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TALMADGE WILSON,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
and SOCIAL SERVICES,

Respondent.

Case No. 95-0043-PC-ER

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RULING ON RESPONDENT'S
REQUEST FOR A
PROTECTIVE ORDER

BACKGROUND

Mr. Wilson filed a complaint on March 17, 1995, alleging that the Department of Health and Social Services (DHSS) discriminated against him on the basis of race in regard to DHSS' decision in February 1995, to hire someone else for the Administrative Officer 2 position as Director of the DHSS Milwaukee JOBS program. The Commission assigned case number 95-0043-PC-ER to the discrimination complaint.

By letter dated June 7, 1995, Mr. Wilson's attorney advised the Commission that Mr. Wilson also desired to file a civil service appeal over the same hiring transaction as raised in the complaint. The Commission assigned case number 95-0121-PC to the appeal.

A prehearing was held in the appeal (case #95-0121-PC) on July 6, 1995, at which time no hearing date was chosen pending investigation of the discrimination complaint (case #95-0043-PC-ER). DHSS raised a jurisdictional objection to the appeal and a briefing schedule was established. (See Conference Report dated July 6, 1995.) The Commission ultimately rejected DHSS' jurisdictional arguments by ruling mailed to the parties on September 28, 1995.

DHSS' brief on the jurisdiction issue raised in the appeal, included a motion for a protective order which was not addressed in the Commission's ruling of September 28, 1995. The parties have been unable to reach agreement as to the wording of the protective order. Accordingly, a briefing

schedule was established whereby the final brief was received by the Commission on May 10, 1996.

Description of Documents at Issue

DHSS filed an answer to Mr. Wilson's discrimination complaint (case #95-0043-PC-ER), by cover letter dated May 19, 1995, which included 21 exhibits as enclosures. DHSS sent Mr. Wilson a copy of the cover letter and enclosures on the same date. The 21 exhibits are summarized below:

- 1) 1/19/95 hiring justification memo from Stafford to Rogers (internal DHSS memo) which explains why the successful candidate was selected. This letter includes a description of past work experience for several candidates, as well as a description of the job requirements and qualifications sought in a successful candidate.
- 2) Copy of the successful candidate's resume.
- 3) One interview panel member's notes taken for the (ultimately) successful candidate during the first interview. Also shows interview questions.
- 4) Same as #3, except these are notes of a second panel member.
- 5) Same as #3, except these are notes of a third panel member.
- 6) One interview panel member's notes taken for the (ultimately) successful candidate during the second interview. Also shows interview questions.
- 7) Same as #6, except these are notes of a second panel member.
- 8) Same as #6, except these are notes of a third panel member.
- 9) Notes taken from a reference check for successful candidate. Also shows questions asked.
- 10) Same as #9, except these are notes from a second reference check.
- 11) Benchmarks (or scoring guide) for first interview questions.
- 12) Mr. Wilson's resume.
- 13) One interview panel member's notes taken for Mr. Wilson during the first interview. The interview questions also are shown.
- 14) Same as #13, except these are notes of a second panel member.
- 15) Same as #13, except these are notes of a third panel member.
- 16) One interview panel member's notes taken taken for Mr. Wilson during the second interview. Also shows interview questions.
- 17) Same as #16, except these are notes of a second panel member.

- 18) Same as #16, except these are notes of a third panel member.
- 19) Notes taken from a reference check for Mr. Wilson. Also shows questions asked.
- 20) Same as #19, except these are notes from a second reference check.
- 21) Same as #19, except these are notes from a third reference check.

DHSS supplied additional documents pursuant to a discovery request in the discrimination case (#95-0043-PC-ER). These documents were tendered to Mr. Wilson's attorney under cover letter dated July 7, 1995. A description of the documents for which DHSS seeks a protective order were designated as "Attachments 3-9" by DHSS, and are summarized below.¹

- 22) The notes of the first panel members for the 4 candidates other than Mr. Wilson and the successful candidate (which already were provided).
- 23) The notes of the second panel members for the 2 candidates other than Mr. Wilson and the successful candidate.
- 24) Resumes of the 4 candidates other than Mr. Wilson and the successful candidate.
- 25) All documentation regarding who actually made the appointment decision, including:
 - a) 1/19/95 memo entitled "Hiring Justification for Milwaukee JOBS AO-2" (duplicates #1 above),
 - b) Resume of selected candidate (duplicates #2 above),
 - c) 2/10/95 appointment letter,
 - d) Social security numbers of any person appearing on other pages of this attachment.

Nature of Dispute

Mr. Wilson's attorney proposed language for a protective order by letter dated February 12, 1996, as shown below in relevant part. The underlined text denotes the portions to which DHSS specifically objected (as noted in the letter from DHSS' attorney dated April 24, 1996).

¹ Copies of Attachments 3-9 were not provided to the Commission. Accordingly, the DHSS' undisputed description of the documents is noted but the Commission was unable to associate the descriptions with any particular numbered attachment.

1. The parties may utilize, share and disclose any information for purposes of preparing or analyzing this or related cases encompassing the same or any parallel causes of action, and share this with other persons who are potential witnesses and consultants or experts, provided that all such persons be advised prior thereto by counsel considering that person as a witness of any restrictions on disclosure and advised that they are subject to the same restrictions.
2. No information shall be disclosed by either party to the public or to other third parties not covered by Paragraph 1, which will provide specifically identifiable personal data about any individual person or candidate, other than the Complainant, pertaining to his or her personal life and enumerated job related information (including without limitation such information as Social Security Number, marital and family status, home telephone number and address, and other similar information, as well as job reference information or comments [Exhs. 19-21] and panel interview notes).
3. Information of a sensitive and detailed nature concerning any such person's job performance should similarly be maintained in a confidential manner. Objective summaries of comparisons of job applicants' qualifications could be released.
4. To the extent any documents include some of the information described above as being "confidential," such documents should not be distributed beyond the limits of those with a need to know (as referenced in paragraph 1 above), unless such information has been deleted. No documents listed in paragraph 7 will be released other than to the persons described in paragraph 1.
5. The parties also agree that in order to protect the selection process, the Respondent's benchmarks for rating candidates should not be distributed beyond the scope of potential experts or other witnesses listed in paragraph 1, so as to potentially allow other persons to benefit in future examinations.

6. In order to protect the public interest, it is agreed that neither counsel nor a party will be prohibited from providing accurate summaries of the relevant evidence in this case to the public media, to the extent that this information may be informative to the public regarding the general nature of the claims and defenses, but neither party should supply such detailed or confidential information that may expose any candidate or individual to embarrassment or harassment based on any actions for which they were not responsible.
7. These principles apply to all documents produced by the parties in discovery, including but not limited to Exhibits #1-21 attached to Respondent's May 19, 1995 answer to the complaint in this case (#95-0043-PC-ER) and Attachments #3-8 to Respondent's July 7, 1995 response to Complainant's discovery request, as well as the [selected candidate's] resume and social security numbers contained in Attachment #9.

RULING RATIONALE

The first numbered paragraph of complainant's proposed protective order presents no concerns to the respondent. The Commission, however, will amend the language to specifically identify the pending appeal (case #95-0121-PC) as one of the "parallel causes of action".

The second numbered paragraph would generally prohibit the release of "specifically identifiable" personal data about any individual. The cited language presents a concern to the Commission in that it could be construed to allow information about each candidates' prior work history to be disclosed if, in the judgement of the person disclosing, such information would not "specifically identify" any individual. The Commission believes disclosure of any individual's work history has the potential to lead to discovery of the individual's identity. Accordingly, the language of the second paragraph will be amended to prohibit the release of any personal data by deleting the words "specifically identifiable".

The first sentence of the third numbered paragraph addresses the limits which the parties could release information about an individual's job performance. The language used includes the words "of a sensitive and

detailed nature" which, again, would provide protection only to the degree that the person making the disclosure does not commit an error in determining what facts are of a "sensitive and detailed nature". The second sentence creates an even broader leeway for error in judgement and is objectionable for that reason. The Commission, accordingly, will amend the second numbered paragraph to include a prohibition against release of information about any person's job performance and will delete the entire third paragraph.

The intention of the fourth numbered paragraph is unclear, in part due to the lack of a definition of the term "confidential". This paragraph will be deleted by the Commission due to the potential it has to create confusion over matters which otherwise are clarified by the remaining paragraphs.

The fifth numbered paragraph will be deleted as already covered by language of the remaining paragraphs.

The sixth numbered paragraph will be deleted. Similar to observations already made in connection with prior paragraphs, the language provides protection only to the extent that the person making the disclosure does not commit errors in judgement concerning what information is "confidential" (an undefined term), whether a summary is "accurate", whether the summary includes only "relevant evidence in this case", whether the summary "may be informative to the public regarding the general nature of the claims and defenses", whether the summary includes information which "may expose any candidate or individual to embarrassment or harassment", and whether any such resulting embarrassment or harassment was caused by "actions for which [the individuals involved] were not responsible".

The language of the seventh numbered paragraph will be amended to delete the reference to future discovery requests, the contents of which are by their nature unknown to the Commission at this time and are not part of the issue presented by the current motion. The seventh numbered paragraph also will be amended as to Attachment #9, to include the 1/19/95 memo and the resume of the selected candidate, which are duplicates of Exh. 1 and 2; to avoid the current conflict whereby the documents would be protected as Exhs. 1 and 2, but not as part of Attachment #9.

DISCUSSION

The Commission's authority to issue a protective order is addressed in s. PC 4.03, Wis. Adm. Code, the text of which is shown below in relevant part.

. . . For good cause, the commission or the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery.

The Commission's responsibility under the rule is not only to protect the parties but to protect other persons involved.² Accordingly, the Commission exercised this responsibility by deleting from the proposed language the potential of disclosing information inappropriately. One example is the added protection created for the candidates by prohibiting disclosure of the individual's work history to avoid the potential of releasing information which could lead to the discovery of a candidate's identity. The Commission notes in this regard that it would be impossible to "correct" the situation where an error in judgement is made in releasing information, for example, to the media, which results in identification of a specific candidate.

Mr. Wilson argued that the Commission's administrative rule did not grant the Commission authority to protect from disclosure the interview questions asked or the benchmarks used to evaluate the candidates' responses. He characterized this as "furthering the purpose of protecting the integrity of the civil service system", as opposed to the purposes protected by the rule. The Commission disagrees.

Every employer knows it takes an investment of staff time to develop interview questions and associated benchmarks for a vacant position and that once developed, money is saved for the business if the questions and benchmarks could be re-used when the position becomes vacant again or where a vacancy exists in a similar position. An "undue expense" and "undue burden", within the meaning of PC 4.03, Wis. Adm. Code, would occur if the Commission did not protect this information from disclosure because the employer would be forced to create new questions and benchmarks to ensure the integrity of a subsequent hiring processes and, in fact, such process may require the employer to abandon the best measures of a successful candidate if

² See, for example, s. 230.13, Stats.

the questions and benchmarks initially used were the most reliable predictors of a successful candidate that could be developed.

ORDER

The parties are subject to the following restrictions in regard to the 21 exhibits submitted by DHSS in its May 19, 1995, answer to Mr. Wilson's discrimination complaint; as well as in regard to Attachments 3-9 submitted by DHSS on July 7, 1995, in response to Mr. Wilson's discovery request:

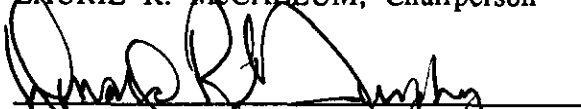
1. The parties may utilize, share and disclose the above-noted information for purposes of preparing or analyzing this or related cases encompassing the same or any parallel causes of action (including, but not limited to, Case No. 95-0121-PC), and share this with other persons who are potential witnesses and consultants or experts, provided that all such persons be advised prior thereto by counsel considering that the person as a witness of any restrictions on disclosure and advised that they are subject to the same restrictions.
2. No information shall be disclosed by either party to the public or to other third parties not covered by Paragraph 1, which will provide personal data about any individual person or candidate, other than the Complainant, pertaining to his or her personal life and enumerated job related information (including, but not limited to, such information as job history, work performance, social security number, marital and family status, and home telephone number and address).
3. The principles mentioned in paragraphs 1-2, apply to:
 - a) Exhibits #1-21 attached to Respondent's May 19, 1995, answer to the complaint in case #95-0043-PC-ER;
 - b) to Attachments #3-8 to Respondent's July 7, 1995, discovery response;
 - c) to social security numbers contained in Attachment #9 of the same discovery response;

- d) to the 1/19/95 memo which is part of said Attachment #9; and
- e) to the resume of the selected candidate which also is part of said Attachment #9.

Dated May 28, 1996.

JMR


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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