

DAPHNE M. ZEILER,
Complainant,

v.

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

**RULING ON
PROTECTIVE ORDER**

Case No. 01-0002-PC-ER

This matter is before the Commission to resolve complainant's dispute over respondent's request for a protective order. Both parties filed written arguments, with the final argument filed on April 24, 2001.

This case was filed on January 4, 2001, alleging that discrimination occurred when respondent did not hire the complainant for the position of Teacher Assistant at Jackson Correctional Institution. The respondent was asked by letter dated February 7, 2001, to file an Answer to the complaint (see §PC 2.04, Wis. Adm. Code) and to respond to eight specific questions posed by the Commission's Equal Rights Supervisor. Respondent filed its Answer under cover letter dated March 8, 2001, and provided answers to the eight questions posed by the Commission, except as follows:

Q1. With respect to the top three candidates, the successful candidate (assuming she or he was not among the top 3), and complainant, please provide: a) interview notes, b) reference notes, c) resume and application, and d) whether each of these candidates had an arrest/conviction record.

Answer: There were only two candidates who were interviewed for the position. Respondent will provide the requested documents (Attachments 2-10) after the Commission issues a protective order

Q2: Provide the interview questions and benchmarks.

Answer: Respondent will provide the requested document (Attachment 11) after the Personnel Commission issues a protective order.

The Equal Rights Supervisor wrote to the parties by letter dated March 12, 2001. She proposed language for the protective order, as shown below:

Any materials filed by respondent and provided to complainant or her representative relating to the personnel records relating to the application, examination, or selection process for the position of Teacher Assistant at Jackson Correctional Institution, including reference materials, interview questions, benchmarks, and notes, resumes, applications, and arrest/conviction record may be used by complainant or complainant's representative only for the purpose of litigating this case before the Personnel Commission or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by the complainant or her representative for any other purpose.

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

The Equal Rights Supervisor also provided the parties with an opportunity to file objections. Complainant filed objections which are discussed in the Opinion section below.

OPINION

Examination scores and ranks as well as "other evaluations of applicants" are protected from public disclosure pursuant to §230.13(1)(a), Stats. Complainant acknowledges the statutory protection for examination scores and ranks but disputes that interview notes, reference notes and copies of the resume and application forms are also protected (letter brief dated 4/17/01).

The Commission, in determining what materials are subject to a protective order, considers (among other factors) whether the records are closed to the public by statute as well as the public policies underlying such statutes. The Commission has held that a protective order is appropriate with regard to the following materials:

Duncan v. DOC, 94-0064-PC-ER, 7/31/97

- names of references
- documentation of responses from references

Balele v. DOR, DER & DMRS, 98-0002-PC-ER, 7/7/98

- examination materials (including the names and race of candidates, copies of exams, score and rank of candidates, name of raters and copies of scoring sheets)
- interview materials (including interviewer's notes)

Respondent's request for a protective order prior to release of interview notes, reference notes, interview questions and benchmarks is supported by §230.13(1)(a), Stats., and by prior Commission cases. Such request also is supported by §103.13(6)(c), Stats., which governs an employee's access to employment documents and specifically forecloses access to "test documents" except for the overall score. Also foreclosed under the same statute is an employee's access to his/her own letters of reference. Accordingly, respondent's request for a protective order for these materials is granted.

Respondent's request for a protective order prior to release of the resumes and applications is denied. It is true that the resumes and applications of non-certified candidates are not subject to public disclosure pursuant to §230.13(2), Stats. The request here, however, was limited to the resumes and applications of the top three candidates who were certified. Respondent contended that these materials were protected pursuant §230.13(1)(a), Stats. Specifically, respondent relies on the statutory phrase that protects "other evaluations of applicants." Respondent has not asserted, however, that the applications and resumes were rated pursuant to an evaluation system. Under these circumstances, the documents must be released without a protective order

Remaining for consideration is respondent's request for a protective order regarding the arrest/conviction record of each candidate. This request for candidates other than complainant is supported by §103.13(6)(e), Stats., which forecloses an employee's access to "information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy." Information pertaining to the existence of the complainant's own arrest/conviction record falls outside the

scope of the statute and is subject to disclosure without issuance of a protective order (Also, see *Fondow v. DOR*, 99-0136-PC-ER, 1/19/00, where the Commission issued a protective order in regard to the disability status, personnel files and performance matters of employees other than the complainant.)

The Commission notes that complainant presented her arguments in the incorrect context. Specifically, she characterized the information as requested in her own discovery efforts when in fact it was the Commission's Equal Rights Supervisor who made the request. The result in terms of a protective order, however, would be the same in either context.

ORDER

Respondent's request for a protective order is granted in part and denied in part as noted in this ruling. As to the portion granted, the wording proposed by the Equal Rights Supervisor is adopted.

Dated: June 28, 2001.

STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers
JUDY M. ROGERS, Commissioner