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EDWARD J. GERMAIN,
 Complainant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 91-0083-PC-ER

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RULING
 ON MOTION
 FOR SANCTIONS

This matter is before the Commission on the respondent's motion for sanctions and dismissal of complaint due to a failure to provide discovery.

The complaint was filed on June 28, 1991. The respondent served interrogatories and a request to produce documents on complainant's counsel on December 16, 1991. On February 27, 1992, after the complainant had failed to respond to the request, the respondent filed a motion to compel. By interim decision and order dated May 14, 1992, the Commission granted the motion to compel.

An initial determination of probable cause and no probable cause was issued on August 25, 1992 and on November 17, 1992, respondent filed its motion for "an order refusing to allow the complainant to support or oppose any claims arising from this complaint, and dismissing this complaint with prejudice, for failure to comply with the Interim Decision and Order." During approximately the month of February, 1993, the parties unsuccessfully attempted to settle the complaint, but it was not until March 18, 1993, that complainant served his responses to respondent's interrogatories. The response totalled 21 pages plus copies of documents.

The complainant offered the following additional description of the facts relevant to the respondent's motion:

On December 2, 1992, a prehearing/conciliation conference was held. The issues were framed and discussion regarding conciliation took place. At the conference it was agreed that further settlement discussions should be undertaken and, consequently, establishment of a hearing date or a briefing schedule

on respondent's Motion for Sanctions was postponed for sixty (60) days. A status conference was set for February 4, 1993.

In the period January through March, 1993, complainant's attorney was involved in a heavy schedule of briefing and litigation including a petition for review to the Wisconsin Supreme Court, extended litigation against Exxon company, and two ERD hearings, among other matters. The February 4 status conference was postponed ultimately until March 8, 1993. However, during that period, serious efforts were made by attorneys for the parties to settle the cases, unfortunately without success.

The Commission's authority with respect to imposing sanctions for failure to comply with an order compelling discovery is set forth in §804.12(2). That authority includes, *inter alia*, "prohibiting the disobedient party from introducing designated matters in evidence" and "dismissing the action or any part thereof."

In this case, the complainant offered essentially no justification for the failure to comply with the Commission's Interim Order. It is true that the Commission's investigation of the charge of discrimination was not completed for more than a year after the complaint was filed. However, in its May 15th Interim Decision, the Commission made it clear that parties are entitled to exercise their discovery rights during the course of an investigation. Significant sanctions are appropriate where no discovery is provided until 10 months after the issuance of an order to compel. There was no showing that the failure to provide discovery was based on the unavailability of the underlying information or that the delay was unintentional. The Commission concludes that the delay reflects gross negligence and a callous disregard for the discovery process and the Commission's May 15th order. The Commission relies on these conclusions and orders preclusion of the evidence sought in the discovery request.

This result is consistent with the Commission's decision in Southwick v. DHSS, 85-0151-PC, 2/13/87, where the Commission barred the respondent from offering evidence related to the subject matter inquired into by appellant's interrogatories which the Commission had previously ordered respondent to answer.

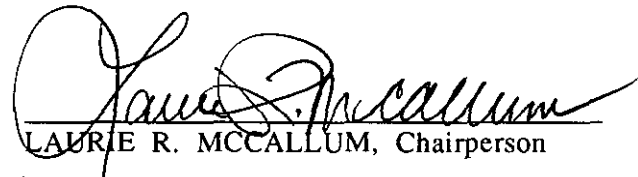
The Commission declines to dismiss the complaint at this time, as requested in respondent's motion.

ORDER

The Commission denies respondent's request that this matter be dismissed as a sanction for failure to provide discovery. Complainant will not be allowed to offer any evidence in support of his position that is related to the subject matter inquired into by the respondent's December 16, 1991 interrogatories and request to produce documents. Another prehearing conference will be scheduled. The conference will also relate to complainant's other pending case, 90-0005-PC-ER).

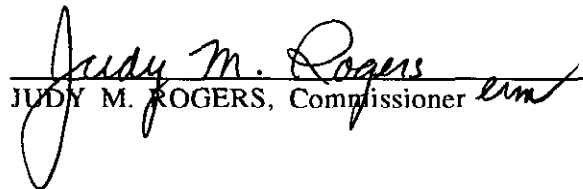
Dated: July 30, 1993

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner *em*