STATE OF WISCONSIN PERSONNEL COMMISSION

WALLACE OWENS,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 91-0163-PC-ER

RULING ON MOTION TO COMPEL DISCOVERY

On July 7, 1992, complainant filed a Motion to Compel Discovery. The following findings are made solely for the purpose of deciding this Motion.

1. On November 7, 1991, complainant filed with the Commission a charge of discrimination alleging that he had been discriminated against on the basis of his color or race when he had been terminated by respondent DOT from a State Patrol Enforcement Cadet position.

2. In defending against this charge of discrimination, respondent has contended that complainant was terminated because the notebooks he was required to prepare as part of his training and employment as an Enforcement Cadet did not meet respondent's performance standards.

3. Respondent's First Request for Interrogatories and Production of Documents, dated February 17, 1992, included the following Interrogatories:

> Interrogatory No. 13: Have you ever been involuntarily terminated from a law enforcement job?
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> Interrogatory No. 14: If the answer to Interrogatory 13 is "yes", provide the name and address of the employer that terminated you, the date of termination, and the reasons why you were terminated.

4. Complainant's Objections and Response to Respondent's First Request for Interrogatories and for Production of Documents, dated March 16, 1992, stated as follows, in pertinent part:

13. In response to Interrogatory Number 13, the Complainant objects to the inquiry as irrelevant to the claims as filed, and not reasonably calculated to lead to discoverable evidence. Subject to these objections; Yes.

14. In response to Interrogatory Number 14, the Complainant objects to this inquiry as irrelevant to the claims as filed, and not reasonably calculated to lead to discoverable evidence. Subject to these objections; the Complainant was involuntarily terminated from the employ of the Department of Transportation, in April of 1990. The Complainant was terminated for earning a cumulative notebook score of 68%. The Complainant was terminated from the Milwaukee Police Department in October of 1982. The reason given for said termination was "unsatisfactory performance."

5. On June 26, 1992, counsel for respondent deposed complainant. The transcript of such deposition states as follows, in pertinent part, beginning at line 21 on page 9:

Q Have you been terminated by any other employer within the last ten years?

MR. OLSON: Objection, irrelevant.

MR. KERNATS:

Q Go ahead and answer.

A. Last ten years Milwaukee Police Department.

Q When was that?

A. In '82, 1982.

Q Did you file any kind of discrimination complaint against the Milwaukee Police Department --

MR. OLSON: Same objection, that's irrelevant.

MR. KERNATS:

Q -- after you were terminated?

A. No.

Q Other than the Milwaukee Police Department, have you known terminated by any employer within the last ten years?

A. No.

Q I'll ask you just a few questions about the termination from the Milwaukee Police Department. You testified that that was sometime in 1982?

A. Yes.

Q Do you remember the reasons why you were terminated from that position?

MR. OLSON: Counsel, what's the relevance of the termination from the Milwaukee Police Department to the current claims as filed?

MR. KERNATS: Is that an objection?

MR. OLSON: It's an objection, and I guess I'm going to allow some latitude here provided that you can show me what the relevance is. Otherwise, if there is no -- I'm not following the line of questioning.

MR. KERNATS: Is that an objection?

MR. OLSON: The objection is to relevance, and I will instruct him not to answer, but I want to give you the opportunity to explain where you're going with this and if you need the information, that's fine, we can continue on with it. Otherwise, I'll instruct him not to answer

MR. KERNATS: I'm not going to argue the objection. I'll tell you that you cannot object -- you cannot instruct your witness not to answer based on relevance. If you do, I'll file a motion to compel and ask for sanctions

MR. OLSON: You can do that. I don't know where you're going to go with sanctions. I know that you cannot ask questions that are not reasonably anticipated to lead to admissible evidence, and if you go too far, you begin to harass the witness, and I think that these kinds of questions are unnecessary and unduly burdensome. So it goes just beyond the relevance objection, it goes into, I guess, the sky would be the limit then. So that's my objection.

MR. KERNATS: Well, will you answer the question then?

MR. OLSON: Well, I'm going to instruct him not to answer any questions about his former employer and the termination there unless you can explain how this will lead to the discovery of admissible evidence.

> MR. KERNATS: Again, I'm not going to argue the motion. I'm going to say that it's relevant. You are providing an improper instruction by telling the witness not to answer and I'll respond to that by filing a motion to compel.
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> MR. OLSON: Well, that would be one way to do it, but also you could mitigate any of your costs by getting the judge on the phone right now and have a ruling on it. If you want to do it that way, that's fine, too.

6. On July 7, 1992, respondent filed a Motion to Compel Discovery requesting that the Commission issue an order compelling the complainant to fully answer questions about the reasons for his termination from the Milwaukee Police Department, which were put to him in the June 26, 1992, deposition; and that the Commission award to respondent reasonable expenses, including attorney fees, incurred as a result of this Motion.

The Commission has adopted the discovery provisions of Chapter 804 of the Wisconsin Statutes. Section PC 4.03, Wis. Adm. Code. Citations to Chapter 804 relevant to the instant case include the following:

> **804.01 General provisions governing discovery.**
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> (2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter the scope of discovery is as follows:
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> (a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> **804.05 Depositions upon oral examination.**
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> (4) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS.
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> (b) All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of

any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Upon request of any party, where the witness has refused to answer, and with the consent of the court, the court may rule by telephone on any objection. The court's ruling shall be recorded in the same manner as the testimony of the deponent In the absence of a ruling by the court, the evidence objected to shall be taken subject to the objections.

(5) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in s. 804.01(3). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

804.12 Failure to make discovery; sanctions. (1) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) *Motion.* If a deponent fails to answer a question propounded or submitted under s. 804.05 or 804.06, or a corporation or other entity fails to make a designation under s. 804.05(2) (3) or 804. 06 (1), or a party fails to answer an interrogatory submitted under s. 804 8, or 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 an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he or she applies for in order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to s. 804.01 (3).

(b) *Evasive or incomplete answer.* For purposes of this subsection an evasive or incomplete answer is to be treated as a failure to answer.

(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 aware of expenses unjust.

> 2. If the motion is denied, the court shall, after opportunity for hearing require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an aware of expenses unjust.
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> 3. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Section 804.01(2)(a), Stats., provides that, "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 sought appears reasonably calculated to lead to the discovery of admissible evidence." One of the issues in this case is the adequacy of complainant's job performance in a State Patrol Enforcement Cadet position. This position is a training position which, if successfully performed, is designed to lead to eventual appointment to a law enforcement position with the Wisconsin State Patrol. The questions under consideration here related to complainant's performance in a law enforcement position with the City of Milwaukee. Although an individual's performance in one job is not a perfect or dispositive indicator of what his performance will be in a subsequent, related job, it is a tool routinely relied upon by employers as one possible indicator. It seems obvious that the skills and abilities or the lack of skills and abilities that a person exhibits in one job will carry over in whole or in part to the skills and abilities that person exhibits in a similar job. As a consequence, the questions posed to complainant relating to his performance in his position with the Milwaukee Police Department appear clearly relevant, for discovery purposes, to the matter at issue here, and were not part of an effort to harass complainant.

The parties have asked the Commission to indicate in this decision whether the language in §804.05(4)(b), Stats., relating to rulings by telephone, would be applicable to Commission proceedings. As indicated above, §PC 4.03 adopts the discovery provisions of Chapter 804, Stats., and does not state any exceptions. As a consequence, parties to Commission proceedings should be able to take advantage of this provision. However, in view of the disruption such requests could inflict on the Commission's operations, the Commission

would suggest that, where possible, the parties consult with the examiner in advance regarding availability, and not use that procedure with respect to mundane issues of relevance

Complainant argues that the Commission's decision in Paul v. DHSS, Case No. 82-PC-ER-69 (10/14/83), would have required counsel for respondent to respond to the objection raised by counsel for complainant at the time the objection was raised at the deposition. However, in Paul, the party filing the Motion to Compel did not, in its written submission to the Commission in support of its Motion, explain the relevance of the requested information to the underlying substantive issue in the case. As a consequence, the Commission denied the Motion in part. This is not the situation here where respondent, in its brief in support of the Motion, offered the following:

> Questions about the Complainant's termination from the Milwaukee Police Department are relevant, and are reasonably calculated to lead to the discovery of admissible evidence in this case because the Complainant alleges that he was terminated by DOT from a law enforcement position because of his race. Without knowing the reasons for his termination from a law enforcement position with the Milwaukee Police Department, it is difficult to clearly demonstrate relevance. Relevance depends upon the answer. For example, if the Complainant had been terminated for dishonesty or falsehood, this would be relevant to the issue of his credibility. If he had been terminated for unsatisfactory report writing, this would be relevant to DOT's assertion that he was terminated from the State Patrol Academy because of unsatisfactory writing skills. In any case, it is not necessary to clearly demonstrate relevance during the discovery stage of a lawsuit. The Commission need only determine that the information may lead to admissible evidence. This question is clearly not so irrelevant, unfair, and intrusive that it constitutes harassment.
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> Further, the Complainant has already given a partial answer to this question in response to DOT's Interrogatory numbers 13 and 14, which asked him to provide the reasons why he was terminated from any law enforcement job. In his written response to these Interrogatories, the Complainant stated that he was terminated from the Milwaukee Police Department for "unsatisfactory performance." DOT has information indicating that this is not a complete statement of the reasons for the Complainant's termination from the Milwaukee Police Department and has the right to require fuller explanation by questioning him in deposition.

The Paul decision does not stand for the proposition that the deposing party must state the relevance of requested information at the time of the deposition when an objection is raised, although counsel are encouraged to attempt to resolve discovery disputes through informal discussion where possible.

The Motion to Compel will be granted and complainant is ordered to fully respond to the questions put to him at the deposition on June 26, 1992, concerning the reasons for his termination from the Milwaukee Police Department. This response is ordered to be made in Madison at the offices of counsel for respondent unless the parties agree to other arrangements.

Failure to answer proper questions at deposition can result in the imposition of sanctions pursuant to §804.12(1)(c), Stats. B & B Investments v. Mirro Corp., 147 Wis. 2d at 686. However, §804.12(1)(c)1. provides that such an award shall only be made "after opportunity for hearing." Such opportunity has not yet been provided. Respondent is hereby advised that, in order to be considered by the Commission, a request for sanctions must be filed after the issuance of this Ruling and Order. After any such filing, the Commission will present the parties an opportunity for hearing on the request.

Finally, complainant raises in his arguments information relating to the deposition of a Leslie Savage. This information is not relevant to the disposition of the instant Motion.

Order

The instant Motion to Compel Discovery is granted and complainant is ordered to fully respond to the questions put to him at the deposition on June 26, 1992, concerning the reasons for his termination from the Milwaukee Police Department. This response is ordered to be made in person in Madison, Wisconsin, at the offices of counsel for respondent unless the parties agree to other arrangements.

Dated: September 18, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt

GERALD F. HODDINOTT, Commissioner