STATE OF WISCONSIN PERSONNEL COMMISSION

DWIGHT BEAVERSON,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 88-0109-PC-ER

DECISION AND ORDER

This case involves a complaint of discrimination which alleges that complainant ranked second in an exam for Motor Vehicle Supervisor 9, and that, after the first-ranked individual withdrew, two younger persons who ranked lower on the exam were hired.

Respondent objected to certain of the initial interrogatories filed by complainant, numbered 5, 8 and 10, on the grounds of relevance, and those numbered 5 and 10 on the grounds of confidentiality. Complainant moved to compel their answer. On June 19, 1989, the Commission entered the following order in relation to such motion to compel:

> Complainant's motion to compel discovery is granted in part and denied in part. Respondent is ordered to answer interrogatories #5, #8, and so much of #10 as relates to persons who were certified as eligible for appointment following examination. Any examination information falling within the confines of §ER-Pers 6.08(2), Wis. Adm. Code, may be submitted under seal to the Commission, where it will be available for inspection by complainant's counsel. Complainant and complainant's counsel are ordered not to disclose said information beyond the extent necessary to pursue this proceeding.

In response to this order, respondent filed an Amended Reply to Interrogatory #5 which was dated December 1, 1989. In response to this

In response to this order, respondent filed an Amended Reply to Interrogatory #5 which was dated December 1, 1989. In response to this Amended Reply, complainant, on December 8, 1989, filed a motion to compel discovery, alleging that this Amended Reply was unresponsive to the subject interrogatory. The Commission agreed and, in an order dated February 22, 1990, stated as follows, in pertinent part:

> 1. Respondent is ordered to produce within 30 days of the date of this order copies of the examination plan, written examination and benchmarks, and oral examination and benchmarks for the examination in questions. The use of this material by complainant and his attorney will be subject to the restrictions set forth in the Commission's June 29, 1989, order.
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> 4. The matter of motion costs will be taken up following a hearing as required by §804.12(1)(c)1., Stats.

A hearing on the matter of motion costs was held on April 9, 1990, before Laurie R. McCallum, Chairperson. The parties were permitted to file briefs and the briefing schedule was completed on May 21, 1990.

The essence of respondent's argument in opposition to the awarding of motion costs to complainant is that the Commission lacks the authority to award such costs as a result of the decision of the Wisconsin Court of Appeals in State v. Beloit Concrete Stone Co., 103 Wis. 2d 506, 513-14, 309 N.W. 2d 28 (1981). In that decision, the court stated, in pertinent part:

> The trial court ordered the state to pay $200 expenses on its unsuccessful motion for protective orders, pursuant to secs. 804.01(3)(b) and 804.12(1)(c), Stats. Those statutes authorize the trial court to award to the party seeking discovery expenses incurred in successfully resisting a motion for a protective order. Neither statute on its face authorizes assessment of expenses on discovery motions against the state.
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> *Martineau v. State Conservation Comm..*, 54 Wis. 2d 76, 79, 194 N.W. 2d 664, 666 (1972), holds that costs may not be taxed against the state or an administrative agency of the state unless expressly authorized by statute. We conclude the trial court erred in awarding expenses against the state.

Respondent's argument has some force as a general proposition, but it must be analyzed in the context of the fact that this is a proceeding under the Fair Employment Act (FEA).

In Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984), the Supreme Court addressed the question of whether the FEA authorizes an administrative agency to award attorney's fees to a prevailing complainant despite the absence of any express statutory language authorizing such an award. The general rule in Wisconsin regarding the award of attorney's fees had been set forth in Cedarburg L. & W. Comm. v. Glens Falls Ins. Co., 42 Wis. 2d 120, 124-25, 166 N.W. 2d 165 (1969), as follows:

> As a general rule, in the absence of any contractual or statutory liability therefor, attorney's fees and expenses incurred by the plaintiff in litigation of his claim against the defendant, aside from statutory court costs and fees, are not recoverable as an item of damages.

In determining that the FEA remedial provision ("order such action by the respondent as will effectuate the purpose of this subchapter," §111.36(3)(b), stats. (1975)) provided adequate implicit authority for the award of attorney's fees to a prevailing complainant, the Court relied heavily on the FEA's liberal construction clause, which provided:

> In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose. §111.31(3), stats. (1975).

There are a number of parallels between the situation in Watkins and the situation here present. Both cases involve precedent that certain items of costs cannot be awarded without statutory authorization. In Watkins, the award of attorney's fees arguably was barred by the holding in Cedarburg L. & W. Comm. v. Glens Falls Ins. Co., 42 Wis. 2d 120, 124-25, 166 N.W. 2d 165 (1969),

that in the absence of statutory authority therefor, the prevailing party cannot recover attorney's fees. In the instant case, an award of motion costs in connection with discovery arguably is barred by the holding of State v. Beloit Concrete Stone Co., 103 Wis. 2d 506, 513-14, 309 N.W. 2d 28 (Ct. App. 1981), and Martineau v. State Conservation Comm., 54 Wis. 2d 76, 79, 194 N.W. 2d 664, 666 (1972), that costs may not be taxed against a state administrative agency without express statutory authorization.

Both of these cases involve proceedings under the FEA, and in both cases it can be said that an award of costs would be consistent with the FEA's liberal interpretation clause. In Watkins, the court's decision included the following discussion:

> Finally, it is evident that the authority to award reasonable attorney's fees to a prevailing complainant is necessary in order to fully enforce and give meaning to the rights created by the Act. The legislature could not have intended the Act to be a meaningless, empty gesture. However, a right without the means to enforce it is meaningless. If rights are to be meaningful, they must be enforceable. To enforce the rights guaranteed under the Act, assistance of counsel is fundamental. One of the more invidious aspects of discrimination is that its targets are frequently the economically weak; who are often unable to afford the assistance of counsel. Without the assistance of counsel, the ability to vindicate one's rights under the Act is so impaired that it renders the existence of those rights nearly meaningless. Where, as here, the relief sought includes no back pay from which a complainant could pay attorney's fees, even a complainant with some economic means who faces the prospect of substantial attorney's fees may well be deterred from enforcing those rights guaranteed under the Act. The legislature clearly could not have intended that result in either situation. 117 Wis. 2d at 765.

Much of this rationale also applies to the ability of a complainant to recover motion costs with respect to discovery pursuant to §804.12, stats. (as essentially adopted by reference by §PC 4.03, Wis. Adm. Code), where a state agency's opposition to a motion or failure to comply with a discovery order is not substantially justified. The ability to conduct discovery is an important tool of a complainant attempting to prosecute an FEA complaint, just as it is an

important tool of the employer in defending against a complaint. A state agency/employer inherently has substantially more resources than a complainant. An interpretation of §PC 4.07, Wis. Adm. Code, and §804.12, stats., which would result in the employer, but not the employe, having the right to recover motion costs on the opposing party's unjustified opposition to a motion or unjustified failure to comply with an order, would severely hamper a complainant's ability to pursue his or her rights under the FEA, and create an even more substantial imbalance in the parties respective capacities to conduct discovery. Given these egregious policy results, which are at odds with the liberal construction clause of the FEA relied on so heavily by the Watkins court in finding authority for an award of attorney's fees in the relatively general remedial language in the FEA, a similar approach appears to be warranted in the instant matter.

The legislature has given quasi-judicial agencies a broad grant of authority to adopt rules governing discovery through §227.45(7), stats., which provides that in class 3 proceedings "an agency may by rule permit the taking and preservation of evidence." The Commission has adopted §PC 4.03, Wis. Adm. Code, which includes the following language:

> All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, stats.

By adopting this rule, the Commission in effect has incorporated by reference the provisions of Chapter 804, Stats. including §804.12, stats., which provides for the taxation of costs under certain circumstances, and without any restrictions on awarding costs against state agencies. The jurisdictional basis for this case is found in the FEA, see §111.375(2), stats.:

> This subchapter applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the

> agency as an employer shall be filed with and processed by the personnel commission under s.230.45(1)(c).

Therefore, reliance on the FEA's liberal construction clause, §111.31(3), stats., as an aid to construction of §804.12, stats., in a manner that would avoid the result of a one-way street for discovery costs -- i.e., costs awardable against complainants but not against state agencies/employers -- that is so clearly at odds with legislative intent and policy, would appear to be warranted under Watkins.

ORDER

Complainant's costs in the amount of $1,278.75 are awarded and are to be paid by respondent within 30 days of the entry of this order.

Dated: October 4, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/AJT:rcr/4

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner