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JONATHAN KEUL,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
 AND SOCIAL SERVICES [DOC*],
 Respondent.

Case No. 87-0052-PC-ER

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DECISION ON MOTION
 FOR DAMAGES, ATTORNEY'S FEES
 AND COSTS; AND MOTION FOR
 PLENARY HEARING ON
 REMEDY AND ATTORNEY'S FEES

This matter is before the Commission on a motion by complainant for damages and attorney's fees, followed by respondent's motion for plenary hearing on remedy and proper proceedings related to attorney's fees. The following discussion is for the purpose of deciding these motions and the facts herein are considered undisputed.

On May 13, 1987 complainant filed a charge of handicap discrimination against respondent. On February 24, 1988 the Commission issued an Initial Determination (I.D.) finding no probable cause to believe complainant's allegations of discrimination. Respondent moved to dismiss the complaint, but by order dated June 1, 1990, the Commission granted complainant's motion to dismiss, only to the extent it applied to the civil service aspect of respondent's failure to have complied with §230.37(2), Stats., and granted complainant's request to amend his response to the I.D. and appeal the Commission's conclusion in the I.D., that §230.37(2), Stats., was outside the scope of the FEA. A hearing was held on the issue of handicapped discrimination and, after post-hearing briefs and oral argument before the Commission, by decision and order dated June 23, 1993, the Commission ruled in favor of complainant. The Commission remanded the matter to respondent and retained jurisdiction for purposes of any disputes regarding remedy and attorney's fees.

On July 23, 1993, complainant filed motions for damages and attorney's fees. Upon respondent's request, a status conference was scheduled and held on September 27, 1993, to consider questions about remedy and attorney's fees. In accordance with a motion and briefing schedule set by the Commission, on November 12, 1993, respondent filed a motion for a plenary hearing on remedy

and proper proceedings relating to attorney's fees. The briefing schedule on this motion was completed on December 16, 1993.

Respondent, in support of its motion, makes these arguments:

1. The proper scope of the hearing on remedy concerns ... complainant's physical and mental condition from 1980 until the present time; efforts made by complainant to mitigate damages; wages earned and supplemental or wage replacement payments received during the relevant time period; and other work/wage related matters.
2. Attorney fees are awarded only to the degree that complainant obtains success in this litigation; and complainant does not become "successful" unless and until he becomes entitled to enforce a judgement, consent degree, or settlement against the respondent, which would require a decision on merit as to remedy.
3. Under Wisconsin law, the Personnel Commission's power to award attorney fees against the state must conform to the express statutory conditions set forth in either sec. 227.485 or sec. 814.245, Wis. Stats.

In response, complainant, referencing his June 23, 1993, motion for damages and fees, argues that issues of remedy and attorney's fees are properly before the Commission on the base of motions, documentation and briefs and argues that further hearing is unnecessary. More particularly, complainant argues that he testified to the periods of time he would have been able to work; that he authorized respondent to obtain all medical records during the discovery process; that he testified about recurring income at 65% of his wage rate continuation throughout the period at issue; and that a statement of attorney's fees and costs has been submitted.

The record shows that the issue in this case was whether respondent discriminated against complainant on the basis of handicap in violation of the Wisconsin Fair Employment Act in connection with failure to accommodate complainant during the period from May 1983 to May 4, 1987. The cutoff date of May 4, 1987 was over the objection of complainant. There is a certain amount of overlap between the evidence relating to the issue of liability and to the issue of remedy, because both involve questions concerning complainant's medical condition and his capacity to work. However, it seems relatively clear that implicit in both parties' approach to this litigation was that the hearing on the aforesaid issue was not meant to resolve all questions relating to remedy. This is graphically illustrated by the fact that while complainant now contends that the remedy phase can be resolved on the basis of the existing record, he is unable to cite a dollar amount of lost wages in the existing record,

but relies in his brief in opposition to respondent's request for a hearing as follows:

4. Computation of income that Complainant would have received from provision of employment with accommodation. Complainant has general information from friends and co-workers as to raises obtained by correctional officers after he was disabled. The damages computation is based on his estimates of those raises. Exact back wages could only be computed from data in Respondent's possession. However obtaining data for fully accurate computation would be quite a job, and probably isn't worth doing. Complainant has suggested to Respondent that someone in their agency could review his estimates and give them an opinion as to whether they should accept his estimates or get the exact figures themselves. Respondent has not replied to this suggestion. (Complainant's brief, pp. 6-7.)

Complainant has the burden of proof of all issues (with the exception of certain aspects of the issue of accommodation), and in the absence of a stipulation between the parties, this representation by complainant provides no basis for a finding on the amount of back pay. Furthermore, while the issue of liability was limited to the period ending with complainant's discharge in 1987, neither party attempted to present evidence concerning his status after his discharge in the context of an argument that it related to the issue of remedy. Therefore, while the overlap between certain aspects of the issues of liability and remedy may result in a determination that some of the findings already made may control in the remedy phase, and the existing record should only be supplemented where necessary with respect to remedy issues, a further hearing on remedy is appropriate.

Also respondent argues that attorney's fees cannot be considered until the remedy is determined, thereby establishing the prevailing party. We disagree. It is clear from the Commission's order dated June 23, 1993, which adopted the proposed decision and order, that complainant was the prevailing party. However, the Commission agrees that attorney's fees be finally determined with the completion of this legal process, at which time the Commission will address the parties' arguments as to the determination of fees.

Finally, the court's decision in Wis. Dept. of Trans. v. Wis. Pers. Comm., 176 Wis. 2d 731, 734, 500 N.W. 2d 664 (1992) has not caused the Commission to believe it lacks authority to award attorney's fees in accordance with §227.485, Stats., as well as Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984). There is nothing in the DOT case that would require compliance with §227.485 to award fees under the FEA's remedial authority as interpreted in Watkins.

The Commission continues to urge the parties to attempt to reach a stipulation with respect to all or part of the remedy phase of this case, in an attempt to eliminate or reduce the need for further proceedings and the accumulation of further fees and costs.

ORDER

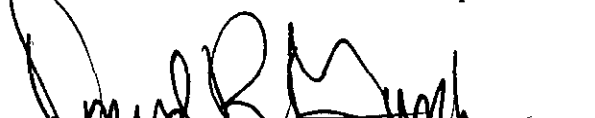
The subject motions are granted to the extent expressed in the discussion: Hearing will be held on the matter of remedy. The parties will be contacted for the purpose of scheduling a status conference.

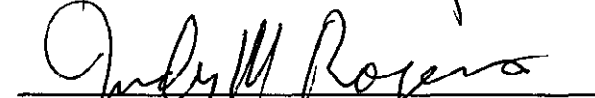
Dated: February 3, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

* Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary, Department of Health and Social Services with respect to the position(s) that is the subject of this proceeding is now held by the Secretary, Department of Corrections.