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JUDITH VOLOVSEK,

Complainant,

v.

Secretary, DEPARTMENT OF
 AGRICULTURE, TRADE AND
 CONSUMER PROTECTION, and
 Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS

Respondents.

Case No. 93-0098-PC-ER

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RULING ON
 MOTION FOR
 ORDER
 TO PROTECT DOCUMENTS

The Commission has previously issued two protective orders in the above matter. On February 3, 1994, the respondent filed a motion with the Commission, alleging violation by complainant of the previous protective orders and requesting the prior orders be repealed and a revised order implemented. A conference was convened with the parties on February 11, 1994, and the parties agreed to an evidentiary hearing on February 24, 1994, with oral argument at the conclusion thereof.

The complaint in this case alleges discrimination relating to various conduct, including the failure to appoint the complainant to positions of Environmental Enforcement Specialist (EES). At all relevant times, the complainant has been employed by respondent.

Complainant was one of many DATCP employees who took a civil service exam, were certified and then were interviewed for EES positions at DATCP.

After complainant filed her complaint of discrimination with the Commission on June 16, 1993, respondents filed an answer to the complaint, accompanied by a motion for a protective order for certain materials. As reflected in an order of the Commission dated October 20, 1993, the parties reached agreement as to complainant's access to the materials and the following conditions were placed upon access and use:

1. The respondents shall provide complainant's attorney with a copy of the interview questions (Exhibit 28). Complainant's attorney shall keep this copy in her possession and shall make no

copies of it. Complainant's attorney will allow the complainant to review it, but will otherwise protect the document from unauthorized review. Complainant's attorney shall return this copy of Exhibit to respondents' attorney upon completion of her response to the respondent's answer.

2. The respondents shall provide complainant's attorney with copies of interview notes for 15 separate individuals who were interviewed by DATCP. These interview notes include Exhibits 31 through 35 which are subject to the Motion to Protect. The copies that will be sent to complainant's attorney shall have all personally identifying characteristics blocked out and shall be separately numbered. Complainant's attorney may provide copies of these documents to the complainant.

3. The respondents shall provide complainant's attorney with a copy of the scores to interview questions (Exhibit 29) which has all names blocked out and replaced by numbers which correspond to the numbers on the interview notes. Complainant's attorney may provide a copy of this document to the complainant.

4. Both the Commission and complainant's attorney have unblocked copies of the scores of interview questions (Exhibit 29). Complainant's attorney shall not share this document with the complainant or any other person. The Commission has removed Exhibit 29 from the attachment to the respondents' answer and has placed it in the file with the other documents which were initially identified by respondents as being subject to the motion for protective order.

5. Respondents will not object to objections raised by complainant to the protective order and motion, in the event this matter goes on to hearing.

Respondents later filed a supplementary answer and requested the Commission issue another protective order for some of the included documents. Those documents included test questions, rating criteria and worksheets of interviewers for a civil service exam as well as the resumes of a number of the candidates. The parties were not in agreement as to certain of the restrictions placed on these documents and in a ruling dated December 28, 1993, the Commission decided these disputes and issued the following order:

The respondent is directed to provide complainant's attorney with a copy of those documents identified as Exhibits 54a through 70. The examination questions (Exhibit 57) and the applicant resumes (Exhibits 60 through 70) may not be copied by complainant or complainant's attorney and may not leave the possession of complainant's attorney. Complainant's attorney may copy the remaining documents. All of these documents may be used by

complainant or her attorney solely for the purpose of preparing for litigation of this case and may not be disclosed by the complainant or his representative for any other purpose or to any other person. The Commission will maintain its copies of these documents in envelopes marked "Confidential."

Respondents have identified numerous statements alleged to have been made by the complainant on several different occasions as violating the two protective orders. The complainant did engage in the following conduct:

a. On November 22, 1993, the complainant met with a co-worker, Elizabeth O'Donnell. The complainant said she had some information relating to her case and asked Ms. O'Donnell if she wanted to read it.

b. On January 20, 1994, the complainant had a discussion with Mark McCloskey, another co-worker. During the discussion, the complainant said:

i. She had confidential documents and Mr. McCloskey would be surprised at what was in the documents.

ii. Promotional decisions were made based upon personalities and not professionalism.

iii. The interview panel liked one of the successful candidates for a reason which complainant specified to Mr. McCloskey. The reason identified by complainant is consistent with information in the interview notes (Exhibit 35) as well as in the document describing the hiring justification statement (Exhibit 27, describing "the reasons for selecting the successful candidate over other applicants.")

iv. The interview documents described Mr. McCloskey's interview in a particular way, which complainant specified to Mr. McCloskey. This description is very similar to information set forth in the interview notes (Exhibit 31).

c. On January 21, 1994, complainant told three co-workers, including Bob Gutknecht, that:

i. Mr. X had "scored number 1."

ii. She knew how Mr. Gutknecht answered one of the exam questions. When asked by Mr. Gutknecht how he had answered the question, the complainant described his answer. Complainant's description of the answer was, according to Mr. Gutknecht, inaccurate.

Shortly after the civil service exam results were issued, and before the complainant filed her complaint of discrimination, many of complainant's co-

workers, including Mr. Gutknecht, had heard that Mr. X had ranked highest on the qualifying examination.

d. During several conversations with another co-worker, John Peters, during the approximately 6 months after complainant filed her complaint, and after she had received the first batch of documents from respondent, complainant stated that in the hiring process, "everybody said basically the same thing." Mr. Peters was unclear whether these comments referred to the examination or to the interview portion of the hiring process.

Discussion

The respondent has the burden of establishing that the complainant violated the protective orders previously issued by the Commission. While it is apparent that the complainant's comments with her co-workers included statements which related both specific and general information about the interviews which were conducted for the positions, and presumably *should* have been prohibited by the protective orders, the respondent has not been able to establish that the complainant violated the provisions of the orders as they were, in fact, entered.

The first order, dated October 20, 1993, allowed complainant's attorney to provide complainant with redacted copies of the interview notes and scores. The complainant's attorney was required to protect the interview questions from "unauthorized review" and could not share the unredacted interview scores with complainant or anyone else. There was no general prohibition in the order which otherwise limited the use of the described documents.¹ The statements made by complainant to Ms. O'Donnell occurred in November, before, the second protective order was issued. Complainant's mere statement to Ms. O'Donnell that complainant had some information relating to her case and asking Ms. O'Donnell if she wanted to read it clearly does not violate either order.

¹The Commission notes that the substantive language of protective order was submitted to the Commission as having been agreed to by the parties. That agreement could have addressed the conduct being complained of here, but did not.

The second incident, involving statements made to Mr. McCloskey, is more troublesome. Complainant generally denied discussing the evaluations of all those who competed for the vacancies, but she did not deny making the statements to Mr. McCloskey and she stated that she only vaguely recalled the conversation. In contrast, Mr. McCloskey clearly and credibly described various comments made by complainant, one of which very clearly referenced information found only on the interview notes. Another statement by complainant involved information on both the interview notes and the hiring justification. While the Commission concludes that the complainant's testimony, that she absolutely never discussed with her co-workers the evaluation of those who competed for the positions, was flawed, the key question raised by this motion is whether the complainant's conduct violated the operative protective orders. The answer to that question has to be that complainant did not.

There is no showing that complainant's statements referenced any of the exhibits covered by the second protective order, which had language prohibiting use of those documents for any purpose other than for preparing for litigation. The closest question is raised by Mr. Peters' testimony that complainant had said that everyone said basically the same thing. To the extent this statement related to the examination evaluations (Exhibits 54 through 56), it would be covered by the second order. However, Mr. Peters could not say whether the comment was referring to the interview process or the examination process. As a consequence, there is no basis on which to conclude that the statements violated the second order. Similarly, there is no way to conclude that the complainant's statement that Mr. X had "scored number 1" was information derived from any of the documents protected by the protective order. The document setting forth the exam results (Exhibit 53) is not among the documents listed in the second protective order. The Commission notes that many of the complainant's co-workers had already heard about Mr. X's exam ranking. Finally, Mr. Gutknecht testified about complainant's comments that she knew what his answer was to a certain exam question. Assuming that Mr. Gutknecht's testimony was referring to an exam rather than interview question, there is no way to determine on this record that the information provided by the complainant was actually contained in the exam materials covered by the second protective order. Mr. Gutknecht only testified that the complainant's information was inaccurate and he did not testify as to what the

statement was. Assuming it was inaccurate, the Commission must conclude that it did not come from one of the documents covered by the protective order.

Respondent may wish to propose a revision of the language of the current protective orders so that the result is more consistent with the confidentiality protections found in §230.13, Stats. Before filing such a proposal with the Commission, the respondents should confer with complainant to determine whether the language of the order can be agreed upon.

ORDER

Respondents' motion filed on February 3, 1994, is denied.

Dated: March 1, 1994 STATE PERSONNEL COMMISSION


KURT M. STEGE, Hearing Examiner

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K:D:temp-4/94 Volovsek