

OFFICIAL

STATE OF WISCONSIN

PERSONNEL COMMISSION

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*
WILLIAM P. ROWE, *
*
Appellant, *
*
v. *
*
Secretary, DEPARTMENT OF *
EMPLOYMENT RELATIONS, *
*
Respondent. *
*
Case No. 79-202-PC *
*
* * * * *

INTERIM
DECISION
AND
ORDER

NATURE OF THE CASE

This case is an appeal of the non-selection of appellant for the position of Director of the Bureau of Employee Training and Development with the Department of Employment Relations. At the prehearing conference held in this case, the parties did not agree on the issues involved in the appeal and appellant requested certain information which respondent declined to disclose until a decision was made with respect to the issues on appeal. This Interim Decision and Order goes only to these matters raised at the prehearing conference and is based on written briefs submitted by the parties.

OPINION

The respondent at the prehearing conference proposed the following issue, with which appellant disagreed:

Whether or not respondent acted illegally or abused its discretion in not selecting the appellant.

The appellant subsequently proposed issues to which respondent made jurisdictional objections in its response brief. The actions cited by the appellant as the basis for issues on appeal are:

1. The selection of Mr. Joe Pelliteri to fill the disputed position in an acting capacity prior to the announcement of the position.
2. The decision to restrict the recruitment for the position to a service-wide promotion for classified employees;
3. The decision to permit one week after issuance of the job announcement in which to receive applications;
4. The alleged participation of Ms. Carol Lobes in specifying examination questions and answers and the weights assigned to each answer;
5. Alleged manipulation of the examination scoring to place Mr. Pellitteri in the group of the top five candidates.

With respect to #5, Mr. Rowe stated at the prehearing that he could produce a witness who had knowledge of the alleged test manipulation, but that he would supply respondent with the witness' name only if the Commission would issue a protective order to prevent retaliation against the witness.

In addition to proposing these actions as the basis of issues on appeal, Mr. Rowe renewed his request for information. He had requested the following information at the prehearing conference and continues to request it:

- "1. List of all who completed written examination and scores.
2. List of all minority and female candidates who competed in written or oral examination.
3. List of all who completed oral interview, scores and size of score deviation.
4. Oral test questions, and answers prescribed by DER.
5. Written description of scoring process used in oral and written examination.
6. List of questions and prescribed answers asked by Carol Lobes in her final selection interview.
7. Carol Lobes' written report of action concerning why the candidate was selected vs the other candidates.

8. Name of personnel analyst(s) involved in selection process.
9. Names of persons who scored the combined written/oral exam, including person handling computer phase scoring.
10. List of names and organizational affiliation of Oral Board test members plus scoring each member gave to each candidate.
11. Examples of other job announcements, at the same level, where only one week was given between distribution and due date for applications (evidence of consistency).
12. Written evidence of personnel specialists authorization of scoring for the oral interview.
13. Transcribed copies of all oral examination responses of each candidate.
14. Achievement history questionnaires of each of the candidates who competed in the oral interview.
15. Copy of transcript of briefing given to oral examination panel.
16. Copy of request for approval (to the director) for the temporary assignment of Joe Pelliteri to the acting position (Pers 32.01 - Acting Assignments). Were other viable alternative people considered?
17. Evidence of filing a reason for limited recruitment (copy of file) - Pers. 12.02 and 6.01.
18. Evidence of examination security - Pers 6.09(2).
19. Copy of position staff chart including reporting relationships that was submitted prior to May 1979 job announcement.

Respondent argues that an appeal based on any of these allegations is untimely because each action occurred well prior to 30 days from the date on which the appeal was filed. In addition respondent objects to appellant's standing to raise issues nos. 1, 2, 3, and 4.

As the Commission understands it, the appellant is appealing his non-appointment on the theory that the entire selection process, including the examination, was "wired" to result in the selection of the person ultimately appointed. The appellant did not file a timely appeal from actions which allegedly occurred during the examination process. Therefore, he cannot appeal the examination as an independent transaction, but he is not precluded from introducing evidence relating to the examination which may be relevant to the question of whether the appointment decision was illegal or an abuse of discretion. For example, if the appointing authority had requested that the personnel manager design an examination that would ensure the certification of a particular individual, who was later appointed to the position, this request would be relevant to the question of whether the appointing authority had acted illegally or abused his or her discretion with respect to the appointment process. The offer of such evidence would not be objectionable on the ground that a timely appeal had not been taken from the examination, since the evidence would be offered as relevant to the appointment decision.

In view of the Commission's understanding of Mr. Rowe's theory that certain pre-certification personnel actions allegedly adversely affected the post-certification selection process, he is entitled to the discovery requested in order to prepare his case for hearing. The Commission has recently entered an order in which it permitted discovery of examination scoring criteria and achievement history questionnaire responses. McElhose v. Division of Personnel and Department of Health and Social Services, Case No. 79-299-PC, Prehearing Decision and Order dated 4/28/80. The Commission

also recognized the legitimate interest of the respondent Division to protect the confidentiality of the examination process. Although the appeal in McElhose was not identical to this appeal, a single principle governs Commission decisions concerning disputes over discovery in both McElhose and in the present case. The appellant's ability to prepare for hearing is directly related to the availability of information controlled exclusively by respondent. The respondent has a valid interest in the confidentiality of certain information. Both parties interests can be served by providing that the requested discovery be made available to appellant under seal. The information so provided will remain unavailable to the public but will be subject to review by appellant under appropriate conditions and safeguards.

In addition to the parties' disputes with respect to the scope of discovery and the nature of the issues on appeal, there is another matter to be discussed. The appellant requested the Commission to provide protection for the unnamed witness who is alleged to have information concerning examination scoring manipulation. In the alternative, appellant asks the Commission to conduct its own investigation of his allegation. The Commission cannot undertake an investigation separate from the hearing process provided by statute in Chapter 227, Wis. Stats.

The appellant has requested the Commission to issue a protective order concerning the witness who the appellant asserts has information concerning test manipulation. Although the Commission cannot conduct an independent investigation of allegations of wrongdoing, it can issue an order to the respondent to not retaliate against the witness in response to the disclosure of the information.

ORDER

It is ordered that:

1. The respondent is directed to submit to the Commission within two weeks of the date of this Order, as sealed exhibits, the information requested by the appellant and cited on pages 2 and 3 of this Interim Decision and Order. This information will not be made available to the public, but will be available for appellant at the Commission's offices. The appellant is directed not to divulge the contents of these documents outside the hearing which may be held in this case.

2. The respondent is directed not to retaliate in any way against the witness whose name appellant may disclose as the source of his information and belief that the examination was "manipulated."

3. The issue for the hearing in this case is whether the appointing authority acted illegally or in abuse of his or her discretion in failing to appoint the appellant.

Dated June 3, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Commissioner

Donald R. Murphy
Donald R. Murphy
Commissioner

Gordon H. Brehm
Gordon H. Brehm
Commissioner