

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROBERT BEHLING, *

Appellant, *

v. *

Secretary, DEPARTMENT OF REVENUE and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, *

Respondents. *

Case No. 88-0060-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

This is an appeal of respondent's decision denying appellant's request for the reclassification of his position. On October 14, 1988, appellant filed a Motion to Compel Discovery of a "copy of the Employee Performance Evaluation Report (AP-718) for position number 039761 which covers the period July 1986 through January 1987 with all areas dealing with the position's Result Areas and Standards intact but all other areas blanked out." The briefing schedule on the motion was completed on November 30, 1988. The following findings of fact were derived from documents filed by the parties with the Commission and appear to be undisputed.

1. Appellant has requested the reclassification of his position from Property Assessment Supervisor 1 (PR01-16) to Property Assessment Supervisor 2 (PR01-17).

2. Position number 039761 is classified at the Property Assessment Supervisor 2 (PASup 2) level.

3. Form AP-718 is entitled "Employee Performance Evaluation Report" and identifies the employee whose performance is to be evaluated and the

position occupied by such employee and provides instructions for evaluating the performance of such employee. Form AP-718 states as follows, in pertinent part:

USE OF FORM: This form and its supplement, AP-718A, Supplement to Performance Evaluation Report, must be used for an employee's annual performance evaluation. Complete the appropriate sections of this form and attach a sufficient number of form AP-718A to document the necessary Results Areas and Performance Standards for the evaluation period. You may have the information in that area typed by someone else. ...

THE INFORMATION IN "REVIEW SESSION FINDINGS" COLUMN OF AP-718A IS CONFIDENTIAL AND MUST BE LEGIBLY HANDWRITTEN, PRINTED, OR TYPEWRITTEN

MAJOR OBJECTIVES: In the "Results Areas and Performance Standards" column of the Supplement identify important goals and/or worker activities from the Position Description and/or other major job assignments for the ensuing evaluation period. Items identified should conform to organizational goals and work plans. For each of the identified "Result Areas," establish the standards against which performance results will be measured (i.e., quality, quantity, accountability, etc.).

* * *

GENERAL EVALUATION COMMENTS: A. Describe the employee's overall performance during the evaluation period. Include specifics about the employee's skills, abilities, and knowledge (both strength and weaknesses).

The "Review Session Findings" column of Form AP-718A is actually entitled "Review Session: Evaluation" and is the evaluation section of the form.

4. Respondent has provided appellant with a copy of the relevant position description for position number 039761.

Respondent argues in opposition to the motion that the entire requested document is not discoverable because it is confidential and not relevant to the instant appeal.

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 party,...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.

In the instant case, the requested sections of the subject document contain information relating to the nature of the duties and responsibilities of a position classified at the level appellant seeks for his position and the standards for the performance of such duties and responsibilities by the position incumbent. Certainly, the nature of the duties and responsibilities of a position offered for comparison purposes is relevant to the subject matter of the instant case. In addition, the standards for the performance of such duties and responsibilities could contain information relating to the nature of the duties to be performed as well as how such duties are to be performed. This information as well could facilitate the comparison of appellant's position with position number 039761 and should be considered relevant for discovery purposes. However, any information relating to the quality of the performance of the incumbent of position number 039761 is not relevant to the subject matter of this appeal for discovery purposes. The determination of the proper classification of a position does not rely in whole or in part on the performance of an employee in that position or any other position. It is a position--a grouping of duties and responsibilities-- that is being reviewed, not an individual. Such information has not, however, been requested by appellant in the subject discovery request, i.e., appellant has

specifically excluded from such request information included in the evaluation section of Form AP-718A.

Respondent also argues that the information contained in the requested document is confidential and, therefore, not discoverable. However, the requested document was prepared in the ordinary course of business of a governmental entity and is subject to the state's open records law.

The "Declaration of Policy" for the open records law is set forth in Section 19.31, Stats., and states as follows:

Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of offices and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, a consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Section 19.35, (1)(a), Stats., states as follows, in pertinent part:

Access to records; fees. (1) Right to inspection. (a) Except as otherwise provided by law, any requester has a right to inspect any record. ...The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

Section 19.85(1)(c), Stats., provides the following exemption to the open meetings law:

A closed session may be held for any of the following purposes:
(c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

These statutory provision, read together, necessarily lead to the conclusion that the subject document, dealing at least in part with performance evaluation data of a public employee, is a public record which is presumed to be open but access to which may be restricted upon a demonstration that there is a need to restrict public access.

Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W. 2d 179 (1979), contains, inter alia, the following discussion of the open records law:

In Beckon v. Emery, 36 Wis. 2d 510, 516, 153 N.W. 2d 501 (1967), we stated that the 'public policy,' and hence the public interest, favors the right of inspection of documents and public records. See, also State ex rel Dalton v. Mundy, 80 Wis. 2d 190, 196, 257 N.W. 2d 877 (1977). These cases restate the legislative presumption that, where a public record is involved, the denial of inspection is contrary to the public policy and the public interest.

To implement this presumption, our opinions have set out procedures and legal standards for determining whether inspection of records is mandated by the statute. In the first instance, when a demand to inspect public records is made, the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection. ...If the custodian decides not to allow inspection, he must state specific public policy reasons for the refusal. ...

In the case before Commission, there is more than just the strong public interest discussed above which favors disclosure. The disclosure is sought not simply by a member of the public, but by the appellant, who has made a showing of need for the information in order to pursue his appeal. It has already been determined above that the requested document contains information which has reasonable probative value in view of the issue of the underlying appeal. There is public interest in assuring that the appellant has a full opportunity to litigate his appeal.

Against these interests, the Commission must weigh the interests served by nondisclosure. Respondent has offered in this regard that disclosure will

interfere with the "privacy rights" of the incumbent of position number 039761. This may be the case if information relating to the quality of the incumbent's performance in this position were at issue here. However, the Commission has already determined above that such information is not relevant for discovery purposes in this case and has not even been requested by appellant in the subject discovery request. As a result, we are only concerned with that information relating to the duties and responsibilities of position number 039761 and the standards for the performance of such duties and responsibilities. The Commission fails to recognize any privacy right involved with the release of such information. The respondent's argument in this regard is surprising in view of the language on respondent's Form AP-718 which indicates that only the information contained in the Evaluation section of Form AP-718A is to be considered confidential and appellant hasn't requested information from that section of the subject form for position number 039761.


The weighing of the relevant interests leads the Commission to the conclusion that appellant's interest in obtaining so much of the subject performance evaluation report as relates to the duties and responsibilities of position number 039761 and the standards for the performance of such duties and responsibilities outweighs respondent's interest in withholding appellant's access to such information.

Order

Appellant's Motion to Compel Discovery is granted. This Motion was specifically limited to the information contained in the Results Areas and Performance Standards section of Form AP-718A for position number 039761 for the period July 1986 through January 1987. Respondent is ordered to

provide such information to appellant within 10 calendar days of the date of
this order.

Dated: December 14, 1988 STATE PERSONNEL COMMISSION


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LRM/lrm

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