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DWIGHT BEAVERSON,
 Complainant,

v.

Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Respondent.

Case Nos. 88-0109-PC-ER

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RULING
 ON DISCOVERY
 MOTIONS

This matter is before the Commission on complainant's motion to compel discovery filed December 8, 1989. Both parties have filed briefs.

Respondent's brief filed on January 3, 1990, interposed a motion for a protective order which would limit the discovery sought in certain of complainant's interrogatories and which would provide an extended time period in which to respond. Also, on December 4, 1989, the Division of Merit Recruitment and Selection (DMRS) filed a letter dated December 1, 1989, seeking "clarification" of the Commission's June 29, 1989, discovery order

This case involves a complaint of discrimination which alleges that complainant ranked second in an exam for Motor Vehicle Supervisor 9, and that after the first-ranked individual withdrew, two younger persons who ranked lower on the exam were hired. Complainant also alleged that this was part of a pattern of discrimination against him and that on at least two previous occasions he had been qualified for similar positions but not hired.

Respondent objected to certain of the initial interrogatories filed by complainant, numbers 5, 8 and 10 on the grounds of relevance, and numbers 5 and 10 on the grounds of confidentiality. Complainant moved to compel their answer. The interrogatories are as follows:

5. For the classification MVS9 list the educational requirements, training, experience, tests, evaluations, or other criteria used as factors in determination of suitability for appointment or promotion, the relative weight of each, and the grade, analysis, or other indicia requisite to acceptability for permanent appointment.

8. Specifically identify the written examinations given for the classification MVS9, including at least the following information:

- (a) What agency or official is responsible for the preparation of such examinations;
- (b) What agency or official is responsible for administering such examinations;
- (c) What official or agency is responsible for scoring or grading such examinations;
- (d) What official or agency is responsible for establishing eligible lists based on such examinations;
- (e) What official or agency is responsible for evaluating the results of such examinations and determining their validity; and
- (f) What official or agency is responsible for receipt, investigation, and disposition of complaints concerning the grading, scoring, or ranking of persons taking such examinations.

* * *

10. For the three (3) most recent examinations for the classification MVS9, provide the following information separately for each exam:

- (a) A list of all persons by name, address, and date of birth, who took the examination;
- (b) The score of each person listed in the answer to (a) above on the examination; and
- (c) The position, if ranked, of each person listed in (a) above on the eligible list established pursuant to the examination.

The Commission on June 29, 1989, entered the following order:

Complainant's motion to compel discovery is granted in part and denied in part. Respondent is ordered to answer interrogatories #5, #8, and so much of #10 as relates to persons who were certified as eligible for appointment following examination. Any examination information falling within the confines of §ER-Pers 6.08(2), Wis. Adm. Code, may be submitted under seal to the Commission, where it will be available for inspection by complainant's counsel. Complainant and complainant's counsel are ordered not to disclose said information beyond the extent necessary to pursue this proceeding.

Subsequent to the entry of this order, it appears, based on the submission of counsel for respondent, that she responded to complainant's interrogatories 5, 8 and 10 as follows:

On September 14, 1989, the Respondent filed a Response to Interrogatories #5, #8 and #10 of the Complainant's First Set of Interrogatories. Also on that date, the Respondent separately provided documents to the Complainant's counsel in response to a request of July 19, 1989 for the production of documents. Among the documents provided were rating sheets listing the dimensions which were measured during the employment interview. In its response to Interrogatory #5, the Respondent referred to the fact that information listing the criteria used to evaluate candidates during the employment interview had been provided.

In an effort to provide information relating to the civil service examination which might fall within the scope of Interrogatory #5 in the most efficient manner, the Respondent requested the Department of Employment Relations to provide copies of the Examination Plan, the Written Examination and benchmarks, and the Oral Examination and benchmarks under seal to the Commission. When the Respondent heard nothing further from either counsel for the Department of Employment Relations or counsel for the Complainant, the Respondent assumed that the request had been carried out. However, the Respondent later learned that the documents had not been provided to the Commission and that it was unlikely that they would be provided in the near future.

Since the Department of Transportation is not free to disclose the contents of examination documents covered by Section ER-Pers. 6.08(2), Wis. Admin. Code, without the consent of the Department of Employment Relations, the Respondent promptly amended its initial response to Interrogatory #5 to provide a direct reply without the use of further documents. This amended response was made on December 1, 1989.

Although the Respondent initially sought to provide the Complainant with access to the questions and benchmarks comprising the civil service examination administered in August 1987 and March 1988, it is the Respondent's position that such information in fact exceeds the scope of Interrogatory #5. It is the Respondent's position that it has fully listed the educational requirements, training, experience, tests, evaluations or other criteria used as factors in evaluating candidates for the position in question in this case in its Amended Reply to Interrogatory #5 dated December 1, 1989.

Respondent's Amended Reply to Interrogatory #5 dated December 1, 1989, is as follows:

5. For the classification MVS 9 list, the educational requirements, training, experience, tests, evaluations, or other criteria used as factors in the determination of suitability for appointment or

promotion, the relative weight of each, and the grade, analysis, or other indicia requisite to acceptability for permanent appointment.

Answer At the present time, the Department of Employment Relations has established no minimum training or experience requirements for persons applying to take a civil service examination for a position with a civil service classification of Motor Vehicle Supervisor. To be eligible to be certified for a promotion to a classified position in the Wisconsin civil service, an individual must pass a civil service examination and be placed on a register from which names will be certified to fill vacancies.

In August of 1987, a written examination was administered for both the classification Administrative Officer 2-Supervisor-Section Chief and Motor Vehicle Supervisor 9-Section Chief and District Manager. The announcement for the examination stated for both types of positions:

Knowledge Required: Public policy formulation techniques, including definition of issues and alternatives, legislative and administrative rule making techniques, managerial and supervisory techniques, computer principles and concepts, techniques used in planning and evaluating program performance, analytical skills, Division of Motor Vehicles organizational structure and mission, written and verbal communications techniques.

Qualifications: Candidates must have sufficient training and experience to demonstrate that the skills and knowledge necessary to perform the tasks upon appointment have been acquired. Prospective candidates should evaluate their own training and experience in relation to the tasks to be performed and the knowledge required upon appointment, prior to applying."

The written examination was followed by oral examinations when specific vacancies occurred. The written and oral portions of this examination process each formed 50% of the final civil service examination score for a particular register. A civil service score of 70 was required for placement on the register of eligibles.

After candidates from a register are certified for a particular vacancy, the appointing authority may select any one of the certified candidates and the civil service examination plays no further role in the appointment. The questions and dimensions used to evaluate certified candidates during the employment interviews for vacancies for district managers in Districts 5, 6 and 7 have been provided in response to the plaintiff's request for production of documents dated July 19, 1989.

Also under date of December 1, 1989, filed December 4, 1989, counsel for the Division of Merit Recruitment and Selection (DMRS), which is not a party to this proceeding, requested "clarification" of the Commission's order of

June 29, 1989, order, to "[a]t a minimum. . . provide that any disclosure of the information to anyone other than the complainant or his counsel can not occur until approved by the Commission after due notice to the Division. Given appropriate clarification of the Order, the Division has no objection to submitting the documents to the Commission."

Given this posture, it must be concluded that respondent has failed to respond adequately to Interrogatory #5. What respondent attempted to do here was to answer this interrogatory (in part) by making arrangements with DMRS to provide copies of certain examination documents to complainant.¹ However, these documents have not yet been provided by DMRS, so this approach has not resulted in answering the interrogatory. Respondent's other approach to answering this interrogatory was by its amended answer filed December 4, 1989. This answer does not respond to complainant's inquiry concerning the criteria used to evaluate applicants. Respondent obviously felt in September that the best response to this inquiry was to have orchestrated the submission under seal of copies of the examination plan, the written exam and benchmark, and the oral exam and benchmarks. The Commission agrees that this is the nature of the information sought by the interrogatory, and it is not provided by the amended answer.

Since respondent has still not completely answered Interrogatory #5, complainant is entitled to an order compelling discovery.

Complainant also has moved for attorney's fees in connection with this motion. Respondent contends that the Commission lacks authority to order the award of attorney's fees. The Commission has provided by rule, §PC 4.03, Wis. Adm. Code, that the "parties to a case. . . may obtain discovery and preserve testimony as provided by Ch. 804, Stats.," and that the Commission "may issue orders . . . to compel discovery." The Commission by this rule has in effect incorporated by reference the discovery provisions of Ch. 804, Stats., which includes a provision for the award of attorney's fees, §804.12(1)(c), Stats.

¹ The Commission infers from respondent's brief and affidavit of counsel that respondent has physical custody of the exam material in question, or copies thereof. Respondent contends it is "not free" to disclose this material without the consent of DMRS. To the extent that respondent may be trying to argue it lacks the power to comply with the Commission's June 29, 1989, order, this proposition is not supported by any authority and is not accepted by the Commission.

Respondent points out that there is no specific statutory authorization for the Commission to award attorney's fees with respect to discovery proceedings. However, the courts appear to have acknowledged that administrative agencies have the authority to promulgate rules which provide for prehearing discovery, see State ex rel Thompson v. Nash, 27 Wis. 2d 183, 195 (1965) (concurring opinion), and the award of attorney's fees under appropriate circumstances is simply a part of the discovery mechanism that is designed to help ensure the system functions properly, cf. Atlantic Richfield Co. v. U.S. Dept. of Energy, 769 F.2d 771, 795 (D.C. Cir. 1985):

It seems to us incongruous to grant an agency authority to adjudicate -- which involves vitally the power to find the material facts -- and yet deny authority to assure the soundness of the fact-finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and oftentimes has every incentive to refuse to comply. . . . In our view, evidentiary sanctions for recalcitrance in discovery are part and parcel of the power conferred upon the Secretary of Energy to adjudicate the factual issues related to remedial orders. It follows that such sanctions need not be authorized eo nomine in the Secretary's enabling statute. (footnotes omitted)

Respondent also argues that since attorney's fees under §§227.485 and 111.39(4)(c), Stats., can only be awarded to a prevailing party after a hearing on the merits, it follows that: "consideration of costs relating to motions can be made only after a final determination on the merits in the administrative proceeding. The complainant's request for attorney's fees is premature." In the Commission's view, this argument is inapposite, because there is no relationship between a party's entitlement to costs on a discovery motion and its entitlement to attorney's fees for the entire litigation as a prevailing party.

Section 804.12(1)(c)1., Stats., provides:

If the motion [to compel discovery] is granted, the court shall, after opportunity for hearing, require the party. . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining that order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. (emphasis added)

Since the Commission by this ruling is granting complainant's motion to compel discovery, it will schedule the requisite hearing on expenses unless

it earlier receives notice that the parties have reached an agreement as to said expenses.

Respondent also has moved for a protective order with respect to complainant's request in his second set of interrogatories for detailed information regarding all managerial and leadworker positions filled in the past ten years in the Bureau of Field Services of the Division of Motor Vehicles, on the grounds that the:

request is vastly over-broad in relation to the allegations of the complaint and thus requests irrelevant information which is so extensive as to oppress and place undue burden on the respondent. The request is also vague.

* * *

The complaint in this proceeding involves an allegation of intentional discrimination against the Complainant by David Kussow and Norbert Anderson when they appointed someone other than the Complainant to a position as District Manager in the Bureau of Field Services. The Complainant will likely argue that he should be permitted to obtain information which may tend to show age bias on the part of the two individuals who made the decision not to appoint him. However, the Complainant's Second Set of Interrogatories is not tailored to obtain such relevant information. The interrogatories seek information about substantially all vacancies in the Bureau from 1980 to the present without regard to who made the hiring decision or whether the positions are comparable to that sought by the Complainant. Thus, the Second Set of Interrogatories is again over-broad in its scope and time frame. The Complainant's request should be limited to comparable appointments (District Manager positions or other positions at the same or higher salary ranges) in which David Kussow and Norbert Anderson made the final selection decision.

This request for information by complainant is overly broad to the extent that it involves transactions in which the above-named individuals were not involved. The hiring patterns of other supervisors, whether positive or negative with respect to older candidates, has no relevance to the question of whether the two above-named supervisors discriminated against Mr. Beaverson. However, complainant's request should not be limited to appointments made by Mr. Kussow and Mr. Anderson at the same or higher salary ranges. A pattern of age-related appointments at lower levels would appear to be relevant to the instant transaction.

Respondent also argues that the amount of detailed information sought about each hiring process is so detailed and seeks so much minutiae as to be oppressive and to constitute an undue burden. This perceived problem

presumably will be alleviated to some extent by limiting the request to transactions in which Mr. Kussow and Mr. Anderson were involved. Furthermore, it is not reasonable to require respondent to produce all of the detailed information sought prior to some kind of at least a preliminary indication that the particular transactions have some meaning in the context of the statistical or similar transactions evidence that conceivably would support complainant's case. For example, if one of these supervisors were involved in a transaction in 1981 with respect to which there is no prima facie case of age discrimination, it is hard to discern the relevance of the detailed information about how the staffing process was carried out that complainant seeks. Therefore, complainant will be required to redraft the second set of interrogatories in such a way that the detailed information about the staffing processes will not be sought as to those transactions for which there is no prima facie case of discrimination or for which there is no other basis of relevancy.

Finally, the Commission has before it the December 1, 1989, letter from DMRS requesting "clarification" of the Commission's June 29, 1989, order, as follows:

The Division believes that in order to protect the legitimate interests of all concerned the Commission's order should be more specific. For example, the question of whether disclosure of the information is necessary to prosecute the complaint should not be left to the sole discretion of counsel for the complainant. At minimum, the Commission's order should provide that any disclosure of the information to anyone other than the complainant or his counsel can not occur until approved by the Commission after due notice to the Division.

As noted above, the Commission's order was entered on June 29, 1989. According to the affidavit of counsel submitted by respondent, when she responded to the subject interrogatories on September 14, 1989, she was under the impression, based on previous communications with DMRS, that the documents in questions would be submitted by DMRS at that time. Thus, it appears that the request of DMRS for a "clarification" of the Commission's order has been presented in a belated fashion in this discovery process. Furthermore, the order that was entered is consistent with the approach typically followed by the Commission under such circumstances. Therefore, the December 1, 1989, request for clarification will be denied.

ORDER

1. Respondent is ordered to produce within 30 days of the date of this order copies of the examination plan, written examination and benchmarks, and oral examination and benchmarks for the examination in question. The use of this material by complainant and his attorney will be subject to the restrictions set forth in the Commission's June 29, 1989, order.

2. Respondent will not be required to answer complainant's second set of interrogatories at this time. If complainant wishes to pursue this matter, he must redraft these interrogatories in a way that is consistent with the foregoing discussion.


3. The request of DMRS filed December 4, 1989, for "clarification" of the Commission's June 29, 1989, order is denied.

4. The matter of motion costs will be taken up following a hearing as required by §804.12(1)(c)1., Stats.

Dated: February 22, 1990

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner