STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER A. PESHUT, Complainant,

vs.

UNIVERSITY OF WISCONSIN MILWAUKEE (UWM); NANCY L. ZIMPHER, CHANCELLOR; ERIKA SANDER, ACTING DIRECTOR OF HUMAN RESOURCES; SHANNON BRADBURY, LABOR RELATIONS MANAGER; WILLIAM R. RAYBURN, DEAN OF THE GRADUATE SCHOOL; MARJORIE BJORNSTAD, ASSISTANT DEAN OF THE GRADUATE SCHOOL; SUSAN BURGESS, DIRECTOR OF THE CENTER FOR WOMEN'S STUDIES, Respondents.

Case 465
No. 56793
PP(S)-295

Decision No. 29775-E

JENNIFER A. PESHUT, Complainant,

vs.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION (WSEU); MARTIN BEIL, EXECUTIVE DIRECTOR, KARL HACKER, ASSISTANT DIRECTOR, JANA WEAVER, FIELD REPRESENTATIVE, Respondents.

Case 466
No. 56821
PP(S)-296

Decision No. 29776-E

Appearances:

Ms. Jennifer A. Peshut, P.O. Box 11116, Milwaukee, Wisconsin 53211, appearing on her own behalf.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett,** Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Union Respondents.

Attorney Mark J. Wild, Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of UWM Respondents.

ORDER DENYING MOTIONS

On April 11, 2001, I issued DEC. NOS. 29775-C & 29776-C. The Order contained in the decisions reads thus:

> Complainant's March 20, 2001 amendment to Case 465, No. 56793, PP(S)-295 is denied. The evidentiary portion of the hearing in the consolidated cases noted above is closed. The parties shall, as soon as feasible, state their positions on an appropriate briefing schedule for the submission of closing arguments in the consolidated cases noted above.

On April 26, 2001, Complainant filed a petition for the review of DEC. NOS. 29775-C & 29776-C. On May 2, 2001, Complainant filed a various motions. I issued a letter to the parties dated May 4, 2001, which states:

> On May 2, 2001, Ms. Peshut submitted two sets of documents. One of the documents is headed as "Motions Before Close of Hearing", and poses eight separately numbered points. The second is headed "Motion to Clarify Order on Briefing and Closing Arguments." Please advise me if any of you wish to submit any argument on these documents, and, if so, whether you wish to submit your argument prior to the submission of your post-hearing argument on the merits of the above noted complaints.

Union and UWM Respondents filed a response to this letter by May 21, 2001. In a letter to Complainant dated May 29, 2001, I stated:

> The Union and the State submitted responses to my letter of May 4, 2001. If you wish to enter any argument on the point, please do so postmarked not later than June 8, 2001.

On June 8, 2001, in DECS. NO. 29775-D & 29776-D, the Commission denied Complainant's petition for review. I received no response to my letter of May 29, 2001.

ORDER

The motions filed by Complainant on May 2, 2001 are denied. The parties shall, as soon as feasible, state their positions on an appropriate schedule for the submission of closing arguments in the consolidated cases noted above.

Dated at Madison, Wisconsin, this 2nd day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS

The May 2, 2001 Motions

The Motion to Clarify Order on Briefing and Closing Arguments states that "the order is unclear because it does not distinguish closing arguments from briefing." Citing ERC 20.19, Complainant contends that she "does not waive oral argument or presentation of final briefs." Citing ERC 22.05, Complainant "requests to file a brief and a statement of proposed findings and conclusions."

The "Motions Before Close of Hearing" read thus:

1. Make all correspondence part of the record, because the examiner has treated letters and other correspondence as motions whether or not they were designated as motions.

2. The examiner shall rule on all outstanding and pending motions.

3. Strike from the record the testimony of Leann White given November 16, 2000 appearing on pages 687 through 709 of the transcript, because the testimony is immaterial.

4. Strike from the record exhibits 130-168 and the testimony of Susan Burgess at the December 8, 2000 hearing (Transcript 761-892), because Ms. Peshut was not allowed to offer rebuttal evidence and testimony.

5. Strike from the record exhibits 131-134, 138, 143, 145, 146, 150-152, 154, 159-162, and 168 because they contain substantial hearsay and therefore are inadmissible under s. 908.02 Wis. Stats.

6. Strike from the record Susan Burgess' December 8, 2000 testimony (Transcript 761-892) as it relates to conversations with other persons whom the examiner did not allow to testify and therefore is inadmissible hearsay under s. 908.02 Wis. Stats.

7. Strike from the record exhibit 131 as it was manufactured after July 14, 2000.

8. Sever cases 465 and 466 for purposes of the examiner's final decision.

Respondent's Reply to the Motions

In a letter filed with the Commission on May 18, 2001, counsel for Union Respondents stated: "I have conferred with Mr. Wild as to the State's response to those motions, and, on behalf of the WSEU, I concur with and adopt the State's position and will not duplicate those efforts here."

UWM Respondents filed their statement of position with the Commission on May 21, 2001. In that letter, UWM Respondents argue that ERC 20.19 and 22.05 do not give a party "a right to file a brief and a right to make oral argument." Rather, they grant the right to a "brief or oral argument". UWM Respondents conclude by noting "no objection to Ms. Peshut's request to file a statement of proposed findings and conclusions."

UWM Respondents argue that none of Complainant's "Motions Before Close of Hearing" have merit. The first ignores that the evidentiary record is complete, and any correspondence not admitted as an exhibit at hearing has no place in the evidentiary record.

The second motion fails to specify what motions remain pending, and UWM Respondents believe that "the examiner has already ruled on all motions that were outstanding and pending prior to April 11, 2001."

The third, sixth and seventh motions "should have been made at the hearing and (are) therefore untimely." The fourth seeks only to eliminate "all evidence she deems damaging to her case." Since the exhibits have been admitted into evidence, the motion should be denied. Similar reasons govern the fifth motion. UWM Respondents add that "administrative hearings are less formal than court proceedings and the examiner may accord appropriate weight to evidence received into the record." The eighth motion ignores that "the Commission consolidated these two cases" and that Complainant "has lost any opportunity to reverse this decision."

DISCUSSION

Complainant's motion to clarify turns on ERC 20.19 and ERC 22.05. ERC 20.19 states:

> A hearing shall be deemed closed when the evidence is closed and when any period fixed for filing of briefs, presentation of oral argument, if any, or both has expired. The hearing may be re-opened on good cause shown.

ERC 22.05 states:

> Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, at such time as fixed by the commission member or examiner conducting the hearing, who may direct the filing of briefs when he or she deems such filing warranted by the nature of the proceeding or particular issues therein.

The motion to clarify asserts a non-waivable right of Complainant to oral argument. This focuses on ERC 20.19, since ERC 22.05 governs the form of written post-hearing argument.

Even assuming a litigating party, rather than an examiner under ERC 20.18, can dictate the need for or timing of oral argument, ERC 20.19 cannot be persuasively read to grant Complainant the right she asserts. ERC 20.19 places an "if any" reference following "oral argument." This reference must be given meaning, and that meaning must be restricted to "oral argument" in this setting. ERC 22.05 grants a right to written post-hearing argument, and addresses its form and timing. The "if any" reference underscores that oral argument at the close of a hearing cannot be taken as a right. The provisions of Subsections (6) and (7) of ERC 20.18 underscore this by granting examiners the authority to "regulate the . . . course of the hearing" and to "dispose of procedural requests or other similar matters." It is, in any event, not clear what two forms of closing argument contribute to the close a hearing beyond repetition.

Thus, ERC 20.19 does not grant Complainant the unilateral right to insist upon oral argument. Nor is there any persuasive reason to afford it here. Oral argument is most efficient when offered at the close of a hearing at which all parties attend. That cannot be the case here without overturning prior rulings, which may well be the purpose of Complainant's motion. In any event, oral argument in the procedural posture of this complaint affords nothing beyond further delay, and the Order below denies the motion thus denying the request for oral argument.

ERC 22.05 governs written post-hearing argument. That the argument it covers is written is evident from the use of the terms "file" and "brief", and by the reference to "proposed findings and conclusions." As Complainant points out, this is a right, since the rule states that "(a)ny party shall be entitled" to enter written post-hearing argument if a request is made "before the close of hearing." The "or both" reference arguably leaves the

combination of forms of written argument to the examiner rather than to a litigant. This point is, however, of no significance here. Respondents have stated their willingness to permit Complainant to file a brief and/or proposed findings. I have no objection to the filing of either or both. The parties need only consider the form or forms as they discuss when they propose to file their post-hearing argument.

ERC 22.05 states the "commission member or examiner conducting the hearing" should fix the time for filing of written argument. As stated in DECS. NO. 29775-C & 29776-C, "I afford the parties a chance to stipulate the briefing schedule . . . (i)n any case in which I serve as Examiner." That remains true, as reflected in the Order.

The remaining Motions filed by Complainant do not require extensive discussion. They concern matters of form more than substance. Chapter 227, Stats., governs what constitutes the record. Sec. 227.44, Stats., may be of particular note to Complainant. It is not apparent from Complainant's motion what she feels has or has not been appropriately included in the record. Any assertion of error on my part should be included with Complainant's closing argument.

The second motion concerns, without specifying, unanswered motions. I am aware of none. Any assertion of error on my part should be included with Complainant's closing argument.

The third, fourth, fifth, sixth and seventh motions concern evidentiary rulings already made. Any assertion of error on my part should be included with Complainant's closing argument. It can be noted a finding of fact based on an erroneous ruling is arguably reversible error. Complainant may wish to highlight such error(s) in her brief if she files a brief. If Complainant chooses to file proposed findings, she should base them on evidence not including the evidence she challenges.

The final motion concerns severing Cases 465 and 466 for purposes of the final decision. IN DECS. NO. 29775 & 29776 (WERC, 11/99) at 16, the Commission stated: "Whether separate decisions should issue can be left to the examiner." The parties should feel free to specify, in their closing arguments, whether and why my decision(s) in the consolidated complaints should be separate.

Dated at Madison, Wisconsin, this 2nd day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner
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