

STATE OF WISCONSIN

PERSONNEL COMMISSION

**PASTORI BALELE,**  
*Complainant,*

v.

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

INTERIM  
RULING  
ON  
MOTION  
FOR  
SANCTIONS

Case No. 98-0145-PC-ER

In a ruling dated July 19, 1999, the Commission considered various discovery disputes between the parties and granted respondents' motion to compel, in part, and denied it in part. That motion by respondents was premised on their first discovery request directed to complainant.

By letter dated July 27, 1999, the Commission scheduled a conference call for August 19, 1999 to establish a deadline by which complainant would be required to comply with the July 19<sup>th</sup> ruling. By letter dated July 23, 1999, complainant wrote to the Commission as noted below in relevant part:

I would like to inform the Commission and Respondents that I have no choice other than to comply with the order to answer the interrogatories compelled by the Commission. I believe this may save my complaint and potential costs . . .

If in case my answers are determined to be still inadequate, I am asking the Commission to enjoin me from introducing evidence related to the inadequate answers.

The conference call was held as scheduled on August 19, 1999. The resulting summary letter to the parties contained the following pertinent information:

Complainant has until August 24, 1999, to supply the information covered by the Commission's July 19<sup>th</sup> Order granting, in part, respondents' motion to compel. Complainant indicated his responses will not be substantially different than his previous responses to the questions. If so, respondents indicated their intention to seek sanctions for failing to comply with the Commission's order . . .

The parties agreed to defer respondents' motion for expenses under §804.12(2), Stats., that is mentioned in the Commission's July 19<sup>th</sup> Order, until rulings are issued . . .

Complainant responded to the order by letter dated August 19, 1999. That letter reads, in relevant part:

There is nothing to add or describe my experience because all experiences were described in my AHQ responses.

As provided in my letter of July 23, 1999, if the answers do not satisfy this Commission and DER and DMRS then I should be enjoined from using the responses, which I cannot respond to because there is no answer to those questions or I have answered to the best of my knowledge before.

Respondents then filed a motion for sanctions, alleging complainant had failed to comply with the order to compel. That motion is currently before the Commission.<sup>1</sup> The parties have filed written arguments. Complainant appears *pro se*.

The case arises from respondents' decision to hire someone other than complainant for the career executive position of Executive Human Resource Manager-Centered Exam. In a ruling dated April 7, 1999, the Commission established the issues for hearing as follows:

1. Whether respondents discriminated against complainant based on color, national origin/ancestry or race or retaliated against complainant for having engaged in Fair Employment Activities with respect to respondents' use of particular questions for the Achievement History Question-

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<sup>1</sup> Respondent has also filed a second motion to compel discovery. That motion is based on respondent's second discovery request of complainant. In light of the conclusion reached by the Commission on the respondents' motion for sanctions, it is unnecessary to reach the second motion.

naire (AHQ) analysis for the Executive Human Resources Manager position.

2. Whether the procedure of permitting persons who already have career executive status to proceed to the interview stage of the selection process without completing an AHQ constitutes illegal discrimination, based on race, under the Fair Employment Act on a disparate impact theory.

#### OPINION

The first task before the Commission is to determine whether any of the complainant's discovery responses constitute bad faith. The concept of bad faith was discussed in *Hudson Diesel, Inc. v. Kendall*, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App., 1995), as follows:

Section 805.03, Stats., does not define bad faith. Nonetheless, it is readily understood that bad faith by its nature cannot be unintentional. Given this fact, it is apparent that to dismiss a complaint for bad faith, the trial court must find that the noncomplying party intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand. If the trial court concludes that the noncomplying party acted in bad faith, the trial court may impose those sanctions it considers appropriate. . . .

The Commission's July 19<sup>th</sup> ruling granted respondents' motion to compel in part and denied it in part. The net effect was that complainant was ordered to provide complete responses to 40 questions and sub-questions contained in the 22 interrogatories covered by the order. Complainant's supplemental response August 19, 1999 (noted above), leads the Commission to conclude that complainant lacks any evidence or additional evidence as to 14 interrogatories and that he has responded in bad faith as to 8 interrogatories.

Each discovery request at issue here is discussed separately below. The interrogatory is stated first, the complainant's answer is then quoted and the Commission's July 19<sup>th</sup> ruling is summarized.

I. No Bad Faith

The complainant states he has no information to add regarding the following interrogatories. As noted below, the Commission concludes that complainant's lack of additional information leads to a conclusion that he either has no information to add or that he has no information at all to support the claim.

**4.b. Describe in detail exactly how the AHQ version was used to deny you the position at issue. Answer: Complainant never answered this question. Ruling: Motion to compel granted.**

The statement of the first hearing issue is particular to the specific AHQ used in the contested hiring. The Commission concludes that complainant has no evidence to support the first hearing issue.

**4.c. Identify any and all facts which you are aware of that support your allegation that DER/DMRS denied you the position at issue because of your race and national origin. Answer: Complainant never answered this question. Ruling: Motion to compel granted.**

The Commission concludes he has no evidence to support the first hearing issue.

**10.a. You allege that "DER/DMRS and their agents used the AHQ version to ensure that no blacks and other racial minorities and therefore complainant were certified and selected into the position at issue. a) Do you contend that no blacks or other racial minorities were certified as eligible for the position at issue? Answer: I believed so. Even if there were racial minorities certified, they were not selected. However, that is not the issue. The issue is that I was not certified while career executive employees were allowed to interview without their material being examined. Ruling: The Commission agrees complainant has not answered the question because he responded by describing the belief he held at the time he drafted his complaint instead of describing his current contention.**

Complainant acknowledged in answer to a different interrogatory (#25) that use of the AHQ did not bar certification of at least some black candidates. The Commission concludes that complainant's answer to interrogatory #10.a., is he no longer contends that no blacks or other racial minorities were certified for the position.

I. No Bad Faith

The complainant states he has no information to add regarding the following interrogatories. As noted below, the Commission concludes that complainant's lack of additional information leads to a conclusion that he either has no information to add or that he has no information at all to support the claim.

- 4.b. **Describe in detail exactly how the AHQ version was used to deny you the position at issue.** *Answer: Complainant never answered this question. Ruling: Motion to compel granted.*

The statement of the first hearing issue is particular to the specific AHQ used in the contested hiring. The Commission concludes that complainant has no evidence to support the first hearing issue.

- 4.c. **Identify any and all facts which you are aware of that support your allegation that DER/DMRS denied you the position at issue because of your race and national origin.** *Answer: Complainant never answered this question. Ruling: Motion to compel granted.*

The Commission concludes he has no evidence to support the first hearing issue.

- 10.a. **You allege that "DER/DMRS and their agents used the AHQ version to ensure that no blacks and other racial minorities and therefore complainant were certified and selected into the position at issue. a) Do you contend that no blacks or other racial minorities were certified as eligible for the position at issue?** *Answer: I believed so. Even if there were racial minorities certified, they were not selected. However, that is not the issue. The issue is that I was not certified while career executive employees were allowed to interview without their material being examined. Ruling: The Commission agrees complainant has not answered the question because he responded by describing the belief he held at the time he drafted his complaint instead of describing his current contention.*

Complainant acknowledged in answer to a different interrogatory (#25) that use of the AHQ did not bar certification of at least some black candidates. The Commission concludes that complainant's answer to interrogatory #10.a., is he no longer contends that no blacks or other racial minorities were certified for the position.

- 10.b. **Describe in detail all of the reasons as to exactly how the AHQ version would ensure that you, blacks and other racial minorities would not be certified and selected.** *Answer: The AHQ is used to practice to remove (sic) some or all blacks from eligibility for promotion in order to promote whites and white career executives. The less or no racial minorities are certified (sic) the easier for agency management to give reasons why they do not hire racial minorities. Ruling: The Commission agrees complainant's response merely states a conclusion. It fails to respond to how the AHQ operates to separate racial minorities.*

The statement of the first hearing issue is particular to the specific AHQ used in the contested hiring. The only response provided by complainant relates to the second hearing issue. The Commission concludes that complainant has no evidence to support the first hearing issue.

- 15.f. **Describe specifically how any alleged manipulation of state policy excluded blacks and other racial minorities from being certified and selected.** *Answer: The stated employees advised agencies that although the policy used the word "shall" agencies did not have to follow the policy. Ruling: Complainant failed to specify how racial minorities were excluded by the alleged manipulation.*

The Commission concludes that complainant has no further evidence to support this claim.

20. **Explain why, if DER/DMRS used a rating panel which consisted of at least one racial minority to rate your AHQ responses and those of other applicants, such a process would discriminate against you.** *Answer: The crux of the AHQ usage is to subject blacks to exam while allowing whites with career executives to proceed to interview without being subjected to complainant. [sic] This is the key contention in this case. Ruling: The Commission is unable to understand complainant's response given the question posed in the interrogatory.*

The only response submitted by complainant relates to the second hearing issue, rather than the question posed in the interrogatory. The Commission concludes that he has no evidence to support the contention that a balanced rating panel resulted in discrimination against him.

21.b. You allege that "preliminary investigations have further revealed that the individual appointed for the position had been pre-certified and pre-selected as soon as the position became vacant." b.) Identify any person (by name) who provided you with information in support of your allegation that the individual appointed was pre-certified and pre-selected and describe in detail what that person told you. *Answer: I believe that. The individual selected did not have the required qualification. Ruling: Complainant failed to answer the question because he did not identify the person or describe what the person advised him.*

The Commission concludes that this allegation was based upon complainant's own beliefs and that he has no further evidence to support the allegation.

23.a. You allege that "DER/DMRS and their officials had planned to flunk as many blacks as possible . . . to appoint the white individual who had been pre-certified and pre-selected." a.) Identify each and every fact, including the name of any person who provided you with any information, to support your allegation that DER/DMRS planned to flunk as many blacks as possible. *Answer: Complainant and other blacks were qualified for the position as indicated above. See also Chapter 281 of Wisconsin Staffing Manual. DER and DMRS officials used the AHQ as to flunk as many racial minorities as possible. Ruling: Complainant failed to answer the question posed.*

The Commission concludes that no one told complainant that DER/DMRS or its officials planned to flunk as many blacks as possible. The Commission also concludes that he has no further evidence to support this allegation.

23.b. *Describe how DER/DMRS planned to flunk as many blacks as possible. Answer: There was no reason to flunk the complainant in this position because he had passed similar positions in just two months. By implication DER and DMRS planned to flunk the complainant. Ruling: Complainant failed to answer the question.*

The Commission concludes complainant has no evidence to support the allegation other than his own experience as described in the answer given previously.

23.c. How many blacks do you believe were "flunked"? *Answer: I was one of those flunked and those certified were not selected. Ruling: Complainant failed to answer the question posed.*

The Commission concludes that complainant does not know how many blacks were “flunked” other than himself.

24. *You allege that you were "otherwise qualified" for the position at issue. Identify each and every reason to support your contention that you were qualified. Your answer must, in order to be responsive, describe all of your experiences in the following areas. If you have had any such experience answer "yes" and describe all of that experience indicating the month and year of the experience, who your employer was and if employed by the state what position did you hold. If you did not have any experience in and [sic] area answer "no":*
- a.) Planning recruitment for written exam titles;
  - b.) Producing or being involved in the production of the Current Employment Opportunities Bulletin (COB) and the State Employee Promotion and Transfer Opportunities Bulletin (SEB);
  - c.) Multiple choice exam development (Developing, scoring, determining reliability and validating; register establishment and certification techniques);
  - d.) Coordinating production and distribution of civil service examination;
  - e.) Managing a civil service written examination system;
  - f.) The number and level of persons supervised (professional, paraprofessional, support etc.);
  - g.) Role and techniques used to recruit and hire staff, manage staff performance and deal with disciplinary problems;
  - h.) Managing a large (e.g. State wide, large numbers of records, high volume of transaction) automated information systems;
  - i.) Dealing effectively with information technology specialists to resolve system problems and identify/explain changes;
  - j.) Providing businesses/users input (conceptual and/or technical) to help develop a new computer system.

*Answer: (See ruling on Motion in this case). I do not have to have specific experience in recruitment for written exam titles. This was a career executive position and that is why DER and DMRS allowed people with career executive status to proceed to interview. (See Chapter 281 of Wisconsin Staffing Manual pages 1-4. See also opinion in Balele v. DMRS & DHSS, 91-0118-PC-ER). Ruling: Complainant failed to answer the questions posed in these interrogatories.*



Complainant supplemented his answer saying that all his experiences were described in the AHQ he completed for the vacant position. Presumably respondents have his AHQ and, based on complainant's response, respondents may rely on the information noted in the AHQ as complainant's entire answer to the interrogatory.

25. **You allege that DER/DMRS used the AHQ as a barrier "to stop inflow of blacks into DER/DMRS top management positions." a.) Identify each and every fact which supports your allegation. b.) Describe in detail exactly how using the AHQ would stop the inflow of blacks into DER/DMRS.** *Answer: DER and DMRS does (sic) not have blacks in the career executive positions. In fact some who proceeded to interview were blacks. DER and DMRS subjects (sic) blacks to AHQ to reduce their number of eligible while allowing white career executives to proceed to interview. Ruling: The Commission agrees that complainant has not answered the questions posed.*

The Commission concludes complainant has no further information to support these claims.

28. **You allege that DER/DMRS intentionally discriminated against you by using the AHQ testing technique. Set forth each and every reason why you believe the AHQ used in this instance discriminated against you.** *Answer: DER and DMRS and its officials knew that I am black and they knew I was an applicant. Further I have discovered two of the people on the panel were my enemies. DER and DMRS and its agents subjected me to an AHQ while white career executives were not. Ruling: The Commission agrees the response does not indicate the basis on which complainant believes this particular AHQ discriminated against him. If the respondents' question does not accurately reflect the complainant's allegation, complainant may explain in his answer why it does not do so.*

The statement of the first hearing issue is particular to the specific AHQ used in the contested hiring. The Commission concludes that complainant has no evidence to support the first hearing issue.

30. **Are you contending that the AHQ testing technique in general discriminates against and has a disparate impact on racial minorities? If your answer is "yes", identify each and every reason why you contend that to be the case and provide any and all evidence, including all reference materials which supports your contention.** *Answer: Yes. The AHQ is used to remove qualified racial minorities from consideration for career executive position. Ruling: The Commission agrees complainant*

*has failed to answer the question posed because he merely stated a conclusion rather than providing the reasons behind the contention.*

Complainant has never answered the question posed. The Commission concludes that the only proof complainant has to support this allegation is the same as he recited in answer to interrogatory #25.

## II. Bad Faith

The Commission finds that complainant's answers to the following interrogatories constitute bad faith, as either intentional conduct without a clear and justifiable excuse or as unintentional conduct which is so extreme, substantial and persistent that it properly can be characterized as egregious. See, *Hudson Diesel, Inc. v. Kendall*, 149 Wis. 2d 531, 542-46, 535 N.W.2d 65 (Ct. App., 1995), discussed in detail in section III. of this ruling.

- 2.c. **Identify any and all documents and/or statistical evidence which demonstrates that there is a substantial disparity between the number of qualified racial minorities and qualified non racial minorities; (1) seeking career executive positions; and (2) being placed on the career executive registers; . . . c.) Identify any and all facts which you are aware of that support your allegation that DER/DMRS denied you the position at issue because of your race and national origin.** *Answer: The answer is the same as in 2b. [Complainant's answer to 2b was: "The AHQ has disparate impact because it removed qualified racial minorities, including the complainant from the interviewee and selection lists. However, people with career executive status were not subjected to the AHQ. Therefore the AHQ in this particular case was used to rake [sic] complainant, though qualified, from the interview list.] The Commission has repeatedly ruled that practice can have disparate impact on complainant as an individual or protected group. In this case complainant, a black applicant, was removed whereas people with career executive status, mostly whites, were allowed to proceed to interview without being tested (See Ruling on DER and DMRS in this case)<sup>2</sup>. Ruling: The Commission agrees that complainant has not adequately answered the question because he has not identified all documents and/or statistical evidence demonstrating a substantial disparity. The Commission interprets complainant's response to refer only to the second part of the interrogatory, which requests "all facts which support your contention that the AHQ testing*

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<sup>2</sup> The stated reference to the ruling is part of complainant's answer to this interrogatory.

*technique caused the substantial disparity." The Commission further interprets complainant's response to be that the only facts in support of this contention are that complainant, who is black, did not pass the AHQ while career executives, most of whom are white, did not have to take the AHQ. The Commission further concludes that complainant did respond to the second, but not the first, part of interrogatory 2c.*

Complainant now contends he has no further information to add. His failure to provide the statistical evidence and related documents requested constitute bad faith. Complainant has litigated many cases in this forum raising similar issues in every case. He is well aware of the labor force statistics available and yet has refused to provide the information and related documents. As to complainant's failure to provide additional response to the second part of interrogatory 2c, the Commission concludes that he has not answered in bad faith but that he has no further evidence to support this claim.

5. **You allege "Complainant called five racial minorities whom he knew would apply and qualify for the position at issue and similar positions in DER/DMRS and state wide."**
  - a.) **What are the names, work addresses and class levels of each of the five racial minorities you called?**
  - b.) **Are any of those five individuals career executives?**
  - c.) **What were the exact dates you contacted each of the five racial minorities?**
  - d.) **What was the entire conversation (what you said and what they said) you had with each of the five racial minorities?**
  - e.) **Did any of them apply for the position at issue?**
  - f.) **For each of the five individuals provide any and all reasons why you contend that they would qualify for the position at issue, identifying each and every fact which demonstrates that they were qualified.**

*Answer: In this case I also meant the multiple incidents I had called Oriedo and applied for similar positions in DER and other agencies. But also I had in mind about the case involving Dr. Oriedo who was flunked two times similar positions in DOC (sic).*

*c) Objections. I talked with Dr. Oriedo almost every day. It is impossible to tell exact dates.*

*d) Dr. Oriedo and I talk about searching for jobs all the time. Therefore the conversation involving the type of positions as the one at issue came up.*

*Ruling: The Commission agrees that complainant failed to identify the five racial minorities and that complainant has failed to answer the specific interrogatories relating to those individuals.*

Complainant now contends he has no further information to add. His inability to name the referenced five racial minorities demonstrates that the pleading was made in bad faith. His failure to even indicate whether Mr. Oriedo ever applied for the position at issue (portion "e" of interrogatory #5) and, if so, what Mr. Oriedo's qualifications were (portion "f") constitute bad-faith responses. This is information readily available to complainant as he notes that he speaks with Mr. Oriedo almost every day.

6. **You allege "Complainant discovered that they (the five racial minorities) too had been screened out as ineligible for the position at issue and similar positions in DER/DMRS and other state agencies using the AHQ." Identify each and every fact which supports your allegation and explain:**
  - a.) **By name which of the five individuals had been screened out as ineligible for the position at issue.**
  - b.) **By name which of the five individuals had been screened out as ineligible for similar positions in DER/DMRS using the AHQ. For each such individual identify the similar position, when this occurred and provide all reasons why you contend those positions were similar to the one at issue.**
  - c.) **By name which of the five individuals had been screened out as ineligible for similar positions in other state agencies using the AHQ. For each such individual identify the position(s) and agency and provide all reasons why you contend those positions were similar to the position at issue.**
  - d.) **Of the individuals you named in subparagraph b and c above, have they ever been declared eligible and passed onto the interview stage when AHQ testing was used? If so, identify those individuals.**

*Answer: a) By this I was counting incidents I had been screened out. For example I was screened out two times in DOC, 2 times in DOA. Dr. Oriedo had been screened out from similar positions in 2 times at DOC and 2 times at DPI.*

*b) I have been screened out 30 times, Oriedo has been screened 5 times in similar positions. I believe that exceeds the number DER and DMRS asked for. Respondents can view the exam result slips by calling him at 267-7975.*

*c) I have been screened out more than 30 times, and Oriedo has been screened out more than 5 times in similar positions.*

*d) Yes.*

*Ruling: The Commission agrees complainant has failed to answer the specific questions raised by respondents by failing to identify the five racial minorities referenced in complainant's allegation and by failing to answer the specific subparts of the questions in relation to those five persons.*

Mr. Balele now contends that he has no further information to add. His inability to substantiate his allegation about 5 racial minorities leads the Commission to conclude that the pleading was made in bad faith. The responses provided concerning himself and Mr. Oriedo also constitute bad faith. He knows that Mr. Oriedo's experience with AHQs does not support an allegation that the AHQ process had a disparate impact on blacks. Complainant knows this because he represented Mr. Oriedo at hearing where the testimony given by Mr. Oriedo did not support the claim that AHQs had a disparate impact on minorities. [See *Oriedo v. ECB, DER & DMRS*, 98-0013-PC-ER, 7/20/99, where the Commission noted that Mr. Oriedo previously had applied for 13 positions where AHQs were used as a testing device. The scores received by Mr. Oriedo on the AHQs were sufficient to merit an interview in 11 of the 13 positions, insufficient in 1 of the 13 positions and the AHQ was not scored in the thirteenth position.] Complainant's failure to provide his own record of success where AHQs were used constitutes bad faith because it deprives the opposing parties of information to determine if complainant's own experience with the AHQ process supports his allegation or whether, as with Mr. Oriedo, such evidence would not support the allegation.

**15.a. You allege that "further investigation revealed that DER/DMRS officials had manipulated state policy to exclude blacks and other racial minorities from certifying and selecting panels."**

**a.) [W]hat were all of the facts uncovered in the investigation?**

*Answer: I did investigate the issue at DER, DOT, WTCSB, DOT. In fact the Attorney Vergeront is key person in manipulating the said policies.*

*Ruling: Complainant failed to describe the facts uncovered in the investigation.*

Complainant now contends he has no further information to add. He acknowledged in his prior answer that he conducted an investigation and identified the "key person" alleged to be at fault. His failure to divulge the facts uncovered in his investigation and to identify the

uncovered facts supporting his conclusion deprive respondents of the ability to prepare for hearing on this allegation and constitutes a bad faith response to discovery.

**22.c. You allege that "DER/DMRS officials had criminally rigged certification and selection of the appointed individual." c.) On what basis do you contend that the actions were criminal, citing any applicable statute? *Answer: I believed so. Also see §230.43, Stats. Ruling: Complainant failed to answer the question because he did not identify the particular statutory language which allegedly was violated and, accordingly, has failed to explain the reasons why he believed the conduct to be criminal.***

Complainant now contends he has no further information to add. He has provided no reason why he could not identify the particular statutory language upon which he bases his serious allegation of criminal behavior. His failure to supplement his answer as ordered by the Commission constitutes bad faith.

**26.c. You allege that "respondents allowed people with career executive status, most of whom were white people, to proceed to the interview stage and have a chance to be selected regardless of their qualifications." c) In this recruitment which individuals by name were allowed to proceed to interview, without answering the AHQ because of their career executive status, indicating which of those you contend were white and which you contend were black. *Answer: Now I know there was white career executive individuals allowed to proceed to interview without being examined. The law does not allow even subtle discrimination based on race. Therefore this question is moot. Ruling: The Commission agrees with respondents' contention that complainant has not responded to the question posed in the interrogatory.***

Complainant now contends he has no further information to add. He noted in the prior response that he knew some white individuals already in career executive status were allowed to proceed to interview without going through the AHQ process. He has not offered any reason why he has failed to provide even the names of those individuals he previously referenced. His failure to do so constitutes a bad-faith response to discovery.

**26.d. Identify any and all reasons why you contend that people with career executive status are without qualifications to be interviewed. *Answer: I believe that not every career executive has all the qualifications for all career executive position (sic). This is a common sense (sic) for any ordinary people to believe. The allegations states (sic): "[O]n the other***

*hand respondents allowed people with career executive status, most of whom were white people, to proceed to the interview stage and have a chance to be selected regardless of their qualifications. Since racial minorities were underutilized in administrative manager position, complainant alleges that the career executive status had disparate impact on racial minorities and therefore complainant.” (See Ruling on Motion in this case). In fact Complainant discovery in the past revealed that not all career executive employees are qualified for all career executive positions. Further the intent of Chapter 230.24 is to avail training and experience of career executive employees. If all career executives were qualified for all career executive positions there would be no need of Chapter 230.24. Ruling: The Commission agrees with respondents’ contention that complainant has not responded to the question posed in the interrogatory because complainant has not explained the reasons for his contention that people with career executive status are without qualifications to be interviewed.*

The Commission ordered complainant to supplement his answer to explain the reasons for his contention that not all career executive employees are qualified for career executive positions. Complainant’s prior response indicated that his own prior discovery supported his contention. His failure to supplement the response as ordered by, for example, detailing the results of his prior discovery that he previously said supports the allegation is bad faith.

**33.c. Identify which of those recruitments that used an AHQ testing technique resulted in your being certified to the interview stage. Answer: Subject to objection complainant has not been keen to see what type of techniques were used. There are many variety of AHQs. Ruling: The Commission agrees with respondents’ contention that complainant failed to answer the question posed.**

Complainant now contends he has no further information to add. This is a bad-faith evasion of discovery because he deprives respondents of the information about his own success rate with AHQs, which leaves respondents without a basis to determine whether complainant’s own experience supports the allegation. (See above discussion of *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99, relating to interrogatory #6.)

III. Sanctions

The possible sanctions for failing to comply with an order compelling discovery are set forth 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:

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 staying 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.

(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.

Respondents seek dismissal of the complaint as the appropriate sanction for complainant's failure to comply with the Commission's July 19<sup>th</sup> order. Dismissal, as a discovery sanction, is discussed in the *Hudson Diesel* case as shown below (194 Wis. 2d 531, 542-46):



Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary. In *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859, 865 (1991), our supreme court held that dismissal is appropriate only where the noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse. . . .

If the noncomplying party's conduct, though unintentional, is so extreme, substantial and persistent that it can properly be characterized as egregious, the trial court may dismiss the action. . . .

We further conclude that when the conduct that is the basis for dismissal is not intentional or in bad faith, the trial court must determine whether less severe sanctions are available to remedy the noncomplying party's discovery violation before dismissal may be ordered.

We emphasize that a trial court need only explore alternative remedies where the noncomplying party's conduct is unintentional. (citations omitted)

In *Hudson Diesel*, the Court of Appeals concluded the plaintiff's conduct was neither made in bad faith nor so serious and persistent that it could be classified as egregious. The court of appeals found the trial court had erred in dismissing the complaint:

There is nothing in this case to indicate that Hudson persistently violated discovery procedure or that its conduct was part of a continuous attempt to obstruct or delay litigation. The record shows only that Hudson responded to the defendants' discovery request, that the response was found inadequate and that an order was entered sanctioning Hudson for its inadequate response. The defendants never requested Hudson to supplement its response, nor did the court order Hudson to do so. Instead, the court entered a prophylactic order, sanctioning Hudson for its conduct and limiting the evidence it could use to establish that it was prepared to perform the contract on the day of closing. Hudson accepted and complied with the court's order.

Further, the record shows that while Hudson's discovery response was inadequate, Hudson did attempt to comply with the defendants' discovery demand. Hudson provided the defendants with approximately sixty-four pages of documents, including an accounting of auction proceeds, several tax returns and a variety of other documents. All of these documents related to Hudson's claim that it possessed sufficient financial resources to perform the contract on the closing date.

The facts of the present case are clearly distinguishable from those in *Hudson Diesel*. 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. Respondents served its first set of interrogatories on complainant on February 16, 1999. Complainant initially responded to the discovery request on February 25, 1999. By letter dated March 3, 1999, respondents requested an in-person status conference to discuss perceived inadequacies in complainant's response and such conference was held at which time complainant agreed to file additional responses by April 12, 1999. The April 12<sup>th</sup> date was later extended and complainant filed his revised response to the respondents' discovery request on April 19<sup>th</sup>. Respondents subsequently filed a motion to compel that was resolved by the Commission's order dated July 19, 1999.

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 24<sup>th</sup> 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."<sup>3</sup> 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.

Although *Hudson Diesel* indicates alternative sanctions need not be considered, the Commission will do so. Complainant suggests an appropriate sanction would be: "to enjoin me from introducing evidence related to the inadequate answers."<sup>4</sup> This suggestion appears to relate to the language of §804.12(2)(a)2., Stats., and to the sanction imposed by the Commission in *Germain v. DHSS*, 91-0083-PC-ER, 7/30/93, and *Southwick v. DHSS*, 85-0151-PC, 2/13/87 where the Commission barred a party from offering evidence related to the subject

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<sup>3</sup> Complainant's motion was denied in the Commission's July 19<sup>th</sup> ruling.

<sup>4</sup> This suggestion is found in complainant's letter dated July 23, 1999. In his September 20<sup>th</sup> brief on respondents' motion, complainant does not mention this alternative but concludes that the motion should be denied "[b]ecause DER/DMRS have failed to carry their burden that the information they are seeking is relevant to the hearing on the merits of this case."

matter inquired into by the underlying discovery requests and where the party had failed to timely comply with an order compelling discovery. While the *Southwick* ruling does not offer an explanation for the conclusion reached, in *Germain*, the recalcitrant party had provided the requested information, albeit months late. This alternative sanction is rejected because the interrogatories complainant answered in bad faith do not involve minor issues of fact but, instead, go to the heart of both hearing issues.

A second alternative sanction would be to dismiss one of the two issues for hearing and to then allow the complainant to proceed to present any relevant evidence (whether or not it related to the interrogatories covered by the order to compel) regarding the remaining issue. This sanction obviously would be less drastic than dismissal of the entire proceeding, but would be inappropriate where, as here, complainant's answers made in bad faith (as found in this ruling) go to the heart of both hearing issues. Furthermore, complainant is a frequent litigant in this forum, and must be made to realize that he may not avoid responding to discovery on allegations raised himself in his complaint. He also must be made to realize that he may not refuse to respond to discovery in a manner that hampers respondents' ability to prepare for hearing and/or to identify unsupported allegations which should not go forward to hearing. Given these circumstances, the Commission declines to dismiss only one of the two hearing issues.

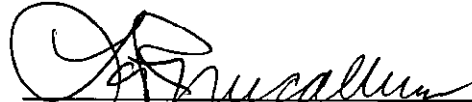
#### IV. Reasonable Expenses, Including Attorney Fees

The Commission retains jurisdiction over this case to provide respondents an opportunity to submit an application for reasonable expenses and attorney fees, pursuant to §804.12(2)(b), Stats., in regard to the interrogatories found to have been answered in bad faith as noted in this ruling. The Commission requests that the arguments filed by the parties address whether assessment of reasonable expenses is appropriate here and, if so, what the dollar amount of the award should be.

ORDER

This case is dismissed except to the extent that the Commission retains jurisdiction to consider reasonable expenses as a sanction. The parties will be contacted to establish a timetable for filing written arguments on the question of reasonable expenses.

Dated: December 3, 1999 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

JMR: 980145Cru13

  
JUDY M. ROGERS, Commissioner

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