

NATHANIEL HARWELL,
Complainant,

v.

**Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION,**
Respondent.

**RULING
ON
DISCOVERY MOTIONS**

Case Nos. 98-0210-PC-ER, 99-0051, 0063,
0096-PC-ER

These matters are before the Commission on respondent's motion to quash and complainant's motion to compel discovery. These motions both relate to complainant's January 21, 2001, discovery request. The parties have been afforded full opportunity to brief these motions. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of resolving these motions.

FINDINGS OF FACT

1. Complainant filed his first set of discovery requests on June 28, 1999. The Commission issued a ruling addressing a dispute about this set of discovery requests on November 5, 1999. As relevant here, this ruling held as follows:

(a) Complainant's motion to compel discovery was denied as to the following requests due to the fact that these requests sought to elicit information relating to any discrimination practiced by any DPI employee rather than to information relevant for discovery purposes to complainant's employment:

Requests for Admission 19, 20, 21, 23, 24, 25, 26, 55, 56, 57,
58, 59, 60, 68, 69, 70, 71, 72, 73, 74, 75

Interrogatories 51, 51, 53

Requests for Production 4, 8, 9, 10, 12, 13, 14, 18, 19

(b) Complainant's motion to compel discovery was denied as to the following requests due to complainant's failure to draw a connection between these requests and his allegations of discrimination:

Requests for Admission 62, 64, 65, 66, 67

Interrogatories 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43,
45, 46, 55, 56, 57, 58, 59, 68

Request for Production 3

(c) Complainant's motion to compel discovery was denied as to the following requests, which requested information from particular individuals, due to the fact that fact that discovery must be directed to parties, rather than to particular persons who are non-parties:

Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 29, 69,
70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

2. Complainant filed his second set of discovery requests on January 22, 2001.

3. Of the Requests for Admission in this second set of discovery requests, 61 of the 67 requests were substantially identical to those in the first set, and, in the Commission's earlier ruling (See Finding 1, above), complainant had been denied discovery as to 19 of these 61. (See Requests for Admissions table attached to this ruling)

4. Of the Interrogatories in this second set of discovery requests, 31 of the 49 requests were substantially identical to those in the first set, and, in the Commission's earlier ruling, complainant had been denied discovery as to 7 of these 31. (See Interrogatories table attached to this ruling)

5. Of the Requests for Production in this second set of discovery requests, 5 of the 22 requests were substantially identical to those in the first set, and, in its earlier ruling, the Commission had denied discovery as to 3 of these 5. (See Requests for Production table attached to this ruling)

6. Respondent either answered the requests in complainant's first set of discovery requests, or was not required to answer such requests pursuant to the Commission's November 5, 1999, ruling.

7 Respondent terminated complainant's employment effective April 8, 1999.

8. The subject matter of nearly all the requests in the second set related to matters which were completed prior to the date of complainant's termination. As an example, many of the requests relate to statements made to complainant during the period of his employment, information maintained relating to complainant's employment, or evaluations of complainant's employment. Since complainant was terminated April 8, 1999, these types of requests would be circumscribed by the period of his employment. (See "Possible Relevance After 4/8/99?" column in each of the tables attached to this ruling)

OPINION

In his first set of discovery requests, complainant set forth 77 requests for admissions; 84 interrogatories, 12 of which had multiple parts; and 21 requests for production of documents. Respondent answered these, some by objections relating to relevance or to the fact that the request was directed to an individual who was not a party. In its November 5, 1999, ruling, the Commission sustained each of respondent's 90 objections except for one (Interrogatory 62). In addition, in that ruling, the Commission gave complainant considerable guidance as to the permissible scope of prehearing discovery in a Commission proceeding.

Complainant has repeated, in his second set of discovery requests, 97 of the requests set forth in his first set, i.e., 97 requests which have either been answered or to which respondent's objections were sustained in the Commission's November 5, 1999, ruling. Complainant made no effort to identify which requests were repeats, and which were not, and it was not obvious from the order in which the requests were presented. Although it could be argued, even though complainant hasn't, that some new information may have come to light between the date of the responses to the first set of discovery requests and the date of this ruling, an examination of the substance of these requests reveals that, by and large, they relate to matters which were completed prior to the date of complainant's termination, i.e., April 8, 1999. (See "Possible Relevance after 4/8/99?" column in attached tables) Moreover, respondent would have had a continuing obligation to update its responses to the earlier requests. Complainant

does argue that, in his second set of discovery requests, several of the pages consisted of “the discovery request designed by DPI.” However, these pages do not consist of discovery requests but instead of general language instructing the recipient as to the definition of terms used, applicable time periods, etc. There is no possible justification for complainant’s actions in this regard. Although he is not represented by counsel, no special expertise is required to know that it is an abuse of the discovery process to ask for information which has already been provided, or to ask for information which the Commission has already ruled that the respondent is not required to provide.

Respondent has denominated the motion it has filed here as a motion to quash complainant’s second round of discovery requests. The Commission is interpreting this motion as a motion for a protective order pursuant to §804.01(3), Stats.

Complainant has brought his motion to compel discovery pursuant to §804.12. Section 804.12(1)(a), Stats., provides in relevant part that, “[i]f the court denies that motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to s. 804.01(3).”

Pursuant to §PC 4.03, Wis. Adm. Code, “[a]ll parties to a case before the Commission may obtain discovery and preserve testimony as provided by ch. 804, Stats.” Section 804.01(3), Stats., provides as follows, as relevant here:

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

1. That the discovery not be had;
2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matter;
5. That discovery be conducted with no one present except persons designated by the court;
6. That a deposition after being sealed be opened only by order of the court;
7. That a trade secret. not be disclosed or be disclosed only in a designated way;

8. That the parties simultaneously file specified documents ..

- (b) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 804.12(1)(c) applies to the award of expenses incurred in relation to the motion.

In view of the egregious abuse of the discovery process engaged in by complainant here, it is not only appropriate to deny his motion to compel discovery, but also to issue a protective order pursuant to which respondent is not required to file further response to the discovery requests made to date by complainant in this matter. It should be noted that the deadline for discovery in this case has passed, so no additional discovery requests by either party are permissible.

Respondent has requested that the Commission award monetary sanctions. However, the provisions of §804.12(1)(c), Stats., state that such an award can be made only after an "opportunity for hearing." If respondent would like to pursue this, a request for hearing on the issue of the award of monetary sanctions should be presented to the Commission.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. Respondent has shown good cause pursuant to §801.01(3), Stats., and justice requires the issuance of an order to protect respondent from annoyance, embarrassment, oppression, or undue burden or expense.

3. Complainant has failed to show that he is entitled to an order to compel discovery pursuant to §804.12, Stats.

ORDER

Complainant's motion to compel is denied. Respondent's motion to quash (for protective order) is granted, and, pursuant to this protective order, respondent is not required to provide further response to the discovery requests filed by complainant in this matter. Any request for a hearing on the issue of monetary sanctions must be filed

with the Commission on or before December 28, 2001, unless this deadline is extended by one of the Commission's hearing examiners.

Dated: December 3, 2001

STATE PERSONNEL COMMISSION

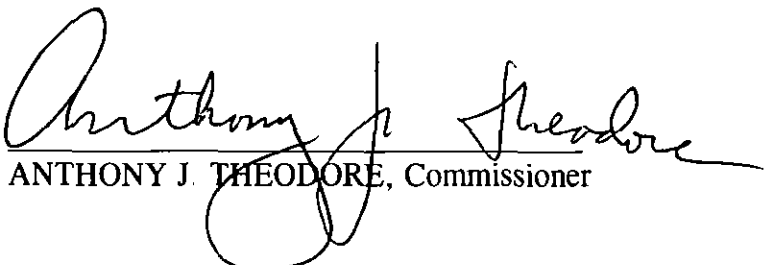

LAURIE R. McCALLUM, Chairperson

LRM:980210Cru6.1


JUDY M. ROGERS, Commissioner

CONCURRING AND DISSENTING OPINION:

I agree with the majority's decision except to the extent it provides that respondent is not required to respond to *all* of complainant's discovery requests. The decision as to the scope of the protective order involves the exercise of discretion. While I think it is a close question, I would exercise that discretion by limiting the protective order to relieving respondent of the necessity to respond to requests which have been identified as substantially identical to the earlier discovery requests. In my opinion this strikes a better balance between the interests of the unrepresented complainant and those of the respondent agency. Complainant had at least the basis for an argument that his second discovery requests were legitimate. The Commission's order cuts off his entire remaining opportunity for discovery, and, in my opinion, imposes an excessive sanction.


ANTHONY J. THEODORE, Commissioner

REQUESTS FOR ADMISSION

1 ST SET #	2D SET #	SUBSTANTIALLY IDENTICAL? ("x" if yes)	DISCOVERY DENIED IN EARLIER RULING? ("x" if yes)	POSSIBLE RELEVANCE AFTER 4/8/99? ("x" if yes)
2	1	x		
3	2	(see footnote) ¹		x
4	3	x		
6	4	x		
7	5	x		
8	6	(see footnote 1)		x
9	7	x		
10	8	x		
12	9	x		x
13	10	x		x
14	11	x		x
15	12	x		
16	13	x		
17	14	x		
18	15	x		
21	16	x	x	
22	17	x		
23	18	x	x	
24	19	x	x	
25	20	x	x	
26	21	x	x	
28	22	x		x
29	23	x		x
30	24	x		x
31	25	x		x
32	26	x		x
33	27	x		x
34	28	x		
35	29	x		
36	30	x		
37	31	x		
38	32	x		
1 ST SET #	2D SET #	SUBSTANTIALLY	DISCOVERY	POSSIBLE

¹ The language of the request in the second set substitutes the words "People of Color" for "African-Americans," and requests information relating to "the teams," with which he worked rather than the agency as a whole.

(Admissions)	(Admissions)	IDENTICAL? ("x" if yes)	DENIED IN EARLIER RULING? ("x" if yes)	RELEVANCE AFTER 4/8/99? ("x" if yes)
39	33	x		
40	34	x		
41	35	x		
44	36	x		
45	37	x		
46	38	x		
47	39	x		
48	40	x		
49	41	x		
50	42	x		
51	43	x		
52	44	x		
53	45	x		
54	46	x		
55	47	x	x	
56	48	x	x	
57	49	x	x	
58	50	x	x	
59	51	x	x	
60	52	x	x	
61	53	x		
62	54	x	x	
63	55	x		x
68	56	x	x	
69	57	x	x	
70	58	x	x	
71	59	x	x	
72	60	x	x	
73	61	x	x	
74	62	x	x	
76	63	x		
77	64	(see footnote) ²		
	65			
	66			
	67			

² The request in the first set focused on Sam Bus telling race and sexist jokes whereas the request in the second set focused on respondent allowing Sam Bus to do this.

INTERROGATORIES

1 ST SET #	2D SET #	SUBSTANTIALLY IDENTICAL? ("x" if yes)	DISCOVERY DENIED IN EARLIER RULING? ("x" if yes)	POSSIBLE RELEVANCE AFTER 4/8/99? ("x" if yes)
1	1	(see footnote) ³	x	x
	2			
	3			
16	4	x	x	
17	5	x		
18	6	x		
19	7	x		
20	8	(see footnote) ⁴		
21	9	(see footnote 4)		
22	10	(see footnote 4)		
23	11	(see footnote 4)		
24	12	(see footnote 4)		
25	13	(see footnote 4)		
26	14	(see footnote 4)		
27	15	(see footnote 4)		
29	16	(see footnote) ⁵	x	
30	17	x		
31	18	x	x	
32	19	x	x	
33	20	x	x	
	21			
39	22	x	x	
44	23	x		x
47,48	24	x		
49	25	x		
	26			
51	27	x	x	

³ In the first set, this interrogatory asked about actions taken against "African-Americans" or "People of Color," while this interrogatory in the second set asked about actions taken against individuals protected by the Wisconsin Fair Employment Act or Title VII of the Civil Rights Act of 1964.

⁴ The words "have a file on" in this interrogatory in the first set was replaced by the words "maintain records on" in this interrogatory in the second set. These interrogatories, despite this change, are considered substantially identical for purposes of this ruling.

⁵ In this interrogatory in the first set, complainant referred only to the applications development team, but in this interrogatory in the second set, complainant referred to "the teams" which he explained means both the applications development team and the technology services team.

1ST SET # (Interrs)	2D SET # (Interrs)	SUBSTANTIALLY IDENTICAL? ("x" if yes)	DISCOVERY DENIED IN EARLIER RULING? ("x" if yes)	POSSIBLE RELEVANCE AFTER 4/8/99? ("x" if yes)
	28			
52	29	x		
53	30	x	x	
60	31	x		x
61	32	x		x
62	33	x		x
63	34	x		x
66	35	x		
64	36	x		
65	37	x		
67	38	x		x
70-76	39			x
77	40	(see footnote) ⁶	x	
79	41	(see footnote 6)	x	
80	42	(see footnote 6)	x	
82	43	(see footnote 6)	x	
84	44	(see footnote 6)	x	
84	45	(see footnote 6)	x	
	46			
	47			
	48			
43	49			x

⁶ In this interrogatory in the first set, complainant restricted his request to the members of the applications development team, but in this interrogatory in the second set, complainant referred to "the teams" which he explained means both the applications development team and the technology services team

REQUESTS FOR PRODUCTION OF DOCUMENTS

1ST SET #	2D SET #	SUBSTANTIALLY IDENTICAL? ("x" if yes)	DISCOVERY DENIED IN EARLIER RULING? ("x" if yes)	POSSIBLE RELEVANCE AFTER 4/8/99? ("x" if yes)
1,2	1			
	2			x
8	3	x	x	
9	4	x	x	
10	5		x	
	6			
	7			
	8			
15	9			
16	10			
17	11	x		x
18	12	(see footnote 6)	x	x
19	13	x	x	
20	14	(see footnote) ⁷		
2	15			
	16			
2	17			
	18			
21	19	x		
	20			x
	21			x
	22			x

⁷ In this request in the first set, complainant used the language "the date each version was to be signed by Nathaniel Harwell," but, in this interrogatory in the second set, he used the language "the date each version was developed."