

STATE OF WISCONSIN

PERSONNEL COMMISSION

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TIMOTHY GALBRAITH,
Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,
Respondent.

Case Nos. 91-0067-PC-ER
91-0143-PC-ER

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MARTHA FLOREY,
Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,
Respondent.

Case No. 91-0086-PC-ER

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BARBARA MILLER,
Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,
Respondent.

Case Nos. 91-0117-PC-ER
91-0142-PC-ER

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DECISION
ON MOTIONS
TO
COMPEL DISCOVERY
AND
FOR PROTECTIVE
ORDER

These matters are before the Commission to resolve a dispute over the discoverability of an investigative report. Complainants have filed motions to compel discovery and respondent has filed a motion for a protective order and the parties have been given the opportunity to submit arguments thereon.

This dispute involves an investigatory report prepared by respondent's Affirmative Action Officer, Demetri Fisher, concerning complainant's charges of gender discrimination/harassment and retaliation against their supervisor, Mila Plosky. In response to complainant's request for a copy of this document, respondent provided a "final report" prepared by Deputy Secretary Jorgensen, which summarized Mr. Fisher's report, but refused to provide a copy of Mr. Fisher's actual investigative report.

The Commission rules provide that "parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats." §PC 4.03 Wis. Adm. Code. Section 804.01(2)(a), Stats., provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.

In support of its motion for a protective order with regard to Mr. Fisher's investigative report, respondent argues first that "[s]ince DOT has conceded the merit of the complainants' allegations in the matters pending before the Commission in the Deputy Secretary's final report, Mr. Fisher's preliminary report is not relevant." However, since the Deputy Secretary's findings run only to the issue of "probable cause," and the complainants already have gone past this stage of the process through waiver of investigation pursuant to §230.45(1m), Stats., it does not appear that respondent has made a blanket admission of liability for all purposes. Therefore, relevance cannot be ruled out on this ground.

Respondent's second contention is that "portions of Mr. Fisher's report are privileged because they describe disciplinary action actually imposed upon DOT employees and recommendations for disciplinary action against a DOT employee. Information relating to disciplinary action against state employees is privileged under §230.13(3), Stats." However, this subsection does not create an absolute "privilege" per se, but merely provides that "the secretary [of DER] and the administrator [of DMRS] may keep records of the following personnel matters closed to the public." (emphasis added)
Complainants should not be precluded from discovery of the investigative

report because it refers to disciplinary actions, the records of which are subject to a discretionary exception to the open records law.

ORDER

Respondent's motion for a protective order is denied. Complainants' motions to compel discovery are granted, and respondent is directed to provide each complainant with a copy of Mr. Fisher's investigative report within seven days of the date of the entry of this order.

Dated: December 23, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner