

MICAH A. ORIEDO,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**

Respondent.

Case No. 98-0124-PC-ER

**RULING
ON MOTION FOR
PROTECTIVE
ORDER**

This matter is before the Commission on respondent's motion for a protective order.

The underlying complaint of discrimination, based on color, national origin or ancestry and race, was filed on July 2, 1998. The Commission has issued two prior rulings on issues raised by the parties. The matter is now before the Commission on respondent's motion for a protective order, filed with respect to complainant's discovery request dated February 9, 1999. In its motion, respondent states:

1. That on February 9, 1999, the Complainant caused to be served upon Respondent Interrogatories, Requests for Admission, and Request for Production of Documents.
2. That some of Complainant's Interrogatories are incomprehensible, and that some of Complainant's Interrogatories and Requests for Documents request confidential information and information which would be unduly burdensome to produce.
3. That the basis of Respondent's objections to producing the material referenced in Item #2 is, in part, Sec. 805.01(3), Wis. Stats., which provides for any order which justice requires to protect against undue burden or expense; the basis of Respondent's objection to producing material which is confidential is Sec. 103.13(6)(e), Wis. Stats., which authorizes withholding information disclosure of which would invade a person's privacy, as well as Sec. 230.13, Stats., which authorizes withholding information from closed personnel transactions.

A prehearing conference, which was initially convened on March 1, 1999, was scheduled to reconvene on March 15th. In a letter to the parties dated March 15th, the Commission staff member who held the conference wrote:

During the prehearing conference on March 15, 1999, I raised the topic of the respondent's motion, dated March 11th and filed on March 12th, relating to various discovery disputes/issues. I informed the parties that it was my normal practice to have the parties discuss any discovery disputes informally before placing them in front of the Commission for formal ruling. Respondent refused to engage in such a discussion.

Complainant has until March 26, 1999, to respond to the motion and respondent will then have until April 2nd to file a reply.

Complainant filed a second discovery request of respondent on March 17th and responded to the respondent's motion as follows:

1. I [am] asking the Commission to grant DOC a blanket protective order for its documents that I am seeking or will seek to be released pursuant to Chapter 804 of Wisconsin Statutes. DOC has refused to release some documents arguing that they are confidential. The Protective Order should permit me to examine and copy the documents I sought or will seek in . . . discovery requests. I agree that the Protective Order should stipulate that I am not allowed to share the information with anybody other than Pastori Balele during the proceedings of this case in the Commission.

2. I will re-examine the language in my requests for discovery to see if editing is necessary. If I do not see any language use problem in those requests, I will have no alternative but to move the Commission for relief including filing a motion [for] default judgment against DOC.

Respondent filed a reply that stated, in part:

Mr. Oriedo's Interrogatories, Requests for Admission, and Requests for Documents propounded to Respondent on 2-9-99 in the above-captioned matter are verbatim the same as Interrogatories previously propounded in a case filed in the Commission previously by a Pastori Balele, Case No. 97-0012-PC-ER, who is Mr. Oriedo's representative in the instant case. The Commission previously ruled in Respondent's favor on a substantially identical motion by the Respondent in the Balele matter, in a decision issued 7-23-97.

Complainant and his representative cannot be unaware of the defects in these discovery requests because this is set forth clearly and at length in Respondent's Motion and Brief.

It is now up to Complainant, if he chooses, to reformulate the discovery requests so they are not incomprehensible, or unduly burdensome and expensive.

At the prehearing conference on 3-15-99, it was suggested that the parties meet informally to discuss these issues. The issues were informally discussed at some length during the prehearing conference. Although a Commission representative participated in this phone conference, the discussion became heated and was not productive.

Respondent's counsel has no objection to sitting down informally with Complainant; but, under the circumstances, what is the point?

Respondent's counsel cannot ethically give legal advice to Complainant or his representative.

Complainant and his representative are not rookies. Complainant's representative, Mr. Balele, has filed complaints in the Commission against numerous state agencies.

In materials dated April 15, 1999, the respondent answered complainant's second set of discovery requests and also filed a motion for a protective order relating to certain of those requests.

The point of an informal discussion between the parties to a discovery dispute is to make a good faith effort to resolve that dispute before requiring the parties and the Commission to go through the process of deciding the dispute formally, i.e. through the issuance of a written ruling after the submission of written arguments. Informal discussion may allow the parties to the dispute to identify problems, eliminate misunderstandings, recognize alternatives and reach agreements.

The Commission has consistently taken the position of encouraging parties to work out discovery disputes between themselves before submitting them to the Commission. This policy reflects the fact that the discovery process is actually a process between the parties. Local Rule 3 of the District Court for the Western District of

Wisconsin reflects a strong endorsement of engaging in an informal attempt to resolve discovery disputes before placing the matter before the court:

The court will not hear any motion concerning discovery under Rules 27 through 37 of the Federal Rules of Civil Procedure unless it appears in the motion or accompanying affidavit that moving counsel has made a serious effort to resolve the discovery dispute.

Respondent's refusal¹ to engage in an informal discussion of the discovery dispute in this matter has, to date, precluded the parties from reaching an informal agreement and has insured that they would file their briefs and that the Commission would render a written ruling. While the Commission cannot know whether an informal discussion would have resulted in a withdrawal of respondent's motion or an agreement on all points of dispute between the parties relating to discovery, respondent's refusal to participate in the discussion dictated another process and another result.

It would have been preferable if respondent had, on its own, contacted complainant in an effort to resolve the discovery dispute informally. However, it clearly was inappropriate for the respondent to refuse to engage in such informal discussions once directed to do so by a member of the Commission's staff. The Commission still perceives a potential for the parties to either eliminate their dispute or to reduce its scope by engaging in informal discussions. Therefore, the Commission issues the following

ORDER

Respondent's motion, dated March 11, 1999, is denied. Respondent is directed to contact complainant and to make a serious and good faith effort to resolve, informally, all aspects of the discovery dispute. If the parties, through direct discussions, are unsuccessful in their efforts, and if they both agree that a representative of the Commission might be of assistance in reaching agreement, they may contact the Com-

¹ The Commission declines to accept respondent's suggestion that the discovery issues were actually "informally discussed at some length during the prehearing conference." Rather, the

mission and ask that a representative of the Commission participate in their discussions. Irrespective of the results of the informal discussions, counsel for the respondent shall submit a letter to the Commission clearly describing all efforts taken by respondent to resolve the discovery dispute. Only after such a letter is filed will the Commission take up another motion by respondent relating to complainant's February 9th discovery request.

Because the respondent has also recently filed another motion for protective order, this one relating to complainant's March 17th discovery requests, respondent is directed to follow the same procedure of informal discussions and a letter before the Commission will address the respondent's April 15th motion for protective order.

Dated: April 21, 1999. STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:980124Cru13


JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter.

Commission accepts the description of events found in the March 15th letter, which noted: "Respondent refused to engage in such a discussion."