STATE OF WISCONSIN PERSONNEL COMMISSION

CHERYL GIEBEL,

Appellant,

v.

Chairman, WISCONSIN GAMING COMMISSION,

Respondent.

Case No. 93-0041-PC

RULING ON MOTION TO COMPEL

The procedural status of this matter is as summarized in a joint letter to the examiner dated September 30, 1993, which reads, in part:

> Ms. Giebel appeals a disciplinary suspension imposed by the Wisconsin Gaming Commission ("WGC"). The suspension was "for [Ms. Geibel's] failure... to disclose to the Wisconsin Gaming Commission... [her] personal relationship with an individual who holds a license and is regulated by the Commission." The "individual" described in this statement is Mr. Bruce Petersen [sic.]. The hearing in the matter was scheduled for October 18, 1993.
>
> A dispute exists between the appellant and the respondent regarding pre-hearing procedures. We agreed to submit the dispute to you for resolution prior to hearing, and therefore, postpone and reschedule the hearing.
>
> The WGC scheduled the deposition of Ms. Giebel and Mr. Bruce Petersen for September 30, 1993.
>
> Prior to the deposition, [appellant's] Attorney Hawks informed [respondent's] Attorney McClure that he would object if the WGC asked Ms. Geibel [sic.] or Mr. Petersen questions related to the scope and nature of the relationship between them. Ms. Giebel submits, through her attorney, that such questions would not likely lead to relevant evidence and would violate her constitutional and statutory rights of privacy. Attorney Hawks further informed Attorney McClure that if the WGC propounded such questions, then he would advise the deponents not to answer them. Attorney McClure stated that he intended to ask such questions.

> Give these positions, the parties agreed to postpone the depositions in order to permit WGC Commission the opportunity to bring a motion to compel discovery.
>
> The parties agree that the issue for the examiner is whether under the circumstances of this case, the discovery sought by the WGC should be compelled.

The parties filed briefs. For purposes of ruling on the motion to compel, the following facts appear to be undisputed.

At all relevant times, the appellant has been employed by the respondent at the St. Croix Meadows Greyhound Park as a paddock judge, with responsibility to oversee the "ginny pit" area of the track where animals are sequestered prior to their entry in a pari-mutuel race. This entails identifying and weighing in the animals. The paddock judge is responsible for reporting all observed rule violations to the stewards for enforcement action.

In addition, commencing in the fall of 1992, the appellant began a cross-training program which required her to occasionally perform the duties of an entry level steward.

The board of stewards is comprised of three persons, two of whom are employed by WGC, and one of whom (the "association steward") is employed by the racing association licensed to conduct races.

Stewards are responsible for overseeing enforcement of all rules and regulations governing the conduct of racing at a racetrack, and are empowered to impose monetary penalties of up to $2,000 and to suspend an occupational license for up to ninety days. Decisions of the stewards govern any aspect of racing operations, even in a case of a conflict with the opinion of management of the racetrack.

Bruce Peterson was licensed as the association steward for St. Croix Meadows Greyhound Park, Inc., from December 10, 1992 to March 7, 1993.

The March 10, 1993 letter of discipline to the appellant reads, in relevant part:

> This letter is to formally notify you of your suspension from work without pay for the period of February 5, 1993 through March 7, 1993. The suspension is for the failure on your behalf to disclose to the Wisconsin Gaming Commission (Commission) your personal relationship with an individual who holds a license and is regulated by the Commission. The duration of the suspension covers the time the conflict of interest situation between yourself and a

> licensee was discovered to its date of resolution. You are expected to return to work on March 10, 1993.
>
> Specifically, the suspension is for the violation of the Commission Work Rule "(I) Work Performance (1) insubordination, failure or refusal to follow the written or oral instructions of supervisory authority in carrying out work assignments." In this instance, both yourself and the person the relationship is occurring with are in regulatory positions with authority to impose disciplinary action which includes forfeitures and suspension of occupational licenses. Also, you are in a position required to report rule violations and regulate the actions of the noted individual you were personally involved with during this time. From past presentations regarding this type of behavior by the Commission's General Counsel, Personnel Director and your receipt of the conflict of interest provision of the statutes and the work rules, you were aware such actions are strictly prohibited.
>
> What makes your inaction to disclose the relationship even more egregious is Presiding Steward Steve Blouin questioned you in early July regarding a reported relationship with the licensee and reminded you of the prohibition of such actions. Mr. Blouin advised you in this meeting that a relationship of this nature would indeed be a violation of the conflict of interest provisions. When Linda Minash, Personnel Director, questioned you on February 4, 1993, concerning this relationship prior to the determination of disciplinary action, you admitted to the ongoing relationship with the licensee. In that same conversation you stated that you understood the Commission's position concerning the Conflict of Interest and was glad that it was finally out in the open.
>
> Attempts on your part to conceal the relationship from the Commission not only illustrates your breadth of understanding of the conflict of interest provisions, but that you personally understood such actions were inappropriate. Attempts to withhold such knowledge has not only compromised your position as a regulator but casts doubt on the regulatory process in which you are employed to enforce. Future actions of this nature may result in further discipline including termination.

In addition to the work rule specifically referenced in the letter of suspension, the respondent has the following work rule:

> Employes of the Commission are prohibited from any of the following acts:
>
> * * *
>
> V. OUTSIDE ACTIVITIES AND EMPLOYMENT

* * *

5. Engaging in any outside activities or employment which may impair the employe's independence of judgment or ability to perform his or her duties as an employe of the state.

Respondent provided an affidavit by the division administrator of respondent's Racing Division which stated, in part:

11. Wis. Admin. Code §7.10(1)(f) requires all racing officials to report observed violations of racing rules. If Giebel were to become aware of any conduct by Peterson which is a violation of a racing rule or statute, or otherwise punishable under applicable law, she would be obligated by virtue of her position as either a commission paddock judge or commission steward to cause appropriate enforcement actions to be initiated. As a steward, Giebel would also be empowered to participate as a decision maker in the hearing to determine what penalty, if any, would accrue to such conduct. If Peterson, while a steward, were to become aware of any conduct by Giebel which is a violation of a commission rule or statute or otherwise punishable under applicable law, he would be obligated by virtue of his position as an association steward to see that an enforcement action against Giebel were initiated. As a steward, Peterson would also be empowered to participate as a decision maker in the hearing to determine what penalty, if any, would accrue to such conduct. By virtue of their position as stewards, Giebel and Peterson would be aware of any report of misconduct regarding the other made by a regulated party. As racing officials, Giebel and Peterson would be in a position to engage in retaliatory action against a regulated party for providing derogatory information about the other.

12. It has been the policy of both the Wisconsin Racing Board and the Wisconsin Gaming Commission since the inception of racing in Wisconsin that relationships involving husbands and wives and commission and association employes could not serve in capacities which one would be required to oversee and enforce regulatory responsibilities towards the other. It was felt that, due to the adverse nature of enforcement and disciplinary actions against the disciplined party, the nature of such relationship would prevent the neutral and independent exercise of these regulatory responsibilities by one individual against another.... These policies were enacted in order to preserve the actual effectiveness of regulatory oversight, and also to prevent any appearance of impropriety, or favoritism in the regulation of racing.

Discussion

In analyzing this motion, the examiner is dealing solely with the motion to compel and is not deciding the merits of the case. The limited question is whether the respondent can pursue discovery relating to the existence of a

personal relationship between the appellant, who was employed as the paddock judge and sometime commission steward at the St. Croix Meadows Greyhound Park, and Mr. Peterson, who worked as the association steward at the St. Croix Meadows Greyhound Park.

Complainant's initial contention in response to the motion is that questions relating to a personal relationship between the appellant and Mr. Peterson are irrelevant because they do not relate to whether "she ever took anything of value from Peterson, or if she ever failed to report a violation of rules or regulations by Peterson, or other questions relating to her actual work performance." The existence of a conflict of interest need not be determined solely on the basis of actual work performance. Here, the respondent is contending that the appellant failed to disclose the existence of an "intimate emotional and personal relationship" between appellant and Mr. Peterson, so as to fall under the conflict of interest provisions. The existence of such a relationship is clearly relevant to the respondent's stated premise for imposing discipline.

The appellant also raises various contentions implicating statutory and constitutional right of privacy and freedom of association. Complainant cites §895.50, Stats.:

> (2) In this section, "invasion of privacy" means any of the following:
>
> * * *
>
> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed, It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

Under the appellant's theory, the privacy statute would preclude an employer from engaging in any *internal* communication of information relating to a matter concerning the private life of an employe, even if that information clearly establishes that the employe's conduct violated applicable work rules. Wisconsin case law indicates that oral communication among numerous employes and jail inmates is sufficient to constitute publicity under (2)(c), at least

for the purpose of overcoming a motion for summary judgment. Hillman v. Columbia County, 164 W. 2d 376, 474 N.W. 2d 913 (Ct. App. 1991). However, where the information is to be used for the limited purpose of attempting to sustain discipline imposed against the appellant after she has appealed that discipline and there is no showing tha the information is to be provided to any of respondent's employes other than those directly involved in the appeal, the employer must have the right to obtain that information. The Commission declines to read §895.50, Stats., so broadly as to preclude the discovery sought here.

The appellant also contends that discovery questions relating to her personal relationships violates the constitutional rights of privacy and freedom of association.

In Whalen v. Roe, 429 U.S. 589, 599, 51 L.Ed. 2d 64, 97 S.Ct. 869 (1977), the Supreme Court recognized that there exists under the U.S. Constitution a right to privacy protecting "the individual interest in avoiding disclosure of personal matters." The case which appellant primarily relies on in support of her contention that her privacy interests are paramount here is Reuter v. Skipper, 126 Labor Cases 24,991 (D.C. Oregon, 1993). That case involved a female corrections officer who was placed on paid administrative leave, and subsequently threatened with dismissal, because of her personal association with an ex-felon. Her employer, the county sheriff's office, had work rules which presume a conflict of interest where an employe engages in "an ongoing and continuous business, social or non-marital sexual relationship with [a person who] has been imprisoned for or convicted of a felony within the past ten years. The court granted plaintiff's motion for partial summary judgment after concluding that a couple living together as husband and wife constituted a "family" and that state intrusions into the family unit should be evaluated with a standard of review of intermediate scrutiny, i.e. that the rules restricting constitutional behavior "need only be tailored in a reasonable manner to serve a substantial state interest," quoting Edenfield v. Fane, _ U.S. _, 123 L.Ed. 2d 543, 113 S.Ct. 1792, 1798 (1993). The court found that the rule was not tailored in a reasonable manner to serve the identified state interest of maintaining the "security" of the sheriff's office. The court then went on to conclude that,

even if a lesser standard of review were to be applied,[1] the employer had offered insufficient evidence that the rule was rationally connected to its duty of security and safety in its jails. In its lengthy support of its ruling, the court pointed out that the plaintiff's relationship was with an *ex*-convict, in contrast to other jurisdictions which prohibit employes from associating with inmates, and that two correctional professionals had stated that the rule was unworkable and was not reasonably related to the needs of the sheriff's office.

In the present case, a key concern is that the alleged relationship was between the association steward, who is designated by the industry which is being regulated, and one of the two other members of the Board of Stewards.

Respondent has adequately identified an interest which is sufficient to sustain a motion to compel. The respondent has identified the governmental interests at stake in the present case as follows:

> [T]hose exercising the police powers of the state, as does complainant, may be required to do so in a manner that assures the persons subject to state authority that it will be done in a fair and impartial manner. The public, who wagers the money on the races which goes to benefit the state, must also be assured of the integrity of the regulatory process so they will not lose confidence to the fiscal detriment of the state. Perception, when it implicates a legitimate interest, is cognizable in a constitutional balancing test.

Respondent's reply brief, p. 8 (citation omitted).

Mr. Peterson is not someone, as in the Reuter case, whose *former* status been the source of a potential conflict of interest. Mr. Peterson and the appellant were both actually serving as stewards at the time in question. This situation is much more analogous to that in Kukla v. Village of Antioch, 647 F. Supp. 799 (N.D. Ill., 1986) where a village police department fired a dispatcher and sergeant for living together. The court noted the small size of the village police force and indicated that a similar policy could be very difficult to justify if applied by the City of Chicago:

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[1]The court identified this lesser standard as requiring respondent to show that the work rule had at least a "rational connection" to promotion of safety of persons and property, and cited Kelley v. Johnson, 425 U.S. 238, 247 , 47 L.Ed. 2d 708, 96 S.Ct. 1440 (1976).

> If an Antioch sergeant developed a relationship with an Antioch patrolman or dispatcher, certain reactions are predictable, among them that other Antioch patrolmen or dispatchers would tiptoe lightly around certain subjects for fear of offending that sergeant. After all, in Antioch, offending one sergeant meant offending half of all the sergeants on the force. Given human nature, a belief that an intra-departmental relationship would negatively affect the department is more reasonable on a small force than a large one.

*Id.* at 810. The court went on to justify the regulation based upon the likelihood of negative effects of such a relationship on police operations, based on prior experience resulting from a previous relationship.

In Fugate v. Phoenix Civil Service Board, 791 F. 2d 736 (9th Cir., 1986) the police officers in question had engaged in sexual relations with prostitutes while on duty and the employer demonstrated that their "job performance was threatened by obvious conflicts of interest as well as by the possibility of blackmail." *Id.* at 741. The dismissal of the employes was upheld and the court rejected the employe's privacy claim.

At this point in the proceeding, the respondent has identified a sufficient governmental interest to compel the appellant to provide discovery relating to the alleged relationship with another steward, a topic which is clearly relevant to the question of whether there was just cause for the suspension of the appellant.

ORDER

Respondent's motion to compel is granted and the appellant is directed to answer inquiries concerning her relationship with Bruce Peterson to determine if an impermissible conflict of interest exists or existed.

Dated: March 15, 1994 STATE PERSONNEL COMMISSION

KURT M. STEGE, Hearing Examiner

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