

STATE OF WISCONSIN

PERSONNEL COMMISSION

PATRICIA DUNCAN,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING ON
COMPLAINANT'S
MOTION TO COMPEL**

Case No. 96-0064-PC-ER

On June 6, 1996, complainant filed a discrimination complaint alleging that respondent discriminated against her on the bases of race, color, creed, ancestry, national origin and sex when she was not hired on multiple occasions. The interview dates were May 24, 1996, July 1995, and November 1994.

Ms. Duncan filed a letter dated May 7, 1997, which the Commission interpreted as a motion to compel discovery. Both parties filed written arguments. The following findings of fact are made solely for the purpose of resolving the present motion and appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. By way of background, information is provided in the first three paragraphs regarding a prior ruling issued by the Commission:

Respondent filed an Answer to the complaint on July 23, 1996, which included the following request:

Interview questions and benchmarks are not included as they are confidential under state law and in addition are too numerous and burdensome for the Respondent to provide copies to the Commission and the Complainant. The Respondent has two requests. First, the Respondent asks the Commission to issue a Protective Order directing that the complainant and the Commission may not reveal the information contained in the interview questions and benchmarks to anyone other than Complainant's representative and only for the purpose of preparing for litigation of this matter. Respondent will provide Complainant's interview instrument and the benchmarks to the Complainant and Commission upon receipt of such Order. Second, Respondent respectfully requests the remaining information relating to interviews conducted of individuals other than Complainant be reviewed in the Respondent's offices and

any information gathered under such review remain confidential under the Order.

2. Respondent further explained in its Answer that 255 candidates were interviewed for the November 1994 hires, with 171 recommended for hire. In July 1995, 138 candidates were interviewed with 95 recommended for hire. In May 1996, 157 candidates were interviewed with 102 recommended for hire.

3. The Commission issued a protective order, dated October 2, 1996, which stated as follows:

Upon the request of the respondent that a protective order be issued in this matter, the Commission proposed certain language for such an order and provided the parties with an opportunity to indicate if they disagreed with that language. The Commission did not receive a response from either party. Therefore:

Any materials filed by respondent and provided to complainant or his (sic) representative relating to the interview and evaluation of job candidates for the Probation and Parole Agent vacancies in question may be used by the complainant or her representative only for the purpose of preparing litigation of this case or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by complainant or her representative for any other purpose. The complainant is directed to inform the Commission of the name and address of any expert or to her witness she intends to consult prior to divulging any of this material to any such expert, so that the Commission may service copies of this order on such person prior to disclosure of the material, and any such person is directed not to disclose the materials to the public or outside the confines of this proceeding.

Respondent thereafter (by memo dated 10/4/96) provided materials to complainant under the protective order. Specifically, the memo described the disclosure as:

Pursuant to the Personnel Commission's October 2, 1996 Protective Order issued as a result of [respondent's] July 23, 1996 request, I have enclosed copies of your interview instruments and benchmarks for the three recruitments relating to your above-captioned complaint.

4. Complainant served a discovery request upon respondent by letter dated March 27, 1997. Respondent answered the request on April 30, 1997. The questions and responses are noted in paragraphs 5 through 7 below, along with respondent's

interpretation of each request. Complainant does not dispute respondent's interpretations.

5. Production Request (PR) 1: Provide in writing the written questionnaire or notes used when all of my (Duncan) references were contacted over the telephone responses to the questions.

Respondent interpreted PR1 as a request for complainant's own reference information. DOC agreed to make the references provided for the complaint available for her inspection at its legal office, subject to the Commission's protective order issued October 2, 1996.

6. PR 2: Provide the list of all former employers, colleges and all professionals names that were contacted and their responses over the phone and references response in their own handwriting also Duncan references.

Respondent interpreted the above as a request for all reference information obtained by respondent. Respondent objected to providing reference information for candidates other than complainant contending the information was confidential under sec. 230.13, Stats.

7. PR3: Provide all successful candidates references responses over the phone and in their own handwriting. And provide their references names (all successful candidates).

Respondent interpreted the above as a request for reference information on all successful candidates. Respondent objected contending that the information sought was confidential under sec. 230.13, Stats.

8. Complainant also objected to being required to travel 150 miles to Madison in order to view the requested documents when respondent mailed her confidential information previously. She indicated that if respondent is concerned that the documents would get lost in the mail, Federal Express guarantees one-day delivery and would require her to sign for the information.

OPINION

The parties agree complainant is entitled to information relating to references given for complainant from any source, as requested in PR1 and PR2. The contention is whether complainant is required to travel to Madison to view the documents.

Respondent offered no explanation to justify the requirement that complainant travel to Madison. Accordingly, the requested documents relating to complainant's own references must be mailed to her. Respondent may charge complainant for the reasonable cost of copying and require payment prior to mailing the documents. The information disclosed under this paragraph is subject to the terms of the protective order previously issued by the Commission.

Remaining for resolution is complainant's request for reference information regarding all candidates (PR2) and all successful candidates (PR3). Respondent contends complainant is not entitled to the requested information pursuant to §230.13(1)(a), Stats., the text of which is shown below in pertinent part:

Closed records. (1) Except as provided in §103.13, the secretary and the administrator may keep records of the following personnel matters closed to the public:

(a) Examination scores and ranks and other evaluations of applicants . . .

(2) Unless the name of an applicant is certified under §230.25, the secretary and the administrator shall keep records of the identity of an applicant for a position closed to the public.

The Commission agrees with respondent that §230.13, Stats., protects disclosure of the above-noted information "to the public." The complainant, however, is requesting the information in the context of litigation, not as a member of the public. Furthermore, the information she seeks has potential relevance to her discrimination complaint. Accordingly, complainant is entitled to discovery of the information sought in PR2 and PR3, but any information she receives from respondent will be subject to the terms of the protective order previously issued by the Commission. The manner of disclosure is discussed below.

The Commission will not order respondent to mail complainant the documents regarding references for candidates other than complainant. Such an order would be unduly burdensome due to the large number of individuals interviewed and hired. Respondent shall provide complainant with access to the documents in respondent's Madison office (or at another location if both parties can agree to an alternative arrangement). The Commission believes complainant may be able to narrow her request by first reviewing the documents. Of course, respondent may require complainant to pay a reasonable copying cost for the documents she selects and,

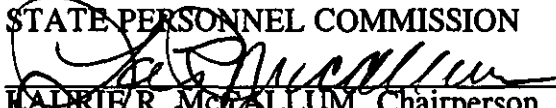


further, may require pre-payment of the copying cost before tendering the requested copies.

ORDER

That respondent must mail documents to complainant regarding reference information about herself and that respondent must make available for complainant's inspection information relating to reference checks on other candidates, all as described in this ruling.

Dated: July 31, 1997.

JMR
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STATE PERSONNEL COMMISSION

MADRIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner