Commission on Human Rights and Opportunities ex rel. Marcia McIntosh-Waller	: Connecticut Commission on Human Rights and Opportunities : : CHRO No. 0750080
v.	: Fed. No. 01-07-0200-8 :
Donna and David Vahlstrom	: March 19, 2008

Ruling re: the respondents' motion to re-open

The public hearing in this matter was held on February 20, 2008 and February 26, 2008. Attorney Michelle Dumas Keuler represented the commission; the complainant appeared pro se; and Attorney Andrew Houlding represented the respondents. The respondents did not testify at the public hearing because, although they were listed on the commission's proposed witness list, the commission chose not to call them and because they were not listed on their own witness list. On March 4, 2008, the respondents filed a motion and memorandum to re-open the hearing to permit them to testify. On March 18, 2008, the commission filed its objection.

The respondents' motion is denied.

In arguing that they have "a right to testify" and "a right to present evidence;" Memorandum, pp. 3, 4; the respondents ignore the clear and unambiguous language of the statute and regulations they themselves cite. The respondents erroneously contend that General Statutes § 4-177c gives them a right, indeed an absolute right, to present

evidence. Memorandum, p. 4. Section 4-177c, though, does not say that. What §4-177c does say is:

> (a) In a contested case, *each party* and the agency conducting the proceeding *shall be afforded the opportunity* (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.
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> (b) Persons not named as parties or intervenors may, in the discretion of the presiding officer, be given an opportunity to present oral or written statements. The presiding officer may require any such statement to be given under oath or affirmation.

(Emphasis added.) In other words, the parties do not have an unfettered, absolute right to present evidence and testimony; they are afforded *an opportunity* to present evidence and testimony, an opportunity that they can either utilize or not. The parameters of this opportunity are further detailed in sections 46a-54-78a and 46a-54-90a of the Regulations of Connecticut State Agencies.

Section 46a-54-78a (b) defines conferences and hearings to "include, but are not limited to, the following . . . (4) Hearings, which provide the parties *with a reasonable opportunity, as determined by the presiding officer*, to present evidence and examine

and compel the attendance of witnesses for resolution and disposition of the complaint on its merits . . . .” (Emphasis added.) Section 46a-54-90a (b) provides that: “Parties may call, examine and cross-examine witnesses and introduce evidence into the record of the proceedings, *subject to the ruling of the presiding officer and as provided in section 46a-54-78a to section 46a-54-96a,* inclusive, of the Regulations of Connecticut State Agencies and the Connecticut General Statutes.” (Emphasis added.) Thus, the regulations track the statute that a party’s participation in a contested case is a reasonable opportunity subject to oversight by the presiding referee, not an unrestricted right.

Contrary to the respondents’ assertion that they have been treated as non-party witnesses; Motion, p. 1; they have been treated as parties and have been expected to abide by the practices and procedures applicable to all parties. As set forth in the hearing conference summary and order of May 1, 2007, the respondents were provided with the opportunity, and took advantage of the opportunity, to request the production of documents for inspection and copying; object to opposing parties’ request for the production of documents; file motions to compel the production of documents; submit proposed witness and exhibit lists; attend the hearing conference, settlement conference and public hearing; and cross examine witnesses called by the commission, even being permitted to cross-examine the commission’s witnesses beyond the commission’s scope of direct examination.

With respect to proposed witnesses, all parties were placed on clear and unequivocal notice that they were to file and serve a "list of the party's proposed witnesses, their addresses, summary of proposed testimony . . . . Witnesses not listed, except for impeachment and rebuttal, may not be permitted to testify except for good cause shown . . . ." Hearing conference summary and order, p. 4. The respondents did in fact file and serve a witness list on October 12, 2007 in which they listed only one potential witness, James Michaud. Despite the clear notice that proposed witnesses were to be listed on a witness list and clear notice of the consequences of not identifying people as potential witnesses, the respondents did not list themselves as witnesses on their witness list. The respondents also did not file a motion to amend their list to include themselves after the then-presiding officer ruled that the commission could list and call the respondents as witnesses in its case-in-chief (over the strenuous objection of the respondents). Further, although the commission notified the respondents at the hearing on February 20, 2008 that it would not be calling them as witnesses, the respondents again failed to file a motion to amend their list to include themselves for the February 26, 2008 hearing. Because there is no rule which requires parties to testify or even to attend a hearing; *Lisa, Inc. v Amore Apizza, LLC*, superior court, judicial district of New Haven at New Haven, Docket No. NNH-CV-02-0464367s (February 27, 2003) (2003 WL 1090517); the requirement that all potential witnesses, including parties, be identified on the proffering party's witness list is not unreasonable. The respondents, though, did not show that good cause existed for their failures to

include themselves on their witness list and amend their witness list to include themselves.

Section 46a-54-83a (a) of the Regulations of Connecticut State Agencies provides in relevant part: “The presiding officer shall have full authority to control the contested case proceeding, to receive motions and other papers, to administer oaths, to admit or to exclude testimony or other evidence and to rule upon all motions and objections.” This authority to control the proceeding and exclude testimony is, of course, subject to the exercise of reasonable discretion. Reasonable discretion includes providing all parties with a full and fair opportunity to be heard and with timely notice of procedures and consequences. As evident by a review of the voluminous file in this case, the respondents were provided with a full and fair opportunity to be heard, the requirement to include all potential witnesses on their witness list and the consequences of failing, absent good cause, to list all potential witnesses for their case in chief. That the respondents are now having second thoughts about their trial tactics and strategy does not justify reopening this case.

The motion to reopen is denied. Briefs remain due on or before April 24, 2008 at which time the record will close.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Ms. Marcia McIntosh-Waller
Andrew L. Houlding, Esq.
Michelle Dumas Keuler, Esq.