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RANDY McELHOSE,
 Appellant,
 v.
 Administrator, DIVISION OF
 PERSONNEL, and
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case No. 79-299-PC

* * * * *

PREHEARING DECISION
 AND ORDER

The Commission has reviewed the following letters or copies of letters from the parties:

- Letter from Randal to McElhose dated 1/23/80
- Letter from McElhose to Randal dated 2/4/80
- Letter from Randal to Commission dated 2/8/80
- Letter from McElhose to Commission dated 2/12/80
- Letter from McElhose to Commission dated 3/20/80

There is a dispute with respect to the disclosure by respondent to appellant of certain examination materials with respect to the exam in question, specifically "Scoring/Ranking Criteria" and "Achievement History Questionnaire Responses."

The respondent seeks to prevent discovery on the following grounds, see letter dated February 8, 1980:

- "First, that the scoring/ranking criteria and A.H.Q. responses are irrelevant to the appellant's case.
- Second, that information regarding the relative qualifications of the appellant and the person ultimately chosen for the job can be obtained through the testimony of the appellant and the person chosen.
- Third, that the information requested is confidential under §Pers. 6.08(1)(b), Wis. Admin. Code, and that there is no authority for the commission to subpoena such confidential information."

As to the first ground for objection, it does not appear at this point that the material in question would be irrelevant, and in any event this is not an appropriate basis to resist discovery. The second ground also is not an appropriate basis to resist discovery.

As to the third ground, the application of §Pers. 6.08(1)(b) here urged by respondent would have the effect of severely hampering the ability of any applicant to challenge an exam in a hearing before the Commission. The applicant/appellant would be unable to examine key documents in the exam process.

Section 230.05(5), Wis. Stats., provides in part:

"The administrator shall promulgate rules for the effective operation of the provisions of this subchapter, the responsibility for which is specifically charged to the administrator."

Clearly, this Commission is charged with the responsibility for conducting hearings on appeals of the kind involved here, see §230.45(1)(a), Stats. Discovery before the Commission is authorized, see §PB 2.02, Wis. Adm. Code and Chapter 196, Laws of 1977. Section Pers. 6.08(1)(b), Wis. Adm. Code, should not be construed to authorize non-disclosure of exam materials in the context of a contested case appeal of an examination process. In many past examination appeals the Commission has attempted to accommodate both the interests in confidentiality and the appellant's interest in being able to fully prepare for hearing by providing that the documents in question be provided to the Commission under seal and that thereafter they be kept unavailable to the public but subject to review by the appellant under appropriate conditions and safeguards. Such an order will be entered in this case,

subject to consideration of any objections that might be raised by the administrator of the Division of Personnel, who is not a party but who apparently should be.

There are two additional matters noted by the Commission on its own motion.

The following issue and subissues were established at the prehearing conference, see Conference Report dated 12/4/79:

"Whether the exam process used for filling the position of Chief DVR Planning Section, was arbitrary and capricious.

Subissues

1) Whether or not the review panel was so unknowledgeable of the job requirements of the position of Analyst 5, DVR, that the use of this panel by DHSS was arbitrary and capricious.

2) Whether or not the scoring criteria were so unrelated to the requirements of the position of Planning Analyst 5, DVR, as to be arbitrary and capricious."

The Commission notes that the appellant appeared at the prehearing and has appeared throughout this proceeding without counsel or other representation.

Section 230.16(4), Stats., provides in part:

"All examinations, including minimum training and experience requirements, for positions in the classified service, shall be job-related in compliance with appropriate validation standards ..."

This presents a question as to whether the issue established at the prehearing conference is appropriate. Given these circumstances, the Commission will provide the parties an opportunity to present arguments on the appropriate issue, and then review this question before the hearing.

Finally, it is noted that the administrator of the Division of Personnel is not a party to this appeal. It appears unquestioned that the examination in question was delegated to respondent by the administrator, in which case the administrator should be added as a party-respondent pursuant to §230.05(2)(a), Stats., and an order to that effect will be entered.

ORDER

1. It is ordered that:

A. The respondent's request for a protective order contained in Ms. Randal's letter dated February 8, 1980, is denied. The respondent is directed to submit to the Commission within seven working days of the date of this order, as sealed exhibits, the scoring/ranking criteria and achievement history questionnaire responses related to the examination in question. These documents are not to be made available to the public. They will be made available for inspection by the appellant at the Commission's offices. The appellant is directed not to divulge the contents of these documents outside the hearing.

B. The parties may submit arguments on the appropriate issue for hearing not later than May 5, 1980.

C. The administrator, Division of Personnel is designated as a party-respondent to this appeal.

2. It is further ordered that this matter proceed to hearing on May 23, 1980, at 9 a.m., in Room 803, 131 West Wilson Street, Madison.

Dated: April 28, 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

AJT:jmg