STATE OF WISCONSIN PERSONNEL COMMISSION

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RONALD PAUL,                    *
                                *
               Appellant,       *
                                *
v.                              *
                                *
Secretary, DEPARTMENT OF        *
HEALTH AND SOCIAL SERVICES,     *
                                *
               Respondent.      *
                                *
Case Nos. 82-PC-ER-69           *
          82-156-PC             *
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INTERIM DECISION AND ORDER

This matter is before the Commission on the motion of the complainant/-appellant (hereafter employe) for sanctions based on inadequate responses to discovery. The parties, through counsel, have filed briefs.

The employe submitted to the respondent a "Request to Produce Documents, Writings, Data, Etc.," dated May 19, 1983 consisting of 32 items. The respondent, in a response dated May, 19, 1983, indicated that certain items would be made available, but with respect to certain other items responded that they were irrelevant or that they constituted confidential information pursuant to §230.12(1), Stats.

The employe, by motion dated July 8, 1983, requested the following:

> "... an Order directing his employment as Institution Security Director at the Mendota Mental Health Institute (MMHI) on the basis that the Department has not responded to the "REQUEST TO PRODUCE DOCUMENTS, WRITINGS, DATA, ETC." or alternatively, that its response was evasive and/or incomplete within the meaning of section 804.12, Wis. Stats., (1981-82).
>
> This motion is based upon chapter 804, Wisconsin Statutes and especially those provisions in Section 804.12 providing sanctions for inadequate/insufficient discovery responses."

Pursuant to §PC 2.02, Wis. Adm. Code, parties to proceedings before the Commission "... shall have available all the means of discovery that are

available to parties to judicial proceedings as set forth in ch. 804, Stats. ..."

Under §804.12, Stats., sanctions of the kind here sought by the employe are available under only two circumstances. Section 804.12(2) provides for sanctions if a party "... fails to obey an order to provide or permit discovery ..." Normally, this is an order procured under §804.12(1) "MOTION FOR ORDER COMPELLING DISCOVERY" when a party "fails to respond that inspection will be permitted as requested or fails to permit inspection as requested ..." However, in this case no such order to provide or permit discovery has been sought or granted.

Section 804.12(4) provides for sanctions for (as relevant) failure "(c) to serve a written response to a request for inspection submitted under §804.09, after proper service of the request ..." In this case, there has been no such failure to serve a written response.

The respondent has served a written response. The employe's contention is that the response was "evasive or incomplete," which, pursuant to §804.12(1)(b), "is to be treated as a failure to answer." However, failure to answer, while a basis for an order compelling discovery under §804.12(1), is not a basis for sanctions under §804.12(2) or (4). Compare, Booker v. Anderson, 83 F.R.D. 272, 282 (D.C. Miss. 1979), which applied the very similar Federal Rules of Civil Procedure:

> "The proper remedy for incomplete answers is a motion to compel under Rule 37(1)(3), not a motion for sanctions under Rule 37(d)... Since the deficiency in the responses by plaintiffs George Stricklin and Chrestman is obvious, the court will treat Union Defendant's motion for dismissal as to plaintiffs George Stricklin and Chrestman as a motion to compel and will require these two plaintiffs to file responses which have been signed and made under oath."

The Commission will treat the employe's motion as a motion to compel discovery.

While the employe argues that a response that the information sought is irrelevant is not valid, §804.12(2)(a), relating to the scope of discovery provides:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonable calculated to lead to the discovery of admissible evidence." (emphasis supplied)

While a discovery request is not objectionable because the information sought would not be admissible at trial, the information must, in the broad sense, be relevant to the subject matter of the pending action. Compare, Wright & Miller, Federal Practice and Procedure: Civil §2213:

> "Objection can be made to inspection of some or all of the items sought on the ground that they are not relevant to the subject matter of the action or that they are privileged..."

The respondent did not use the statutory language "not relevant to the subject matter" in its response to the request for production and inspection, but it did indicate in its brief that the objections are on this basis, as opposed to "inadmissible at the trial." The employe has not specifically addressed how the objected items are relevant to the subject matter of this proceeding, relying rather on the theory that "irrelevancy is not a valid basis for resisting discovery." In the absence of any articulation by the appellant as to how the requested information is relevant to this proceeding, that portion of the motion to compel that is premised on respondent's relevancy objections to the interrogatories must be denied.

The respondent objected to certain of the items as "confidential," citing §230.13(1), Stats. This statute provides as follows:

> "Closed records. Except as provided in §103.13, the secretary and administrator may keep records of the following personnel matters closed to the public:
>
> (1) Evaluations of applicants."

The employe argues that "confidentiality" is an unsatisfactory response. This is essentially the same as a claim of privilege, and in the Commission's opinion is not unsatisfactory *per se*. However, again treating the motion as one to compel discovery, one of these items should be disclosed under a protective order.

Item 4 requests performance evaluations of the successful applicant. Section 230.13(1), Stats., does not impose any absolute barrier to disclosure, because it uses the word "may" and because it refers to disclosure to the "public," which is not synonymous with the foreclosure of any disclosure, such as is sought here by a litigant, which normally would be imposed by a statutory "privilege." The employe has an obvious interest in obtaining the information sought because he is claiming that the successful applicant is less qualified than he. The employe has suggested that this information should have been provided under a protective order. The Commission agrees and will enter such an order. Compare, *Rowe v. DER*, Wis. Pers. Commission, No. 79-202-PC (6/3/80).

The other items objected to on confidentiality grounds (12-14) were also objected to on grounds of relevancy, so the order to be entered on this motion will not cover these items.

ORDER

The appellant/complainant's motion dated July 8, 1983, is denied insofar as it requests his employment as Institution Security Director at MMHI or other sanctions. Treating the motion as a motion to compel discovery, it is denied, in part and granted to the following extent:

The respondent is ordered to file the material requested by item 4 with the Commission under seal. This material will be made available to the attorney for the appellant/complainant. Said attorney and the appellant/-complainant are directed to handle this material confidentially and not to disclose this material or any information regarding it to the public.

The respondent is further ordered to comply with the foregoing within 20 days of the date of this order.

Dated: October 14, 1983

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

AJT:ers

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