

COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND MASSACHUSETTS NURSES ASSOCIATION, SUP-2414 (10/29/80). Ruling on Interlocutory Appeals.

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Commissioners Participating:

Phillips Axten, Chairman
 Joan G. Dolan, Commissioner
 Gary D. Altman, Commissioner

**RULING ON INTERLOCUTORY
 APPEALS**

Facts

On August 1, 1980, the Labor Relations Commission (Commission) issued its Complaint of Prohibited Practice in the above-captioned case, concerning employees of the Commonwealth of Massachusetts (Commonwealth) in statewide Unit 7 who work for the Valley Adult Counseling Service, Inc. (VACS) and the South Shore Mental Health Center (SSMHC) under provider agreements with the Commonwealth's Department of Mental Health (DMH). The Complaint alleged an unlawful unilateral change in the private practice policies at both VACS and SSMHC. An Expedited Hearing on the Complaint was scheduled for August 21, 1980.

On August 20, 1980, Valerie Semensi of the Office of Employee Relations (OER), counsel for the Commonwealth, telephoned the Commission's Executive Secretary seeking a postponement of the hearing because her "main" witness, Ronald Hirsch, SSMHC director, was unavailable. Gabriel Dumont, counsel for the Massachusetts Nurses Association (MNA), the charging party, objected to the postponement because his witnesses were already prepared to be present and because the request was not timely.¹ The Executive Secretary's office denied the postponement.

The Expedited Hearing convened as scheduled on August 21st before Hearing Officer Rachel J. Minter. At a pre-hearing conference with counsel, the hearing officer indicated to Ms. Semensi her willingness to schedule a subsequent date to take Mr. Hirsch's testimony. The hearing officer then asked the parties how many witnesses each had brought and the anticipated length of the hearing. Ms. Semensi stated that she would be calling another

¹402 CMR 12.06 provides that "Except for good cause shown, no request for postponement will be granted on any of the three days immediately preceding the date of hearing or conference."



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witness in addition to Hirsch, VACS director Benjamin Lewis, but that she had not brought Mr. Lewis with her that day. The hearing officer asked Ms. Semensi if Mr. Lewis was also unavailable; Semensi replied that Lewis was available, but that because her request for a postponement had been denied, and she did not wish to "split up" her witnesses, she had chosen not to bring Lewis and would call him on a second day of hearing. The MNA objected to this plan, because the case involved two separate facilities; if Lewis testified that day, all testimony relating to VACS would be concluded, and the union witnesses from VACS could be excused.

The hearing went forward with the union's witnesses. Counsel for the Commonwealth requested a noontime adjournment to bring in another witness and this request was granted. After lunch, the Commonwealth opened its case by calling as its first witness Joan Tighe of the Office of Federal Affairs at DMH.

At the completion of the examination of Ms. Tighe, the Commonwealth indicated it had no further witnesses present, but intended to call Lewis and Hirsch on the next day of hearing. The MNA reiterated its objection to a continuance as to testimony relating to VACS. The hearing officer again advised Ms. Semensi and Mr. Dumont that she was prepared to schedule another day to take Hirsch's testimony, and the date of September 19, 1980 was agreed upon.

The hearing officer ruled, however, that she would not permit Mr. Lewis to take the stand on the subsequent date. The basis for her ruling was that Ms. Semensi had had the opportunity to call Lewis on August 21, but by her own admission opted not to; that the MNA would be prejudiced by having to bring its VACS witnesses in for a second day, when testimony relating to VACS could have ended with Lewis' testimony on that day; and that, while objecting to presenting her case over two days, Ms. Semensi had in fact opened the Commonwealth's case by calling Tighe.

On September 19, 1980, the parties appeared and Ms. Semensi attempted to call Benjamin Lewis as her first witness. The hearing officer reiterated her ruling excluding Lewis' testimony. The Commonwealth took the position that this ruling exceeded the hearing officer's authority as set forth in 402 CMR 13.05. The hearing officer referred the parties to 402 CMR 13.02(4),³ which

³Prior to the close of a hearing, a party may seek relief from a ruling or order of the hearing officer in the following manner:

- (a) the request for relief must be in writing and addressed to the Executive Secretary.
- (b) the request must set forth with specificity the ruling or order from which relief is sought, and grounds on which the party believes that it is entitled to relief, including why review following the close of the hearing is not an adequate remedy.

Such requests for review shall not operate to delay or interrupt the hearing. The ruling of the hearing officer shall remain in effect until and unless
(footnote continued on following page)

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provides for interlocutory review of a hearing officer's decision in the course of a hearing. Counsel for both parties and the hearing officer agreed that the record would remain open until 5 pm, September 22, 1980, to permit the Commonwealth to seek relief under Rule 13.02(4).

The testimony of Ronald Hirsch, SSMHC director, was then taken, without incident.

Upon completion of Hirsch's testimony, Ms. Semensi called Karen Orsini, assistant director of VACS, to the stand. Mr. Dumont objected to her testimony on similar grounds as the objection to Lewis' testimony. The MNA witnesses from VACS were not present on September 19, as the MNA understood that testimony on the second day was to be limited to matters involving SSMHC; if Orsini was allowed to testify, the MNA demanded that union witnesses be allowed a subsequent opportunity for rebuttal, and would prefer that no testimony relating to VACS be taken until its witnesses were present. In addition, Dumont stated that if Orsini was to testify, the hearing officer might as well permit Lewis to testify, if Orsini's appearance was merely the Commonwealth's way of circumventing the ruling on Lewis.

The hearing officer stated that, after reviewing the tapes of the first day of hearing, and upon her recollection of conversations with counsel both on and off the record, it was her understanding that testimony on September 19 would be limited to SSMHC. Therefore, the hearing officer ruled that Orsini would not be permitted to testify in lieu of Lewis, and that this ruling could also be appealed under 13.02(4).

At this point, George Perry, who indicated that he is the attorney for Valley Adult Counseling Service, asked to be heard. Mr. Perry orally moved to intervene, on the basis that VACS was an interested party. Perry argued that VACS was in fact the employer of the affected employees ("both a private and a public employer"), had received no notice of the first day of hearing, and had had no opportunity to cross-examine MNA witnesses from VACS who had appeared on that day.

The MNA opposed intervention. Counsel for the Commonwealth stated that VACS had an interest in the proceedings and outlined the sequence of events relating to notice: When the charge was filed, Semensi contacted DMH and a representative from that agency accompanied her to the informal conference held in this matter. When the hearing date was set, Semensi asked the DMH representative to have VACS and SSMHC personnel at her office the morning of the hearing. She did not know the status of DMH's communications with the centers. When Semensi was advised on August 20 that Hirsch was on vacation, she decided "it was not fair to go half-way" through the case and told DMH not to have Lewis come in.

³(continued from previous page)
modified or overruled by the Commission. The Commission may, at its discretion, defer any ruling on such requests until the close of the hearing."



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The hearing officer denied Perry's motion to intervene on the basis that VACS is not the statutory employer, that the Commonwealth had not defended on the basis that it was not the employer, and that therefore VACS had no standing to intervene. Perry was advised of the procedure for interlocutory appeal under Rule 13.02(4), although the hearing officer ruled that VACS was not a "party" within her understanding of that rule.

The hearing was adjourned with the reminder that counsel were to file petitions for relief from the hearing officer's rulings before the record closed on September 22, 1980 at 5 pm.

Opinion

On September 22, 1980, the Commonwealth filed with the Executive Secretary its request under Rule 13.02(4) for relief from the hearing officer's ruling excluding the testimony of Benjamin Lewis and Karen Orsini.

On September 26, 1980, Perry, on behalf of VACS, filed a Motion to Reopen Hearing, pursuant to 402 CMR 13.12 and an appeal of the hearing officer's ruling denying the motion to intervene.

We will deal with these seriatim.

The Testimony of Lewis and Orsini

When ruling on "interlocutory appeals" under Rule 13.02(4), our standard of review is whether the hearing officer abused his or her discretion. Upon examination of all of the circumstances, we find that it was not an abuse of discretion for the hearing officer to have excluded the testimony of Lewis and Orsini.

A party to the Commission's proceedings is expected to appear on the scheduled hearing date prepared to go forward. Of course, when this is impossible because of extenuating circumstances such as unavailability of a witness, accommodation can be made; and the hearing officer did arrange to re-schedule Hirsch's testimony.

There was no reason why Lewis could not have testified on August 21, and where the Commonwealth voluntarily chose not to bring him, it made that decision at its peril. We understand Ms. Semensi's desire to examine all her witnesses together. Nonetheless, we note that in order to litigate a case most efficiently, the scheduling of witnesses is often juggled by the parties. In any event Ms. Semensi called Tighe on the afternoon of the first day and thus chose to divide her presentation. Moreover, the Commonwealth's unwillingness to proceed on August 21 essentially wasted the remainder of the time which counsel, the Commission, and the hearing officer had set aside for this case. Finally, continuing the VACS aspect of the case would have caused some hardship to the other side. Considering all of these circumstances, we cannot conclude that it was an abuse of discretion to exclude Lewis testimony.

Once the hearing officer had made her ruling on August 21st, that she would not allow Lewis to testify, the MNA and the hearing officer proceeded



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with the understanding that testimony on September 19 would involve only SSMHC.

Orsini was called by the Commonwealth on September 19, to offer testimony on VACS. In other words, Orsini was called by the Commonwealth to offer testimony that would have been introduced if Lewis's testimony had not been excluded. The same factors of prejudice and hardship to the MNA, and inefficient use of agency time and resources existed if Orsini were allowed to testify. We conclude, therefore, that the hearing officer's ruling to exclude the testimony of Orsini was not an abuse of discretion.

VACS Motion to Intervene

We note, initially, that VACS' request for relief pursuant to Rule 13.02(4) is not timely. That rule requires that such request be filed "prior to the close of the hearing," and the record in this case was held open until 5:00 September 22 expressly for the purpose of permitting counsel to file objections to the hearing officer's rulings. In addition, it is debatable whether VACS is a "party" entitled to seek relief under 13.02(4).

Nevertheless, we will rule on the merits of the motion to intervene; and on VACS' motion to reopen the hearing filed pursuant to Rule 13.12.

Whether we apply an abuse of discretion standard, or engage in an independent assessment, we are persuaded that the hearing officer ruled correctly in denying the motion to intervene and we therefore decline to reopen the hearing to permit VACS' participation as a party.

It is clear from the record that the Commonwealth is the statutory employer of employees at VACS and SSMHC who are on the State payroll and who are included in statewide bargaining Unit 7. Moreover, the Commonwealth has in its answer admitted jurisdiction over the Unit 7 employees. Any decision or order issued by the Commission will affect only Commonwealth employees at these facilities, as the Complaint does not assert jurisdiction over any other employees. The statutory scheme created by the definition of "employer" in G.L. c. 150E §1 contemplated that, although the Commonwealth is composed of many agencies, only the commissioner of administration represents the Commonwealth and "acts in its interest in dealing with public employees." The agency concerned may work with OER in preparation of a defense to a prohibited practice complaint, but that agency is represented by OER and is not an independent party to our proceedings. Although VACS is not an agency of the Commonwealth, it is in an analogous position. Specifically, its interests as to state employees must be protected through the Commonwealth's representative.

The arguments which VACS raises as to its lack of notice of our proceedings also relate to the issue of who is the employer. It is regrettable that communications apparently broke down between OER, DMH and VACS, however, the Commission's notification requirements were met by service of the Complaint upon OER, which serves as counsel to the Commonwealth in collective bargaining matters.



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Conclusion

For all the aforesaid reasons, we find that the hearing officer did not abuse her discretion in excluding the testimony of Benjamin Lewis and Karen Orsini, and we decline the Motion by VACS to intervene and re-open the hearing in this matter.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, CHAIRMAN
JOAN G. DOLAN, COMMISSIONER
GARY D. ALTMAN, COMMISSIONER

