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HARDEN et al.,
 (James Harden, Willie Garrette,
 and Dale Nash),

Complainants,

v.

Secretary, DEPARTMENT OF
 REGULATION AND LICENSING,
 and Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,

Respondents.

Case Nos. 90-0106-PC-ER
 90-0092-PC-ER
 90-0107-PC-ER
 91-0184-PC-ER

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RULING
 ON MOTIONS
 FOR SANCTIONS
 AND
 TO DISMISS
 FOR LACK OF
 PROSECUTION

This matter is before the Commission on respondent DRL's motions for sanctions and to dismiss for failure of prosecution, filed August 5, 1992. Both parties have filed briefs and supporting documents

Respondent bases these motions on the following statement of facts, which have not been disputed by complainants:

- a. The original complaints in these matters were filed in June, 1990.
- b. A Prehearing Conference was scheduled before the Commission for November 27, 1990. Complainants' counsel did not attend the conference and was telephoned by the hearing officer and participated by telephone. (Exhibit 2.)
- c. A prehearing conference was held on May 3, 1991 at which time the parties agreed to meet on May 24, 1991. At the completion of the meeting on May 24, 1991 complainants agreed to provide respondents with information about issues in dispute and the relief sought. Complainants did not follow up this meeting with additional information as promised. Events subsequent to the meeting are detailed in a letter of September 25, 1991 from attorney Teel Haas to the Commission (Exhibit 3).¹

¹ This letter reflects that the parties met on May 24, 1991, that Mr. Fox advised that "he would get back to us in about a week with further information about what his clients want and where we are in the process," that Mr. Dusso then called Mr. Fox on June 18, 1991, and Mr. Fox said he would get back to him in about a week, that Mr. Dusso sent Mr. Fox a letter on July 21, 1991, again

- d. On September 30, 1991 the Commission sent each complainant a letter requesting to be notified if the complainants wished to waive the investigation and proceed directly to hearing (Exhibit 4.). None of the complainants have responded to this letter.
- e. On December 23, 1991, the Commission requested that complainants advise the Commission within 20 days whether complainants wished to waive an investigation and proceed to hearing on the merits pursuant to s. 230.45(1)(m). (Exhibit 5.)
- f. Respondent R&L's First Set of Requests for Production in the above entitled matters were served on complainants' attorney by certified mail on March 3, 1992. None of the complainants served a formal or informal response of any kind to the requests filed by respondent R&L as required by statute.
- g. Following a prehearing conference and stipulation, copies of documents were provided on May 15, 1992 to respondent R&L by complainants pursuant to respondent R&L's requests for production. These documents include a five page document entitled "CONTINUATION OF DISCRIMINATION AND RETALIATION REGARDING WILLIE GARRETTE." This document refers to attached documents numbered 1 through 30. After a careful review of all of the produced documents, respondent R&L was unable to locate documents numbered 16, 17, 28, and 29 which are referred to in the five page documents (Exhibit 6)
- h. On July 16, 1992 respondent R&L's attorney wrote to complainants' attorney, indicating he had been unable to locate documents numbered 16, 17, 27, 28, 29 or 30 in the materials provided and requested assistance in locating these documents or that copies be provided. (Exhibit 7.) Complainants did not respond to this informal request that these materials be provided or identified.
- i. At the Conference held on May 8, 1992, complainants agreed to proceed promptly with this matter. The Conference report dated May 11, 1992 states, among other things:

"Mr. Fox will advise no later than June 30, 1992, whether his clients will waive investigation and whether his clients will continue to pursue these matters before this commission or proceed in a different forum."

Complainants have failed to respond to this request of May 8, 1992, from the Commission.

Respondent's motions dated August 5, 1992.

requesting a response, and that as of the date of the letter (September 25, 1991), there still had been no response, and that respondents "still do not know what kind of remedy the appellants are seeking, or exactly how they believe they have been injured by any of the actions taken."

In response to these motions, complainants contend that the documents that allegedly were not provided on May 15, 1992 (see sub. (g) above), are in the possession, custody and control of respondent. Complainants' counsel asserts that after he received the July 16, 1992, letter from respondent's counsel advising that he had been unable to locate these documents (see sub. (h) above) he:

[C]alled a meeting with his clients to further inquire as to the location of these documents ... The meeting had to coordinate the schedule of all three complainants and had to be scheduled around numerous depositions and trial preparation. The meeting could not be scheduled until August 12, 1992, by which time the motion to compel had been filed by Attorney Dusso.

Unverified affidavit filed September 1, 1992. Complainant's counsel further asserts in this affidavit that he "believed that I was to write to the Commission on the various dates referred to in Attorney Dusso's submissions only in the event that the complainants were waiving their rights or filing in another forum." Finally, counsel for complainants asserts that on September 1, 1992, he "instructed Garrette to deliver a binder with a selection of those documents kept at the department to Attorney Dusso for his inspection." However, the latter asserts that as of September 18, 1992, no such documents had been delivered.

In the filing currently before the Commission, respondent renews its motion for sanctions filed May 1, 1992, and raises additional matters that have occurred since then. The original motion recited that complainants did not respond to the request for production and inspection that had been served on March 5, 1992.² Complainants have offered no excuse for failing to respond to the request for production, other than to contend that the documents sought also were in the possession of respondent and therefore were not subject to §804.09, Stats. However, even if this were a valid contention, it does not excuse complainant's failure to make any response to this discovery request.

Complainants also fault respondent's attorney for not trying to resolve this dispute between counsel without resort to the Commission. Respondent's attorney wrote to complainants' attorney on July 16, 1992, to advise that he had

² A conference report dated May 11, 1992, reflects with respect to respondent's May 1, 1992, motion for sanctions: "the documents in question will be made available next week in Mr. Fox's office. Mr. Dusso then will decide whether to pursue sanctions."

been unable to locate certain documents that ostensibly had been among those provided on May 15, 1992. Complainants' counsel asserts that due to the press of business and scheduling problems, he could not schedule a meeting with complainants until August 12, 1992, by which time the motion to compel had been filed (on August 5th). Under all the circumstances, particularly including the fact that complainants originally had made no response whatsoever to the initial request for production, and complainants' counsel had missed numerous deadlines for providing information about the status of the case, the Commission cannot agree that respondent's counsel had an obligation to have taken the initiative to contact complainants' counsel one more time before resorting to the instant motion.

Since complainants failed to respond to the original request for production, and subsequently failed to produce all of the indicated documents, respondent is entitled to an order compelling discovery. While the award of expenses, pursuant to §804.12(1)(c)1, Stats., has been requested, that subsection provides that a ruling on this aspect of the matter cannot be made without the opportunity for hearing. Therefore, a hearing on expenses will be scheduled.

With respect to respondent's motion to dismiss for failure of prosecution, the apparently undisputed record reflects that counsel for complainants has failed to respond to certain other deadlines, in addition to having failed to respond to the request for production and inspection. The only excuse offered for this is the statement in counsel's affidavit that: "I believed that I was to write to the Commission on the various dates referred to in Attorney Dusso's submissions only in the event that the complainants were waiving their rights or filing in another forum." This assertion is consistent with the language in the September 30, 1991, form letter to complainants advising them of the statutory change which permitted unilateral waiver of investigation: "If you decide that you wish to waive the investigation and to proceed directly to a hearing on the merits of your case, please let us know this in writing as soon as possible." However, there were other deadlines established that were not susceptible to this interpretation. For example, a letter from Commission staff dated December 23, 1991, stated: "I am requesting that Mr. Fox advise the Commission within 20 days of the date of this letter whether he wishes to waive investigation and proceed to hearing on the merits pursuant to §230.45(1)(m), Stats., or whether he wishes to have these

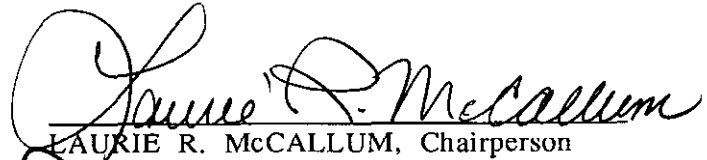
matters investigated." A conference report dated May 11, 1992, reflected that the parties had agreed, among other things, that: "Mr. Fox will advise no later than June 30, 1992, whether his clients will waive investigation and whether his clients will continue to pursue these matters before this Commission or proceed in a different forum." However, even though a number of deadlines have been missed without a showing of cause or excuse, in the Commission's opinion, dismissal is not warranted.

The standards for dismissing an administrative proceeding for failure of prosecution probably are somewhat analogous to those utilized with respect to the dismissal of a judicial proceeding for failure to comply with a court order, or for failure of prosecution. In the former situation (failure to comply with an order), dismissal is discretionary once it has been determined that a party has failed to comply with an order, in the absence of a showing of a "clear and justifiable excuse" therefore, and the failure to comply is "egregious." Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 276, 470 N.W. 2d 859 (1991). In the instant case, it cannot be determined that the conduct involved was "egregious," particularly in light of the fact that the status of these cases essentially has been that of "awaiting investigation," and it cannot be said on this record that the conduct of complainants' counsel has caused a delay in processing of these cases. With respect to failure of prosecution, dismissal is not appropriate, inasmuch as it cannot be concluded that complainants' failure to meet deadlines and to respond to discovery have caused a delay in the progress of these matters, and there has been no showing of prejudice to respondent. See Wermuth v. DATCP, 82-PC-ER-47 (1/31/89).

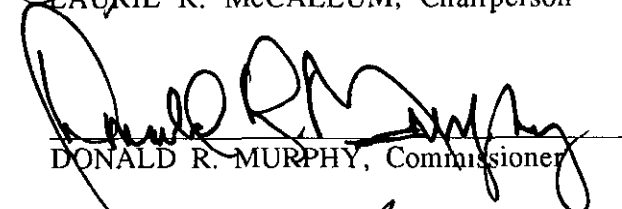
ORDER

Respondent's motions for sanctions and to dismiss for lack of prosecution are denied to the extent that dismissal will not be ordered. Complainants are to produce the documents referred to above in sub (h) within 20 days of the date of this order. Pursuant to §804.12(1)(c)1, Stats., a hearing will be scheduled on respondent's request for expenses.

Dated: December 17, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT.rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner