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GARY G. WENTZ,

Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 94-0056-PC-ER

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RULING
ON REQUEST
FOR
SANCTIONS

This matter is before the Commission on the respondent's request for sanctions due to complainant's failure to provide the Commission with specific information relating to certain statements referenced in the materials filed by the complainant as part of the investigation of his complaint.

Complainant perfected a complaint of discrimination against the respondent by filing a notarized complaint form with the Commission on April 26, 1994. The form summarized respondent's conduct as follows:

In May, 1993, the Division of Motor Vehicles made an adverse employment decision based upon my sex (Male) and sexual orientation (homosexual). Had it not been for this discrimination, I would have been appointed to the position of Director, Bureau of Vehicle Services. This employment decision was the culmination of a pattern of discrimination described in supplemental documents provided to the Commission. This fact is further substantiated by the DOT's actions since May, 1993; specifically, deliberate, arbitrary and capricious delays in the reclassification of my current position by the Bureau of Human Resource Services; and the AA/EEO Office's refusal to provide me the same level of service afforded other protected groups.

Respondent filed an answer to the complaint on May 31, 1994, complainant responded to the answer June 15th, respondent filed a supplemental answer on July 15th. Complainant then responded in a letter dated August 1, 1994, which included the following statements:

3. Prior to the AO5 [Director, Bureau of Vehicle Services] interviews, I was informed by an employee of the DMV Administrator's Office that Roger Cross [Administrator of the

Division of Motor Vehicles] would "be in trouble" if a male were hired. [Hereafter referred to as statement #1]

* * *

As to the culture of the agency, a number of individuals are prepared to testify before the Commission that they have witnessed, or been subject to, discrimination within the Wisconsin Department of Transportation based on sexual orientation. The discrimination ranges from insensitivity and ignorance (ie. I was asked by my supervisor within the past two weeks what "term" she should use to refer to homosexuals that wouldn't be "offensive") to blatant and inflammatory acts (ie. a Bureau Director telling his staff he would never allow a gay employee of his to become a section chief. [statement #2])

Respondent filed a third answer on August 16th, stating it was impossible to respond to statements #1 and #2 without knowing who made the statement and when.

By letter dated August 19, 1994, a member of the Commission's staff requested complainant provide the Commission with both the date of the two statements and the names of the individuals who made them, by August 31st. Complainant declined, stating:

"Prior to the AOS interviews, I was informed by an employee of the DMV Administrator's Office that Roger Cross would be in trouble if a male were hired."

Response: I respectfully decline to identify the employee at this time out of concern for the individual involved. I am prepared to identify the individual, submit corroborating written evidence, and subpoena the witness at the time of the formal hearing before the Personnel Commission.

"a Bureau Director telling his staff that he would never allow a gay employee of his to become a section chief."

Response: I respectfully decline to identify the employee at this time as the individual who was discriminated against is considering filing separate action in Federal Court. I am prepared to identify the manager who made the statement, the individual who the statement was against, and subpoena the individual staff members who were witnesses to the statement, at the time of a formal hearing before the Personnel Commission.

Respondent then filed its request that the Commission "impose the sanctions, except dismissal, authorized in s. PC 2.05(4)(b), Wis. Adm. Code for the

Complainant's refusal to provide relevant information specifically requested by the Commission." The Commission subsequently provided the complainant with a copy of s. PC 2.05(4)(b), and provided him further opportunity to supply the underlying information, and well as an opportunity to submit arguments regarding the request for sanctions.

The complainant has clarified that his intent with respect to statement #2 was to supply background information regarding his existing charge of discrimination rather than to identify a separate claim. Complainant again declined to submit the information, and argued that the adverse impact of providing the information outweighed any potential benefit to DOT.

The applicable provisions of §PC 2.05, Wis. Adm. Code, read:

To carry out its investigation, the commission may use all those methods of discovery specified in ch. 804, Stats., issue subpoenas and subpoenas duces tecum and require answers as provided in s. PC 2.04.

* * *

(3) *Time limit for responding to Commission's discovery requests.* A party shall respond to the commission's discovery requests within 30 days after service unless the commission grants an extension or modification for good cause shown.

(4) *Sanctions.* (a) The commission shall notify the party from whom discovery is sought that the failure to answer or produce requested information necessary for an investigation may result in the imposition of those sanctions set forth in pars. (b), (c) and (d).

(b) If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

Even though the August 19, 1994 request to the complainant did not provide notice to the complainant that his failure to respond could result in the imposition of sanctions identified in §PC 2.05(4)(b), (c), and (d), respondent's subsequent motion specifically requested that such sanctions (with the exception of dismissal) be imposed, and the Commission then provided the complainant with a copy of the applicable rules, including all of §PC 2.05.

Thereafter, the complainant reiterated his decision not to provide the requested information. Complainant's refusal is properly considered a "failure to answer or produce requested information" within the meaning of §PC 2.05(4)(b).

The two options available to the Commission are to "make an appropriate inference and issue an initial determination" or, at hearing, to "exclude any evidence which should have been offered in response to the discovery request." The Commission has substantial discretion in terms of determining which of these sanctions is more appropriate.

Because the complainant has identified the alleged statements to the Commission but not the date nor the speaker, the first of the two options is more appropriate. It would be different if the Commission had made a more generalized request for information supporting a claim, and a complainant failed to reference clearly relevant information known to the complainant in support of the underlying claim. Under those circumstances, the information would never come to light during the course of the investigation, so it could not be a factor in the initial determination. If the complainant subsequently sought to introduce the information at hearing, having previously not mentioned it in response to the Commission's discovery request during the investigation, exclusion at hearing might be appropriate.

Here, the statements have been identified, but not the date and speaker. Respondent can no longer be said to be surprised as to the existence of the allegation that the statements were made. Respondent is in a position to initiate discovery relating to the specifics of the statements.¹ Where, as part of the Commission's investigation, complainant has refused to provide specifics relating to alleged statements that are clearly relevant to his claim, the Commission will infer, for purposes of the investigation only, that such alleged statements were never made.

¹As a party, respondent has a right to pursue discovery pursuant to §PC 4.03, Wis. Adm. Code.


ORDER


Respondent's request for the imposition of sanctions listed in §PC 2.05 (3) is granted to the extent that in preparing the initial determination, the inference will be made that the alleged statements (#1 and #2 above) were never made.

Dated: October 24, 1994 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner