

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 & SELECTION,

Respondents.

Case No. 86-0192-PC

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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission to resolve a dispute about discovery.

This is an appeal pursuant to §230.44(1)(a), Stats., of an Administrative Officer 1 (AO 1) examination. The appellant has engaged in certain prehearing discovery pursuant to §PC 2.02, Wis. Adm. Code:

Parties shall have available the means of discovery that are available to parties to judicial proceedings as set forth in ch. 804, Stats., to the extent that the same are not inconsistent with or prohibited by these rules or the Wisconsin Statutes or the Wisconsin Administrative code.

Respondent DER objected to the provision of, and refused to disclose certain items among the material sought, as set forth in a letter dated January 2, 1987:

You will be permitted to inspect a summary of the raters comments, if any, of your oral and written examination. DMRS objects to your inspection of documents prepared by raters on other applicants' oral and written examinations on the grounds that disclosure of this information is prohibited by sec. 230.113, Stats., and ER-Pers. 6.08, Wis. Admin. Code.

* * *

You will be permitted to inspect your scores and your rank by rater. DMRS objects to your inspection of the names, scores and ranks of the other applicants on the grounds that disclosure of this information is prohibited by sec. 230.13, Stats., and ER-Pers. 6.08, Wis. Adm. Code.

* * *

With respect to the following documents, DMRS objects to inspection on the grounds that pursuant to sec. 230.13, Stats., and ER-Pers. 6.08, Wis. Admin. Code the information contained therein may not be disclosed.

3. Achievement History
applications - all
candidates
4. Examination questions used
in the oral and written examinations
5. Oral examination
evaluation booklet
6. Tapes of oral interviews -
all candidates
7. Written essay responses -
all candidates
10. 'Benchmark' answers for all oral and written examination
questions.

The respondent's rationale for objecting to release of the aforesaid material is based on §§230.13, 230.16(10), and 230.16(11), Stats., and ER-Pers 6108, Wis. Adm. Code, which respectively provide as follows:

230.13 Closed records. Except as provided in s. 103.13, the secretary and the administrator may keep records of the following personnel matters closed to the public:

- (1) Evaluations of applicants.
- (2) Names of applicants other than those certified for employment.
- (3) Dismissals.
- (4) Demotions.
- (5) Disciplinary actions.
- (6) Pay survey data obtained from identifiable nonpublic employers.
- (7) Names of nonpublic employers contributing pay survey data.

* * *

230.16 (10) Every precaution shall be taken to prevent any unauthorized person from gaining any knowledge of the nature or content of the examinations that is not available to every applicant.

230.16 (11) Records of examinations, including a transcript or recorded tape of oral examinations, given under this subchapter shall be retained for at least one year. Inspection of such records shall be regulated by rules of the administrator. (emphasis added)

6.08 Release of examination information. (1) 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:

(a) The following information may be released: The composition of the examination, as determined in s. ER-Pers 6.05(2), the weight of and score on each separately scored component; the result of performance or physical tests; and information as to whether veterans preference was included in the grade.

(b) Information which shall not be released under this section includes but is not limited to the following: copies of examination booklets, rating guides and scoring keys; copies of written comments of oral board members; tapes of oral examination; results of medical examinations except through the examinee's designated physician; scores of other candidates identified by name except for those certified for employment; and answers to specific items on written examinations.

In the Commission's opinion, the aforesaid rule should be applied in a manner that is consistent with other provisions in the civil service code that require that DMRS conduct examinations that are "job-related in compliance with appropriate validation standards," §230.16(4), Stats., and which must be administered in accordance with "appropriate scientific techniques and procedures...." §230.16(5), Stats., and which permit examinees to appeal exam results to the commission, §230.44(1),(a), Stats. An examinee, such as Mr. Doyle, who on appeal challenges whether DMRS conducted a particular examination in accordance with these statutory

requirements could hardly hope to pursue his case successfully unless he had access to the materials he is seeking. This would be somewhat similar to a patient trying to pursue a malpractice claim against a surgeon without being able to have access to any of the charts or medical records involved in his case.

The rule in question apparently reflects policy concerns about exam security. In a number of past cases, the commission has attempted to address these concerns while permitting appellants to proceed with exam appeals by directing that exam documents be submitted to the commission where they have been maintained under seal, and only made available to the appellant with directions not to divulge the contents outside the hearing context. Paul v. DHSS, Wis. Pers. Commn. No. 82-PC-ER-69, 82-156-PC (10/14/83); Rowe v. DER, No. 79-202-PC, (6/3/80); McElhose v. DP/DHSS, No. 79-299-PC (4/28/80). This approach avoids any direct conflict with § ER-Pers 6.08(1)(b), Wis. Adm. Code, since in submitting the requested material to the commission, the respondent is not releasing the material to the examinee per se. Finally, it should be noted that in the event that DMRS comes to have some concern (this has not been enunciated) that Mr. Doyle's access to this material could create a problem with respect to a particular examination in which he might wish to participate in the future, as opposed to a more generalized concern about exam security, this can be dealt with on a case by case basis.

ORDER

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 the material beyond
the extent necessary for the processing of this appeal.

March, 1987

STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner