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ALLEN J. HUBBARD,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0082-PC

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RULING ON APPELLANT'S
MOTION TO COMPEL
DISCOVERY

This ruling by the hearing examiner addresses certain discovery issues raised by appellant's motion to compel dated October 4, 1991, and left unresolved after a conference held on October 17, 1991, as set forth in appellant's subsequent letter of October 28, 1991. The examiner has considered respondent's response filed October 17, 1991, to appellant's October 4, 1991, motion to compel, in addressing these issues. The matters which are still in controversy according to appellant's October 28, 1991, letter are as follows:

Issue No. 1. The final point total score for Allen J. Hubbard.

I have attached to this letter a copy of my October 15, 1991 hand-written letter to Ms. Judy Burke of DER which also asks for someone in that agency to tell me what my final score from the Master Ratings Panel process was. It is indeed a shame that I have had to go to such great lengths to extract from DER what appears to be a straightforward answer. I understand from the October 17 conference among the parties that Ms. Burke will, in fact, respond to my written request. I request that Ms. Burke satisfy this request in writing no later than November 1, 1991.

Since under Chapter 804, Stats., the normal time for responding to discovery requests is 30 days after service, and no basis has been identified for an accelerated schedule, compliance with this request will be due November 14, 1991.

Issue No. 2. The individual rating sheets of all panelists who graded Alien J. Hubbard's position.

Directly contrary to DER's October 17 response to my motion to compel, I have not "conceded" that "Respondent has provided Appellant with what was on the rating lists." As I indicated verbally at our October 17 conference, I believe that I must have the "individual rating sheets of all panelists who graded my position", as I stated originally in my July 18, 1991 memo to the State Personnel Commission, so that I may see for myself how the scoring was accomplished regarding my position.

This issue is one I wish the Commission to rule on; whether DER is to provide me with the individual rating sheets blinded once (i.e., sheets identified with the rater's agency affiliation), or twice (i.e., all rating sheets provided without panelist designation, except that the provided sheets be the only ones used to grade my position) is for the Commission, not DER, to decide.

Since Monday, November 4, 1991 is 30 days following the date of filing of my motion to compel, I believe that DER should be compelled to satisfy this request by November 4, 1991.

Respondent's October 17, 1991, response to the motion to compel with respect to this item is as follows (respondent's reference to timeliness is not included since this issue was mooted by the rescheduling of the hearing):

Second, such information is confidential and privileged, outside the scope of the jurisdiction of the Commission, irrelevant and immaterial, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, as the rating panel members were placed in a position of confidentiality and acted upon that basis, dissemination of any of the requested information would constitute a breach of that agreement without the consent of each of the panel members.

While there is not citation of authority to support the claim of confidentiality or privilege, and it is questionable whether information that is otherwise relevant can be excluded from the discovery process by a pledge of confidentiality if it has no legal basis, the entire question of confidentiality is mooted by appellant's offer to have this information provided on a blind or double blind basis. With respect to the question of relevance, it cannot be concluded at this stage of the proceeding and given the limited record involved, that this information would be outside the liberal boundaries of

relevance applicable to discovery proceedings, see Mincy v. DER, 90-0229, 0257-PC (3/12/91). Respondent's contention that this information runs to matters outside the scope of the Commission's jurisdiction is premature at this state of this proceeding. The information sought appears to be relevant to a classification analysis of appellant's position, and the fact that it also arguably runs to matters arguably outside the Commission's jurisdiction does not render it nondiscoverable, again, see Mincy. Therefore, this information will be ordered produced. Since no need for further specificity has been identified by appellant, this information may be double-blinded. This information must be produced no later than November 14, 1991, with the preceding information discussed under item #1.

Issue No. 5. Rating sheets and agency input relating to Wedepohl, Schuchardt, Acker, Burns, and Landis.

I want the commission to rule on this issue. As I state in my motion to compel, this information is crucial for the preparation of my case. I believe that DER must satisfy this request by November 4, 1991, in a manner consistent with whatever blinding (please see issue no. 2, above) the Commission deems appropriate.

Respondent's response to this item basically reiterates its response to the previous item. This information will enable appellant to compare his position to other engineering positions in state service and therefore appears to be relevant. Again, any possible concerns about confidentiality are addressed by appellant's offer to have these documents double blinded. Therefore, this information also will be required to be provided, on a double-blinded basis, no later than November 14, 1991.

Issue No. 7. Minimum ratings panel score which resulted in an Advanced 2 classification.

Since my October 15 letter to Ms. Burke (attached) asks a question which, if answered satisfactorily, will satisfy my original (July 18) curiosity on this issue, I am willing to let DER proceed to respond in writing to my October 15 letter as a way to satisfy this issue. However, I want DER's response as soon as possible and in no case later than November 14, 1991.

This item in effect has been addressed above, under item #1.

Dated: NOVEMBER 6, 1991 STATE PERSONNEL COMMISSION

AJT/gdt/2



ANTHONY J. THEODORE, Hearing Examiner