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STATE OF WISCONSIN

PERSONNEL COMMISSION

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HARDEN et al.,
(James Harden, Willie Garrette,
and Dale Nash),

Complainants,

v.

Secretary, DEPARTMENT OF
REGULATION AND LICENSING,
and Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case Nos. 90-0106-PC-ER
90-0092-PC-ER
90-0107-PC-ER
91-0184-PC-ER

* * * * *

RULING ON
REQUEST FOR
REASONABLE EXPENSES

This matter is before the Commission on the question of whether the respondent is entitled to reasonable expenses as a consequence of a discovery request and subsequent motion for sanctions. A hearing was held on March 1, 1993.

A review of the case file reflects the following procedural history.

The original complaints in these matters were filed in June of 1990. Respondent Department of Regulation and Licensing (hereafter referred to as respondent) served complainants' attorney with discovery requests on March 3, 1992. The requests were denominated "Respondent's First Set of Requests for Production" and they referenced both §804.09, Stats., and §PC 2.02, Wis. Admin. Code.

Having received no response whatsoever to the discovery requests, on May 1, 1992, respondent filed a "Notice of Motion and Motion for Sanctions for Failure to Comply with Discovery Request." The notice and motion stated, in part:

1. Please take notice that respondent... will move the Personnel Commission under sec. 804.12(4), Stats. and secs. PC 1.08 and 2.04, Wis. Adm. Code for an order dismissing the above captioned matters on the grounds that the complainants failed to

serve any response to discovery requests under sec. 804.09, Stats. which were duly served on complainant by respondent.

* * *

3. This motion is brought pursuant to sec. 804.12(4), Stats. The grounds for the motion are that Respondent's First Set of Requests for Production in the above entitled matters were served on complainant's attorney by certified mail on March 3, 1992 and that complainant served no formal or informal response of any kind to the requests filed by respondent.... Complainants have failed completely to respond to respondent's discovery requests.

A prehearing conference was held with the parties on May 8, 1992. The parties agreed that the documents that were subject to respondent's motion would be made available to the respondent during the following week in the office of complainants' attorney and that respondent's attorney would then decide whether to pursue sanctions. Copies of documents were provided to respondent on May 15, 1992. These materials included a five page document which in turn referred to certain attached documents numbered 1 through 30. Not all of the numbered documents were, however, attached.

On July 16, 1992 respondent wrote to complainants' attorney, indicating respondent had been unable to locate 6 of the numbered documents. Respondent requested assistance in locating the documents or that it be provided copies. The complainants did not respond to this letter.

On August 5, 1992, respondent filed a "Notice of Motion, Renewed Motion for Sanctions and Motion to Dismiss for Lack of Prosecution. The notice and motion stated in part:

1. Please take notice that respondent... renews its motion for sanctions filed on May 1, 1992... and requests as relief in addition to the relief sought in the May 1, 1992 motion, an order requiring the complainants to pay the reasonable expenses, including attorneys fees, caused by the failure of complainants to serve any response to discovery requests duly served on complainant and by the failure of complainants to seasonably supplement complainants' incomplete response and for such other orders in regard to complainants' failures as are just.

* * *

NOTICE AND MOTION TO DISMISS FOR FAILURE TO PROSECUTE

3. Please take further notice that respondent R&L moves... for an order dismissing the above captioned matters... on

the grounds that 1) Complainants have failed to exercise reasonable diligence in prosecuting the complaints filed in the captioned matters; 2) complainants have not responded to requests by the Commission's hearing officer nor complied with time limits set by the hearing officer or promised by complainants' attorney....

The parties filed briefs relating to respondent's motions. In its reply brief filed on September 18, 1992, respondent's attorney averred that he still had not received the documents in question. However, on October 2, 1992, respondent acknowledged receipt on September 21, 1992 of approximately 230 pages of materials from complainants. In a December 28, 1992 letter to the Commission, respondent's attorney also acknowledged that the September 21st delivery had satisfied its outstanding request for production.

In a ruling dated December 17, 1992, the Commission denied the respondent's motion to dismiss for lack of prosecution, ordered complainants to produce the numbered documents which had not been supplied on May 15th, and scheduled a hearing on respondent's request for expenses "pursuant to §804.12(1)(c)1." That portion of the ruling which related to respondent's motion for discovery sanctions is set out below:

In response to these motions, complainants contend that the documents that allegedly were not provided on May 15, 1992... are in the possession, custody and control of respondent. Complainants' counsel asserts that after he received the July 16, 1992, letter from respondent's counsel advising that he had been unable to locate these documents... he:

[C]alled a meeting with his clients to further inquire as to the location of these documents... The meeting had to coordinate the schedule of all three complainants and had to be scheduled around numerous depositions and trial preparation. The meeting could not be scheduled until August 12, 1992, by which time the motion to compel had been filed by Attorney Dusso.

Unverified affidavit filed September 1, 1992. Complainant's counsel further asserts in this affidavit that he "believed that I was to write to the Commission on the various dates referred to in Attorney Dusso's submissions only in the event that the complainants were waiving their rights or filing in another forum." Finally, counsel for complainants asserts that on September 1, 1992, he "instructed Garrette to deliver a binder with a selection of those documents kept at the department to Attorney Dusso for his inspection." However, the latter asserts that as of September 18, 1992, no such documents had been delivered.

In the filing currently before the Commission, respondent renews its motion for sanctions filed May 1, 1992, and raises additional matters that have occurred since then. The original motion recited that complainants did not respond to the request for production and inspection that had been served on March 5, 1992. Complainants have offered no excuse for failing to respond to the request for production, other than to contend that the documents sought also were in the possession of respondent and therefore were not subject to §804.09, Stats. However, even if this were a valid contention, it does not excuse complainant's failure to make any response to this discovery request.

Complainants also fault respondent's attorney for not trying to resolve this dispute between counsel without resort to the Commission. Respondent's attorney wrote to complainants' attorney on July 16, 1992, to advise that he had been unable to locate certain documents that ostensibly had been among those provided on May 15, 1992. Complainants' counsel asserts that due to the press of business and scheduling problems, he could not schedule a meeting with complainants until August 12, 1992, by which time the motion to compel had been filed (on August 5th). Under all the circumstances, particularly including the fact that complainants originally had made no response whatsoever to the initial request for production, and complainants' counsel had missed numerous deadlines for providing information about the status of the case, the Commission cannot agree that respondent's counsel had an obligation to have taken the initiative to contact complainants' counsel one more time before resorting to the instant motion.

Since complainants failed to respond to the original request for production, and subsequently failed to produce all of the indicated documents, respondent is entitled to an order compelling discovery. While the award of expenses, pursuant to §804.12(1)(c)1., Stats., has been requested, that subsection provides that a ruling on this aspect of the matter cannot be made without the opportunity for hearing. Therefore, a hearing on expenses will be scheduled. (footnote omitted)

The Commission went on to address the respondent's motion to dismiss for lack of prosecution. The Commission concluded that dismissal of the cases was not warranted, even though the "apparently undisputed record reflects that counsel for complaints has failed to respond to certain other deadlines,¹ in addition to having failed to respond to the request for production and inspection."

¹Elsewhere in the December 17th ruling, these delays are identified as not responding to a letter from Commission staff dated December 23, 1991, and not responding as directed in a conference report dated May 11, 1992.

The relevant portions of the statutes relating to sanctions for failure to make discovery are found in §804.12:

(1) MOTION FOR ORDER COMPELLING DISCOVERY. A party... may apply for an order compelling discovery as follows:

(a) Motion. If... a party, in response to a request for inspection submitted under s. 804.09, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling... inspection in accordance with the request.

* * *

(c) Award of expenses of motion. 1. 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.

* * *

(4) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION OR SUPPLEMENT RESPONSES. If a party... fails: to serve a written response to a request for inspection submitted under s. 804.09, after proper service of the request, ... the court in which the action is pending on motion may make such orders in regard to the failure as are just.... In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by s. 804.01.

The Commission's December 17th ruling invoked the language of §804.12(1), despite the fact that the respondent had clearly filed its motion under §804.12(4).² Subsection (1) sets forth the procedure available to a party

²The December 17th ruling also was without effect to the extent that the materials that it ordered the complainants to provide to the respondent had been received by respondent on September 21, 1992, which was several days after the last brief was filed on the respondent's renewed motion for sanctions.

seeking discovery when the response to their request to produce is that the materials are not properly discoverable. In contrast, subsection (4) establishes the relief available when a request to produce is met simply by silence. The substantially identical language of Federal Rule 37³ is discussed in 4A Moore's Federal Practice ¶37.05:

The general pattern of procedure under the discovery rules begins with the service of a request for discovery, in the form of a notice to take a deposition, interrogatories, a request to produce documents or other tangible things or to enter upon land or other property, or a request to admit or deny the genuineness of documents or the truth of statements of fact or fact-related opinion, followed by a response either complying with the request or indicating an intention to comply, or setting forth objections together with the reasons therefor. After the discovering party receives these responses, he must make the decision whether to accept the response or to move the court to compel discovery. At the hearing on the motion, the court resolves questions about the adequacy of answers and the validity of objections. In such a system, designed to operate insofar as possible without judicial intervention, it is crucial, of course, that the initial request be answered and such objections as the party may have be set forth. If it were necessary to seek a court order requiring a response, followed by a response setting up objections, followed by a second motion to resolve the objections and order discovery, the possibility for delay and abuse would be apparent. Rule 37(d) makes it explicit that a party properly served has an absolute duty to respond, that is, to... serve a response to requests for discovery under Rule 34... and that the court in which the action is pending may enforce this duty by imposing sanctions for its violation. Rule 37(d) deals, then, with failure to make the initial response required by the Rules, while subdivisions (a) and (b) provide a method of resolving differences between the parties and enforcing the court's determinations. Thus, there must be an order under subdivision (a) before sanctions are imposed under (b), while under (d) the party aggrieved moves directly for the imposition of sanctions.... In short, if the party from whom discovery is sought complies with the rule in question by making the initial response, he has a right to refuse discovery until compelled by court order, subject to the expenses of determining the justification of his refusal; but if he does not comply with the rule, he is subject to the sanctions set forth in Rule 37(d).

This sequence was ultimately clarified in the respondent's letter to the Commission dated December 28, 1992.

³Rule 37(a) is the equivalent of §804.12(1), while Rule 37(d) is the equivalent of §804.12(4).

In its December 17th ruling, the Commission clearly indicated that it was considering the issue of awarding reasonable expenses to the respondent and that it would provide the parties an opportunity for hearing on that issue. That opportunity was provided to the parties and during the hearing, as well as in the various materials previously submitted relating to respondent's motion, there was no information tending to show that the complainants' failure to respond to the respondent's March 3, 1992 discovery request was substantially justified. Likewise, there is no information tending to show that an award of expenses to the respondent for having to file its May 1, 1992 motion and subsequent amendment, would be unjust. While the Commission encourages parties to attempt to resolve discovery disputes informally, and without resort to motion practice, the circumstances present here support awarding expenses to the respondent. The complainants simply failed to respond to the request for inspection within the 30 day period specified in §804.09(2). This failure means that, given the respondent's motion under §804.12(4), the Commission has the discretion to award expenses arising from that failure. The complainants' other conduct, including the delays in providing the numbered materials and the various other delays which were identified in the December 17th ruling, justify the award of expenses.

The complainants argue that the December 17th ruling held that their conduct was not egregious. However, the Commission reached this conclusion in the context of ruling on respondent's motion to dismiss for failure of prosecution, rather than as part of the ruling on the motion for discovery sanctions. In the present dispute, there is no standard of egregious conduct, so the December 17th conclusion on this point does not bar an award of reasonable expenses.

Complainants also point out that the December 17th ruling had no meaning in the sense that it required the complainants to produce certain documents within 20 days despite the fact that those documents had already reached the respondent. Nevertheless, it is clear that the respondent's motion for sanctions which was the subject of the December 17th ruling referenced §804.12(4) and specifically sought "reasonable expenses, including attorneys fees." It was the Commission which incorrectly referenced §804.12(1) when ruling on respondent's motion. In any event, the matter has ended up at the same end point of determining whether an award of reasonable expenses is

appropriate and, after a hearing, the complainants still have not provided a basis for concluding that their failure to respond was substantially justified or that there are other circumstances which make an award of expenses unjust. For that reason, the respondent is entitled to reasonable expenses, including attorney's fees, and the respondent is directed to submit, within 14 days of the date of this order, an itemized statement of the claimed expenses relating to the original and renewed motion and resulting briefs. The complainants will then have 10 days in which to file any response to the statement.

During the hearing on this matter, the complainants requested they be awarded reasonable costs and attorneys fees in the amount of \$500 because the Commission's December 17th ruling had denied the respondent's motions. Complainants' request must be denied in that it is premised on a mischaracterization of the Commission's December 17th ruling which in fact found that the complainants failed to make any response to the respondent's March 5, 1992 discovery request and ordered complainants to provide the requested discovery.

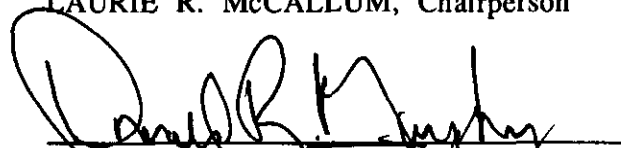
ORDER

Respondent's request for reasonable expenses is granted to the extent that respondent is directed to file within 14 days of the date of this order an itemized statement of the claimed expenses. The complainants will then have 10 days in which to file any response to the statement.

Dated: April 23, 1993

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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