

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**RONALD M. MOLNAR**, Appellant,

vs.

**STATE OF WISCONSIN – DEPARTMENT OF CORRECTIONS**, Respondent.

Case 76  
No. 67495  
PA(adv)-133

**Decision No. 32336-B**

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**Appearances**

**Mr. Alan D. Eisenberg**, Attorney at Law, 3111 West Wisconsin Avenue, Milwaukee, Wisconsin 53208-3957, appearing on behalf of Appellant.

**Ms. Deborah Rychlowski**, Attorney at Law, Department of Corrections, 3099 E. Washington Avenue, PO Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of Respondent.

**ORDER**

Over the objection of Respondent, the Examiner orally granted Appellant's request to conduct a discovery deposition of one witness, Ms. Murphy, after the agreed upon time for conducting discovery had passed. Thereafter, the parties entered into an agreement in which this deposition would be conducted on September 10, 2008 at 10:30 a.m. at the Offices of the Department of Corrections, located on Rayne Road in Sturtevant, Wisconsin. No deposition was conducted on September 10, 2008. On September 29, 2008, the Examiner received Appellant's written request for the Examiner to reaffirm her original oral directive allowing Appellant to conduct the discovery deposition. Respondent's Attorney has requested that the Examiner rule that the deposition not be taken. Having considered the positions of the parties, as well as the record to date, the undersigned issues the following

**ORDER**

The Examiner withdraws her prior oral directive allowing Appellant to depose Melissa Murphy.

Dated at Madison, Wisconsin, this 17th day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

**STATE OF WISCONSIN – DEPARTMENT OF CORRECTIONS (Molnar)**

**MEMORANDUM ACCOMPANYING ORDER**

Initially, Appellant appeared *pro se*. As a *pro se*, Appellant and Respondent's Attorney, Deborah Rychlowski, agreed to discovery timelines. Thereafter, the parties engaged in discovery. After the expiration of the time for completion of discovery and shortly before the date of the previously scheduled hearing, Appellant retained an Attorney, Alan D. Eisenberg, to represent Appellant in his appeal.

Attorney Eisenberg advised the Examiner and Attorney Rychlowski that, due to scheduling conflicts, he was not able to appear at the hearing as previously scheduled and the hearing was postponed. Attorney Eisenberg also advised the Examiner and Respondent's Attorney that he wished to engage in discovery by deposing one witness, *i.e.*, Ms. Melissa Murphy. Respondent's Attorney objected to this deposition on the basis that the time for discovery had passed. The Examiner orally advised the Attorneys for Appellant and Respondent that, based upon the fact that Appellant had only recently obtained counsel and that this counsel had asked for limited discovery, *i.e.*, one deposition of Ms. Murphy, she would allow Appellant's Attorney to depose the one witness.

Thereafter, Attorney Eisenberg and Attorney Rychlowski agreed upon a date, time and place to conduct the deposition, *i.e.*, September 10, 2008 at 10:30 a.m. at the Offices of the Department of Corrections, located on Rayne Road in Sturtevant, Wisconsin. The Appellant, Attorney Rychlowski and Ms. Murphy, the witness who was the subject of the deposition, were present at the Offices of the Department of Corrections, located on Rayne Road in Sturtevant, Wisconsin on September 10, 2008 at 10:30 a.m.; but neither Attorney Eisenberg, nor a court reporter, were present. No deposition was taken on September 10, 2008.

By letter dated September 19, 2008, Attorney Rychlowski requested that the deposition of Ms. Murphy not be taken. In this letter, Attorney Rychlowski asserts that, at approximately 10:25 a.m. on September 10, 2008, Appellant handed Attorney Rychlowski a cell phone and told her that Attorney Eisenberg wished to speak with her; that, at that time, Attorney Eisenberg informed her that he was running late due to a court appearance and that he would arrive in approximately fifteen minutes; that Attorney Rychlowski responded that was fine and she would wait for Attorney Eisenberg; that, at approximately 10:30 a.m., Appellant handed Attorney Rychlowski a cell phone and told her that Attorney Eisenberg again wished to speak with her. Attorney Rychlowski states that, at that time, "Atty. Eisenberg stated that his office had erroneously assumed that because the deposition was scheduled at the offices of the Department, that the Department would be arranging for the court reporter to be there. Atty. Eisenberg stated that his office had not made any arrangements for the court reporter to be at the scheduled deposition, so that the deposition would have to be rescheduled. . . ."

In a letter dated September 25, 2008, Attorney Eisenberg states:

This is regarding the letter to you from Attorney Rychlowski dated September 19, 2008.

Her letter detailed errors made in our office and she is correct. We have profusely apologized already. Opposing Counsel has been evasive and elusive on setting a rescheduled date which we are ready, willing, able and eager to accomplish.

We supplied her with numerous dates, and she waited an unreasonably long time to pick the only date that had been taken by another court. We continued to believe that pursuit of the truth in an important case like this should be a paramount concern.

Please reaffirm your original directive allowing a deposition.

Appellant's e-mail of September 25, 2008 7:56 PM to Attorney Eisenberg states:

I read through the sept. 19, 2008 letter from Deb Rychlowski to Coleen Burns regarding the deposition of Melissa Murphy. I found it to be missing some information regarding the conversation Rychlowski had with you on the day the depositions were postponed. The letter neglected to indicate that she was amenable to having the deposition rescheduled. She did not wish to await your arrival some 10 minutes later and when the reporter matter was mentioned, she indicated we needed to reschedule. That was clearly agreed to by Rychlowski at that time and it bewilders me how she is now opposing the deposition.

Attorney Eisenberg's responsive e-mail of September 25, 2008 at 10:01 PM states:

He is absolutely correct; I was willing to come ahead and get a reporter on short notice and she agreed to reschedule the deposition.

In her e-mail of September 26, 2008 at 10:32 a.m., Attorney Rychlowski states, in relevant, part:

. . .

When I spoke with Atty. Eisenberg the second time, about five minutes later, Atty. Eisenberg told me that his office had erroneously failed to hire a court reporter for the deposition, and Atty. Eisenberg said that we had to reschedule the deposition. Atty. Eisenberg never made any suggestion that he would be willing to attempt to locate a court reporter on short notice and never offered to do so. If Atty. Eisenberg was willing to attempt to locate a court reporter on short notice, he never said that to me. His e-mail states that he was willing to do that. However, his e-mail does not state that he told me that.

. . . Atty. Eisenberg stated that the deposition would have to be rescheduled. He stated it as a fact. He gave no other alternatives. Atty. Eisenberg said that he would get his office on the line to let me know of dates for his future availability for the deposition. I said that since the deposition wasn't going to happen that date, that there was no urgency to it, and it would be discussed later. . . . While I was on the phone with Atty. Eisenberg, I did tell Annette Schubert and Melissa Murphy, who were in the room sitting next to me, that Atty. Eisenberg said that his office had erroneously failed to hire a court reporter and that the deposition would have to be rescheduled.

. . .

As far as Mr. Molnar's version of the events, it makes no sense. If I said that DOC would not be willing to wait for Atty. Eisenberg to appear when he said that he would be late to the deposition, there would be no reason for Atty. Eisenberg to request to speak to me five minutes later and tell me that his office had erroneously failed to hire a court reporter. If what Mr. Molnar states were the truth, it would already have been determined that the deposition would not take place and there would be no need for the second phone call regarding the reporter.

Also, Mr. Molnar was not part of my telephone conversation with Atty. Eisenberg. It was not a three way call. Mr. Molnar was standing in the same room where I was sitting during my phone call with Atty. Eisenberg, but was not part of the phone conversation. . . .

. . .

In an e-mail dated September 26, 2008 7:35 p.m., Attorney Eisenberg states:

The information supplied by Ms. Rychlowski is false. The information we reported is accurate. We want to reschedule the deposition and get on with the case.

In his e-mail of September 25, 2008, the Appellant states that he read Attorney Rychlowski's letter of September 19, 2008 and then comments on certain missing information regarding the conversation that Attorney Rychlowski had with Attorney Eisenberg on September 10, 2008. Appellant does not take issue with Attorney Rychlowski's assertion that Appellant had handed a cell phone to Ms. Rychlowski so that she could speak with Attorney Eisenberg on two occasions.

It is apparent that Appellant was not privy to statements made by Attorney Eisenberg during the two telephone conversations with Attorney Rychlowski. Thus, Appellant cannot know what was said by Attorney Eisenberg regarding the reporter, or any other matter, during the two telephone conversations.

Much of the information supplied by Attorney Rychlowski in her e-mail of September 26, 2008 is consistent with the information that she supplied in her letter dated September 19, 2008. Attorney Eisenberg's letter dated September 26, 2008, "regarding" Attorney Rychlowski's letter of September 19, 2008 does not contest the veracity of such information. Attorney Eisenberg's blanket statement that "The information supplied by Ms. Rychlowski is false" cannot be accurate.

### Conclusion

The most reasonable conclusion to be drawn from the information provided to the Examiner is that, on September 10, 2008, Attorney Eisenberg did not tell Attorney Rychlowski that he was willing to come ahead and attempt to obtain a court reporter on short notice; but rather, told Attorney Rychlowski that, due to his office's failure to arrange for a court reporter, the deposition of Ms. Murphy would have to be rescheduled. If on September 10, 2008 Attorney Rychlowski had made an agreement with Attorney Eisenberg to reschedule the deposition, it is likely that Attorney Eisenberg would have referenced such agreement in his September 25, 2008 letter "regarding" Attorney Rychlowski's letter of September 19, 2008. The information provided to the Examiner does not warrant the conclusion that, on September 10, 2008, Attorney Rychlowski communicated an agreement to reschedule the deposition to Attorney Eisenberg.

As the party requesting to take the discovery deposition of Ms. Murphy, the Appellant has the responsibility to arrange to have a court reporter present to take this discovery deposition at the time and place agreed upon by the parties. Attorney Eisenberg has confirmed that, due to errors in his office, no court reporter was present to take the deposition of Ms. Murphy at the time and place agreed upon by the parties. Attorney Eisenberg has also confirmed that, as reported by Attorney Rychlowski, the error in his office was a misperception that DOC would be providing the court reporter. The information provided to the Examiner provides no reasonable basis to conclude that this misperception was due to any conduct upon the part of Respondent.

As discussed above, Appellant, over the objection of Respondent, requests the Examiner to reaffirm her prior directive allowing Appellant to take a discovery deposition of Ms. Murphy. The effect of this prior Examiner directive was to extend the time for discovery for the limited purpose of allowing Appellant to depose Ms. Murphy.

This matter involves a personnel appeal that is subject to **PC 4.03 Discovery**, which states:

All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission or the hearing examiner may issue orders to protect persons or

parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery.

Appellant's failure to arrange to have a court reporter present to take Ms. Murphy's discovery deposition at the time and place agreed upon by the parties was not for good cause. As a result of this failure, Ms. Murphy could not be deposed at the time and place agreed upon by the parties and Respondent suffered undue burden and expense. Not only was there waste of Respondent employee Attorney Rychlowski's work time; but also, Respondent incurred costs associated with Attorney Rychlowski's travel between Madison and Sturtevant, Wisconsin. Additionally, Ms. Murphy was unnecessarily inconvenienced. Accordingly, the Examiner withdraws her prior oral directive allowing Appellant to depose Melissa Murphy.

Dated at Madison, Wisconsin, this 17<sup>th</sup> day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

