STATE OF WISCONSIN PERSONNEL COMMISSION

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GREG M. DOYLE,

Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 86-0192-PC

INTERIM DECISION AND ORDER

The Commission entered a decision and order on March 4, 1987, to resolve a dispute between the appellant and DMRS regarding discovery of certain examination information. The Commission ordered as follows:

> "DMRS is directed to submit to the commission the material (or copies thereof) with respect to which discovery has been withheld, set forth above within 5 working days of the date of this order. The commission will maintain this material on a sealed basis. The appellant will have access to the material, but is directed not to divulge this material beyond the extent necessary for the processing of this appeal."

DMRS did not comply with this order, but filed a letter on March 11, 1987, which reiterated its contentions that the Commission lacks the authority to require that this material be made available as was ordered, and which posed certain questions about how the commission proposed to interpret and administer its order.

The appellant in a letter filed March 13, 1987, has asked the Commission to impose sanctions, but has not specified any particular sanctions. The Commission conceivably could enter an order imposing sanctions as provided in §804.12(2), stats. However, an award of costs is essentially meaningless,

since there has been no appearance by counsel for the appellant at this juncture. The commission could restrict the respondent in some fashion with respect to the presentation of its case, such an approach also would seem to be hollow, since at the hearing on the merits, it presumably will be the appellant who will offer the material as to which he seeks discovery. The most extreme sanction the Commission itself could impose is to render what would amount to a default judgment. However, this would deprive the appellant of the chance to have his claims adjudicated on the merits, and may be of limited practical impact given the restrictions on the commission's ultimate remedial authority in a case of this nature.[1] While the Commission conceivably could seek judicial sanctions pursuant to §§804.12(2)(a)4. and 785.06, stats., it is reluctant to do so except as a last resort because of the costs and delay attendant on pursuing an independent judicial proceeding. Therefore, at this point and on this record the Commission will attempt to address the matters raised by DMRS in its March 11, 1987, letter and to move this case along.

The thrust of DMRS's position is that the Commission lacks authority for its March 4, 1987, order and that it conflicts with §ER-Pers. 6.08, Wis. Adm. Code.

The Commission clearly has jurisdiction over this appeal pursuant to §230.44(1)(a), stats. The Commission has duly adopted an administrative rule, §PC 2.02, Wis. Adm. Code, which gives parties to Commission proceedings the same right to discovery as is available in judicial proceedings as set forth in ch. 804, stats., and which provides in a "Note" thereto: "Whenever ch. 804 refers to resort a court as, for example, for an order compelling

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[1] E.g., §230.44(4)(d), stats., substantially limits the circumstances under which the commission can remove an incumbent so as to reopen a position to competition.

discovery, resort shall be had to the commission rather than to a court." Section 804.01(3)(a) 7., stats., provides for the entry of a protective order that a trade secret "or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." (emphasis added) There is a precedent for requesting that a Court in a discovery proceeding enter an order "...that the [plaintiff], their counsel, and their expert witnesses keep any information discovered confidential...." Earl v. Gulf & Western Mfg. Co., 123 Wis. 2d 200, 208, 366 N.W. 2d 160 (Ct. of Appeals 1985). Therefore, it seems clear that the commission generally has the authority to enter orders regulating and compelling discovery.

Furthermore, the Commission's March 4, 1987, order is not in conflict with the provisions of §ER-Pers. 6.08(1), Wis. Adm. Code, as respondent argues. Section ER-Pers.6.08(1) provides:

> "Any examinee may be given information on the results of his or her examination and the methods by which such results were determined in accordance with the following provisions:
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> * * *
>
> (b) Information which shall not be released under this section includes but is not limited to the following...." (emphasis added)

This rule governs release of information to an examinee. The order in question required respondent to provide the information to the Commission, not to the examinee, albeit it will eventually reach the appellant.

Even if it were concluded there was an apparent conflict between the Commission's order and §ER-Pers. 6.08(1)(b), Wis. Adm. Code, the rule can be interpreted in such a manner as to eliminate the apparent conflict.[2]

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[2] Respondent asserts in its March 11th letter that the commission as an administrative agency lacks the authority to determine that a rule is invalid. This is incorrect. Sewerage Commission of Milwaukee v. DNR, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981), Paul v. DHSS & DMRS, Wis. Pers. Comm. No. 82-PC-ER-69, 82-156-PC (10/11/84). However, given the Commission's construction of §ER-Pers. 6.08(1)(b), Wis. Adm. Code, it is unnecessary to consider whether it is invalid because of conflict with other statutory provisions.

Section ER-Pers. 6.08(1)(b) concerns disclosure to examinees. The particular statutory authority for the promulgation of this rule appears to be in one or more of these statutory provisions:

> 230.13...the secretary and the administrator may keep records of the following personnel matters closed to the public...
>
> * * *
>
> 230.16(10) Every precaution shall be taken to prevent any unauthorized person from gaining any knowledge of the nature and content of the examination that is not available to every applicant.
>
> 230.16(11) Records of examinations ... shall be retained for at least one year. Inspection of such records shall be regulated by rules of the administrator. (emphasis added).

These provisions basically are exceptions to the open records law, or restrictions on public access to the records in question. However, Mr. Doyle is not merely a member of the public or a member of the public who has taken an exam. He is exercising his statutory right to appeal an exam and to challenge its validity. Access to the exam material here in question is critical to his ability to pursue such an appeal. Therefore, it seems logical in this context to construe §PC 2.02, Wis. Adm. Code, and, by express incorporation, the specific sections of ch. 804, stats., as fully applicable to this dispute, and as governing to the extent they are seen to conflict with the provisions of §ER-Pers. 6.08(1)(b), Wis. Adm. Code, which restricts access to exam materials by examinees in general.

For example, in Siegler v. DNR & DP, Wis. Pers. Comm. No. 82-206-PC (3/4/83), the appellant sought discovery of a personnel analyst's notes concerning a reclassification. Discovery was resisted on the theory that the notes were not public records, or if they were, they were covered by exemptions in the public records law. The commission ruled as follows:

> The Commission rules provide at §PC 2.02, Wis. Adm. Code, that parties shall have the same discovery rights as are available to parties to judicial proceedings under Chapter 804, Stats. There is no basis to believe that the provisions of the public records law restrict the right of a litigant to effect discovery which is proper under Chapter 804, because the party from whom discovery is sought is a government body or official. In the opinion of the Commission, the purpose of the public

> records law is to provide for access to governmental records by persons approaching government bodies for this purpose, not to rewrite the law on discovery for persons involved in litigation with the government. On this record, the discovery sought is proper within the principles contained in Chapter 804, and should be allowed.

In 74 Op. Atty. Gen. 1, 3 (1985), the Attorney General discussed a situation involving discovery before the Tax Appeals Commission under an administrative code provision very similar to §PC 2.02. Section TA 1.35, Wis. Adm. Code provided that "[p]arties may obtain discovery before the commission in the same manner and by the same method as provided under ch. 804, Stats., unless inconsistent with or prohibited by statute...." The attorney general stated:

> "It is my opinion that any discovery procedures applying specifically to administrative proceedings before your agency do constitute the 'regulation' of access to public records that may be relevant in the proceedings. Thus the discovery procedures would be incorporated in the public records law through section 19.35(1)(j) as the means of accomplishing access."

Section 804.01(2)(a), stats., "extends discovery to all relevant matters not privileged under Chapter 905 of the Wisconsin Rules of Evidence...." Graczyk, The New Wisconsin Rules of Civil Procedure: Chapter 804, 59 Marquette L. Rev. 463, 468 (1976). If a party has concerns that disclosure of non-privileged material through discovery will be injurious, the adjudicative body should attempt to address these concerns to the extent possible through the entry of a protective order under §804.01(3)(a), stats., as has been done here, rather than simply to deny discovery and effectively abort the entire appeal proceeding.

Respondent makes several inquiries as to the extent of the appellant's access to and use of the materials. To respond, if the appellant determines that he needs to make notes or photocopies of the material for the purpose of preparing for hearing or consulting with attorneys or exam experts, he may do

so. However, the Commission's March 4th order will apply to any use of such copies or notes and to any attorneys or experts who may obtain access to said copies or notes, and the appellant will be ordered to advise the commission of the names of anyone he intends to provide with such access so that copies of these orders can be served on them prior to their obtaining such access.

The respondent also raises concerns about the Commission's authority to enforce its March 4th order:

> "...As a general proposition, if a court orders a person to do something, and the order is violated or not complied with, the person can be held in contempt. The Commission is an administrative agency and not a court and cannot hold anyone in contempt. It appears that there is no effective sanction that can be imposed in the event that the Appellant or a person otherwise entitled to review the examination information pursuant to the commission's order discloses the information in violation of the commission's directive...."

While it is true the Commission itself lacks authority to impose sanctions for contempt, §785.06, stats., provides:

> "A ... state administrative agency conducting an action or proceeding or a party to the action or proceeding may petition the circuit court in the county in which the action or proceeding is being conducted for a remedial or punitive sanction specified in s.785.04 for conduct specified in s.785.01 in the action or proceeding."

The definition of a "contempt of court" includes the intentional "[d]isobedience, resistance or obstruction," §785.01(1)(b), stats., of an order, and the range of sanctions available includes the payment of compensatory damages, imprisonment, forfeiture, or other order or sanction, §785.04(1), stats. These sanctions are of course in addition to the sanctions available to the Commission, such as the rendition of a default or dismissal, §§227.44(5), 804.12(2)(a) 3., stats.

Finally, respondent objects to the disclosure of names of the examinees. While the Commission believes that any privacy interest of the other examinees is protected by the Commission's March 4th order, there would not

appear to be any reason why the respondent should not be permitted to substitute some form of coding in lieu of the actual names of the examinees. The respondent expresses concern that the appellant could identify some of the examinees by listening to the exam tapes and suggests that they be transcribed, at appellant's expense. While the Commission has no objection to the provision of transcriptions, it sees no reason why the appellant, rather than the respondent, should have to bear this cost.

Finally, it is in the interests of the orderly administration of the administrative process that the parties comply with the Commission's orders. Any party certainly is free to disagree with a Commission decision, but it should either seek such appropriate review or reconsideration of the decision as has been provided by law or comply with the order. While the Commission is reluctant to seek judicial contempt sanctions except as a last resort, as discussed above, it is prepared to do so in this case should respondent further fail to comply with its orders.

ORDER

Respondent DMRS is ordered to submit to the Commission the material (or copies thereof) with respect to which discovery has been withheld, as set forth in the Commission's March 4, 1987, decision and order. The deadline for submission of this material is five working days from the date of service of this order. In addition to the restrictions on this material as set forth in that order, appellant is directed to inform the Commission of the name and address of any expert or attorney he intends to consult prior to divulging any of said material to any such person, so that the Commission can serve

copies of these orders on such person prior to disclosure of the material, and any such person is directed not to disclose the examination materials to the public or outside the confines of this proceeding.

Dated: March 24, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

Donald R. Murphy
DONALD R. MURPHY, Commissioner

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

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