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WILLIAM C. GOEHRING,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 92-0735-PC

* * * * *

RULING ON
MOTION
TO
COMPEL

This matter is before the Commission on the appellant's motion to compel discovery. The appeal arises from the decision not to hire the appellant for the position of State Quality Control Supervisor in the respondent's Division of Economic Support, Bureau of Economic Assistance.

Sometime between November 23, 1992 and December 23, 1992, the appellant filed a discovery request with respondent. By letter dated December 23, 1992, respondent stated, in part:

This department does not possess the completed achievement history questionnaires referred to in your request #7. Those documents are in the possession of the Department of Employment Relations, and this department is under no obligation to provide them.

The appellant has filed a motion to compel discovery of the achievement history questionnaires (AHQs).¹ In support of his motion, appellant states that the AHQ documents are relevant to his allegation of preselection, and argues that the documents are in fact available to respondent DHSS because the Department of Employment Relations (DER) "really acts as a 'service' agency for other departments of the state" and the two agencies should be viewed as one legal entity for purposes of discovery.²

¹In a ruling issued on April 23, 1993, the Commission denied appellant's motion for discovery sanctions relating to the failure of respondent to provide the AHQs. Appellant subsequently clarified that he had sought both sanctions and an order compelling the discovery.

²The appellant did request the documents directly from DER but the request was denied, both as a discovery request and as an open records request. The

In terms of the question of whether the requested materials "appear reasonably calculated to lead to the discovery of admissible evidence," under §804.01(2)(a), Stats., the appellant has raised a theory that the respondent engaged in preselection:

My claim of preselect involves a series of events which include but is not limited to the achievement history questionnaire, the interview process and other events prior to the interview. The achievement history questionnaires are an important link in the process I shall prove.

Based upon this theory and if the requested documents were in the possession of DHSS, they would be discoverable. Therefore, the remaining question is whether DHSS and the Division of Merit Recruitment and Selection in the Department of Employment Relations, should be considered as one legal entity for purposes of appellant's discovery request.

Pursuant to §804.09(1), Stats.:

Any party may serve on any other party a request (a) to produce... any designated documents... which constitute or contain matters within the scope of s. 804.01(2) and which are in the possession, custody or control of the party upon whom the request is served....

The sole party respondent in this case, which was filed under the Commission's jurisdiction provided by §230.44(1)(d), Stats., is the Department of Health and Social Services. That department does not possess the AHQ's, nor can those documents be said to be within the "custody or control" of DHSS.³ They remain under the separate control of the Division of Merit Recruitment and Selection. Responsibilities of the Administrator of DMRS are set forth in §230.05, Stats., and they include maintaining records of "examination scores and ranks and

denial letter states that the Division of Merit Recruitment and Selection, DER, is not a named party so is not covered by the rules of discovery, and that the documents are "closed records according to §§230.13, Stats., and ER-Pers 6.08(2), Wis. Adm. Code." If DMRS were to be added as a party, it would be subject to discovery. Here, the appellant has not requested that DMRS be made a party.

³The appellant has already requested copies of the AHQ's from DMRS. A copy of the DMRS response indicates that that agency treated the request as an open records request and denied it, citing §§230.13, Stats., and ER-Pers 6.08(2), Wis. Adm. Code. The response also informed the appellant that he could seek review if the denial "through a mandamus action under §19.37(1), Stats., or by application to the District Attorney or Attorney General."

other evaluations of applicants" as indicated in §230.13(1)(a), Stats. On the other hand, appointing authorities, such as the Secretary of DHSS, are given authority under §230.06(1)(b), Stats., to "appoint persons to or remove persons from the classified service." These responsibilities are clearly segregated.


The appellant's motion before the Commission is not in the posture of an "independent action [i.e., presumably a court proceeding] against a person not a party for production of documents and things," as provided in §804.09(3), Stats.

ORDER

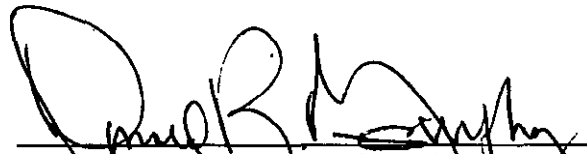
Appellant's motion to compel is denied.

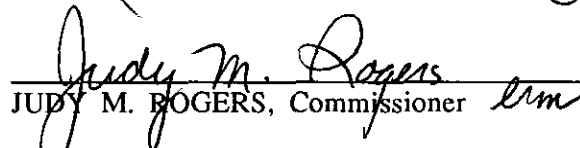
Dated: July 30, 1993

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-7/93 Goehring


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner *lm*