

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**JEROME SWEENEY**, Appellant,

vs.

**DEPARTMENT OF CORRECTIONS**, Respondent.

Case 81  
No. 67936  
PA(sel)-53

**Decision No. 32467-B**

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**Appearances:**

**Jerome Sweeney**, appearing on his own behalf.

**Deborah Rychlowski**, Assistant Legal Counsel, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

**ORDER DENYING MOTION FOR RELEASE FROM PROTECTIVE ORDER**

This matter, which arises from the decision not to select the Appellant for a vacant Supervising Officer 2 position, is before the Wisconsin Employment Relations Commission (the Commission) on the Appellant's request relating to a Protective Order issued by the examiner on July 9, 2008. The final date for submitting written arguments was May 11, 2009.

On June 30, 2008, after the Appellant had served a discovery request, Respondent filed a Motion for Protective Order "to safeguard privacy rights and to control the dissemination of materials" that Appellant was seeking to discover. Respondent's motion set forth the following specific terms and conditions:

1. The materials submitted by Respondent pertaining to application materials, examination materials, interview questions, benchmarks and reference checks for the Supervising Officer 2 position at Black River Correctional Center, may be used by Appellant or Appellant's representative only for the purpose of litigating this case or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by Appellant or Appellant's

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representative for any other purpose. The interview questions and benchmarks may be used again in subsequent recruitments. If someone has access to these, the person may have an unfair advantage when he/she applies for this position.

2. In addition, DOC requests that applicants other than appellant be referred to by their initials for purposes of this proceeding to protect their privacy.
3. In addition, although DOC recognizes that these materials may be subject to open records requests, DOC would request that WERC advise DOC if any open records request is made for the materials DOC has provided pursuant to discovery requests used in this litigation.

After an exchange of email messages, the Appellant wrote that he had “no objection to the Protective Order.”

By Protective Order dated July 9, 2008, the examiner granted the motion, specifically citing the absence of any objection by Appellant. The order read, in part:

[T]he following conditions are placed upon access and use of the materials:

The materials submitted by Respondent pertaining to application materials, examination materials, interview questions, benchmarks and reference checks for the Supervising Officer 2 position at Black River Correctional Center, may be used by Appellant or Appellant’s representative only for the purpose of litigating this case or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by Appellant or Appellant’s representative for any other purpose.

It is also ordered that, for the purposes of this proceeding and to protect the privacy of individuals, applicants other than Appellant are to be identified by initials whenever it is possible to do so without confusing the record and that the Commission will advise DOC of all public records requests for materials provided by DOC pursuant to discovery requests made in this litigation.

Approximately nine months later, after the materials encompassed by the discovery request had been supplied to him and after a hearing had been conducted on the merits of the case, Appellant filed a written request to be released from the Protective Order:

In the near future I will be meeting with members of the legislature to discuss legislation related to state employment to include issues involving my current case. I understand that there are some documents pertaining to my case that are

currently under protective order. I am respectfully requesting approval for the release of these documents for review by the legislature. . . .

Appellant subsequently clarified that he sought to be able to disclose *all* of the materials covered by the Protective Order, i.e. “materials pertaining to application materials, examination materials, interview questions, benchmarks and reference checks” that were provided to him in response to his discovery requests.

The parties stipulated to the issuance of the Protective Order before the Respondent complied with Appellant’s discovery request. Appellant now seeks release from that stipulation to use the material for purposes other than this litigation.

Considerations involved in deciding whether to relieve a party from the obligations of a stipulation are generally the same in administrative proceedings as in judicial proceedings. MARTIN ET AL V. DOC, CASE NOS. 90-0080, 0083, 0084, 0088, 0104, 0116-PC-ER (PERS. COMM. 10/16/92). In MARTIN, the Commission went on to state:

. . . In NOVAK V. DER, 83-0104-PC (2/29/84), the Commission cited SCHMIDT V. SCHMIDT, 40 WIS. 2D 649, 654, 162 N.W.2D 618 (1968):

“The discretion of the trial court to relieve parties from stipulations when improvident or induced by fraud, misunderstanding or mistake or rendered inequitable by the development of a new situation, is a legal discretion to be exercised in the promotion of justice and equity, and there must be a plain case of fraud, misunderstanding or mistake to justify relief.”

The Appellant has not presented an adequate basis for being released from the Protective Order because there has been no showing of fraud, misunderstanding or mistake. It appears that Respondent relied upon the stipulated Order at the time it responded to Appellant’s discovery requests and supplied Appellant with the selection materials and that Respondent may have responded differently to the discovery requests had it known that Appellant would seek release from the stipulated Order. To exercise the Commission’s discretion by releasing Appellant from the Protective Order would not promote justice and equity. Under the circumstances, the Protective Order remains in effect and it continues to limit the Appellant’s use of the information described by the order.

In an electronic message dated April 14, 2009, Appellant wrote: “I also would like to know if ... both the respondent’s and appellant’s briefs and the digital recordings of the hearing fall within the protective order?” Briefs and recordings that contain information that is subject to the protective order may not be disclosed by Appellant for any purposes other than the purposes permitted in the protective order.

If the Appellant believes that he is able to craft his contacts with legislators (or other individuals) in a manner that is still consistent with the Protective Order, I suggest that any

questions in that regard be addressed in direct communication between the Appellant and counsel for Respondent. This procedure is consistent with the Respondent's electronic message of April 15, 2009, which indicated that "DOC would have to review each document which Mr. Sweeney requests that he be able to disclose to the legislature and determine if it would come under the protective order." If, after such a procedure, the parties are unable to resolve their differences, they may contact the examiner for assistance in that regard.

**ORDER**

Appellant's request for release from the Protective Order that was issued on July 9, 2008, is denied.

Dated at Madison, Wisconsin, this 21st day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner