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WILLIAM A. HEBERT, *

Complainant, *

v. *

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS, *

Respondent. *

Case No. 84-0206-PC-ER *

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WILLIAM A. HEBERT, *

Appellant, *

v. *

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS, *

Respondent. *

Case No. 84-0242-PC *

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This matter is before the Commission on the motion of complainant/
appellant for an order compelling discovery, which was filed August 9, 1985.
The respondent was given until August 22, 1985, in which to respond.
Respondent did not file within this period but did file a response on August
28, 1985.

Complainant/appellant's attorney submitted an affidavit with the afore-
said motion which recited, inter alia, that written interrogatories were
served on respondent's attorney on May 24, 1985; that following a period of no
response he sent respondent's attorney a letter on July 2, 1985, informing him

DECISION AND
ORDER ON MOTION
TO COMPEL DISCOVERY

that he intended to move for an order compelling discovery if the answers were not received within 10 days; and that after a further period of no response he attempted to contact respondent's attorney by phone on July 31, 1985, but was unable to reach him and his call was not returned.

The response from respondent's attorney advised that the responses were being prepared, and that while he regretted the delay he had not given the interrogatories priority because there has not been a probable cause determination. The answers to the interrogatories subsequently were filed on September 4, 1985.

The Commission's rules provide at §PC 2.02, Wis. Adm. Code:

"Parties shall have available all the means of discovery that are available to parties to judicial proceedings as set forth in Ch. 804, Stats., to the extent that the same are not inconsistent with or prohibited by these rules or the Wisconsin Statutes or the Wisconsin Administrative Code."

The explanatory note under this section provides: "Wherever ch. 804 refers to resort to a court, as, for example, for an order compelling discovery, resort shall be had to the Commission rather than to a court."

Section 804.12(1)(a), stats., provides inter alia, as follows:

"A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) Motion. If . . . a party fails to answer an interrogatory submitted under s.804.08. . . the discovering party may move for an order compelling an answer. . ."

Even if the Commission were to consider the response of respondent's attorney, which was not timely filed, there is no showing of any valid reason why the interrogatories were not responded to in a timely fashion or why an order compelling discovery should not issue. Therefore, the complainant/appellant's motion for an order compelling respondent to answer the

interrogatories propounded to respondent on May 24, 1985, is substantively meritorious. However, there is a question whether the requested order should issue, since the respondent has filed the answers to the interrogatories. Neither party has had the opportunity to address this question. Since, as discussed below, it appears a hearing will be required on the subject of attorney fees, the Commission will not address this question now, but will permit the parties to present arguments thereon at the hearing.

As a separate part of the aforesaid motion, the complainant/appellant also seeks expenses and fees incurred in connection with the motion. Section 804.12(1)(c)1, stats., provides:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." (emphasis supplied)

Since the statute provides that a hearing is required before the award of expenses, such a hearing will be held, unless the Commission is earlier notified that the parties have reached a stipulation as to the matter of expenses.

ORDER

Since the filing of the answers to the interrogatories raises an issue as to whether it is necessary to grant complainant/appellant's motion for an order compelling respondent to answer the interrogatories propounded to respondent on May 24, 1985, and to actually issue said order, and since pursuant to §804.12(a)(c)1., stats., an opportunity for hearing on the matter of payment of the movant's expenses incurred in obtaining this order is necessary, a hearing will be scheduled to address these issues.

Dated: September 13, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


LAURIE R. McCALLUM, Commissioner

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