

PASTORI M. BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS;
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION; and
Secretary, DEPARTMENT OF
CORRECTIONS.**

Respondents.

Case No. 97-0012-PC-ER

**RULING ON
COMPLAINANT'S
MOTION TO COMPEL
DISCOVERY and
RULING ON DOC'S
MOTION FOR
PROTECTIVE ORDER**

Complainant developed a discovery request dated April 22, 1997, which DOC answered by letter dated May 22, 1997, with a request for a protective order regarding some of the requested items. Complainant filed a motion to compel discovery by letter dated May 27, 1997, contesting DOC's answers to Interrogatory #29, and production requests #3, 8, 9, 10, 14 and 15.

The already-scheduled hearing dates were canceled to create sufficient time for resolution of the current motions. After this ruling is mailed to the parties, the Commission will send them a letter scheduling a status conference at which time new hearing dates will be selected.

The information requested by complainant through discovery is shown below, along with DOC's answer.

Production Request #8: Produce the application materials of each candidate for the position of Budget and Policy Officer 3 (BPO-3) as received by DOC.

Answer: Objection. These are closed personnel transactions and are not available under Sec. 230.13, Stats.

Production Request # 9: Produce the candidates' resumes and the letters as presented to the rating panel members for the BPO-3 position.

Answer: Objection. These are closed personnel transactions and are not available under Sec. 230.13, Stats.

Production Request #10: Produce the application materials of career executive employees for the position of BPO-3.

Answer: Objection. These are closed personnel transactions and are not available under Sec. 230.13, Stats.

Production Request #14: Produce the sheets on which raw scores were written for each candidate for the BPO-3 position.

Answer: Objection. These are closed personnel transactions under Sec. 230.13, Stats.

Production Request #15: Produce candidates' resumes and letters after they had been rated by the rating panel members.

Answer: Objection. These are closed personnel transactions under Sec. 230.13, Stats.

DOC asserts that the above-noted production requests could not be answered due to operation of §230.13, Stats. There is no dispute that the requested materials are otherwise subject to discovery and relevant to the case. The cited statutory section is shown below in relevant part.

230.13 CLOSED RECORDS. (1) . . . the secretary and administrator may keep records of the following personnel matters closed to the public:

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

The statute cited above protects certain information from being disclosed "to the public." The complainant's requests were made not as a member of the public but in the context of litigation. The information is relevant to his case and he is entitled to this discovery. DOC's concern that the requested materials not be issued without a protective order is valid and, accordingly, this portion of DOC's request for a protective order is granted.

Interrogatory #29: State the names, races of the certified candidates for the BPO-3 position.

Answer: Attached is an alphabetical listing of persons certified for the BPO-3 position.

The problem with DOC's answer to Interrogatory #29 is not evident from the answer recited above. DOC noted, however, in written arguments dated June 11, 1997, that the race of the certified candidates was not disclosed. The race of the certified candidates is relevant to the hearing issues (as defined by Commission Ruling dated

June 5, 1997). Further, the race of each candidate is not a subject matter protected under 230.13, Stats. Complainant is entitled to receive the requested information. Respondent has a valid reason for requesting that the disclosed information be subject to a protective order and, accordingly, this portion of respondent's motion is granted.

Production Request #3: Produce the sheet or document on which the benchmarks for the BPO-3 position were written for the BPO-3 position.

Answer: This document may be reviewed by Complainant in DOC's Affirmative Action office. Contact DOC's legal counsel at 608/266-5755 to make arrangements for this review.

Again, the problem with DOC's answer to the third production request is not evident from the answer recited above. Complainant's perception of the problem is noted on page 5 of arguments dated June 17, 1997. Specifically, complainant indicated that he saw the document at DOC premises, but DOC refused to provide him with a copy until he paid the copy charges. DOC is entitled to payment for copy charges associated with discovery requests. The Commission further notes that the requested materials are protected from disclosure to the public under §230.13(1)(a), Stats. Accordingly, this discovery request also will be made subject to the protective order.

The protective order DOC requested as part of its discovery answer dated May 22, 1997, related to items not yet discussed as part of complainant's motion. These additional matters are addressed below.

Interrogatory #4: How many racial minorities applied for DOC administrators senior executive positions during the calendar year of 1996?

Answer: Objection. This information is not available without pulling every register file for all certifications, then reviewing all hiring files whether at the DER or DOC to look at specific applicants, which process would be unduly burdensome and expensive. For this reason, Respondent DOC is hereby filing a request for a protective order.

Interrogatory #5: How many people applied for DOC administrators senior executive positions during the calendar year of 1996?

Answer: Same response as Item #4.

Interrogatory #6: How many racial minorities were interviewed for DOC administrators-senior executive positions in 1996?

Answer: Same response as Items #4 and 5.

Complainant presented no specific response to DOC's answers to interrogatories #s 4-6. DOC is not required to gather and create a document of the requested information at its own expense. The Commission concludes that these requests are burdensome and, accordingly, relieves DOC of the need to answer them.

Interrogatory #7: How many people were in certified registers of positions in administrators-senior executive job group in DOC in December 1996? (Include those in 1994, 1995 and 1996, per Ch. ER-MRS 11(2) Reactivation of Registers.)

Answer: This request is too unclear to respond to. Certification and register are two different concepts. Respondent would be willing to try to answer this question if Complainant would clarify what it means, unless the request turns out to be unduly burdensome or expensive in terms of file research.

Interrogatory #8: How many racial minorities were in DOC various certified registers of positions in administrators-senior executive job group in December 1996? (Include those in 1994, 1995 and 1996, per Ch. ER-MRS 11(2) Reactivation of Registers.)

Answer: Same response as item #7.

Interrogatory #9: How many people were in DOC various certified registers of positions in career executive program in December 1996? (Include those in 1994, 1995 and 1996 per Ch. ER-MRS 11(2) Reactivation of Registers.)

Answer: Same response as Items #7 and 8.

Interrogatory #10: How many racial minorities were in DOC various certified registers of positions in career executive program in December 1996? (Include those in 1994, 1995 and 1996 per Ch. ER-MRS 11(2) Reactivation of Registers.)

Answer: Same response as Items #7, 8 and 9.

DOC is correct that the terms "certification" and "register" have different meanings. Even if DER and DMRS were able to discern complainant's intended meaning, such insight cannot be imputed to DOC's attorney. DOC's objection has merit and, accordingly, DOC is relieved of responsibility to answer interrogatories 7-10. Complainant may clarify his questions in subsequent interrogatories, if he wishes.

Interrogatory #17: State the names, race(s) of career executive employees who applied for the position of BPO-3.

Answer: [Names provided.] Race is not being provided because it is confidential under the provisions of Sec. 103.13(6)(e), Stats.

Consistent with prior rulings, DOC must disclose the information requested in Interrogatory #17, but such disclosure will be subject to the protective order herein.

Interrogatory #24: State how many times DOC has used the resume and letter not to exceed two pages as practice to determine people for further consideration in administrators-senior executive positions.

Answer: Objection. As stated, this interrogatory is burdensome and unclear. No time frame is indicated. Unless and until Complainant clarifies this question, Respondent is requesting a protective order.

Complainant indicated he has re-framed Interrogatory #24 in a second set of discovery. He does not consider the matter to be an issue any longer. This portion of DOC's request for a protective order is granted as the question in its initial form was burdensome.

Interrogatory #25: In 1996, two positions of Correctional Service Manager 2-Regional Chief-Division of Juvenile Corrections became vacant in October 1996. Please answer the following as regards these two positions: a) State the names and races of people who applied for the two positions. b) How many of these candidates were certified for further consideration. c) How many of the candidates certified for further consideration were racial minorities. Please state their names.

Answer: a) Objection. The names and races of these individuals are confidential under Sec. 230.13, Wis. Stats. b) Attached is the list of candidates certified for the two positions... c) Two candidates certified were racial minorities. Their names cannot be identified because this information is confidential under Sec. 230.13, Stats.

The withheld information is not a subject matter protected against public disclosure under 230.13, Stats. Accordingly, DOC must disclose the requested information but the information obtained will be subject to a protective order.

Interrogatory #26: In 1996, a position of Correctional Services Manager 1 became vacant in DOC. Please answer the following related to this position: a) State the names and races of candidates who applied for the position. b) How many of the candidates were certified for further consideration. c) How many of the candidates certified for further consideration were racial minorities.

Answer: a-c) DOC has a number (5-6) of Correctional Service Manager 1 positions in this agency. We need to know which position Complainant is referring to in order to respond. Otherwise the interrogatory is unduly burdensome and expensive and Respondent DOC hereby requests a protective order.

Complainant made no specific argument about DOC's answer to interrogatory #26. The Commission grants DOC's request for relief from answering the question. Complainant may clarify his question in subsequent interrogatories, if he wishes.

ORDER

As noted in the body of this ruling, DOC must provide complainant with answers to: Interrogatory #s 17, 25 and 29; as well as Production Request #s 3, 8, 9, 10, 14 and 15; within 30 days of the date of this Order and complainant's use of the disclosed information is subject to the following protective order:

- 1) the above-noted materials received by complainant may be used by the complainant (or his representative) only for the purpose of litigation of this case, and
- 2) if complainant intends to consult a representative, an expert or other witness, the complainant is directed to inform the commission and the respondents' counsel of the name and address of that individual prior to divulging any of the protected materials to such representative, expert or other witness, and the commission will service copies of this order on such person prior to granting authority to complainant to disclose the materials. By this order, representative, expert or other witness is directed not to disclose the materials to the public or outside the confines of this proceeding.

Also as noted in the body of this ruling, DOC is relieved from answering the following discovery requests: Interrogatories 4 through 10, 24 and 26.

Dated: July 23, 1997.

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STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in consideration of this matter.