

DANIEL HAWK,
Complainant,

v.

**Secretary, DEPARTMENT OF
COMMERCE,**
Respondent.

**RULINGS ON MOTIONS
FOR PROTECTIVE
ORDERS AND MOTION
FOR DISCOVERY
SANCTIONS**

Case No. 99-0047-PC-ER

This is a complaint of discrimination on the basis of race and national origin or ancestry in regard to a probationary termination. The subjects of this ruling are the following:

- A. On November 24, 1999, respondent filed a motion for protective order in regard to discovery requests filed by complainant on October 18, November 2, (two requests), and November 17, 1999.
- B. On February 11, 2000, complainant filed a motion for sanctions in regard to respondent's response to the ruling issued by the Commission on January 21, 2000.
- C. On March 10, 2000, respondent filed a motion for a protective order in regard to complainant's February 18, 2000, notice of deposition of Brenda Blanchard.

The parties were permitted to file written arguments in regard to such motions, and the final argument was filed on March 17, 2000. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. Complainant's discovery request of October 18, 1999, requested the following information:

From the Area Development Managers of Region 1, 2, and 3, Marty Ambros, Mary Jo Carson, and Dennis Russell respectfully the following information: for the time period of the USDA Empowerment Zone application for the months of January to October of 1998, schedules of appointments, time sheets, travel reports, meetings, seminars, and similar information.

2. Complainant's first discovery request of November 2, 1999, requested the following information:

a) A copy of the USDA Empowerment Zone Manual. The Native American Liaison had two manuals, an older manual approximately 1994 in which the City of Milwaukee was involved. The other manual is a newer manual (1998) in which it was used for the Northwest WI EZ and the Northwoods Nijjii EZ. Please send this manual to me if not needed or provide me with a copy.

b) Within the ANSWER from the Respondent dated June 14, 1999, the Respondent states in Allegation 1 last paragraph that "This behavior occurred throughout the Complainant's probationary employment." Complainant has provided a list of "Performance Deficiencies" as recorded in the "Performance Planning & Development Report" dated 3/3/99 as described below. Complainant requests that the Respondent records all performance deficiencies other than those addressed:

- Mark Bugher Letter
- Northwest WI EZ RED Funding Request
- MEPG Seminar in Green Bay

c) On the same "Performance Planning & Development Report", in the Summary Section page 1 first paragraph, it states that "In this process he often circumvented the established chain of command..." Please provide all incidents (documented or undocumented) when the chain of command was circumvented other than the incident with the Mark Bugher letter. The definition of OFTEN is many times, frequently.

3. Complainant's second discovery request of November 2, 1999, requests the same information requested in the October 18 request.

4. Complainant's discovery request of November 17, 1999, requested the following information:

a) All fiscal documents pertaining to the funding of the Brown County Arena and Convention Center for FY 2000 and 2001.

b) In reference to the Bureau of Business Finance, provide the name of the WEDI Loan Officer and the date this position became effective. Also, provide the date Paul Larkin's position became effective.

c) In reference to the Office of Loan and Grant Administration, provide the date Deb Lapotka's position became effective. Also, provide the date Debbie Haust's position became effective. Also, provide the date Geri Peterson's position became effective. Also, provide the names of the contract specialists and they're starting effective dates. Provide the name of the WEDI Program Assistant and the date this position became effective. And, provide the name of the CAPCO Financial Examiner and the date this position became effective.

5. On January 21, 2000, the Commission issued a ruling ordering respondent to respond to the following discovery requests:

a) Tribal Enrollment Identification Number and federally recognized tribal affiliation for Louie Cornelius.

b) A list of all people, employees, etc. that attended the economic development reorganization meeting...

6. Respondent's response to the discovery request set forth in Finding 5.a., above, was dated February 8, 2000, and stated as follows:

The Ruling, as well as your Discovery Request, is directed to the Respondent Wisconsin Department of Commerce. Discovery requests such as yours, are to Respondent's understanding, to be directed to parties pursuant to s. 804.08 Wis. Stats and not to possible or potential witnesses.

Respondent does not have the information requested in Item 1 of your Discovery Request. Respondent cannot provide what it does not have. Respondent cannot comply with a request to do the impossible.

Furthermore, it is Respondent's understanding that an employer is prohibited by law pursuant to s.895.50 Wis. Stats. to require or demand its employee as a private citizen to produce, divulge or share private information of that employee.

7. Respondent's response to the discovery request set forth in Finding 5.b., above, was dated February 8, 2000, and stated as follows:

Respondent provides the information requested in Item 3 of your Discovery Request in a Memorandum dated February 3, 2000 from Roger Nacker, the Deputy Administrator of Respondent's Economic Development Division. The Economic Development Division appears to be the most likely place within the Department where the information you are seeking would be located.

8. The February 3, 2000, memo referenced in Finding 7., above, states as follows:

After much thought and a check of my calendar, I have confirmed the following facts. A Division-wide meeting for the Economic Development Division was called for January 27, 1999, by Corey Hoze. At that time Corey Hoze was Administrator of the Division. Mr. Hoze no longer works for the Department of Commerce. The meeting was held in the first floor conference room during the time period 10 am to 1pm. All personnel in the Division were requested to attend to hear about reorganization plans for the Division. This information was obtained from my calendar.

Since this was over a year ago, my memory is firm only on the following points. The meeting was called and conducted by then Division Administrator Corey Hoze. Corey made a Powerpoint presentation on the organizational changes. The projector was operated by Troy Brown, who was then Director of the Office of Grant and Loan Administration. Mr. Brown is no longer with the Department of Commerce. I was there. While most of the Division was there I cannot recall, after this length of time, with any degree of certainty specifically who was and who was not at the meeting.

9. Mr. Cornelius was complainant's supervisor during complainant's tenure as the Native American Liaison for respondent, the position which is the subject of this action, and effectively made the decision to terminate complainant's probationary employment in this position.

10. In its defense to this charge of discrimination, respondent contends that Mr. Cornelius is a Native American.

11. Respondent acknowledges that questions relating to Mr. Cornelius's tribal affiliation and tribal enrollment identification number would be discoverable were Mr. Cornelius to be deposed by complainant.

12. In a notice dated February 18, 2000, complainant indicated his intention to depose Brenda Blanchard on March 27, 2000. Ms. Blanchard is the Secretary of the Department of Commerce. In this notice, complainant did not specify the matters on which he intended to examine Secretary Blanchard in this deposition.

13. As a part of its motion for a protective order in regard to the noticed deposition of Secretary Blanchard, respondent filed an affidavit of Secretary Blanchard which stated as follows, in relevant part:

. . . 5. Although I do know that the complainant is a former probationary employe of the Department, I played no role in his termination except to be briefed by the Division Administrator of the Division of the Department in which Mr. Hawk worked on the decision to terminate his employment and to sign, as the appointing authority for the Department, the letter prepared for me which advised Mr. Hawk of his termination. I have no personal knowledge of the complainant's work performance while he was employed with the Department or of any alleged acts of national origin discrimination which the complainant may allege, nor do I have any information which may be relevant in any way to the complainant's claims in this case.

6. I do not know why the complainant wants to take my deposition nor has he to my knowledge identified what area of information he intends to pursue. When he does so, pursuant to the Personnel Commission and the Wisconsin Discovery Rules, I will designate a person(s) to testify as to information sought by the deposition.

7. If I were required to give a deposition in this matter, I believe it would be a waste of time because I have no first hand knowledge of any relevant facts and the time spent preparing for and attending this deposition would be time which I would otherwise devote to those duties I am required to do by law as set forth above. . . .

14. In the brief he filed on March 17, 2000, complainant specified the following as the areas about which he intended to question Secretary Blanchard were he to depose her: the failure of respondent to follow its Equal Employment Opportunity/Affirmative Action plan in regard to complainant's probationary termination, and Mr. Cornelius's reliance on complainant's request to meet with

Secretary Blanchard pursuant to her “open door policy” as a basis for concluding that complainant had inappropriately failed to follow the “chain of command.”

OPINION

A. Motion for Protective Order re: 10/18, 11/2 and 11/17 Requests

Section PC 4.03, Wis. Adm. Code, states as follows:

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.

Section 804.01(2)(a), Stats., provides, in relevant part, that

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, . . . 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.

Section 804.01(3)(a), Stats., provides, in relevant part, that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:

1. That the discovery not be had;
2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters. . .

In its motion, respondent contends that the subject requests are not reasonably calculated to lead to the discovery of admissible evidence and were employed by complainant as a tactic to annoy, oppress, and require respondent to incur undue burden and expense.

In responding to the motion, the only specific link complainant has provided between the subject discovery requests and the underlying issue in this case appears on page two of the written arguments he filed with the Commission on March 1, 2000, to wit:

. . . the Discovery Request information will prove that certain adverse statements made about the Complainant were not true and were in fact pretextual, proving that the Respondent's claimed performance deficiencies are false. Merely, a pretext for the underlying motivation to get rid of the Complaint (sic) without having to transfer and promote, relative to the Economic Development Re-Organization.

Complainant has failed to explain the potential relevance of any of the subject discovery requests in any of the numerous written arguments he has supplied the Commission in regard to this motion. However, it is obvious, and apparently not disputed by respondent, that part of the first November 2 request, i.e., the requests stated in Findings 2.b. and 2.c., above, which relate to the performance deficiencies upon which complainant's probationary termination were based, are discoverable. As a result, respondent's motion for a protective order is granted in regard to the discovery requests stated in Findings 1., 2.a., 3., and 4, above, and denied as to Findings 2.b. and 2.c. Respondent has asserted that it has already provided this information to complainant but complainant disputes this. The Commission directs the parties to attempt to informally resolve this dispute before formally bringing it to the Commission for resolution.

Finally in this regard, complainant seems to be under the impression that the protective orders sought by respondent here would preclude any further discovery by complainant. This impression is mistaken since the motion related only to the discovery requests specified in Findings 1., 2., 3., and 4., above. Respondent has proposed that discovery be held in abeyance pending completion of the Initial

Determination due to complainant's abuse of the discovery process. However, neither party has clean hands in regard to the discovery problems experienced to date. The Commission declines to impose such a limitation on the discovery process under the circumstances present here in the absence of a stipulation by the parties to do so. However, the Commission agrees that the piecemeal manner in which complainant has filed his discovery requests has become confusing and recommends that he engage in more orderly discovery.

B. Motion for Sanctions

Section 804.12(2(a), Stats., states as follows, in relevant part:

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 saying 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.

It should first be noted that complainant does not appear to contend that the response provided by respondent to that part of the January 21, 2000, ruling stated in Finding 5.b., above is the subject of this motion for sanctions. This motion relates than only to respondent's failure to provide Mr. Cornelius's federally recognized tribal affiliation and tribal enrollment identification number (See Finding 5.a., above).

Although much of respondent's argument in regard to this motion amounts to a re-argument of the original motion to compel, the ruling on that earlier motion has

already been made, and the Commission does not intend to re-visit it at this stage of these proceedings. However, two items should be noted. First, contrary to respondent's contention, the Commission has not concluded that an individual must be a tribal member in order to be regarded as a Native American for purposes of application of the Fair Employment Act because that question has not been before the Commission. Second, the conclusion that Mr. Cornelius's federally recognized tribal affiliation or tribal enrollment identification number could lead to the discovery of admissible evidence is based on respondent's proffered defense in this discrimination case that, like complainant, Mr. Cornelius is a Native American, and on complainant's apparent dispute of this fact. The Commission concluded as a basis for the earlier ruling that, since respondent was relying upon this defense to the discrimination charge, and since Mr. Cornelius was a member of management and acting as an agent of respondent when effecting the subject termination, this information was discoverable and respondent was a proper source of this information. Respondent acknowledges that this information would be discoverable upon deposition of Mr. Cornelius. In view of Mr. Cornelius's role in the subject action and position with respondent, the contention that this information is not discoverable from respondent is puzzling.

In view of the nature of the violation of the Commission's order under consideration here, the Commission concludes that an appropriate sanction would be to conclude that it is established for all purposes related to this matter that Mr. Cornelius does not have a federally recognized tribal affiliation or a tribal enrollment identification number.

C. Motion for Protective Order re: Deposition of Brenda Blanchard

Section 804.05(2)(e), Stats., states as follows, in relevant part:

A party may in the notice [of deposition] name as the deponent . . . a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The . . . state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each

erson designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized by statute or rule.

In the notice of deposition under consideration here, complainant failed to “designate with reasonable particularity the matters on which examination is requested,” and this notice, as a result, failed to satisfy this requirement of §804.05(2)(e), Stats. Since, however, complainant is unrepresented, and since he has, subsequent to this notice, provided, in response to the related motion for protective order, specifics regarding the matters on which he intended to depose Secretary Blanchard, it will be concluded that, for our purposes here, complainant has satisfied this statutory requirement. If §804.05(2)(e), Stats., were the only provision of Chapter 804 governing the deposition of a state official, respondent could designate a person to testify as to these matters in lieu of Secretary Blanchard and we would be done with this issue. However, in *State v. Beloit Concrete Stone Co.*, 103 Wis.2d 506 (Ct.App. 1981), the Court of Appeals, in reviewing a notice to depose the secretary of an agency of state government, noted that §804.05(2)(e), Stats., was not the only provision of Ch. 804, Stats., governing the deposition of a state officer, stating that “[p]arties may depose state officers under sec. 804.05(1), which authorizes deposition of ‘any person’.” The court went on to specify the following criteria which should be considered in determining whether a deposition of a cabinet secretary of a state government agency is appropriate:

We conclude that a highly placed state official who seeks a protective order should not be compelled to testify on deposition in his official capacity unless a clear showing is made that the deposition is necessary to prevent prejudice or injustice. In determining whether to grant an official’s motion for a protective order, the trial court should consider, among other things, such factors as the effect on government business if the official must attend a deposition and the likelihood that the alternative procedure provided by sec. 804.05(2)(e), Stats., will provide the party seeking discovery with the information sought.

In regard to complainant’s representation that he would ask Secretary Blanchard about respondent’s alleged failure to follow its Equal Employment/Affirmative Action

plan in regard to complainant's probationary termination, complainant has failed to make a clear showing that he would not be able to obtain this information if Secretary Blanchard were to designate another individual within the Department of Commerce to testify about the requirements of this plan and how these requirements would apply to a probationary termination like complainant's or to complainant's specifically. In regard to complainant's representation that he would ask Secretary Blanchard about Mr. Cornelius's reliance on complainant's request to meet with her as a basis for concluding that complainant had inappropriately failed to follow the "chain of command," complainant has failed to make a clear showing that he would not be able to obtain this information from Mr. Cornelius or others involved in the termination decision. Complainant acknowledges that Secretary Blanchard was not involved in making the termination decision and it is not clear, as a result, what he actually intended to elicit from Secretary Blanchard in this regard. Based on the above, it is concluded that complainant has failed to sustain his burden here and the issuance of a protective order would be appropriate.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b) Stats.
2. Respondent has the burden to prove entitlement to the protective orders sought in the subject motions.
3. Respondent has sustained this burden in part as discussed above.
4. Complainant has the burden to show entitlement to discovery sanctions as requested in his motion.
5. Complainant has sustained this burden.
6. The Commission has the discretion to determine the sanction to which complainant is entitled.

ORDER

1. Respondent's motion for protective order is granted as to those matters cited in Findings 1., 2.a., 3., and 4., above. Respondent's motion for protective order is denied as to those matters cited in Findings 2.b., and 2.c., above. Respondent is ordered to provide the information sought in Findings 2.b. and 2.c. to complainant within 30 days of the date of this ruling.


2. Complainant's motion for sanctions is granted. It is hereby established for all purposes related to this matter that Mr. Cornelius does not have a federally recognized tribal affiliation or a tribal enrollment identification number.

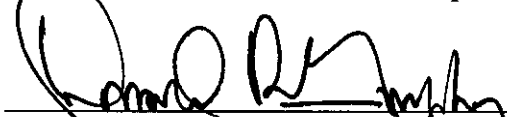
3. Respondent's motion for protective order in regard to the deposition of Secretary Blanchard is granted. Respondent is directed to designate an individual who could provide testimony in lieu of Secretary Blanchard in regard to respondent's equal employment/affirmative action plan and its application in general and to complainant's termination in particular; and an individual who could provide testimony in lieu of Secretary Blanchard in regard to respondent's alleged reliance on complainant's request for a meeting with Secretary Blanchard as a performance deficiency upon which his termination was based at least in part.

Dated: April 7, 2000

STATE PERSONNEL COMMISSION

LRM-990047Cru14


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner