

STATE OF WISCONSIN

PERSONNEL COMMISSION

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DWIGHT BEAVERSON, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

TRANSPORTATION, *

Respondent. *

Case No. 88-0109-PC-ER *

* * * * *

RULING ON PETITION FOR REHEARING

On October 4, 1990, the Commission granted a motion for costs filed by complainant and ordered respondent to pay costs in the amount of \$1,278.75 within 30 days of the date of the entry of the order. On October 22, 1990, respondent filed a petition for rehearing in regard to such order.

The underlying charge of discrimination was filed on June 30, 1988. Shortly thereafter, complainant filed his first set of interrogatories and respondent filed its response thereto on September 15, 1989. Complainant filed a motion to compel discovery in regard to such response by respondent and the Commission issued an order on June 29, 1989, granting the motion in substantial part and denying the motion in regard to one aspect of one out of the three subject interrogatories. Respondent then filed a response pursuant to such order on September 14, 1989. Complainant, based on its position that respondent's answer to interrogatory #5 was still unresponsive, filed a second motion to compel discovery on December 8, 1989, with an accompanying motion for costs. The motion for costs related solely to the December 8, 1989, motion to compel discovery. On February 22, 1990, the Commission granted complainant's motion to compel discovery and ordered that a hearing be held on the motion for costs. Such hearing was held on April 9, 1990, and the Commission

granted the motion for costs on October 4, 1990. Respondent was represented by Attorney Barbara Bird at the hearing; complainant was represented by Attorney Victor Arellano at the hearing. Complainant's brief in response to the petition for rehearing was filed with the Commission on November 2, 1990.

Respondent asserts that it has been deprived of a hearing on costs as required by §804.12(1)(c)1., Stats., Respondent argues on pages 1 and 2 of the brief accompanying the subject petition for rehearing in regard to the hearing convened on April 9, 1990, that:

At the hearing, the Department of Transportation requested that prior to any further evidentiary hearing and arguments on the merits of the Complainant's request for attorney fees, the Personnel Commission reconsider its order of February 22, 1990, and permit the filing of additional briefs on the issue of the Personnel Commission's authority to award costs. . . Chairperson Laurie McCallum, who presided at the April 9, 1990 hearing, granted the Respondent's request to be permitted to file a motion for reconsideration of the February 22, 1990 decision and order of the Commission and to present additional legal arguments on the authority of the Personnel Commission to entertain requests for costs in bringing discovery motions. The hearing was adjourned pending the filing of the motion and briefs of the parties on this particular legal issue.

However, a review of the record of the April 9, 1990, hearing indicates otherwise. The first statement of the hearing examiner on the record was as follows:

There was a preliminary matter discussed off the record by Ms. Bird and, basically, it related to the fact that she has recently discovered a case . . . relating to assessment of costs under Section 804.12(1)(c)1. I had decided that we would go ahead and conduct the hearing today as we had planned and she could, of course, renew her objection to the authority of the Commission to assess costs under this section of the statutes.

The hearing examiner went on to ask the parties if either of them intended to introduce any evidence through testimony or documents. Counsel for complainant indicated that he did not and counsel for respondent indicated that she would only if charges prior to December of 1989 were included within the

scope of the motion for costs. Counsel for complainant indicated that they were not and then asked counsel for respondent if that was the only concern that she had relating to the costs submitted by complainant, and counsel for respondent indicated that that was her only concern. Counsel for complainant indicated that he would review and re-submit his charges based on their understanding. The hearing examiner then went on to state:

All right. That's my understanding. And if we do file a brief, you'll both be given an opportunity to discuss the scope of the motion and what should be included in the costs if there's still a dispute after Mr. Arellano re-submits his bill.

* * * * *

Why don't we set a time for you, Victor, to file your affidavit and expenses and then we can set our briefing schedule after that so that we know what the scope of that argument will include.

* * * * *

. . . By the time you (referring to Ms. Bird) are writing your brief, we'll know about whether you still want to dispute the costs that are included so that you can certainly include that within the scope of your brief if you think that it's appropriate at that time.

The record indicates that the hearing examiner advised the parties early in the proceedings on April 9, 1990, that the hearing to decide the issues of costs under §804.12(1)(c)1. would go forward that day as scheduled, gave the parties the opportunity to introduce factual evidence into the hearing record which both parties declined, and set up a briefing schedule to address the issues relating to the substance of the motion as well as the issue of the Commission's authority to award such costs. Also, to argue as respondent does that the briefing schedule was set up only for the purpose of addressing the issue of the Commission's authority, makes no practical sense. If that were true, and the merits of the motion for costs not intended to be included, why was the schedule set up to commence only after counsel for complainant had re-submitted

his charges? These realities of the record are inconsistent with the description of the proceedings advanced by respondent in its brief in support of the petition for rehearing and inconsistent with the basic argument advanced by respondent in support of the petition for rehearing, i.e., that it did not have a full opportunity to raise all the issues permitted under §804.12(1)(c)1., Stats., through an evidentiary hearing and through written arguments. A misunderstanding by a party as to the scope of the proceedings is not a sufficient basis upon which to grant a petition for rehearing and the Commission finds no other basis sufficient to support respondent's petition.

It is clear from the record that neither party expressed a desire to create any further factual record in regard to the subject motion for costs once it was agreed that only charges incurred in December of 1989 and thereafter were included within the scope of such motion. The Commission also concludes that respondent has effectively waived its right to further argue the merits of the subject motion for costs. However, despite such waiver, respondent has taken the opportunity in its petition for rehearing to specify those issues it would raise in opposition to the motion for costs. Based on the following analysis, the Commission concludes that, even if it had granted respondent's petition for rehearing, respondent's position on the underlying motion for costs would not prevail.

Respondent first challenges the reasonableness of the amount of time charged by counsel for complainant, i.e., 29 hours. The work involved the filing and briefing of a motion to compel discovery, the filing and briefing of a motion for costs, participation in a short hearing on costs, and filing a response to a petition for rehearing. The Commission cannot agree that 29 hours is an unreasonable amount of time to spend on these activities.

Respondent argues next that certain of the charges were incurred in relation to aspects of the litigation other than those included within the scope of the subject motion for costs. The subject motion to compel discovery was filed on December 8, 1989, and counsel for complainant filed his response to the petition for rehearing on November 2, 1990. All of his charges relate to activities performed around or between these two dates and there is no basis upon which to conclude from the record that the time charged was not spent in working on the subject motion to compel, the subject motion for costs, and the subject petition for rehearing.

Respondent argues next that the Commission should have apportioned costs. However, the subject motion for costs relates solely to the motion to compel discovery filed on December 8, 1989, which was granted in toto. The Commission fails to recognize how apportionment could be appropriate here.

Respondent also argues that it was not given an opportunity to argue how an award by the Commission in response to the subject motion for costs would be unjust within the meaning of §801.12(1)(c)1. In reviewing the situation under consideration here in regard to the subject motion to compel, the Commission can uncover no circumstance which could render the award of costs unjust.

Finally, respondent argues that it was not given an opportunity to argue how its opposition to the subject motion to compel discovery was substantially justified within the meaning of §804.12(1)(c)1., Stats. In reviewing the respondent's rationale for opposing the subject motion to compel discovery, the Commission does not find substantial justification, i.e., a reasonable basis in law or fact, for respondent's failure to provide to complainant the information the Commission had ordered respondent to provide pursuant to a previous mo-

tion to compel discovery. The Commission does not find that any circumstance beyond respondent's control had resulted in such failure or that respondent's explanation for its failure was persuasive. As the Commission concluded in its order of February 22, 1990, granting the subject motion to compel:

. . . it must be concluded that respondent has failed to respond adequately to Interrogatory #5. What respondent attempted to do here was to answer this interrogatory (in part) by making arrangements with DMRS to provide copies of certain examination documents to complainant. However, these documents have not yet been provided by DMRS, so this approach has not resulted in answering the interrogatory. Respondent's other approach to answering this interrogatory was by its amended answer filed December 4, 1989. This answer does not respond to complainant's inquiry concerning the criteria used to evaluate applicants. Respondent obviously felt in September that the best response to this inquiry was to have orchestrated the submission under seal of copies of the examination plan, the written exam and benchmark, and the oral exam and benchmarks. The Commission agrees that this is the nature of the information sought by the interrogatory, and it is not provided by the amended answer.

Order

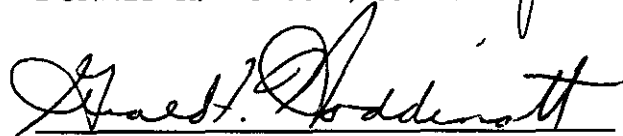
This petition for rehearing is denied.

Dated: November 19, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner