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STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 MARY SOUTHWICK, *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 HEALTH AND SOCIAL SERVICES, *
 *
 Respondent. *
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 Case No. 85-0151-PC *
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on the motion of appellant to compel the respondent to answer or make more complete answers to the appellant's first set of interrogatories. The parties, through counsel, have filed briefs.

On August 30, 1985, appellant filed with respondent a document entitled "Interrogatories" consisting of 43 items and requesting that respondent answer such interrogatories within 30 days. The respondent, after obtaining authorization for an extension of time within which to answer, in a document entitled "Answers to Interrogatories" and dated October 16, 1985, filed its answers and objections to appellant's request. On November 7, 1985, appellant filed with the Commission a motion and notice of motion to compel respondent to answer or complete answers to the subject set of interrogatories based upon the following grounds:

1. That writings and documents which were requested to be "identified" were not identified as requested.
2. Questions were improperly objected to as "unduly burdensome, overbroad, and ambiguous" when answers to those questions require the

respondent to particularize criticisms of the appellant which are at the very heart of this case.

3. Questions are objected to as irrelevant when such an objection is not proper under the Wisconsin Rules of Civil Procedure.

4. With the exception of answers to interrogatories 1, 2, 7, 26, 29, 30, 33, 34, 40, and 41, answers to questions are incomplete and evasive within the meaning of Wis. Stats. 804.12(b).

The brief filed with the Commission by appellant on March 4, 1986, indicated in its conclusion section on p. 16 that the motion to compel only related to interrogatories 3(b), 5, 6, 16-24, 28, 29, 31, 32, 36, 37, 42, and 43. Respondent objects to all but 3(b), 28, 42, and 43 on the basis that information is sought which is not relevant to the issue under consideration in the underlying appeal.

The underlying appeal involves the reassignment of the appellant from her career executive position as Director of the Bureau of Economic Assistance (PR-20) to the career executive position of Director of the Southern Regional Office (PR-18). On August 6, 1985, the appellant filed a timely appeal of such reassignment.

The Commission has jurisdiction to hear and decide this appeal pursuant to §230.44(1)(c), Stats., and §ER-Pers. 30.10, Wis. Adm. Code. In Basinas v. State, 104 Wis. 2d 539 (1981), the Wis. Sup. Ct. stated:

"We conclude that sec. 230.44(1)(c), Stats. 1977, and sec. PERS 30.10, Wis. Adm. Code (1975), give the Commission jurisdiction over an appeal by a career executive employee from a reassignment to a job in a lower pay range if the appeal alleges that the reassignment was an unreasonable and improper exercise of discretion or was for disciplinary purposes."

The appellant in the instant case has not alleged that the subject reassignment was for disciplinary purposes so the proper issue is whether the reassignment was an unreasonable and improper exercise of discretion.

The Personnel Commission has granted to parties to its proceedings "all the means of discovery that are available to parties to judicial proceedings as set forth in Ch. 804, Stats. ..." §PC2.02, Wis. Adm. Code.

Section 804.01(2), Stats., states in pertinent part:

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The statute which creates the career executive program is §230.24, Stats., which states in pertinent part:

The administrator may by rule develop a career executive program that emphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employees a broad opportunity for career advancement and to provide for the mobility of such employees among the agencies and units of state government for the most advantageous use of their managerial and administrative skills . . .

Section ER-Pers 30.07, Wis. Adm. Code, states in pertinent part:

(1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same or lower classification level for which the employee is qualified to perform

the work after being given the customary orientation provided to newly hired workers in such positions. (emphasis supplied).

(2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employee in a career executive position in the same or lower classification level for which the employee is qualified the appointing authority may make such reassignment provided it is reasonable and proper....

As provided in §804.01(2)(a), Stats., it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. This is the standard applied by the Commission in reviewing each of the following objections based on relevance.

The following states and discusses each of the interrogatories which is included within the ambit of the instant motion and respondent's objections to each.

INTERROGATORY 5

5. Identify and particularize any alternatives both in and outside the Department of Health and Social Services that were considered or discussed with regard to the reassignment of Mary Southwick from her position as director of BEA and include the following information:...

Objection to Interrogatory 5.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

As stated above,, the issue in the instant appeal is whether respondent's reassignment of appellant was an unreasonable and improper exercise of discretion. In Reidinger v. Optometry Examining Board, 81 Wis. 2d 292 (1977), the Wis. Supreme Court, in reviewing a decision of an administrative body, said:

Discretion is more than a choice between alternatives without giving the rationale or reason behind the choice. In McCleary v. State, 49 Wis. 2d 263 (1971), this court said: "Discretion is

not synonymous with decision-making. Rather, the term contemplates a process of reasoning..."

It could obviously be relevant to the issue in the instant appeal for the Commission to consider information relating to the process of reasoning engaged in by respondent in determining that DHSS's program goals could best be accomplished by reassigning appellant and appointing John Erickson to take her place as Director of the Bureau of Economic Assistance and this is the type of information sought to be elicited by this interrogatory.

INTERROGATORY 6

6. State whether or not the appointing authority or its agents ever considered or discussed transfer of Mary Southwick to a non-career executive position and identify, as that term is defined for you in these interrogatories, each such discussion, the participants, time, date, place, etc.

Objection to Interrogatory 6.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

Although the relevance of this interrogatory is less obvious than that of number 5, the Commission regards it as being subsumed by interrogatory number 5 and, as a result, the conclusion as to relevance reached in relation to interrogatory 5 would apply.

INTERROGATORY 16

16. Identify each and every discussion had by the appointing authority or its agents in which a replacement or potential replacement for Mary Southwick as Director of the Bureau of Economic Assistance was discussed?

Objection to Interrogatory 16.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

INTERROGATORY 17

17. Identify any notes, memoranda, documents or other records that discuss the replacement of Mary Southwick as Director of the Bureau of Economic Assistance.

Objection to Interrogatory 17.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

INTERROGATORY 18

18. Identify each and every individual who was considered by the appointing authority or its agents as a replacement for Mary Southwick as Director of the BEA on either a permanent or temporary basis giving the following:

(a) The name of the individual;

(b) The time and place such individual was discussed as a replacement for Mary Southwick;

(c) Whether the replacement considered was permanent or temporary;

(d) Any factors that went into the evaluation of the individual as a possible replacement for Mary Southwick;

(e) Identify any records pertaining to individuals who were reviewed in order to determine their qualifications as a replacement for Southwick;

Objection to Interrogatory 18.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

INTERROGATORY 19

Identify all documents, notes, memoranda or other records related to the performance of John Erickson during the entire tenure of his employment by the Department of Health and Social Services.

Objection to Interrogatory 19.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

INTERROGATORY 20

Identify any documents, notes, memoranda or other records which reflect discussion by the appointing authority or its agents of the suitability of John Erickson as the replacement for Mary Southwick as director of the Bureau of Economic Assistance.

Objection to Interrogatory 20.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

INTERROGATORY 21

Identify all performance documents related to the performance of John Erickson as the director of the Southern Regional Office.

Objection to Interrogatory 21.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

As stated above in relation to interrogatory 5, it could be relevant to the issue presented by this appeal for the Commission to consider the process of reasoning respondent employed in reaching its decision to reassign appellant and to appoint Mr. Erickson to take her place as Director of the Bureau of Economic Assistance. This could include a consideration of the relative qualifications of appellant and those considered as replacements for appellant (including Mr. Erickson) vis a vis the applicable program goals of DHSS. This is the type of information that interrogatories 16-21 seek to elicit.

INTERROGATORY 22

State whether or not John Erickson has discussed the possibility of retirement with the appointing authority or its agents and identify any and all communications with or from John Erickson pertaining to the subject matter of retirement as of the date of these interrogatories.

Objection to Interrogatory 22.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

INTERROGATORY 23

State whether the appointing authority discussed the possibility of the retirement of John Erickson with persons other than John Erickson and identify such persons.

Objection to Interrogatory 23.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

Although the relevance of the information sought to be elicited by these interrogatories is less obvious than that for interrogatories 16-21 above, respondent's awareness that Mr. Erickson could serve in the subject position only a short period of time could be relevant to consideration of whether it was an unreasonable and improper exercise of discretion for respondent to determine that the program goals of DHSS would be better served by having Mr. Erickson instead of appellant serve as Director of the Bureau of Economic Assistance.

INTERROGATORY 24

State whether or not Peter Pawlisch has been considered or discussed by the appointing authority or its agents as a potential director for the Bureau of Economic Assistance and identify the date, time, place and nature of each discussion.

Objection to Interrogatory 24.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

To the extent the information sought to be elicited by this interrogatory is subsumed by interrogatories 16, 17, and 18, it could be relevant.

INTERROGATORY 29

Identify and locate the appointment books of the following individuals for the years 1984 and 1985: Peter Pawlisch, Gerald Berge, Linda Dupont-Johnson and Mark Hoover.

Answer and Objection to Interrogatory 29.

The writings requested concerning Gerald Berge, Linda Dupont-Johnson and Mark Hoover may be inspected and copies in Rm. 520, 1 West Wilson Street, Madison, WI any time during State office hours on 48 hours written notice.

Respondent objects to any further answer on the grounds that the interrogatory asks for writings that are not relevant to the stipulated issue in this proceeding.

The motion filed by appellant states, in pertinent part, that:

4. With the exception of answers to interrogatories 1, 2, 7, 26, 29, 30, 33, 34, 40, and 41, answers to questions are incomplete and evasive within the meaning of Wis. Stats. 804.12(b).

The Commission has proceeded under the assumption, as a result of the clear language of this section of the motion, that appellant did not seek to compel further answers to the interrogatories enumerated therein and that the mention of interrogatory 29 in appellant's brief was an oversight.

INTERROGATORY 31

Identify any and all documents indicating assignments made to Peter Pawlisch directly from Gerald Berge or Linda Dupont-Johnson other than in the area of emergency services from 1981 to present.

Objection to Interrogatory 31.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding and is overbroad and ambiguous.

INTERROGATORY 32.

Identify any and all documents, notes, memoranda or other records related to the performance of Peter Pawlisch in the Bureau of Economic Assistance from 1981 to the present.

Objection to Interrogatory 32.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

During the period of time appellant served as Director of the Bureau of Economic Assistance, Peter Pawlisch served as one of appellant's subordinates. The information sought to be elicited by this interrogatory could be relevant if assignments given to Mr. Pawlisch by Mr. Berge or Ms. Johnson or if Mr Pawlisch's job performance had an impact on appellant's ability to manage the programs she supervised and their resources.

INTERROGATORY 36

Identify any and all documents, notes, memoranda or other records from 1982 to the present produced by the Department of

Health and Social Services pertaining to the Low Income Energy Assistance Program and the Weatherization Program giving the following:

(a) The drafter of the document and

(b) The person who reviewed and/or approved that document in addition to the signatory.

Answer to Interrogatory 36.

The writings requested for the time that Mary Southwick held the position of Director of the Bureau of Economic Assistance may be inspected and copied in Rm. 520, 1 West Wilson Street, Madison, WI any time during State office hours on 48 hours written notice.

Respondent objects to any further answer on the grounds that the writings sought are not relevant to the stipulated issue of this proceeding.

Appellant's performance as Director of the Bureau of Economic Assistance (of which the Weatherization Program and the Low Income Energy Assistance Program were a part) is obviously relevant to the issue in this appeal. An assessment of such performance could reasonably include, inter alia, a comparison of the functioning and program goals of the programs appellant supervised with the functioning and program goals of such programs prior to appellant's supervision of them. As a consequence, the information sought to be elicited by Interrogatory 36, even that which predates appellant's supervision of the Weatherization Program and the Low Income Energy Assistance Program, could be relevant.

INTERROGATORY 37

Identify and locate the personnel file of Bernard Stumbras and identify any and all documents related to the performance of Bernard Stumbras from 1981 to the present.

Objection to Interrogatory 37.

This interrogatory asks for information that is not relevant to the stipulated issue of this proceeding.

Mr. Stumbras was appellant's first line supervisor during most of the time she served as Director of the Bureau of Economic Assistance. The information sought to be elicited by this interrogatory could be relevant if Mr. Stumbras' performance had an impact on appellant's ability to manage the programs she supervised.

INTERROGATORY 28

List any and all complaints about the performance of Mary Southwick as director of the BEA that were received by the appointing authority or its agents during her tenure in that position.

Answer and Objection to Interrogatory 28.

See Exhibit 1. Several example of complaints are: in late 1984 several counties complained about their inability to get answers to questions from the Office of Child Support. In the Spring of 1985 Bureau of Economic Assistance staff complained about clerical problems in the Bureau of Economic Assistance Section on Planning and Implementation.

Respondent objects to any further answer on the grounds that the interrogatory is overbroad and ambiguous.

To the extent that this interrogatory seeks to elicit information regarding those complaints regarding appellant's performance of which those individuals making or having input into the subject reassignment decision were aware, it is not overbroad. Beyond such limits, however, it is overbroad.

INTERROGATORY 2 & 3b

2. List each reason that Mary Southwick was reassigned from her position as director of the Bureau of Economic Assistance (BEA) to her new position as director of the Southern Regional Office (SRO).

3. For each reason listed in response to interrogatory number 2 state the following:

(b) A description of the facts that became known to the appointing authority or its agents in support of the particular reason; relating said facts to the date, time and circumstances which brought them to light.

Answer and Objection to Interrogatory 3.

(b) See Exhibit 1. Respondent objects to any additional answer on the grounds that the interrogatory is unduly burdensome and overbroad, especially in light of fact that depositions of the persons having such knowledge have been scheduled.

INTERROGATORY 42

Identify each and every instance that the appointing authority or its agents considers Mary Southwick's performance to have been deficient as director of the BEA with regard to her "county relationships" including but not limited to the following information:

(a) Date, time and description of each factual incident supporting a conclusion that Mary Southwick's county relationships were not satisfactory.

(b) Description of any document, notes, memoranda or other records referencing facts that support a conclusion that Mary Southwick's county relationships were not satisfactory.

(c) Identity of any verbal complaints by individuals that support a conclusion that Mary Southwick's county relationships were not satisfactory.

(d) Identify any documents or communications wherein Mary Southwick was told that her county relationships were not satisfactory.

Answer and Objection to Interrogatory 42.

See Exhibit 1. Respondent objects to any further answer on the grounds that the interrogatory is unduly burdensome and overbroad, especially in light of fact that depositions of the persons having such knowledge have been scheduled.

The exhibit 1 referenced in the answer and objection to Interrogatory 3(b) is a July 8, 1985, memo to appellant from Gerald Berge, Administrator, Division of Community Services, outlining the respondent's reasons for reassigning appellant. Respondent, in its brief, offers as the primary reason for its objections to these interrogatories the fact that those individuals with knowledge of the information requested by these interrogatories have been deposed and to require them to answer interrogatories

which seek to elicit the same type of information already sought to be elicited through deposition is unduly burdensome.

Section 804.01(1), Stats., provides:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under sub. (3), the frequency of use of these methods is not limited.

It is clear that this statutory language allows a party to utilize both depositions and interrogatories and does not prohibit seeking to elicit the same type of information through both discovery devices. Respondent offers no authority from which to conclude otherwise. Certainly, limits must be imposed to prevent unreasonable duplication. In this instance, however, the subject interrogatories go to the heart of the case, i.e., appellant's performance as director of the Bureau of Economic Assistance, and it is not unreasonable for appellant to seek to elicit this information through both a deposition and an interrogatory. As appellant points out in her brief, during a deposition, a deponent may often say they do not recall or they are answering to the best of their recollection. In preparing an answer to an interrogatory, however, an individual has an opportunity to research the question and this may result in a different answer or a more complete answer than that derived from recall.

As with Interrogatory 28, to the extent that Interrogatory 42 seeks to elicit information regarding instances of which those individuals making or having input into the subject reassignment decision were aware, it is not overbroad, but, beyond such limits, it is overbroad.

INTERROGATORY 43

Identify any and all documents, notes, memoranda or other records from 1982 to the present which describe the working relationship between the Bureau of Economic Assistance and counties.

Objection to Interrogatory 43.

Respondent objects to answering the interrogatory on the grounds that the interrogatory is overbroad and ambiguous.

Respondent accurately states in its brief that this interrogatory is not sufficiently specific.

Finally, the definitions section of the subject set of interrogatories defines "identify" or "identity" when used in reference to a document to mean:

- a. The type of document (e.g., letter, memorandum, printout, report, newspaper, etc.);
- b. The date, if any, of the document;
- c. The author;
- d. The addresses;
- e. The present location;
- f. The person or persons having custody of control over it; and
- g. The person or persons executing this document. If any such document was, but is no longer, in your possession, custody or control, state what disposition was made of it. In all instances in which the following interrogatories ask for detailed descriptions of documents, copies of such documents must be attached to your answers in lieu of the detailed description if copies are available.

Sec. 804.08(3), Stats., specifically gives a party answering interrogatories the option to produce records for inspection and copying.

(3) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient

answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

The Commission agrees with respondent that making the documents requested by appellant available to her for inspection and copying is an adequate response to those interrogatories included within the ambit of the subject motion which asks for respondent to "identify" certain documents in view of the fact that it appears that the burden referenced in §804.08(3), Stats., is substantially the same for both parties in regard to such interrogatories.

ORDER

The motion of appellant is granted in part and denied in part in accordance with the above decision.

As part of the subject motion, appellant requests that the Commission award the appellant her costs and attorney's fees in bringing the motion. Section 804.12(1)(c), Stats., provides as follows:

(1) MOTION FOR ORDER COMPELLING DISCOVERY.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

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(c) Award of expenses of motion. 1. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

2. If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the

reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

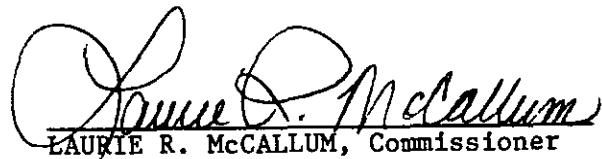
3. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

The Commission will contact the parties regarding further proceedings in this regard.

Dated: April 16, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

LRM:jmf
ID10/1

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