

MARIE J. NELSON,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MADISON,**
Respondent.

**RULING ON
MOTION**

Case No. 97-0020-PC-ER

The complainant has essentially filed a motion for sanctions pursuant to §804.12(2), Stats., based on respondent's alleged failure to comply with the Commission's order of December 19, 1997. The following findings are derived from information provided by the parties or from the case file in this matter, appear to be undisputed, and are made solely for the purpose of deciding this motion:

1. On December 19, 1997, the Commission issued the following order:

Respondent's motion for reconsideration is denied. Respondent is ordered to provide a copy of all documents used or generated as a part of the subject investigation to complainant within 30 days of the date of this ruling. The protective order stated in this ruling is effective as of the date of this ruling.

2. The investigation referred to in this order was an investigation, which had been completed by June Weisberger, an emeritus professor of law at the University of Wisconsin Law School, of the substance of complainant's allegations which form the basis of this complaint.

3. In a letter to the Commission dated January 27, 1998, complainant stated as follows, in pertinent part:

I have received a copy of the summary report Prof. Weisberger wrote of her investigation of my case. Mr. Dowling also included a copy of my husband's questions and answers and the addendum Prof. Weisberger

wrote about these questions. Nothing else was included to comply with the Order issued to the UW.

4. In a letter to complainant dated February 9, 1998, counsel for respondent stated as follows, in pertinent part:

I am writing to let you know that I have discussed the issue of Professor Weisberger's working documents with Commissioner Laurie McCallum. I have explained to Commissioner McCallum that Professor Weisberger no longer has possession of the working papers. She believes that she forwarded her entire file to the UW-Madison Provost's office. I am attempting to locate the documents within that office.

5. In a letter to complainant dated February 17, 1998, counsel for respondent stated as follows, in pertinent part:

Enclosed please find copies of the additional materials that have now been located from Professor Weisberger's investigation. . . . I also have three cassette tapes . . . I will have copies of these tapes made and forwarded to you as soon as possible.

6. The cassette tapes referenced in Finding 5 were forwarded to complainant on or around February 20, 1998.

7. In a letter to the Commission dated February 22, 1998, complainant stated as follows, in pertinent part:

Per our conversation on February 20, 1998, I am writing to inform the Commission that the documents that I received on Thursday, February 19, 1998 from Mr. Dowling at the UW Legal Services was, as I predicted, not even close to being complete. . . .

. . . It is ridiculous for the University to have not provided me with a copy of Professor Weisberger's notes. These notes are the only documentation regarding several crucial interviews and responses. Just by reading Professor Weisberger's investigation summary, it is quite obvious that there is a very large amount of information that was not provided to me. . . .

Pursuant to sec. 804.12(2)(a)(3), Wis. Stats., I am requesting that a judgment be rendered by default against the University . . .

8. In a letter to the parties dated March 2, 1998, Commissioner McCallum stated as follows:

On February 25, 1998, the Commission received a letter from complainant in which she expressed her belief that the respondent's response to the Commission's discovery order relating to Professor Weisberger's investigation did not fully comply with the order, and in which she requested sanctions under §804.12(2), Stats. Obviously, in order to determine whether sanctions are appropriate, the Commission will need additional information from the parties.

Please be advised that respondent is to file in writing, on or before **March 16, 1998**, explaining how its release of information to the complainant fully complies with the Commission's order. This should include an affidavit from Professor Weisberger detailing what documents she generated and/or considered in conducting her investigation; if any of these documents no longer exist, which documents were destroyed and why they were destroyed; and, if Professor Weisberger no longer has custody of any of these documents, which documents does she no longer possess, to whom has custody of these documents been transferred, and why was custody transferred to this other individual or entity. Complainant is then to reply in writing, on or before **March 30, 1998**, indicating specifically the basis for her belief that respondent's response to the Commission's order is incomplete. In the meantime, the deadline for complainant to file her response to respondent's answer is indefinitely postponed. (emphasis in original)

9. In a letter to the Commission dated March 13, 1998, counsel for respondent stated as follows, in pertinent part:

In response to your letter of March 2, 1998 and as agreed in our telephone conversation today, the Respondent submits the following chronological summary of the discovery issues in the above-captioned matter. It is hoped that this signed statement of counsel will be sufficient for the Commission's purposes:

June 6, 1997 - In response to the Complainant's request, previous counsel for the Respondent, Gail M. Snowden, provided various documents. . . .

September 26, 1997 - In response to the Complainant's request, current counsel provided copies of her personnel file and correspondence between the Chancellor of UW-Madison and Professor M██████████. . . .

November 20, 1997 - Over Respondent's objection, the Commission ordered the Respondent "to provide a copy of all documents used or generated as a part of the subject investigation."

December 19, 1997 - The Commission denied the Respondent's motion for reconsideration of the above order and granted a protective order preventing dissemination of such documents by the Complainant.

January 16, 1998 - Counsel provided a complete copy of Emeritus Professor June Weisberger's investigation report to the Complainant. . .

Late January/Early February, 1998 - Counsel spoke with Professor Weisberger by telephone on two occasions. Professor Weisberger informed counsel that she did not have possession of any of her records from the investigation, except for a copy of a handwritten transmittal memorandum to Casey Nagy (Executive Assistant to the Provost) dated June 23, 1997 forwarding all of her working papers. . . . The memorandum lists all documents that Professor Weisberger generated and/or considered in conducting her investigation.

The Provost's office is an appropriate repository for such documents given the facts that it is the office that coordinates all such investigations and Professor Weisberger is retired, working out of her home. The Provost's office was delayed in locating the documents forwarded by Professor Weisberger. . . . However, Mr. Nagy located the documents, including three cassette tapes, and forwarded them in their original sealed envelope to counsel. . . .

February 17, 1998 - Counsel provided a complete copy of Professor Weisberger's working papers as contained in the sealed envelopes to the Complainant. . . .

February 20, 1998 - Counsel provided copies of the three cassette tapes to the Complainant. . . .

It should be clear to the Commission from this chronology that the Respondent has fully complied with its order concerning discovery. The Complainant has been provided copies of all documents that are covered by the Commission's order. Counsel is unaware of the existence of any other documents relating to or resulting from the investigation of this matter. If the Complainant has some specific concern or request, we will pursue it again in good faith. However, the vague, unfounded and unsubstantiated concerns contained in the letter of February 22, 1998 should be disregarded without further and more specific information.

10. A copy of the June 23, 1997, list prepared by Professor Weisberger and forwarded to Mr. Nagy which is referenced in Finding 9, above, was attached to this March 13, 1998, letter from counsel and states as follows:

To: Casey Nagy
From: June Weisberger

6/23/97 List of Enclosed Materials (in no special order)
5 page document dated 3/11/97 from Marie Nelson (supplementing her Personnel Commission complaint)
written response to my written questions from Jeff Nelson
3/24/97 memo from C M
4/9/97 letter from Lester Pines plus 2 pages handwritten statement from Bernice Patterson
4 sheets of e-mail
4/5/97 response from Julie Nelson
3/24/97 memo from Joanne Paul-M
4/24/97 letter from Marie Nelson + 1 tape
3/19/97 response from Andrew Peterson
5/2/97 letter from Marie Nelson + attachment
4/19/97 letter to Marie Nelson from JW + 2 tapes of 4/19/97 conversation in JW's office

11. In a letter to the Commission dated March 18, 1998, complainant stated as follows, in pertinent part:

. . . I would like to express my concern that Mr. Dowling did not fulfill the Commission's request for a signed affidavit listing all documents used in or generated by the investigation. . . .

Mr. Dowling refers to Professor Weisberger's notes in the September 26, 1997 letter objecting to my request for her notes. To me this indicates his belief that the notes exist. The investigation summary report from Professor Weisberger to the Provost Office has information that is not supported by any of the documents provided to me thus far. This leads me to conclude that either: most of the investigation was conducted orally over a period of several months and written into a summary report from memory; or, that handwritten notes, written statements and other written communications between people involved with the investigation are being willfully withheld for reasons that benefit the UW. . . .

12. In a letter to the parties dated March 30, 1998, Commissioner McCallum stated as follows, in pertinent part:

. . . I have decided not to accept Mr. Dowling's letter in lieu of an affidavit from Professor Weisberger. In my opinion, an affidavit from Professor Weisberger, in contrast to the letter from counsel, could resolve complainant's concerns relating to the completeness of the materials she has received from the University of Wisconsin in response to the Commission's order, and, as a result, could obviate the necessity of holding an evidentiary hearing on the matter. It follows from this that the potential inconvenience to Professor Weisberger appears to be substantially outweighed by the potential burden to the parties and to the Commission if it becomes necessary to conduct such a hearing. . . .

13. On April 8, 1998, respondent filed an affidavit of June Weisberger which stated as follows:

1. I am an Emerita Professor of Law at the University of Wisconsin. I was appointed by Chancellor David Ward to investigate Marie J. Nelson's allegations of misconduct against Professor C [REDACTED] M [REDACTED] of the UW School of Veterinary Medicine.

2. I have reviewed University Legal Counsel John Dowling's letter of March 13, 1998 to Laurie R. McCallum of the State Personnel Commission and its attachments. The letter is true and correct to the best of my knowledge in regard to telephone conversations that Mr. Dowling and I had in late January of early February 1998.

3. On June 23, 1997 I forwarded documents from this investigation to Casey Nagy, Executive Assistant to the Provost of UW-Madison. A true and correct copy of my forwarding memorandum and all of the enclosed documents is attached to Mr. Dowling's March 13, 1998 letter. The forwarding memorandum includes a complete listing of all of the documents that I forwarded to Mr. Nagy. Also, on or about June 23, 1997, I discarded my personal working notes from the interviews I had conducted.

4. I no longer have possession of any documents in regard to this matter, except for a copy of the aforementioned forwarding memorandum.

14. In a letter to the Commission dated April 26, 1998, complainant stated as follows, in pertinent part:

. . . Per the letter from Mr. Dowling and the affidavit from Professor Weisberger the documents listed by them constitute a complete copy of all documents generated and/or considered in the investigation. This

statement places a large amount of missing information under the category of personnel working notes which have been improperly destroyed. First, let me start off by saying that many of the documents provided thus far fall into the same category as those that have been destroyed. This causes me to question why the documents were destroyed, who chose what to destroy and what to keep, and lastly, the fact that this was an investigation conducted by a public institution therefore the investigation notes were not private property.

. . . There are primarily two sources that I used to indicate what information and/or documents were generated and/or considered in the investigation. These documents are listed below.

Professor Weisberger's investigation summary report, dated May 3, 1997

Records concerning the appointment of Professor Weisberger to conduct the investigation.

Missing interview notes/statements:

Marie Nelson

C. M.

Joanne Paul-M.

Carolyn Korsower

Dale Bjorling

Andrew Peterson

Rebecca Zuba

Sean Campbell

Bernice Patterson and her husband

Records indicating extra pay calculations provided by the accounting department.

Memorandum from C. M. to June Weisberger, dated March 24, 1997

Memo from Professor Weisberger to Lester Pines dated March 18, 1997

A complete listing for personnel contacted and interviewed was not provided

. . . I hope that this shows that the University of Wisconsin has not fully complied with either the Order requesting the documents or a complete and accurate accounting of the documents generated and/or considered in conducting the investigation. Please let me know if there is anything else that I can provide to support my claim.

Section 804.12(2), Stats., states as follows, as relevant here:

(2) FAILURE TO COMPLY WITH ORDER. (a) If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.

(b) *In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order . . . to pay the reasonable expenses, including attorneys 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.*

It appears that the only items which complainant is claiming have not been properly provided to her pursuant to the Commission's discovery order are the notes created by Professor Weisberger as part of her investigation and upon which she relied in preparing her investigative report. However, such notes, according to Professor Weisberger and respondent, no longer exist and have not existed since at least June 23, 1997. Complainant made the discovery request upon which the Commission relied in issuing its discovery order on August 12, 1997, some months after the notes had been destroyed. It is not possible, within the context of discovery, to order the production of something that does not exist. Based on the undisputed facts before it, the Commission cannot conclude that respondent violated the Commission's discovery order.

Complainant also appears to be offering argument relating to the propriety of Professor Weisberger's destruction of her interview notes. These arguments are not properly addressed within the context of this discovery dispute. However, in regard to her public record argument, §19.32(2), Stats., exempts "notes" such as those here

from the coverage of the public records law; and, in regard to her argument apparently relating to the bad faith destruction of these notes by respondent, complainant is referred to §910.04, Stats., which relates to the admissibility of other evidence relating to the content of documents which have been lost or destroyed. Complainant also has available to her other discovery options relating to obtaining information from those individuals who were interviewed by Professor Weisberger as part of her investigation. Although complainant contends that a list of the names of such individuals was required to be provided to her, this does not appear to be either the subject of her original discovery request or of the Commission's order or subsequent directives to respondent.

ORDER

Complainant's motion for sanctions pursuant to §804.12(2), Stats., is denied. .

Dated: May 20, 1998.

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

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