

It is ordered, That respondent's application for leave to appeal be, and it hereby is, denied.

It is further ordered, That the matter be returned to the examiner with instructions to grant an extension of three weeks from the date now set for the trial to commence, or such further time as he might within his discretion deem necessary in light of his own evaluation of all the factors involved.

Commissioner MacIntyre concurring in the result.

THE STANLEY WORKS

Docket 8760. Order, January 30, 1969

Order denying respondent's request for the production of confidential documents.

ORDER DENYING REQUEST FOR THE PRODUCTION OF CONFIDENTIAL DOCUMENTS

This matter is before the Commission upon the request of respondent for the production of confidential documents, filed December 12, 1968, and complaint counsel's opposition thereto, filed December 18, 1968. This request seeks to reactivate an application of July 24, 1968, which has been held in abeyance pending the outcome of a simultaneously filed motion for issuance of a subpoena directed to the hearing examiner. The request for the production of confidential documents was filed under the Public Information Section of the Administrative Procedure Act¹ and the motion for issuance of a subpoena was made pursuant to the Commission's discovery rules.²

In its request of December 12, 1968, respondent states that "[t]he Hearing Examiner in the above case has now denied Stanley's Motion for Issuance of a Subpoena." Review of the transcript, however, reveals that motion was granted in part and only denied with respect to applicant material (Tr. 222). Accordingly, the better part of respondent's request is now moot. As to the applicant material, the examiner is of the opinion that he is not "at liberty to order the production of this material" and he denied the motion as to it.

The Rules of Practice are silent on the question whether or not the examiner may order the production of applicant material. Since Section 3.36 does not limit the examiner's authority

¹ 5 U.S.C. Sec. 552.

² Sec. 3.36, Rules of Practice.

in this respect, there does not appear to be any reason why he should not have the authority to rule on the motion. If the examiner should, as he in fact did in this proceeding, deny the motion, the orderly and expeditious conduct of the proceeding would require the parties, if they disagreed with the examiner's decision, to appeal to the Commission within the time specified by the Rules of Practice.

Since the examiner's opinion concerning his authority to rule on the motion for issuance of a subpoena may have misled respondent and, as will be explained below, action on an improperly made request for the production of confidential documents was deferred (to the possible prejudice of respondent), the examiner is instructed to consider *de novo* that part of respondent's motion for issuance of a subpoena previously denied.

With respect to the request of July 24, 1968, reactivated on December 12, 1968, it states that it is made pursuant to Section 4.8(b) of the Rules of Practice and is predicated upon the Public Information Act of 1966. It is noted that Section 4.8(b) refers to the availability of public information; requests for confidential information predicated upon the Public Information Act must be made under Section 4.11. Furthermore, Section 4.11(b) requires such requests to be made under oath, which respondent failed to do. In any event, Section 3.22 of the Rules of Practice requires that all motions made during the time a proceeding is before an examiner, with the exception of those relating to the disqualification of the examiner, shall be directed to the examiner, which respondent did not do either. Should the examiner have no authority to rule on the motion, the rules require him to certify it to the Commission, along with his recommendations. This requirement is imposed to insure the orderly conduct of the proceeding. It also enables the Commission to obtain the views and recommendations of the examiner, which would otherwise be missing. For these reasons respondent's request will be denied. Accordingly,

It is ordered, That respondent's request for the production of confidential documents be, and it hereby is, denied.