

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
 \*  
 DAVID WING, \*  
 \*  
                   Complainant, \*  
 \*  
 v. \*  
 \*  
 President, UNIVERSITY OF \*  
 WISCONSIN SYSTEM (Stout) \*  
 \*  
                   Respondent. \*  
 \*  
 Case No. 85-0104-PC-ER \*  
 \*  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter was filed as a complaint of whistleblower retaliation. Complainant has filed a motion to compel discovery. The parties have been provided an opportunity to file arguments and affidavits.

FINDINGS OF FACT

1. On or about September 20, 1984, Mr. Wesley Face, an employe of the respondent conducted a grievance hearing relating to a grievance filed by the complainant.
2. At least a portion of the meeting between Mr. Face and complainant on that date was tape-recorded by Mr. Face.
3. Complainant made a discovery request of the respondent to hear the tape recording of at least a portion of the September 20th meeting.
4. Pursuant to complainant's request, respondent provided complainant with a single tape recorded on one side. This tape did not include a recording of that portion of the September 20th meeting being sought by the complainant. Complainant subsequently filed a motion to compel production of other tapes of the September 20th meeting.

5. Complainant avers as follows:

3. On or about September 20, 1984, a grievance hearing, second step, was held by Vice Chancellor Wesley Face in his office at UW-Stout.

4. Wesley Face tape recorded my properly filed grievance and during the grievance hearing proposed to buy me off rather than grant me the relief requested.

\* \* \*

9. I requested the tape through a Request for Production of Documents. I was provided one (1) tape, which was recorded on one side only and was allowed to listen to that tape. The one side of the tape ended long before the conclusion of the grievance hearing. The other side of the tape was blank.

10. It is my belief from my observance of Wesley Face that the entire conversation, including Wesley Face's attempted buy-off attempt, was tape recorded.

6. By letter dated April 8, 1987, counsel for respondent wrote:

The second issue you mention is Mr. Wing's motion to compel respondent to produce a certain audio tape at his home address. We have previously responded to this request, by providing Mr. Wing with an opportunity to listen to this tape, which is the personal property of Vice Chancellor Wesley Face. Mr. Wing is apparently concerned that the tape is incomplete in some respect. He has, however, been given the chance to hear all that is recorded on the tape in question, and requiring the respondent to produce it again is unnecessary. Accordingly, we also oppose this motion.

7. Mr. Face avers as follows:

(4) I tape recorded the grievance hearing. Following the hearing, however, Mr. Wing and I engaged in informal discussion unrelated to the substance of the grievance. I did not tape record this informal discussion, and I therefore do not have a tape recording of this portion of the conversation.

OPINION

Despite the submission of affidavits, the scope of disagreement between the parties is not entirely clear.

To the extent that respondent's April 8th letter and Mr. Face's affidavit states that all the tape recordings in its possession (including

the possession of Mr. Face) of the meeting<sup>1</sup> between Mr. Face and the complainant on September 20th have already been provided to the complainant, the motion to compel must be denied. As noted in 23 Am Jur 2d 561 (Deposition and Discovery §252):

Production may not be required of a document or thing that does not exist, since if a document or thing does not exist, it cannot be in the possession, custody, or control of a party. [Citations omitted]

It appears that when the April 8th letter and Mr. Face's affidavit are read together, they indicate that all tape recordings of the meeting have already been provided to the complainant. However, to the extent that the April 8th letter Mr. Face's affidavit fail to specify that all tape recordings in the possession of the respondent (including tapes in Mr. Face's possession) of the September 20th meeting have been provided to the complainant, the respondent is ordered to provide complainant such additional tapes (beyond those already provided to Mr. Wing) within 10 days of the date of this order. Within the ten day time period, the respondent shall either supply complainant with additional tapes or clarify that all existing tapes of the September 20th meeting have already been provided to the complainant.

#### ORDER

Within 10 days of the date of this order the respondent shall either supply complainant with any additional tapes of the September 20th meeting or shall clarify that all existing tapes of that meeting have already been provided to him.

---

<sup>1</sup> As used in this interim decision and order, the word "meeting" includes both the September 20th grievance hearing and any "informal discussions" between Mr. Face and the complainant that were conducted on September 20th after the grievance hearing had concluded.

Dated: September 11, 1987 STATE PERSONNEL COMMISSION

  
KURT M. STEGE, Hearing Examiner

KMS:jmf  
JMF05/1