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CALVIN JACKSON,

Complainant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 94-0115-PC-ER

* * * * *

RULING ON SANCTIONS
FOR COMPLAINANT'S FAILURE
TO PROVIDE INFORMATION
REQUESTED BY THE COMMISSION

The issue presented in the pending motion is whether any consequence exists for Mr. Jackson's failure to provide information as requested in the Commission's letter to his attorney, dated March 6, 1995, and the repeated request by certified letter dated September 21, 1995. Unless specifically noted to the contrary, the facts recited below appear to be undisputed and are made for purposes of resolving the stated issue.

FINDINGS OF FACT

- 1. Mr. Jackson filed his charge of discrimination on August 10, 1994, at which time he was unrepresented by counsel. The text of his complaint is shown below.

I am the first shift control sergeant at the Racine Correctional Institution. Over the past six months, I have applied and interviewed for positions as Social Worker I and Security Supervisor 1. In both instances, the positions in question were given to employees already at Racine Correctional Institution (RCI) who have less experience or who have negative performance on their record. In the case of Social Worker, I received a rejection letter (based on "many qualified applicants") before all the positions were filled. The case of Supervisor 1 is different. As the first shift control sergeant, I am usually in charge and directly running all movement in and out of RCI. It has been said I was rejected because even though I work with captains and lieutenants and make many supervisory decisions, I don't "work out back." It is impossible to work "out back" when my post is "up front." It also should be known that out of the four last lieutenants hired, two (2) had little or no "out back" experience. One (1) has nowhere near the knowledge I have and the last one had not even finished probation as sergeant and has

almost no experience with "the line." On many occasions, I have been told that it is definitely noticed when I am not on post. And, that "the line" is not run properly when I'm not here. Although this may or may not be true, it is not a reason to continue me on a post for "the good of the institution;" nor should I be denied a promotion or job change because of this.

2. Mr. Jackson checked three boxes on his complaint form to indicate he believed the Department of Corrections (DOC) discriminated against him due to his color, race and in retaliation for participating in Fair Employment Act (FEA) activities. The text of his complaint (shown in the prior paragraph) did little to expound upon these allegations. For example, he does not anywhere state what his color or race is, or what FEA activities he engaged in for which he believes DOC retaliated against him.
3. Mr. Jackson's complaint was cross-filed with the Equal Employment Opportunity Commission (EEOC), per his request. By notice dated August 31, 1994, the EEOC acknowledged receipt of the cross-filing and indicated EEOC's intention "not to initially investigate the charge".
4. On August 31, 1994, the Commission sent Mr. Jackson a letter requesting further information regarding his complaint with such response due by September 15, 1994. The Commission's letter asked Mr. Jackson to provide the following information: 1) his race/color, 2) his current job classification, 3) the length of time he worked for the state, 4) copies of the rejection letters if he still had them, 5) whether each interview was for a position at the Racine Correctional Institution (RCI), 6) a statement why he felt the failures to hire were due to his race/color, 7) what the term "out back" experience means, 8) who told complainant that "the line" does not operate properly when he was absent and upon what dates, and 9) a description of his rationale for filing under the basis of FEA retaliation.
5. On October 7, 1994 (already past the deadline of Sept. 15, 1994), an attorney hired by Mr. Jackson, Attorney William E. McCarty, called the Commission to say he was "just retained" and would file a response to the Commission's August 31st letter, the following week.
6. On October 10, 1994, Attorney McCarty indicated he would have a response "inhouse" by November 1, 1994 and would send the Commission

- a Notice of Appearance. The promised materials were sent to the Commission by Attorney McCarty's letter dated October 26, 1994.
7. By letter dated October 31, 1994, the Commission requested DOC to file an Answer to Mr. Jackson's complaint by November 30, 1994. On the due date, DOC called the Commission to request an extension to December 16, 1994, which was granted. On the extended due date, DOC called the Commission asking for further extension to December 23, 1994, which was granted. Another extension was requested by DOC on December 23, 1994, which was granted creating a new due date of January 9, 1995. DOC met this date.
 8. DOC filed its Answer to the complaint on January 9, 1995, with a motion for a protective order as to some information which DOC wished to disclose through documentation. DOC's letter indicated that only a copy of the cover letter was sent to Attorney McCarty, and not the referenced documents. DOC expanded its motion by letter dated January 18, 1995, to include the additional information referenced therein, and sent a copy only of the cover letter to Attorney McCarty. Attorney McCarty was requested to indicate by February 2, 1995, whether he objected to DOC's motion for a protective order. Attorney McCarty indicated he had no objections by letter dated February 6, 1995, which the Commission received on February 8, 1995. The protective order was issued by the Commission on February 22, 1995, without specifying a timetable by which DOC would be required to provide a copy of the protected documents to Attorney McCarty, as would be DOC's responsibility pursuant to ss. PC 1.05(1) & (4), Wis. Admin. Code.
 9. Attorney McCarty contacted DOC for copies of the protected documents. DOC responded by letter dated March 2, 1995, with a copy sent to the Commission. DOC's letter to Attorney McCarty indicated as follows:

Attorney Greg Smith has asked me to respond to you regarding the Personnel Commission's Protective Order in the [Jackson] case. Greg tells me the material for the interview and evaluation of job candidates for the Social Worker vacancies in Jackson is the same as the material filed in [another case]. I will not be sending you the material again as it appears you already have it.

10. The Commission sent Attorney McCarty a letter dated March 6, 1995, which noted that DOC filed an Answer on January 9, 1995, and that complainant's reply to such Answer was due by April 5, 1995 -- as measured by Commission receipt of the reply. No reply was filed.
11. The Commission sent Attorney McCarty a letter dated September 21, 1995, with copies sent to Mr. Jackson personally and to DOC's attorney. The Commission sent the letters to Attorney McCarty by certified mail (P 438 365 915) and to Mr. Jackson by certified mail (Z 688 254 815). The text of the Commission's letter is shown below, with the same emphasis as contained in the original document.

Note: This is an important letter that, if not responded to, may lead to the dismissal of the above-captioned case pending before the Personnel Commission. Please read it carefully.

On March 6, 1995, the Commission sent you a copy of the enclosed letter asking for your response to the respondent's answer to your discrimination/retaliation complaint. To date, you have not replied. Do you wish to proceed with your complaint?

If you do not wish to proceed, please sign the statement immediately following and return this letter to the Commission, which authorizes dismissal of your case.

I wish to withdraw the above-captioned discrimination/retaliation complaint.

(Your Name)

Date

If you wish to proceed, then you must either: 1) provide in writing the information requested in the enclosed Commission letter [copy of 3/6/95 letter enclosed] or 2) indicate in writing to the Commission that you have no further information you want to add. You may fulfill the requirement of the second option by signing the statement immediately following and returning this letter to the Commission.

I have reviewed the respondent's answer. I wish to add no rebuttal information.

(Your Name)

Date

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within

20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

At your request, your complaint was also filed with the Equal Employment Opportunity Commission (EEOC). To protect your rights with that agency, you must comply with their enclosed letter. Please note that pursuant to EEOC regulations, you have 30 days in which to respond to the EEOC, as opposed to the 20 day period for responding to the Personnel Commission as set forth above. A timely response to EEOC does not cure a failure to timely respond to the Commission.

12. The certified mail receipts indicate postal pick-up on September 22, 1995, and the return receipts indicate that Attorney McCarty received his copy on Monday, September 25, 1995, and that Mr. Jackson received his copy on September 28, 1995. Twenty days from September 22, 1995, was October 12, 1995.
13. The Commission received a telephone call from Mr. Jackson on October 5, 1995, during which he provided his new mailing address. He also requested a copy of DOC's Answer to the complaint, but was advised that a copy had been sent to Attorney McCarty and Mr. Jackson could get a copy of those materials from Attorney McCarty. The Commission further explained to Mr. Jackson that a copy of the Commission's September 25, 1995 letter had been sent to Mr. Jackson as a courtesy, and that Mr. Jackson needed to "clear the situation up" with Attorney McCarty.
14. On October 10, 1995, the Commission received a telephone call from Attorney McCarty's office saying that Attorney McCarty would respond to the Commission's letter the same day, even though Attorney McCarty was in trial all day. Attorney McCarty's response letter was dated October 10, 1995, and was received by the Commission on October 12, 1995. Attorney McCarty indicated he had reviewed DOC's answer and wished to add rebuttal information within thirty days (an option not presented in the Commission's letter). Attorney McCarty indicated he could not respond sooner due to his "schedule". No further explanation was provided. No further response was received from Attorney McCarty or Mr. Jackson.

15. The Commission sent Attorney McCarty a letter dated November 29, 1995. The letter text is shown below. A courtesy copy was sent to Mr. Jackson.

By certified letter dated September 21, 1995, you were directed to file either your rebuttal statements or advise if you wanted to proceed with your clients case within 20 calendar days of the date of the letter, pursuant to s. 111.39(3), Stats. Your written response was dated October 10, 1995 and was received by the Commission on October 12th. In your response you indicated that "I have reviewed the respondent's answer. I wish to [provide] rebuttal information and will do so within 30 days." To date, the Commission has not received anything. Because it does not appear that your response complied with the 20 day requirement set out in s. 111.39(3), Stats., you are being provided a period of 15 days from the date of this letter to file any arguments you may have as to why the Commission should not dismiss your client's complaint. The respondent will then have 7 days to file any response.

16. The Commission received a telephone call on December 6, 1995, from a second attorney hired by Mr. Jackson, Attorney M. Elizabeth O'Neil. Attorney O'Neil indicated she now represented Mr. Jackson and was in the process of obtaining documents from Attorney McCarty, which she wanted to prepare complainant's response to the Commission letter of November 29, 1995. She expected to have a reply to the Commission by December 15, 1995. Attorney O'Neil confirmed this information by letter to the Commission dated December 6, 1995, which the Commission received on December 8, 1995.
17. Attorney McCarty sent the Commission a letter dated December 11, 1995, which the Commission received on December 13, 1995, stating as shown below:

Please accept this letter as a request on behalf of the complainant, Calvin Jackson, that the above complaint not be dismissed. The press of other work caused me to forget to respond within thirty days indicated in my letter of October 10, 1995. The complainant very much wishes to proceed with his complaint and I will comply with whatever direction the Commission wishes to make with regard to future requests, but it would be unfair to the complainant to dismiss his case because I neglected to respond to the Commission's request for rebuttal.

18. Attorney O'Neil missed her due date of December 15, 1995. On December 18, 1995, Attorney O'Neil called indicating she would receive documents from Attorney McCarty the following week, and accordingly needed an extension to January 3, 1996. The granting of such request was confirmed by Commission letter dated December 18, 1995.
19. Attorney O'Neil called the Commission on January 2, 1996, asking how she could get copies of DOC's Answer. The Commission advised her that DOC's Answer involved extensive documents (about 4-1/2 inches thick). The Commission suggested that Attorney O'Neil initially respond to the timeliness issue, see how the Commission rules on the same and, if the case remained open, the Commission would provide her with a copy of the Answer but Attorney O'Neil would have to pay the copying charges. Attorney O'Neil did not file her response by the extended deadline of January 3, 1996.
20. Attorney O'Neil called the Commission on January 4, 1996, saying she thought the deadline was January 5, not January 3rd as stated in the Commission's letter. Attorney O'Neil said she would send the response by overnight express mail for receipt by the Commission on January 5, 1996. The Commission authorized receipt on January 5, 1996.
21. Attorney O'Neil's response was received by the Commission on January 5, 1996. By letter dated January 9, 1996, the Commission gave DOC an opportunity to file a reply by January 19, 1996 -- a deadline met by DOC.
22. Attorney O'Neil's response referenced in the prior paragraph, contained the pertinent excerpts shown below. The information recited was not supported by affidavits.

Between [Mr. Jackson's] receipt of the November 26, 1995, correspondence from the investigator and December 20, 1995, Mr. Jackson made numerous attempts to contact Attorney McCarty by telephone. Each time he was told that Attorney McCarty was unavailable; Mr. Jackson left messages for Attorney McCarty, but the calls were not returned. Apparently, this lack of availability of counsel was characteristic of Attorney McCarty's representation of Mr. Jackson. Due to Attorney McCarty's extremely busy schedule, he was out of the office for much of the time, and was not able to return all of Mr. Jackson's telephone messages. The fact that no rebuttal was ever filed is not attributable to any recalcitrance on Mr. Jackson's part, but upon the extremely crowded schedule of his former counsel. This fact

is confirmed by Attorney McCarty's letter to the investigator dated December 11, 1995.

Moreover, even if Attorney McCarty's schedule (sic) been less hectic, he could not have provided a substantive response to the respondent's January 9, 1995 submission because he was never provided significant portions of the response. Although the protective order was issued, the documents to which it pertained were not subsequently provided to complainant or his counsel. These documents form the substance of respondent's January 9, 1995 response, and without them the submission is merely a cryptic reference to unidentified documents.

The lack of diligence in providing a rebuttal in this matter is clearly that of Mr. Jackson's former counsel. It would be unjust for the Commission to dismiss the complaint, thereby ending all Mr. Jackson's rights to pursue the matter, based solely upon the scheduling deficiencies of his former counsel. For these reasons, we ask that the Commission retain jurisdiction over the complaint in this matter and establish a scheduling order to permit the complaint (sic) to file a rebuttal to the respondent's January 9, 1995, response.

23. DOC's motion arguments as stated in its letter of January 17, 1996, are shown below. The information recited was without supporting affidavits.

The statute involved, sec. 111.39(3), Stats., clearly contemplates that the Personnel Commission must dismiss complaints (" . . . shall dismiss a complaint if . . .") where the complainant fails to communicate with the Commission for a twenty day period after receiving a certified mail communication from the Commission. The legislature obviously was of the opinion that these matters are too important -- and the employers have too important an interest in a complaint being timely processed -- to let a complaint languish. The time frame the legislature chose was 20 days -- the Commission does not, I submit, have the authority to extend that date. The complaint must be dismissed.

If the Commission believes it has discretion in this matter then the respondent would argue that it has been prejudiced by the complainant's delay in this case. For example, one of the people on the interview panel has left state service since the case was filed. Documents may have been lost or misplaced given the huge amount of time that has passed since the complaint was filed and the investigation began. Witnesses' memories have certainly dimmed somewhat since that time, something that in these cases more often than not works to the detriment of the respondent. Nothing was heard from the complainant between February, 1995, and October, 1995, -- 8 months! He even failed to produce a timely response to a certified letter that made it quite clear that

failure to respond in a timely fashion to the certified letter would result in dismissal of his case. His complaint should be dismissed and the time that would be spent processing his complaint can (sic) be used to process the complaint of someone who will not waste the Commission's and the respondent's valuable time.

Finally, while a client often lives or dies by the acts or omissions of his or her lawyer (that is an issue that must be addressed by the complainant and his past lawyer), if the complainant were truly keenly interested in his complaint he would not have let things drag on as they have. It also seems disingenuous for the complainant to claim that his answer was delayed because he did not have the records in his hand when all he had to do was ask the Commission for them back in February, 1995. All things considered, the Commission should dismiss this complaint.

DISCUSSION

Statutes and Rules Involved

Section 111.39 (3), Stats., suggests that dismissal is mandatory when a complainant fails to respond to a 20-day certified letter. The statutory text is shown below.

The [commission] shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the [commission] concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person.

The Commission's administrative rules cover the situation where a party (including a complainant) fails to provide information requested by the Commission, but such failure does not occur under circumstances covered by s. 111.39 (3), Stats. The pertinent rule provisions are found in PC 2.05 (3)-(4), Wis. Adm. Code, as shown below.

(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.

(c) If a respondent fails to answer . . .

(d) If a respondent fails to answer . . .

The circumstances presented are not covered by s. 111.39 (3), Stats.

The 20-day response period commenced on September 22, 1995 (the date the Commission mailed the certified letter), with Commission receipt of the reply being the measure of the filing date. Jackson v. DHSS, 87-0149-PC-ER (3/10/88), Block v. UW-Madison Extension, 88-0052-PC-ER (7/27/89) and King v. DHSS [DOC], 88-0007-PC-ER (5/29/91). In accord, McCarter v. Johnson Controls (LIRC, 05/21/93) and Schilling v. Walworth County (LIRC, 05/10/84). In Mr. Jackson's case, the Commission mailed the certified letter to Attorney McCarty on September 22, 1995 (§ 11-12 of the Findings of Fact). To be considered timely, the Commission had to receive the response by October 12, 1995.

The Commission received a response letter from Attorney McCarty on October 12, 1995. However, the reply failed to provide the information initially requested in the Commission's letter of March 6, 1995 (§ 10 of the Findings of Fact) and failed to select any of the options provided in the certified letter of September 21, 1995. Instead, Attorney McCarty unilaterally gave himself a 30-day extension. While the sufficiency of this response could be debated, the fact remains that a response was filed timely. Accordingly, the dismissal penalty of s. 111.39 (3), Stats., is inapplicable to the circumstances presented here.

The conclusion reached in the prior paragraph is consistent with the Commission's understanding of the purpose behind the statute as providing authority to dismiss claims where a failure to respond is deemed under the prescribed set of circumstances as sufficient indication that the complainant does not wish to go forward with the litigation. The circumstances in Mr. Jackson's case illustrate that complainant wishes to proceed (as shown by his telephone call to the Commission on October 5, 1995 (§ 13 of the Findings of

Fact), and that Attorney McCarty intended to pursue Mr. Jackson's wishes but could not do so in the allotted time due to the press of other business.

It is appropriate to impose sanctions under PC 2.05 (3) & (4), Wis. Adm. Code.

Mr. Jackson did not provide the information requested in the Commission's letter dated March 6, 1995. Nor did he reply to the repeated request by certified letter in September 1995. The September 1995 letter contained a warning that failure to respond could result in dismissal and such warning was based on s. 111.39 (3), Stats. Attorney McCarty realized the importance of providing the requested information and said he would do so within 30 days of his response. Under these circumstances, the notice provided in the certified letter was sufficient to meet the notice requirements of PC 2.04 (4)(a), Wis. Adm. Code.

The Commission now turns to the question of appropriate sanctions among the alternatives available in PC 2.04(4)(b), Wis. Adm. Code. The most appropriate remedy would be to foreclose Mr. Jackson's opportunity to present rebuttal information and to have an Initial Determination issued based solely upon the information provided by the parties to date. In accord, Harden et al. v. DRL & DER, 90-0092, 0106, 0107, 91-0184-PC-ER (12/17/92). Such sanction is intended here to apply only at the investigative stage (i.e. it is not intended to apply to a hearing on the merits, if one is held in the future).

Additional Observations.

Attorney O'Neil argued that dismissal should not occur even if s. 111.39 (3), Stats., applied to the present situation due to Mr. Jackson's attempts to consult with Attorney McCarty. The Commission notes that if the statutory provision had been applicable to Mr. Jackson's situation, the Commission likely would dismiss the case despite such equity arguments. See, for example, McCarter v. Johnson Controls (LIRC, 05/21/93) (if the response is late, the statute absolutely requires the dismissal of the complaint) and Daniels v. Marcus Corp. (LIRC, 07/14/93) (if the response to the certified mailing is late, dismissal of the complaint is absolutely required).

Attorney O'Neil contended that even if Attorney McCarty's schedule had been less hectic, he would not have been able to file a reply to DOC's Answer because Attorney McCarty did not have all the documents provided with DOC's

Answer. This is an allegation unsupported by any statement from Attorney McCarty, and unsupported by the information known to the Commission. (See, in particular, ¶ 9 of the Findings of Fact.) Furthermore, the contention is irrelevant because Attorney McCarty simply forgot to file the requested information. (See ¶17 of the Findings of Fact.) Attorney McCarty does not allege that the lack of documents played a part in forgetting to meet the deadline he set for himself.

Attorney O'Neil's arguments in her letter of January 4, 1996, contained the following statement.

By correspondence dated March 6, 1995, the [commission's] investigator advised Attorney McCarty that the complaint's (sic) rebuttal to the respondent's January 9th submission must be received by the Commission no later than April 5, 1995. No response was filed on April 5, 1995, and it appears that Attorney McCarty was not again contacted by the Commission until September 21, 1995 . . .

The Commission rejects any potential suggestion raised in the excerpt above that the lack of diligence on Mr. Jackson's and Attorney McCarty's part was in some way the fault of the Commission for failing to remind the parties more often as a means to obtain information which the parties knew they were required to provide.

DOC claims prejudice from Mr. Jackson's failure to provide the requested information in a timely manner. Specifically, DOC stated in its letter of January 17, 1996, as shown below.

[R]espondent . . . has been prejudiced by the complainant's delay in this case. For example, one of the people on the interview panel has left state service since the case was filed. Documents may have been lost or misplaced given the huge amount of time that has passed since the complaint was filed and the investigation began. Witnesses' memories have certainly dimmed somewhat since that time, something that in these cases more often than not works to the detriment of the respondent.

The sanction imposed in this ruling addresses part of the concerns raised by DOC in the above-noted paragraph. Other concerns raised by DOC do not, in the Commission's opinion, warrant imposition of more severe sanctions.

DOC claims that documents "may have been lost or misplaced" due to the delays of Mr. Jackson and Attorney McCarty. DOC received notice of Mr. Jackson's complaint shortly after it was filed. Such notice should have triggered acknowledgement within DOC that related documents needed to be sought out and preserved. DOC also noted that one of the interviewers has left DOC employment. Such risk exists in litigation even when the matter is processed without delay. It is within DOC's power to alleviate the potential problems caused by an employee's leaving by, for example, asking the employee to keep DOC apprised of how to contact the employee. Similarly, it is expected that people's memories will "dim" over time. As counsel for DOC is aware, strategies exist to lessen the potential for recollections to fade (such as early in the proceedings having the witness give DOC's attorney a statement of events).


ORDER

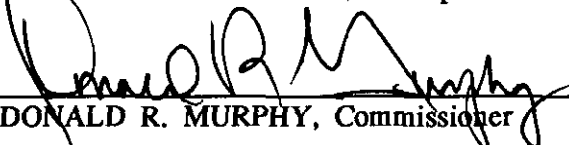
Mr. Jackson is foreclosed from the opportunity to present information in response to the Answer filed by DOC. Jurisdiction is retained for Commission staff to review the information provided to date and to issue an Initial Determination based upon that information.

Further, it appears from file correspondence that Mr. Jackson is now represented by Attorney O'Neil. The Commission will presume that Attorney O'Neil will continue to represent Mr. Jackson, unless (and until) Mr. Jackson sends the Commission written confirmation to the contrary.

Dated March 7, 1996.

JMR


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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