STATE OF WISCONSIN : CIRCUIT COURT : SHEBOYGAN COUNTY

JAMES SCHLUETER,
d/b/a A & W SOUTH,

Plaintiff,

v.

MEMORANDUM DECISION

STATE OF WISCONSIN, LABOR AND
INDUSTRY REVIEW COMMISSION, and
WILLIAM A. WILSON,

Case No. 81 CV 512

Defendants.

This action is before the Court on the employer's §108.09(7), Stats., petition for judicial review of the May 5, 1981 decision of the Labor and Industry Review Commission (hereinafter Commission) affirming the April 1, 1981 determination of the appeal tribunal which found that the employee had not been discharged for misconduct, and thus was eligible for unemployment compensation benefits.

The employer has filed a series of motions with this Court seeking (1) an evidentiary hearing to determine if the employer had good cause for failing to appear at the March 25, 1981 appeal tribunal hearing; (2) for an evidentiary hearing to determine the facts concerning the employee's discharge; and, (3) for an order to make the answer of the Commission more definite and certain.

The hearing on the employer's motion was conducted November 9, 1981; present were Attorney Donald Koehn, on behalf of the employer, and Attorney Earl Buehler, on behalf of the Commission.

I. COMMISSION'S ANSWER. The employer seeks an order to make the Commission's answer more definite and certain. Rule 802.06(6), WIS.R.CIV.PRO., allows such a motion where the moving party cannot file a responsive pleading due to the vagueness and ambiguity in the pleading that requires a response. The employer does not have to file any response to the Commission's answer; therefore, it is not in the position to demand a more definite and certain answer. The Commission's answer complies with the requirements of Rule 802.02(2), WIS.R.CIV.PRO., and is sufficient.

II. EVIDENTIARY HEARINGS.

A. Discharge. The employer has asked this Court to conduct an evidentiary hearing to establish the facts concerning the employee's discharge. In reality, the employer is asking for a trial de novo.

On review of a Commission decision, this Court is prevented from receiving any evidence with the exception that testimony may be received on the issue of whether the Commission has engaged in any illegal action or conduct in rendering its decision. Weibel v. Clark, 87 Wis.2d 696, 708,

275 N.W.2d 686(1979); §§102.23(1) and 108.09(7), Stats. The Court is thus barred from granting the employer's motion, his petition for judicial review does not allege any fraud on the part of the Commission, and the Court cannot conduct a trial de novo on the employee's discharge.

B. Continuances. The real crux of the employer's motion is the request for an evidentiary hearing as to whether or not his petition for a rehearing under §108.09(3)(e), Stats. should have been granted.

The employee appealed from the initial determination denying benefits, and a hearing before an appeals tribunal was scheduled for February 26, 1981. At the request of Attorney William Fale, the employee's attorney, that hearing was postponed and rescheduled for March 25, 1981. Notice of the March 25th hearing was sent directly to the employee, his attorney and the employer, and that notice was dated and mailed March 16, 1981.

Even though Attorney Donald Koehn, counsel for the employer, had entered his written appearance on behalf of the employer on February 24, 1981, the March 16th notice was not mailed directly to him according to his letter of March 18, 1981.

On March 17, 1981, the employee's attorney requested another adjournment because of a prior commitment; however,

that request was denied by letter of March 1981. In part, that letter advised the employee's attorney that, "(y)ou and your client are expected to arrange time off from your everyday affairs."

On March 18, 1981, Attorney Koehn wrote to the Fox River Valley Hearing Office requesting a postponement of the March 25, 1981 hearing because of a prior commitment on his calendar. This request was also denied by letter on March 20, 1981. In part, this letter advised Attorney Koehn that, "(p)arties are expected to make all of the necessary arrangements to be present at their hearing."

The March 25, 1981 hearing proceeded as scheduled. The employee's appearance was by the employee without counsel, and he presented the only evidence considered at the hearing. At the conclusion of the hearing, the appeals tribunal reversed the initial determination and found that the employee was not discharged for misconduct and was entitled to unemployment compensation benefits.

Pursuant to §108.09(3)(e), Stats., the employer, by his counsel, filed a petition for rehearing setting forth the reasons that the employer and counsel failed to appear at the March 25th hearing. This petition for rehearing was denied on April 10, 1981 by the hearing examiner acting as the appeal

tribunal on the grounds that the reasons set forth were not a satisfactory explanation for the employer's absence.

The decision of the hearing examiner, acting as the appeals tribunal, not to postpone the March 25th hearing or to grant the petition for rehearing, is not of the same tenor or character as decisions on benefits which the Court must affirm if there is any credible evidence to support such a decision. Wehr Steel Co. v. DILHR, 102 Wis.2d 480, 486, 307 N.W.2d 302(Ct.App. 1981).

The decision as to postponement or to grant the rehearing is a discretionary act that is subject to review by this Court. See, Kropiwka v. DILHR, 87 Wis.2d 709, 275 N.W.2d 881(1979). And, the question is simply whether, considering the record as a whole, the hearing examiner abused his discretion.

By refusing to grant the employer's request for a postponement and by denying the petition for rehearing, the hearing examiner prevented the employer from being heard by counsel. The well-known rule of law in Wisconsin is,

> . . . that the following due process rights must be accorded in any quasi-judicial administrative action: (1) the right to seasonably know the charges; (2) the right to meet the charges by competent evidence; and (3) the right to be heard by counsel. [Citations Omitted.]

Weibel, 87 Wis.2d at 701. These due process rights are to be afforded to both the employee and the employer.

This rule has been included in the unemployment compensation statute, §108.09(3)(a), Stats., guarantees to both the employee and the employer a reasonable opportunity to be heard.

The Court is hard pressed to find any rational basis for the decision not to allow the employer to be heard by counsel. In fact, the demand of the hearing examiner that Attorney Koehn is "expected to make all of the necessary arrangements to be present" smacks of arrogance because it would require Attorney Koehn to cancel commitments which were set before the hearing date was established by the hearing examiner. Without even an attempt to determine the nature of the commitment Attorney Koehn had, (it could have been an appearance before a court of record or another administrative agency or an appointment with a client) or when Attorney Koehn had made that commitment, the hearing examiner blithely directed him to cancel that commitment or face the consequences or his client would face the consequences. The Court is not aware of any statutory provision giving unemployment compensation hearings such absolute priority.

The denial of the employer's petition for a rehearing is not any better. In fact, it could be inferred that there is

a double standard that is applied, when an employee or his attorney requests a postponement, that request is honored simply for their convenience, but a postponement request by an employer or his attorney is rejected out-of-hand. The hearing examiner's reasoning that to have granted the employer the requested ponstponement of the March 25th hearing would have worked an undue hardship on the employee is unsupported by the record.

The record reflects that the hearing examiner had previously granted the employee a 28-day delay. The employer was not seeking such an extensive delay; rather, Attorney Koehn's letter of March 18, 1981 indicates that he would have been available and would have been willing to be present at the hearing during the period of April 1 - 3, 1981; thus, the delay would have been no greater than 7 - 10 days.

The response of the hearing examiner to the petition for a rehearing is weighted heavily toward the due process rights of the employee. The hearing examiner failed to consider the due process right of the employer to be present and to be heard by counsel. The hearing examiner failed to balance the equally important due process rights of the competing parties. Cf., State v. Wedgeworth, 100 Wis.2d 514, 520-23, 302 N.W.2d 810(1981)(wherein the Supreme Court

discusses the balancing of rights a trial court must conduct before ruling on a motion for a continuance.) By reaching his decision without having conducted the required balancing test, the hearing examiner clearly abused his discretion and acted in an arbitrary and capricious manner.

In a review of the entire record, the Court comes to the inescapable conclusion that the March 25th hearing should have been postponed to accommodate the due process rights of the employer, and that the requested postponement would not have worked an undue hardship upon the employee. And failing that, the petition for rehearing which does set forth good cause for the employer's absence, should have been granted.

This action must be remanded with directions that an order be entered pursuant to §108.09(3)(e), Stats., granting the employer's petition for a rehearing on the grounds that he has established probable good cause for being absent from the March 25, 1981 hearing; and that a new hearing on the employee's appeal of the initial determination denying him unemployment compensation benefits be conducted before an appeal tribunal other than the one that issued the initial decision and ruled on the petition for rehearing.

Employer's counsel shall prepare the appropriate order and file it with the Court within 20 days. The Commission's

counsel shall thereafter have five business days to object to the form or content.

So Ordered.

Dated this 8th day of January, 1982.

BY THE COURT:

Daniel P. Anderson
Circuit Judge