STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 98-0145-PC-ER

RULING ON MOTION FOR EXPENSES AND FINAL ORDER

In an "Interim Ruling on Motion for Sanctions" issued on December 3, 1999, the Commission dismissed this matter "except to the extent that the Commission retains jurisdiction to consider reasonable expenses as a sanction." The parties were asked to submit written arguments on the questions of whether an award of reasonable expenses was appropriate in this case, and if so, what the dollar amount of the award should be.

Respondents subsequently moved for "an award of reasonable expenses, including attorneys fees." In its motion, respondents seek reasonable expenses relating to two discovery rulings issued by the Commission. The first ruling, issued on July 19, 1999, was in response to respondents' motion to compel discovery. Respondents seek reasonable expenses relating to that ruling based on §804.12(1)(c), Stats. Respondents also seek reasonable expenses pursuant to §804.12(2)4., Stats., as a consequence of the Commission's December 3rd ruling. The parties have filed written arguments. Complainant appears *pro se*.

This case arises from respondents' decision to hire someone other than complainant for the career executive position of Executive Human Resource Manager-Centered Exam.

In its ruling dated July 19, 1999, the Commission considered various discovery disputes. The ruling summarized the events leading up to the ruling as follows:

Respondent filed motions on April 22, 1999, to compel discovery and for costs and sanctions. Respondent's motion arises from interrogatories served on complainant on February 16, 1999. Complainant initially responded to the discovery request on February 25, 1999. By letter dated March 3, 1999, respondent requested an in-person status conference to discuss perceived inadequacies in complainant's response. The results of the conference were summarized in a letter from the Commission dated March 12, 1999, which stated, in part:

> This letter summarizes the results of the conference held earlier today regarding the discovery issues raised in respondent's letter dated March 3, 1999.
>
> Complainant agreed to submit a new, more complete response to the respondent's interrogatories. The parties agreed that complainant would have until April 12, 1999, to file that response.

The April 12th date was later extended and complainant filed his revised response to the respondents' discovery request on April 19th. Respondent subsequently filed its motions. The parties filed written arguments regarding the motion. Interspersed with complainant's May 24th written arguments on respondents' motions were another set of responses to the underlying interrogatories. Some of those responses were identical to the April 19th version, but many included some modifications. [Footnote omitted.]

The results of the Commission's July 19th ruling may be summarized as follows:

1. Respondents' motion to compel was granted in part and denied in part. More specifically, the Commission analyzed 33 separate portions of the respondents' interrogatories. Respondents' motion to compel was granted as to 21 segments, denied as to 11, and granted in part and denied in part as to the final segment.
2. Respondents' motion for sanctions under §804.12(2), Stats., was denied as premature.
3. Complainant's motion to enjoin respondent was denied.
4. The Commission indicated it would contact the parties with respect to whether a hearing was necessary regarding respondents' motion for expenses under §804.12(1), Stats., and to establish a date to comply with the ruling on the motion to compel. "Because the statute provides an opportunity for hearing before an award of expenses under §804.12(1)(c), Stats., such a hearing will be held, unless the Commission is notified that the parties have reached a stipulation as to the matter of expenses." (July 19th ruling, page 24)

As reflected in a letter from the Commission dated August 19, 1999, the parties agreed to defer respondent's motion for expenses under §804.12(1), Stats.,[1] that was mentioned in the Commission's July 19th ruling, "until rulings are issued on both" the motion for sanctions and on respondent's July 12th motion to compel discovery which arose from respondents' second discovery request. The latter motion was never ruled on and became moot when the Commission issued its December 3rd ruling dismissing the complaint except for consideration of the issue of reasonable expenses. The December 3rd ruling made the parties' agreement, as reflected in the August 19th letter, moot. The respondent is now seeking the reasonable expenses arising from the motion that served as the basis for the Commission's July 19th ruling and that question is properly before the Commission.

I. Expenses related to the motion to compel that was the subject of the July 19th ruling

Respondents' expense request includes reimbursement for 5.7 hours of time spent by legal counsel, at a rate of $39.606 per hour,[2] relating to the motion to compel. Respondents provided a detailed summary of counsel's activities during these hours that accrued over the course of approximately 5 months. Those activities included reviewing complainant's response to the interrogatories, preparing a letter to the Commission, attending a status conference, reviewing complainant's supplemental responses, preparing the motion to compel, reviewing complainant's response, preparing a reply, and then reviewing the Commission's July 19th ruling. Respondents also seek reimbursement for copying costs at the rate of $0.15 per page and totaling $83.25, arising from both the motion to compel and its subsequent motion for sanctions.

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[1] The letter incorrectly refers to §804.12(2), Stats., which relates to the consequences of a failure to comply with an order compelling discovery. The correct reference is to §804.12(1), Stats., which relates to filing motions to compel discovery.

[2] The total attorney fees associated with this part of respondents' motion is $225.75. Complainant failed to contest the amount of the expenses sought by respondent.

The relevant language for analyzing this portion of respondents' request for reasonable expenses is found in §804.12(1)(c), Stats.:

> 1. If the motion [to compel] is granted, the court shall, after opportunity for hearing,[3] 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 fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> 2. If the motion is denied. . . .
>
> 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.

The 5.7 hours of time and the copying costs requested by respondents are clearly reasonable in light of the complexity of the issues raised by the motion. However, as set forth in the July 19th ruling, respondents' motion to compel was granted in part and denied in part. The Commission's analysis covered 33 separate segments of respondents' interrogatories. The motion to compel was granted with respect to many, but not all, of the segments. Respondent's motion for sanctions was also denied as being premature. Given this percentage of success by the respondents, and given the language of §804.12(1)(c)3., Stats., the Commission concludes that respondents should receive reimbursement for one-half of the requested hours and for all of the copying expenses requested with respect to the motion to compel discovery. In reaching this conclusion, the Commission has given weight to the fact that respondents made a timely effort to resolve the discovery dispute informally, by requesting an in-person conference with a representative of the Commission. It also is noteworthy that the complainant did not make any sort of showing that there are special circumstances that would make an award of expenses unjust.

Complainant did object to the respondents' request. His objections fail to differentiate between the respondent's request for reasonable expenses associated with the

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[3] Neither party requested such a hearing in the present matter.

July 19th ruling and the request relating to the December 3rd ruling. Several of complainant's contentions apply equally to both aspects of respondents' requests.

Complainant contends that the Commission lacks the authority to award monetary sanctions to state agencies as a consequence of discovery violations:

> There is nothing in the entire Administrative Procedure or Section 227 of Wisconsin Statutes authorizing this Commission to award attorney fees and costs sanctions against any complainant for either losing a case or for failing to answer to interrogatories, either because he does not have the answers or in bad faith as the Commission put it. (Brief, page 10)

The Commission has previously imposed monetary sanctions against complainants for discovery violations. *Southwick v. DHSS*, 85-151-PC, 2/13/87; *Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 4/23/93; *Dorf v. DOC*, 93-0121-PC-ER, 5/27/94. These rulings have been premised on the language of §PC 4.03, Wis. Adm. Code:

> All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission or the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery.

As noted elsewhere in this ruling, various provisions in ch. 804, Stats., specifically authorize the awards of reasonable expenses. In *Dept. of Transp. v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N.W.2d 664 (1992), the Wisconsin Supreme Court held that the Commission lacked the authority to tax costs and attorneys fees against a state agency as a discovery sanction. The court relied on the well established rule that costs, including attorney's fees, may not be taxed *against the state* "without express statutory authorization," citing *Martineau v. State Conservation Comm.,* 54 Wis. 2d 76, 69, 194 N.W.2d 664 (1972); *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 5113-14, 309 N.W.2d 28 (Ct. App. 1981); and *Noyes v. The State*, 46 Wis. 250, 251-2, 1 N.W.1 (1879). While there may not be clear authority in ch. 804, Stats., to make an award of reasonable expenses against the state, the first four subsections of §804.12,

Stats., all specifically refer to awards of reasonable expenses, including attorney fees. Therefore, with the exception of state agencies, parties that fail to meet their discovery obligations may be subject to expense awards.

Complainant also advanced arguments that the Equal Access to Justice Act, §227.485, Stats., does not provide a basis for awarding reasonable expenses in this matter. The Commission agrees that the EAJA is inapplicable to respondents' request and does not rely on that provision in its analysis.

II. Expenses relating to the motion for sanctions that was the subject of the December 3rd ruling

Respondents' expense request includes reimbursement for 5.1 hours of time spent by legal counsel, at a rate of $39.606 per hour, relating to the motion for sanctions and the request for reasonable expenses.[4] Respondents summarized the activities performed which included reviewing complainant's supplemental responses, preparing the motion for sanctions, reviewing complainant's response, preparing a reply, reviewing the Commission's December 3rd ruling, and drafting the motion for reasonable expenses. Respondent also seeks reimbursement for copying costs associated with the motion for sanctions, as previously noted.

The relevant language for analyzing this portion of respondents' request for reasonable expenses is found in §804.12(2), Stats.:

> (2) Failure to comply with order.
> (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, 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 . . .
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> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or pro-

[4] The total attorney fees associated with this part of respondents' motion is $201.99. Complainant failed to contest the amount of the expenses sought by respondent.

> ceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .
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> (b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney 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.

In its December 3rd ruling, the Commission offered the following comments regarding the question of whether the complainant had acted in bad faith with respect to respondents' discovery efforts:

> In the present case, complainant repeatedly failed to adequately answer discovery which caused respondent to initially attempt informal resolution of the problems and, when such attempts were unsuccessful, to pursue formal resolution. . . .
>
> An additional fact, which distinguishes *Hudson Diesel* from the present case, is complainant's unacceptable attitude towards his responsibility to answer discovery. His attitude is reflected in his May 24th submission to the Commission wherein he asked that respondents be "enjoined from filing frivolous motions [such as the motion to compel] to [harass] the complainant because of his black race." Another fact, which distinguishes *Hudson Diesel* from the present case, is complainant's bad faith responses to eight interrogatories that go to the heart of both hearing issues. The Commission concludes from all facts present in this case that dismissal of the entire case is an appropriate sanction here. (Footnote omitted)

In support of their request for expenses, respondents also contend that complainant engaged in "additional misconduct" in the present case and that this misconduct came to light when respondent conducted discovery in another case filed by complainant with the Commission, Case No. 98-0199-PC-ER. The respondents' contention is based on complainant's responses to two of the interrogatories addressed by the Commission in its July 19th ruling in this matter. Those interrogatories are set forth below in italics, along with the Commission's analysis, as found in the July 19th ruling:

D. Interrogatory No. 4 a.)

You allege that "Because he (you) had been certified and interviewed in a similar position before, complainant alleges that respondents used the AHQ version to deny him the position because of his race and national origin." Identify each and every fact which supports that allegation and in particular:

a.) Identify by name of agency, position title and date of recruitment all of the "similar positions" for which you were certified and interviewed in the past five years and specify for each such position any and all of the reasons why the positions were similar to the position at issue;

Complainant's final (May 24th) response reads:

The position at issue belonged to the career executive program. All positions in the career executive program are predominantly administrative in nature. (see Chapter 281 [of] Wisconsin Staffing Manual). Without listing all positions here are few:

1994, 1996, 1997, 1998 Admin Officer 3 - Fiscal Service
1994, 1996, 1998, 1998 Administrative Budget and Management Officer 3
1997 Administrative Manager-Deputy Administrator, Division of Law Enforcement Services
1995, Administrative Manager-Director of License Financial Services, Career Executive

[Complainant then listed 31 additional entries using the same format as the first several entries and ending with]

1999 Natural Resource Manager- Parks
Note: if I get some more I will list them for DER and DMRS

Respondent contends that complainant's list of "a few" positions during 1997 and 1998 is not responsive to its request for a list of "all of the 'similar positions'" during the previous five-year period.
The Commission concludes that complainant has provided an appropriate response by indicating he is providing what information he has at present and that he agrees to supplement it as more information becomes known to him. [fn]

Therefore, respondents' motion to compel is denied as to Interrogatory 4a.).

[fn] Respondent also contends complainant's response is confusing in light of his response to Interrogatory 33a.). This contention is addressed under that heading.

The Commission's July 19th ruling went on to address two other interrogatories:

DD. Interrogatory 33a.)
How many career executive positions have you applied for in the past 5 years?

a.) Identify each of those positions by agency, position title and day, month and year you applied;

Complainant's final (May 24th) response reads:
Please answer to interrogatory No. 4a. However, there are those the AHQ was used by agencies to flunk me deliberately. DER and DMRS has the names and data.

Respondent contends the response does not clarify whether it lists all the positions for which he applied or only those for which he was certified. Respondent also contends that complainant's response, when read together with his response to Interrogatory 4a.), is confusing.

In its analysis of Interrogatory 4a.), the Commission has already noted that complainant's response appears to reflect *all* the positions for which he applied rather than just career executive positions. Interrogatory 33a.) asks for a list of *only* career executive positions. The Commission assumes that all of the career executive positions on the list provided for Interrogatory 4a.) have a specific reference to "career executive." In light of this understanding, the Commission concludes complainant has sufficiently delineated the career executive positions for which he applied in the past 5 years and, therefore, has properly responded to Interrogatory 33a.). Therefore, respondents' motion to compel is denied as to that interrogatory. [fn]

EE. Interrogatory 33c.)
Identify which of those recruitments that used an AHQ testing technique resulted in your being certified to the interview stage;

Complainant's final (May 24th) response reads:
Subject to objection complainant has not been keen to see what type of techniques were used. There are many variety of AHQs.

> The Commission agrees with respondents' contention that complainant failed to answer the question posed. Respondent's motion to compel is granted as to Interrogatory 33c.).

[fn] As noted below, if *any* of the Commission's assumptions as set forth in this ruling incorrectly characterize the complainant's responses to respondents' interrogatories, complainant has a duty to so inform the Commission and the respondent within 10 days of the date this order is signed.

Based on information provided by complainant in Case No. 98-0189-PC-ER, respondents concluded that the assumption made by the Commission (and not corrected by the complainant) was incorrect. Respondents describe this realization as follows:

> Respondent relied on the assumption [that only 26 of the 78 positions listed in complainant's responses to Interrogatories 4(a) and 33(a) were all of the career executive positions which complainant had sought since 1994] in the absence of any correction by Complainant until the November 23, 1999, discovery hearing in Case No. 98-0199-PC-ER where Complainant produced the identical list with the representation that *all* of the listed positions were career executive positions. This was confirmed by Complainant's December 9, 1999, filing of his supplemental responses in Case No. 98-0199-PC-ER. On a virtually identical list which Complainant had previously represented to the Commission and Respondent (in Case No. 98-0145-PC-ER) that only 26 positions were career executive, Complainant *now* states that of the 80 listed positions, only 2 were "none-career executive positions [sic]." That means that Complainant has now admitted that 78, *not 26*, positions on the list were career executive positions. That is not an insignificant oversight or misstatement; it is huge. He further answered that he was not certified for an interview in only 10 of those recruitments. That means that of the 78 career executive recruitments Complainant sought which used an AHQ, he was certified in 68 or 87% of those recruitments.
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> There is no doubt that Complainant's responses and representations in Case No. 98-0145-PC-ER were absolutely false. He allowed the Commission to make the assumption that he knew was false and then did not notify the Commission that the assumption was false. . . . Clearly Complainant was deliberately hiding the fact that when a AHQ was used in career executive recruitments, Complainant was certified for an interview 87% of the time.
>
> A success rate of 87% is exceptional and hardly supports Complainant's allegation that AHQs have a disparate treatment and/or disparate impact. . . .

> Clearly Complainant knew that if he disclosed that he had an 87% success rate, huge chunks of his case, if not the entire case, would be ripe for dismissal by summary judgment. (Brief, pp. 3-4)

Complainant fails to address this contention in his response to respondents' motion for reasonable expenses. As a consequence, the Commission concludes that the respondents have accurately described conduct by complainant that qualifies as additional bad faith with respect to the discovery process.[5] That additional misconduct supports awarding expenses to the respondents.

Another element in the Commission's analysis of the respondents' motion for expenses relating to the motion for sanctions is that dismissal of this matter, without an award of expenses, would not tend to discourage the complainant from engaging in substantially similar discovery tactics with respect to other complaints he has filed or will file with the Commission.

This additional information provided by the respondents, in conjunction with the conduct described in the December 3rd ruling serves as the basis for the Commission's conclusion that respondents' request for fees associated with the motion for sanctions should be granted.

In his response to respondents' request, complainant argued that the Commission denied him due process by failing to supply him with a "Notice of Right of Parties to Petition for Rehearing and Judicial Review" when it issued its December 3rd ruling. Pursuant to §227.48(2), Stats:

> Every decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified under s. 227.49(1) for filing a petition for rehearing, under s. 227.53(1)(a) for filing a petition for judicial review or under any other section permitting administrative review of an agency decision begins to run until the agency has complied with this subsection.

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[5] Respondent describes one more alleged "example of Complainant's bad faith" on page 4 of its brief. It is unnecessary for the Commission to address that additional contention based on the Commission's conclusion regarding the first example.

The December 3rd ruling was not a final order of the Commission. Therefore, it was not subject to rehearing or review under §§227.49 or .53(1)(a), Stats. Even if §227.48(2), Stats., could be interpreted as applying to the December 3rd ruling, the consequences would be limited to delaying the time limits for filing a petition for rehearing or filing a petition for judicial review and would not invalidate the ruling itself.

Finally, complainant contends his case should be reinstated because he has stated a cause of action. This argument is unrelated to the basis for the Commission's December 3, 1999, ruling, which was premised on respondents' motion for sanctions under §804.12(2), Stats.

ORDER

Respondents' request for reasonable expenses is granted to the extent of $112.97 for attorney fees associated with the motion to compel, $201.99 for attorney fees associated with the motion for sanctions and $83.25 for copying costs. Complainant is ordered to pay respondents the amount of $398.11, representing the reasonable expenses in this matter, within 60 days of the date the order is signed.

This matter is dismissed for the reasons set forth in the ruling of the Commission issued on December 3, 1999.

Dated: February 28, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:980145Crul4

JUDY M. ROGERS, Commissioner

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

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within

30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95