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TIMOTHY M. RUIPER,

Complainant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 95-0181-PC-ER

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RULING
ON REQUEST TO
IMPOSE SANCTIONS
AND PROTECTIVE ORDER

Two issues are presented for resolution. First, Mr. Rupiper asked the Commission to impose sanctions, pursuant to §PC 2.05(4)(c) and (d), Wis. Adm. Code, due to DOC's untimely-filed answer. Second, DOC seeks a protective order with respect to the bulk of the documents attached to its answer.

Request for Imposition of Sanctions for DOC's Untimely-filed Answer

This complaint was filed on December 14, 1995. The Commission subsequently made two separate requests of Mr. Rupiper for further information. He complied with both requests, although he sought and was granted a three-week extension regarding one of them.

On April 18, 1996, the Commission directed DOC to file an answer by May 20, 1996. The Commission's letter stated, in part:

The failure to file an answer may result in the imposition of the sanctions set forth in §PC 2.05(4)(c), Wis. Adm. Code:

If a respondent fails to answer or to produce requested information necessary for an investigation, the commission may make an appropriate inference, analyze the available evidence and issue an initial determination. If probable cause is ultimately found, conciliation is unsuccessful and a hearing on the merits of the complaint is convened, the hearing examiner or commission may exclude any evidence which should have been offered in response....

An extension of the time limit for filing your answer will be granted only in unusual circumstances.

By letter dated May 28, 1996, and received by the Commission the following day, Mr. Rupiper stated that he had not received an answer from DOC and requested that the Commission "make an appropriate Inference, analyze the available evidence and Issue an Initial determination on the charges" as provided in §PC 2.05(4)(c), Wis. Adm. Code.

By cover letter dated May 28, 1996, DOC filed its answer with the Commission on May 29th (nine days late). DOC responded to Mr. Rupiper's request for sanctions by memo dated May 30th:

Ironically, during the week leading up to the 5/20 date [respondent's counsel] was involved in obtaining an injunction against a former DOC employee who was intimidating DOC employees and their families. Given the unforeseen necessity of preparing for that hearing and the more critical nature of that proceeding, [counsel] could not prepare the Rupiper response by 5/20.

While the Commission does not condone the late filing by DOC, rejection of the answer would be too severe a penalty for the delay involved in this proceeding, given the absence of any prejudice either argued or shown by Mr. Rupiper. This result is consistent with the Commission's decision in Balele v. DHSS et al., 95-0005-PC-ER, 5/15/95 where the Commission declined to reject DHSS' reply¹ which was filed either one or two working days late. The circumstances in the present case may be contrasted to those in Jackson v. DOC, 94-0115-PC-ER, 3/7/96, where the Commission foreclosed complainant from the opportunity to present information in response to respondent's answer. In Jackson, the Commission had sent a letter to complainant's counsel on March 6th noting that respondent had filed its answer and stating that complainant's response was due by April 5th. No response was received and on September 21st, the Commission sent complainant and his counsel a certified letter stating that the case would be dismissed unless complainant either provided the response within 20 days or indicated that there was no information complainant wished to add. Counsel responded on the 20th day and stated that, due to his schedule, he wished to add rebuttal information within 30 days. After a substitution of counsel, complainant failed to meet two more deadlines

¹After respondent filed its answer to the charge of discrimination, the complainant in Balele responded and the respondent was then provided ten days to reply. It was the reply that was late.

before the Commission finally received the response. The aggravated circumstances in Jackson are not present in the instant case.

Request for Protective Order

As noted previously, DOC's answer was filed on May 29, 1996. DOC indicated in the final paragraph of the cover letter that an "edited copy of the undated memo from Brad Ness to Sam Hierlmeier, date stamped as received on April 29, 1996," was sent to Mr. Rupiper without the attachments due to concern that a protective order be issued prior to release of the attachments. DOC proposed language for a protective order in its letter dated July 17, 1996.

Mr. Rupiper has concerns with DOC's proposed language only in the following regard (as stated in his letter dated July 20, 1996, which was received by the Commission on August 5, 1996):

I agree with the language in the sense that the information should not be shared outside the need for litigation.

My only concern with this language is that it is already common knowledge throughout the institution that discipline was administered in my case and it has been brought to my attention by fellow staff that Sgt. Walker received a suspension for his actions involving me. This is known as the schedule showed a leave without pay for a period of time. If this is correct I would not want to be accused in the future of disclosing this information as most of the institution is already aware of discipline levels that are administered at GNCI for most disciplinary actions.

To be sure of this at this time I am requesting that these documents in question be held by the Personnel Commission until I need them for litigation. I retain the right to these documents upon request for litigation preparation within the State system and in any court which I may pursue this situation in the future.

Accordingly, the protective order will be issued as proposed by DOC in its letter dated July 17, 1996, with the caveat that such materials continue to be retained in the Commission's file as requested by Mr. Rupiper.

ORDER

Mr. Rupiper's request to impose sanctions arising from the timing of DOC's answer is denied.


Because DOC's answer will be considered, DOC also will be provided a brief opportunity to respond to incident report #281953 which was included by Mr. Rupiper in his submissions dated June 23, 1996. (See final paragraph of Attorney Stege's letter to the parties dated July 12, 1996.)

The attachments to the memorandum from Brad Ness to Sam Hierlmeier, received by the DOC on April 29, 1996, may be used by Mr. Rupiper or his representative only for the purpose of preparing for litigation of this case and may not be disclosed by him or his representative to any other person for any other purpose.

Dated: August 15, 1996 STATE PERSONNEL COMMISSION

KMS:kms
K:D:temp-8/96 Rupiper


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner