

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JANET SHIMKUS,**  
*Complainant,*

v.

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

**RULING ON  
PROTECTIVE ORDER**

Case No. 99-0166-PC-ER

This case is before the Commission to resolve complainant's objection to respondent's request for a protective order. Both parties are represented by counsel and have filed written arguments, with the final argument filed on December 21, 1999.

This case was filed with the Commission on October 8, 1999, alleging discrimination on the basis of arrest/conviction record in regard to certain employment opportunities. On October 14, 1999, respondent was asked to file an Answer to the complaint and to respond to specific questions prepared by a Commission Equal Rights Officer (ERO). Respondent complied, filing the requested information on December 1, 1999. Respondent replied to the ERO's question 5 by requesting a protective order for documents related to the two top candidates for a Social Worker-Entry position at Racine Youthful Offender Correctional Facility (RYOCF). Respondent indicated that these were "confidential" and "closed records." The specific language of the protective order as suggested by respondent is shown below:

Any documents filed by Respondent and provided to Complainant or her representatives relating to the selection process for the social worker vacancies at the RYOCF may be used by Complainant or her representatives only for the purpose of litigating this case or related cases involving identical or similar issues and involving the same parties, and may not be disclosed by Complainant or Complainant's representatives for any other purpose. Complainant is directed to inform the Personnel Commission of the name and address of any expert or witness Complainant intends to consult prior to divulging any of this material to the expert or witness, so that the Personnel Commission may serve a copy of this order on the expert or witness prior to disclosure of the material,

and the expert or witness is directed not to disclose the materials to the public or outside the confines of this proceeding.

Complainant opposed respondent's request by letter dated December 16, 1999, arguing as noted below (in relevant part):

The respondent has requested a protective order . . . [referring] to certain documents used in the selection process but does not identify them. The respondent indicates that it considers these documents confidential and closed but fails to provide the basis for its position. The respondent has provided no exception to the Open Records Law covering these documents and has not articulated any privacy concerns implicated by disclosure . . .

Moreover, the complainant objects to the language of the proposed order. The second sentence . . . directs the Complainant to notify the Commission of any expert or witness the Complainant intends to consult so that a copy of the order may be served upon that person. This is an onerous process and improperly forces the Complainant to prematurely disclose the names of witnesses and experts, even if those individuals are ultimately not listed as witnesses for hearing. Nor does the order indicate who decides which documents are covered by the order.

Respondent replied to complainant's objection by letter dated December 20, 1999, stating as follows (in pertinent part):

The documents for which respondent seeks a protective order include application materials, resumes and reference checks for successful candidates Wendy Trefz (who declined the offer) and Dawn Nelson.

[There is] a public policy favoring non-disclosure of such records [as] stated in subsection 230.13(1), [Stats.] . . .

Applications, resumes and references are used in the evaluation and selection process. If this information were to be indiscriminately released, there would be a chilling effect upon potential applicants for state employment, many of whom would be reluctant to apply for future positions if they knew their history and personal information could be disclosed to other persons outside the Personnel Commission.

The complainant does not propose alternative language for the protective order. Therefore, respondent requests that the protective order be issued as proposed.

## OPINION

Respondent has requested a protective order to maintain confidentiality of information about job applicants other than complainant (hereafter, "Other Applicants"). The question before the Commission is not whether disclosure would be appropriate under the Open Records Law. The question is whether the protective order is appropriate when such materials are divulged in the context of litigation. The policies underlying the statutes cited by the parties may be relevant to this inquiry.

The Commission has ruled in prior cases that documents subject to protection from disclosure under §230.13(1)(a), Stats., are discoverable if relevant to the issues raised. The Commission also has determined that disclosure of those documents in the context of discovery should be subject to a protective order to prohibit dissemination of the documents beyond the confines of the litigation. *Duncan v. DOC*, 96-0064-PC-ER, 7/31/97. Examination scores and ranks and other evaluations of applicants are protected under §230.13(1)(a), Stats. Accordingly, respondent is entitled to a protective order regarding the application materials, resumes and reference checks of the Other Applicants.

Complainant contends it would be onerous to require her to notify the Commission of any expert or witness she intends to consult so that a copy of the protective order may be served on the expert or witness. She further contends such requirement improperly would force complainant to prematurely divulge the names of her witnesses and experts. The Commission, however, routinely uses the referenced language in protective orders of the nature at issue here and without problems arising. It is the best method the Commission knows of to balance the right of the complainant to have this relevant information against the privacy interests of the Other Applicants. Complainant does not offer any other method of balancing these competing interests. Accordingly, the language proposed by respondent is adopted with slight changes to specifically identify the documents covered by the order.

ORDER

The Commission grants respondent's request for a protective order and the following terms and conditions are placed upon use of the protected information:

The following materials filed by respondent and provided to complainant or her representative may be used by complainant or complainant's representative only for the purpose of litigating 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 complainant's representative for any other purpose:

- a. The application materials, resumes and reference checks for Wendy Trefz, and
- b. The application materials, resumes and reference checks for Dawn Nelson.

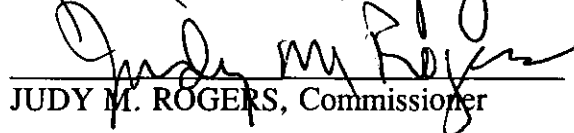
The complainant is directed to inform the Commission of the name and address of any expert or witness she intends to consult prior to divulging any of this material any such person, so that the Commission may serve a copy of this order on the expert or witness prior to disclosure of the material, and the expert or witness is directed not to disclose the materials to the public or outside the confines of this proceeding.

Dated: February 11, 2000.

STATE PERSONNEL COMMISSION

  
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LAURIE R. McCALLUM, Chairperson

  
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DONALD R. MURPHY, Commissioner

  
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JUDY M. ROGERS, Commissioner