific portions of a deposition taken of Susan Dreyfus into evidence rather than calling Ms. Dreyfus to testify. Petitioner had taken Ms. Dreyfus' deposition on June 2, 1999. Both parties had listed Ms. Dreyfus as a possible witness at hearing as provided in §PC 4.02, Wis. Adm. Code. Petitioner's request was memorialized in a submission dated June 8, 1999, and marked as Petitioner's Exhibit 37. The request covered the following portions of the deposition: a) Page 5, lines 2-6; b) page 11, lines 17-23; c) page 15, lines 19-25; d) page 16, lines 8-19; e) page 21, lines 3-11; f) line 20

¹ At the commencement of the hearing, the examiner granted the respondent's request to briefly cross-examine witnesses called by petitioner and then to recall those witnesses during presentation of respondent's case-in-chief.

of page 21 through line 11 of page 22; g) page 27, lines 7-11; h) page 33, lines 2-7; i) line 3 of page 34 through line 2 of page 35; j) page 35, lines 3-8; and k) page 39, lines 17-22.

Before a ruling on petitioner's request had been made, respondent, by letter dated June 10, 1999, asked that the Commission receive all of pages 21 through 39 of Ms. Dreyfus' deposition.

The undersigned examiner considered the two requests and analyzed respondent's June 10th letter in the context of the "fairness" standard in §804.07(1)(d), Stats., i.e. whether pages 21 through 39 included parts "which ought in fairness to be considered" with the portions referenced in petitioner's June 8th request. All segments of the Dreyfus transcript offered by petitioner were placed into the record as Petitioner's Exhibit 37. The examiner also granted respondent's request, in part, and denied it, in part. The parties were first notified of the ruling during the evening of June 10th. The examiner summarized it when the hearing reconvened on June 11th.

The examiner's ruling added the following portions of pages 21 through 39 of the Dreyfus deposition transcript to the hearing record to supplement a) through k) as listed above: 1) page 21, lines 12-19; m) line 12 of page 22 through line 3 of page 23; n) line 8 of page 33 through line 2 of page 34; and o) page 35, lines 9 and 10. Those portions were determined to be appropriate in order to properly understand the context of parts a) through k).

After several additional days of testimony and at the close of its case, respondent asked to introduce all of the remaining portions of the Dreyfus deposition. In the alternative, respondent moved for the introduction of the remaining portions of pages 21 through 39 of the transcript. Respondent based its request on the last clause in §804.07(1)(d), Stats., which provides that "any party may introduce any other parts." The examiner informed the parties he would provide them an opportunity to offer arguments relating to respondent's request at the time the hearing was reconvened on August 17, 1999, for the purpose of resolving disputes as to the submission of exhibits and scheduling post-hearing arguments. After listening to the arguments of the parties,

the examiner advised the parties he wished to perform additional research and would then issue a written ruling.

Respondent's present request raises the following issues: 1) May respondent make such a request at this point in the proceedings, and 2), if so, should either of respondent's requests, which were presented in the alternative, be permitted?

Respondent's current request(s) to supplement certain portions of Ms. Dreyfus' deposition with additional parts of the same deposition was not untimely. The relevant language of §804.07(1)(d), Stats., is identical to the language in Rule 32(a)(4) of the Federal Rules of Civil Procedure. The timing of an adverse party's request under the federal rule is discussed in *Moore's Federal Practice 3d*, §32.61[2][b][ii], pages 32-71 and 72, as follows:

As a matter of prudence, an adverse party should make its request to have additional portions admitted when the initial portion is first introduced into evidence. Occasionally, the failure to make a prompt request has been held to bar a later request that the additional testimony be received during the case of the proponent of the testimony.

The best practice is for the adverse party to request that the additional parts be read when the party who introduced excerpts from the deposition has completed his or her reading. This most effectively rebuts "the adverse inferences that might arise from the fragmentary or incomplete character" *unless the adversary has made a strategic decision to defer offering the other portions until cross/examination or until the adversary puts on his or her own case in chief or rebuttal case.*

The treatise then proceeds to quote a portion of the advisory committee comment to Federal Rule of Evidence 106, which largely mirrors Rule 32(a)(4), and which independently applies at trial: "The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his [or her] own case."

In the present case, the respondent initially asked that the portions of the Dreyfus deposition offered by petitioner be supplemented for purposes of "fairness." The examiner ruled on that request. Later, during its case-in-chief, respondent again asked that the deposition be supplemented. Because the respondent was permitted to recall

witnesses during its case-in-chief and had identified Ms. Dreyfus as a potential witness, the request now being considered may be reviewed in that context. Respondent did not waive its option of seeking to further supplement Ms. Dreyfus' testimony during respondent's case-in-chief.

The remaining question is whether respondent's requests, made in the alternative and during its case-in-chief, to admit the entire Dreyfus deposition, or all of pages 21 through 39 of the deposition, should be granted.

The Commission does not agree with respondent's argument that the last clause in §804.07(1)(d), Stats., gives a party an absolute right to introduce any and all other parts to a deposition whenever a portion of the deposition has already been introduced by a party. If respondent's argument was accepted, the second clause of the statute ("an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced") would become surplusage. Instead, the Commission interprets the last clause of §804.07(1)(d), ("any party may introduce any other parts") to mean that a party's subsequent offer of any other part of the deposition is subject to objection on grounds such as relevancy, materiality and privilege.

The undersigned has reviewed the Dreyfus deposition and concludes that no significant portion of the deposition would be appropriately excluded on objection by petitioner. Therefore, respondent's request to introduce the remaining portion of Ms. Dreyfus' deposition is granted. The original deposition, filed with the Commission on June 7, 1999, is marked as Respondent's Exhibit 173 and admitted into the record.

Petitioner also raised the specter of wanting to make similar requests as to all of the other transcripts that were, in part, read into the record. Complainant argued: "If you permit that then you will have to delay your ruling because I will want to review the whole transcript so I can come back and maybe introduce other [deposition] transcripts. . . . At some point we can not keep expanding and reopening cases. If you are going to rule that they are entitled to submit the whole thing, then you are going to have to rule after we [petitioner] have an opportunity to determine what other transcripts we want to introduce." Petitioner's argument relates to portions of depositions that had

been read into the record for reasons of impeachment, rather than in lieu of in-person testimony. Petitioner (and respondent) already had the opportunity to ask follow-up questions of those witnesses in an effort to clarify their live testimony as well as the snippets of their deposition that had been read into the record for impeachment purpose. Ms. Dreyfus is the only witness whose deposition was used in lieu of live testimony.


Petitioner is having a transcript of the hearing prepared. The briefing schedule will not begin until petitioner has received the transcription. Petitioner is to notify the Commission upon receipt of the transcript.

ORDER

For the reasons noted above, the original deposition of Susan Dreyfus, filed with the Commission on June 7, 1999, is marked as Respondent's Exhibit 173 and admitted into the record.

Dated: September 15, 1999

STATE PERSONNEL COMMISSION


KURT M. STEGE, Hearing Examiner

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