

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**LARRY J. ROBINSON**, Complainant,

vs.

**MILWAUKEE PUBLIC SCHOOLS and MILWAUKEE  
TEACHERS EDUCATION ASSOCIATION**, Respondents.

Case 369  
No. 56811  
MP-3467

**Decision No. 29482-B**

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Appearances:

**Mr. Larry T. Robinson**, 9906 West Magnolia Street, Milwaukee, Wisconsin 53224, appearing on his own behalf.

**Attorney Donald L. Schriefer**, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Public Schools.

Perry, Lerner & Quindel, S.C., by **Attorney Richard Perry**, 823 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Teachers Education Association.

**ORDER REVERSING EXAMINER'S DISMISSAL OF COMPLAINT**

On February 3, 1999, Examiner Sharon A. Gallagher issued an Order Dismissing Complaint in the above matter. The Order confirmed the Examiner's granting of an oral motion to dismiss from Respondent Milwaukee Teachers Education Association at the conclusion of a January 21, 1999 hearing.

Complainant Robinson timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's Order pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties filed written argument in support of and opposition to the petition, the last of which was received April 6, 1999.

29482-B

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

The Examiner's Order Dismissing Complaint is reversed.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

I concur

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Milwaukee Public Schools

**MEMORANDUM ACCOMPANYING ORDER**  
**REVERSING EXAMINER'S DISMISSAL OF COMPLAINT**

In her Order Dismissing Complaint, the Examiner stated:

Larry J. Robinson having, on September 14, 1998, filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee Public Schools and Milwaukee Teachers Education Association had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 5 and 111.70(3)(b) of the Municipal Employment Relations Act by Milwaukee Public Schools' non-renewing Complainant's probationary teaching contract and the Milwaukee Teachers Education Association failing to fairly represent Complainant on his grievance regarding his non-renewal. Sharon A. Gallagher was appointed as Examiner on November 5, 1998. The case was initially scheduled for hearing on January 21, 1999, but the place was changed at the Complainant's request. Hearing was held on January 21, 1999. During the proceedings, Complainant threatened to leave the hearing twice in response to adverse rulings by the Examiner. The Examiner advised Complainant each time he threatened to leave that if he left the hearing before it concluded, his case would be subject to a motion to dismiss, and that Complainant would not have a right to refile regarding the same allegations if the case were dismissed. Thereafter, Complainant remained at the hearing and participated fully therein.

At the end of the day on January 21<sup>st</sup>, after four of Complainant's witnesses had been fully examined, and 14 exhibits were received into the record, Complainant chose to leave the hearing prior to its conclusion. Complainant chose to leave after the Examiner refused to require the Superintendent of MPS to appear to testify. Complainant had failed to properly subpoena the Superintendent and the Superintendent had no personal knowledge of the specifics of the case. (Other witnesses scheduled to testify had personal knowledge of the case.) Complainant also indicated he would not attend the next days of hearing (tentatively scheduled for March 29 through March 31, 1999), and after being again advised by the Examiner of the consequences of his actions, indicated that he knew that his case would be dismissed if he left the hearing prior to its conclusion. Respondents then moved to dismiss the complaint. The Examiner granted Respondents' motion based upon Complainant's abandonment of his action and his refusal to further prosecute his case, with full knowledge of the consequences of his actions.

## **POSITIONS OF THE PARTIES**

### **Complainant Robinson**

Complainant asserts the Commission should reverse the Examiner and allow him to continue to present his case against Respondents.

Complainant argues that the Examiner erred by: failing to allow him to subpoena the Superintendent of Schools; failing to sequester a witness; requiring Complainant to present evidence in a certain way; and otherwise acting in a manner which demonstrated her bias against Complainant.

### **Respondent MTEA**

Respondent MTEA argues that the Examiner's dismissal of the complaint should be affirmed.

Respondent MTEA contends that the Examiner made every effort to explain the nature of the WERC proceeding to Complainant. Had Complainant followed the Examiner's suggestions, Respondent MTEA asserts it is probable all of Complainant's evidence would have been received into the record.

Contrary to the Complainant's claims of bias, Respondent MTEA alleges the Examiner gave Complainant every opportunity to present his case despite Complainant's angry outbursts when the Examiner made an adverse evidentiary ruling. Respondent MTEA alleges the Complainant's conduct and refusal to proceed warranted dismissal of the complaint.

### **Respondent Board**

Respondent Board asserts the Examiner was amply justified in dismissing the complaint and urges the Commission to affirm her Order.

Respondent Board contends the Examiner showed patience and sensitivity to the difficulties that confront a pro se litigant. It argues that the Complainant responded with an unprecedented level of anger and outrageous conduct.

Respondent Board argues that the Examiner advised Complainant of his right to appeal adverse evidentiary rulings following issuance of a decision in the case. Respondent Board also notes that Complainant had been warned several times that if he chose to leave the hearing room, the complaint would be dismissed. When Complainant nonetheless elected to leave the hearing, Respondent Board argues dismissal of the complaint was appropriate.

**DISCUSSION**

At the conclusion of the first day of hearing, the parties and the Examiner were discussing the scheduling of additional days of hearing. The transcript indicates the following exchanges then occurred:

EXAMINER GALLAGHER: Back on the record. It looks like provisionally although Mr. Schriefer and I forgot our calendars today, it looks like the complainant has requested the end of March. And so we have fallen upon the 29<sup>th</sup>, 30<sup>th</sup>, and frankly, if we need it, maybe we should hold onto the 31<sup>st</sup>, I mean we really should, of March, you know. Because once we get done with Mr. Robinson's witnesses, obviously the union has to proceed with its case.

MR. ROBINSON: 29<sup>th</sup>, 30<sup>th</sup>.

EXAMINER GALLAGHER: And 31<sup>st</sup>. We will hold all those days. Now, I have to make sure that my calendar is clear, but I'm thinking that it probably is. And Mr. Schriefer also has to make sure his calendar is clear. We have how many witnesses left, are there 11?

MR. ROBINSON: I have to look.

MR. PERRY: The time also for the Monday.

EXAMINER GALLAGHER: Yes, the time of day.

MR. PERRY: Place we have to find out.

EXAMINER GALLAGHER: Yes, we need to –

MR. ROBINSON: 12.

EXAMINER GALLAGHER: Who are they?

MR. ROBINSON: Michelle Bialles. Why didn't Mr. Varville come?

MR. SCHRIEFER: Who?

EXAMINER GALLAGHER: I was just looking for a list of people. Yes, we're on the record.

MR. ROBINSON: I'm sorry.

EXAMINER GALLAGHER: Alan Brown is not going to come because I've already ruled that I don't believe that as superintendent he's going to be needed here.

MR. ROBINSON: I can't subpoena him?

EXAMINER GALLAGHER: You can subpoena him, but I'm not going to require him to come because I believe that it's clear after this day of testimony that basically all he did -

MR. ROBINSON: I can't subpoena him to come?

EXAMINER GALLAGHER: Well, you've subpoenaed him, but I'm not going to require him to come.

MR. ROBINSON: Why?

EXAMINER GALLAGHER: Because he is simply an administrative head of the entity. He probably has -

MR. ROBINSON: There is no use in us going on. There is no use in this proceeding.

EXAMINER GALLAGHER: Well, Mr. Robinson -

MR. ROBINSON: There is no use.

EXAMINER GALLAGHER: You knew this from the beginning. I told you.

MR. ROBINSON: I'll write the commission. I'm going to tell them that I need his testimony, and you won't let me.

EXAMINER GALLAGHER: Exactly why do you need his testimony? What can he tell us?

MR. ROBINSON: I'm not going to argue it any further. I'm going to just write. I'll get on my computer and write.

EXAMINER GALLAGHER: That's fine. And you're entitled to do that. But there is no interim appeal.

MR. ROBINSON: I'm not going to argue about it. I need his testimony, and I'm not going to settle for that.

EXAMINER GALLAGHER: In that case, I will –

MR. ROBINSON: You can do what you have to.

EXAMINER GALLAGHER: I will take –

MR. ROBINSON: Do what you have to.

EXAMINER GALLAGHER: I will take the affidavit of Mr. Brown into the record.

MR. ROBINSON: Do what you must. I'm not going to – I'm not going to argue with you, Ms. Gallagher. I'm not going to do it. I'm going to go home.

EXAMINER GALLAGHER: Are you going to appear?

MR. ROBINSON: Get on my computer, and I'm going to write.

EXAMINER GALLAGHER: Are you going to appear on the 29<sup>th</sup> of March?

MR. ROBINSON: I'm going to write my representative.

EXAMINER GALLAGHER: Are you going to appear –

MR. ROBINSON: I don't care who Mr. Brown is.

EXAMINER GALLAGHER: On the 29<sup>th</sup> of March?

MR. ROBINSON: I don't care who he is. I'm going to get home, go home and get on my computer, and I'm going to write. Mr. Brown isn't any better than anybody else.

EXAMINER GALLAGHER: Are you going to appear on March 29<sup>th</sup>, sir?

MR. ROBINSON: I'm going to write the commission.

EXAMINER GALLAGHER: Fine. I will now entertain a motion to dismiss. You cannot do this, sir.

MR. ROBINSON: Do what you want.

EXAMINER GALLAGHER: You have a right to appeal to the commission if I am wrong regarding the refusal to allow Mr. Brown to testify. You can appeal it, sir.

MR. ROBINSON: I did –

EXAMINER GALLAGHER: I am not the end.

MR. ROBINSON: I'm not going to argue.

EXAMINER GALLAGHER: You will lose your right to proceed in this case.

MR. ROBINSON: Let me lose it.

(Mr. Robinson leaves the room.)

MR. PERRY: At this time the MTEA moves to dismiss this case.

MR. SCHRIEFER: Board seconds that motion.

MR. PERRY: I would like to give a couple of reasons. The complainant it seems any time there is a ruling against him despite everybody's efforts to be solicitous and understanding about him being a pro se complainant, apparently just can't control himself.

I have been frightened all afternoon at some disadvantage because Mr. Sid Hatch who knows the case and I don't had to leave just to prevent I think a possible violence. But certainly he was going – the complainant was going to walk out. And this repeated behavior is really an abuse of this process and of these witnesses. I was hoping we could have a complete record because I think on the merits every witness he produced destroyed his case. Now, ours is a rather limited aspect of did Mr. Hatch do everything humanly possible to help.

And secondly, was there evidence of racism that could reasonably have been argued. I think if Mr. Robinson by his behavior, and it's every time. This is I think the third or fourth time, and the examiner has shown great patience. I think the record demonstrates that. But the parties, people in this room are aware of it. And still he simply refuses to cooperate with the process. I have a great deal of sympathy for him because I don't think he can control himself.



But nonetheless, I think at this point to put all of these people through what they would have to go through for two or three more days in light of his behavior and everybody's efforts to really meet his needs as far as putting in his case, I believe, and I'm stating this at some length because I think the record should show it, and this is our position, but at this point he's been warned that there would be a motion to dismiss. It's not as though this is a surprise for him, but he said go ahead and do it and out he went.

As I say, this is the third or fourth time, I may have lost track now, that he's had that same behavior. For all of these reasons, I believe this case should be dismissed.

EXAMINER GALLAGHER: Mr. Schriefer, do you have a position?

MR. SCHRIEFER: Yeah, I also move to dismiss. I don't think I have ever been in a hearing where I feel personal fear at asking any question that goes to the merits of the complainant's case owing to a concern about the complainant leaping up and screaming and yelling and gesticulating in a very violent, to me, very threatening tone. I think witnesses have been threatened today and have been intimidated.

I certainly know that Ms. Doss, the assistant principal here with me and Ms. Dansby, the principal, are concerned. I'm concerned. This is unique in my experience as a lawyer. It is - I can't - also can't remember whether it's the third or fourth time. I would like just to go on record stating that when I objected to his conduct earlier, he retorted that my voice was raised.

Well, yeah, my voice was somewhat louder than usual, but I wasn't standing, and I wasn't hollering, and I don't think there was any tone of threat or anything menacing about my objection. My objection was based upon a concern for the witnesses. And quite honestly, me, Mr. Hatch, Mr. Perry, you yourself, everyone in the room.

So I agree with everything that Mr. Perry has said. It's been a very disturbing day I think for my witnesses and myself. And I hope that we don't have to go through this again.

EXAMINER GALLAGHER: Let me just say that I have represented discharged people many times, and I know how upset they get. I know because it's a very difficult thing to face that. However, Mr. Robinson's conduct today was far beyond anything I have ever seen in any court in which I appeared as

counsel on behalf of the complainant or in which I have been the arbitrator or the hearing examiner. I have to say that I believe in my heart that I have bent over backwards to accommodate him, to assist him, to help him accept the process.

And I honestly absent my granting his request to have the superintendent of schools here and every other request he would make, I imagine that we would have these demonstrations in this room or whatever room we're in repeated.

Let me also say for this record that I personally do not believe that the superintendent of schools could possibly have anything of importance to say about this case. I believe that such a person is the kind of functionary who simply deals with the case on an administrative basis and is the one who at the end of the trail signs the documents and is responsible for the overall running of the schools but I'm sure never observed Mr. Robinson, I'm sure never mentored him, I'm sure as far as personal contact with Mr. Robinson, I would be surprised if there was any.

However, be that as it may –

MR. PERRY: Could I interject one point on that. Mr. Schriefer was present and I was not, but under the process in addition to what you mentioned about the administrative role of the superintendent which you accurately set forth, under the process, the superintendent while present sometimes at these board hearings is not permitted to go into deliberations where the board independently makes a decision. And Mr. Schriefer may recall whether or not, but I'm sure he didn't violate that because it happened once and the whole case was thrown out when the superintendent inadvertently wandered into the board deliberations after the hearing.

So if it was in accordance with the regular process, even at that point, he had no role in terms of the deliberations.

MR. SCHRIEFER: Can I just add the superintendent was not even present the night of the hearing. He did not attend the hearing.

EXAMINER GALLAGHER: Okay. All right. So we have a motion to dismiss. I do not take this lightly. However, it's happened to me before. And I have dismissed a case, and I'm sure that, you know – for failure to prosecute. I'm sure that as that case has been appealed, this one will be also. I am confident that I have conducted myself appropriately in this hearing and applied all of my 22 years of legal experience to assist me in trying to deal properly with this case and fairly with Mr. Robinson.

However, given that, I have to say that if he does not show up or would not show up, I guess he has said he will not show up on March 29<sup>th</sup> and that he will avail himself of whatever letter writing campaign he chooses to the commission. Given that, I'm going to grant the motion to dismiss. And obviously he will have the right to appeal that. And I'm sure that he will avail himself of that.

I must say that just as a side light, I never personally felt frightened for myself. However, I found Mr. Robinson's actions to be quite shocking and to be – to a normal person would be threatening. He paced the room, he shouted, he gesticulated as Mr. Schriefer said. He made threats. He badgered witnesses. I'm not a person very susceptible to that kind of tactic, but I can understand the employer's point of view and also the union's point of view on that point.

I also have to say that I would thank the union representative for leaving the room at the point at which it appeared that I could not proceed to keep control of the hearing if he, Mr. Hatch, were at all in any way possible looking at Mr. Robinson. So this has been an extraordinary day, one that I hope will never be repeated in my career. And I'm granting the motion to dismiss. You will get the paperwork. If there is nothing further, we are adjourned.

As is clear from the foregoing, the first day of hearing had been a difficult and emotional one for all concerned. However, by the time the first day was completed, the parties and the Examiner were on course to schedule additional days of hearing.

As is also clear from the foregoing, the first day of hearing concluded with an argument between the Examiner and Complainant over the Complainant's entitlement to compel Superintendent of Schools Brown to testify. This argument ended when Complainant left the hearing room after indicating that he would be appealing the Examiner's ruling to the Commission.

The Examiner's Order Dismissing Complaint indicates her view that:

Complainant also indicated he would not attend the next days of hearing . . .

and that she granted the motion to dismiss:

. . . based upon Complainant's abandonment of his action and his refusal to further prosecute his case . . .

The hearing transcript does not support the Examiner's view that Complainant indicated he would not be attending additional days of hearing. Complainant did not answer the Examiner's question as to whether he would be attending additional days of hearing. Instead,

he indicated he would be filing an appeal with the Commission. Thus, the factual premise underlying the Examiner's action is not present and therefore her Order must be reversed.

We would further note that even if the Complainant had indicated he would not be attending additional days of hearing, dismissal of the complaint would not have been appropriate. Under such circumstances, we would expect an examiner to issue a Notice of Hearing for the dates agreed upon by the parties and to appear prepared for additional hearing on the first such additional hearing date. If a party then failed to appear, the examiner should then take whatever action is appropriate under our holding in PRAIRIE HOME CEMETERY, DEC. NO. 22316-B (WERC, 10/85) and ERC 10.13 (4) which provides:

ERC 10.13 hearing, transcripts.

. . .

(4) EFFECT OF FAILURE TO APPEAR. Any party failing to appear and participate after due notice shall be deemed to have waived the rights set forth in sub. (2), to admit the accuracy of the uncontradicted evidence adduced by the parties present, and shall, unless good cause be shown, be precluded thereafter from introducing any evidence controverting any contentions or allegations. The commission or individual determining the matter may rely on the record as made.

In closing, we are satisfied from our review of the record that Superintendent Brown does have relevant testimony to offer in the matter and, if properly served with a subpoena, is therefore obligated to attend the hearing and testify.

Given all of the foregoing, we have reversed the Examiner. Under all the circumstances, we further conclude the matter will be assigned to another Examiner and that the hearing will begin anew.

Dated at Madison, Wisconsin this 7th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

Milwaukee Public Schools

CONCURRING OPINION OF A. HENRY HEMPE

The majority has characterized the first day of hearing in this matter as “difficult.” I quite agree. Participating in a hearing in which one of the participants is appearing pro se is a challenging, usually unwelcome, task for most experienced attorneys, for it places special burdens on them in their role as “officers of the court.”

It is no less daunting for the examiner conducting the hearing.

On the one hand, the examiner has the obligation of running an orderly hearing, keeping the parties focused on the issue, and following commonly understood rules of evidence and testimony.

On the other hand, the examiner must also protect each side from unfair attack by the others, making sure each side understands the rules of evidence and procedure to be followed. The integrity of the process requires the examiner to insure a level playing field, even though one of the parties has chosen not to be represented by counsel and appears to be thoroughly unfamiliar with evidentiary and procedural rules.

I believe the examiner attempted to maintain this balance in the instant matter. It is also apparent that the Complainant was experiencing mounting frustrations as he felt himself hamstrung by evidentiary and procedural rules with which he was clearly unfamiliar.

Indeed, in view of allegations of intimidation made by counsel for the parties opposing Complainant, it is no small irony that the Complainant appears to have been genuinely intimidated by frequent, sometimes technical objections of opposing counsel to the questions Complainant put to the witnesses he called. The examiner sustained most of these objections, but it is not clear that the reasons for the rulings were always adequately explained to the Complainant. As the hearing wore on, Complainant’s consistent response to objections made to his questions was simply to withdraw the question.

Doubtlessly, the Complainant was also frustrated by the hearing examiner’s apparent unwillingness to allow Complainant sufficient latitude to call witnesses out of order, because that would have resulted in taking testimony on the Employer’s derivative conduct before listening to the testimony focused on the Union’s responsibilities. This, of course, is not the normal order of proof in a case that centers on Complainant’s contention that the Union breached its duty of fair representation.

Not surprisingly, the first day of hearing ended with a sharp disagreement between the Examiner and the Complainant. As the majority recounts, the dispute centered on the Complainant's insistence that Superintendent Brown was an essential witness and the contrary view of the Examiner. The disagreement culminated in Complainant leaving the hearing room as he expressed his intention to write the Commission.

The Examiner's Order Dismissing Complaint indicates her perception that the Complainant did not intend to attend or participate in any further hearing dates. Based on my reading of the hearing transcript, however, I do not share the hearing examiner's apparent certainty on this point. However understandable her perception may have been under the stress of the circumstances then and there existing, I believe a remedy as drastic as dismissal of an action should be supported by more unequivocal evidence than the record reveals in the present case.

This is not to say that hearing examiners (or counsel) should be required to put up with unruly, contumacious, or intimidating conduct of a party appearing pro se. The rules governing an orderly hearing procedure do not change merely because one of the parties chooses not to be represented by counsel. If the conduct of a party electing to proceed pro se becomes so disorderly, threatening, or disrespectful as to cause the hearing to become unmanageable, I believe a dismissal is warranted. See DANIEL B. SMITH V. MILWAUKEE PUBLIC SCHOOLS, ET AL, DEC. NO. 28336-C (GRECO, 10/96)

However, the transcript of the hearing in this matter does not reflect this level of unacceptable conduct. What seems more apparent is that the Complainant's unfamiliarity with rules of evidence and procedure had led him to conclude that the playing field was tilted towards the other side, and that he intended to write the Commission about this conclusion. But whether or not he intended to appear for the continued hearing date can at this point be only a matter for speculation.

Thus I concur with the majority on this issue.

Consistent with the dicta added by the majority, I also believe that even a clearly expressed intention by the Complainant to participate no further in the hearing of this matter by itself is not a sufficient basis for a dismissal. But contrary to the remainder of the majority's dicta, I do not believe that under these circumstances the examiner must issue another Notice of Hearing for the date to which the case is continued and the remaining parties be put to the time and expense of actually appearing. Nor do I believe the PRAIRIE HOME CEMETERY case DEC. No. 22316 (WERC, 10/85) cited by the majority offers support for its view. PRAIRIE HOME CEMETERY addresses an *unexplained* hearing absence by a party.

In my view, a clearly expressed intention by the Complainant to participate no further in the hearing of this case may be deemed a waiver or surrender of his right to proceed further at the hearing level. Thus, I believe on motion of all of the remaining parties the examiner may decide the case on the record made to that point.

Finally, contrary to the view of the examiner, I agree with my colleagues that School Superintendent Brown should be required to testify if properly served with a subpoena.

While a subpoena may be quashed if unreasonable or oppressive, 1/ nothing in the record before us suggests that School Superintendent Brown's compliance with a properly served subpoena in this matter would be either unreasonable or oppressive. Indeed, under the circumstances set forth in the record it appears Superintendent Brown's testimony could be reasonably probative and thus admissible as set forth in Sec. 227.45, Stats.

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*1/ Sec. 805.07(3); also see STATE V. HORN, 126 WIS.2D 447, 456, 393 N.W. 2D 544 (1985).*

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Dated at Madison, Wisconsin this 7<sup>th</sup> day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner