

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GEORGE MUDROVICH, Complainant,

vs.

D.C. EVEREST AREA SCHOOL DISTRICT, Respondent.

Case 53
No. 57582
MP-3522

Decision No. 29946-B

Appearances:

Mr. George A. Mudrovich, 826½ Steuben Street, Wausau, Wisconsin 54403, appearing on his own behalf.

Ruder, Ware & Michler, S.C., by **Attorney Ronald J. Rutlin**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Respondent.

**ORDER DENYING COMPLAINANT'S MOTION TO DISQUALIFY
ATTORNEYS RONALD RUTLIN, CARI WESTERHOF AND
DEAN DIETRICH TO ACT AS ADVOCATES FOR RESPONDENT
FOR THE INSTANT PROHIBITIVE (SIC) PRACTICE CASE**

On May 26, 1999, Complainant filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the Respondent had violated Secs. 111.70(3)(a)1 and 3, Stats., by the administration recommending Complainant's layoff and the School Board members approving the same and rejecting Complainant's application for full-time employment, in part, due to Complainant's protected, concerted activity. On August 1, 2000, Coleen A. Burns was appointed by the Commission to act as Examiner in this case. On August 1, 2000, Complainant filed a Motion to Disqualify Attorneys Ronald Rutlin,

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Cari Westerhoff and Dean Dietrich to Act as Advocates for Respondent for the Instant Prohibitive (sic) Practice Case. On August 8, 2000, Complainant filed an Amendment to this Motion. On August 28, 2000, Respondent filed its Reply to Complainant's Motion to Disqualify Attorneys Ronald J. Rutlin, Cari L. Westerhof and Dean R. Dietrich to Act as Advocates for Respondent for the Instant Prohibited Practice Case. Having considered the argument of the parties and the record as a whole, the Examiner makes and issues the following

ORDER

Complainant's Motion to Disqualify Attorneys Ronald Rutlin, Cari Westerhof and Dean Dietrich to Act as Advocates for Respondent for the Instant Prohibitive (sic) Practice Case is denied.

Dated at Madison, Wisconsin, this 31st day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

D.C. EVEREST SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER DENYING COMPLAINANT'S MOTION TO DISQUALIFY
ATTORNEYS RONALD RUTLIN, CARI WESTERHOF AND
DEAN DIETRICH TO ACT AS ADVOCATES FOR RESPONDENT
FOR THE INSTANT PROHIBITIVE (SIC) PRACTICE CASE

On August 1, 2000, Complainant filed a Motion to Disqualify Attorneys Ronald Rutlin, Cari Westerhof and Dean Dietrich to Act as Advocates for Respondent for the Instant Prohibitive (sic) Practice Complaint. On August 8, 2000, Complainant filed an Amendment to this Motion. On August 28, 2000, Respondent filed its Reply to Complainant's Motion to Disqualify Attorneys Ronald J. Rutlin, Cari L. Westerhof and Dean R. Dietrich to Act as Advocates for Respondent for the Instant Prohibited Practice Case and an Affidavit of Ronald J. Rutlin.

In arguing that the Examiner should disqualify the three named attorneys, Complainant relies upon SCR 20:3.7 of the rules of Professional Conduct for Attorneys. In CITY OF KENOSHA, DEC. NO. 29715-A (1/00), Examiner Nielsen was confronted with a Motion to disqualify a Respondent's counsel. This Examiner agrees with the following statements of Examiner Nielsen:

. . . The threshold question here is whether the Examiner has authority to rule on the conflict question. The Examiner concludes that he does have such authority, not as a matter of interpreting and enforcing the Supreme Court's Rules, but as a matter of insuring that the parties receive basic due process of law.

The rule of Professional Conduct for Attorneys relied upon by Complainant states as follows:

SCR 20:3.7 Lawyer as witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client

. . .

The Comment accompanying SCR 20:3.7 recognizes that an opposing party has a proper objection where the combination of roles may prejudice that party's rights in the litigation. The Comment further recognizes that the basis for this objection is that a witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. Thus, it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

As Respondent argues, a jury may have difficulty in separating the statements of an advocate-witness, but that it is unlikely that a judge, or in this case an Examiner, would be confused by the dual appearance as advocate and witness. Thus, to permit a Respondent advocate-witness to testify in this proceeding would have little, if any, impact upon the due process right of Complainant that is protected by SCR 20:3.7.

Complainant asserts that he intends to call all three of the above-named attorneys as witnesses during the hearing and argues that none of the exceptions set forth in SCR 20:3.7 apply. Inasmuch as Attorney Dean Dietrich and Attorney Cari Westerhof do not represent Respondent in this matter, SCR 20:3.7 is not applicable to these two Attorneys.

The Affidavit of Attorney Ronald J. Rutlin accompanying Respondent's Reply to Complainant's Motion states that:

2. . . . he has represented the D.C. Everest Area School District ("District") for over twenty-three (23) years and has represented the District in defending the District regarding a grievance filed by George A. Mudrovich ("Mudrovich") challenging his layoff by the District which resulted in a five (5) day hearing before Arbitrator Raymond McAlpin, and that he has also represented the District in other claims made by Mudrovich against the District and related to the District's decision to lay-off Mudrovich, including a claim of discrimination Mudrovich filed with the Equal Rights Division of the Wisconsin Department of Workforce Development
3. That he is intimately familiar with the numerous details involved in the instant litigation, and that no other attorney within the firm of Ruder, Ware & Michler has the same intimate knowledge of the details involved in this case.
4. That disqualifying the undersigned would work an unreasonable hardship on the District due to his extended involvement and knowledge of the case.

5. That his disqualification would create an unreasonable financial hardship on the District as the result of the need to familiarize new counsel with all the details, background, and facts involved in this case.

The Examiner is persuaded that to disqualify Attorney Ronald J. Rutlin from acting as counsel for Respondent in this proceeding would work a substantial hardship on the Respondent. Thus, assuming arguendo that Attorney Rutlin is likely to be a necessary witness in this proceeding, Attorney Rutlin's advocacy falls within one of the exceptions stated in SCR 20:3.7.

More importantly, however, Respondent has a due process right to be represented by Counsel of its own choosing. The disqualification of Attorney Rutlin would have a substantial adverse impact upon this due process right of Respondent without providing any significant protection to Complainant's asserted due process right.

Complainant's Motion to Disqualify Attorneys Ronald Rutlin, Cari Westerhoff and Dean Dietrich to Act as Advocates for Respondent for the Instant Prohibitive (sic) Practice Case is denied.

Dated at Madison, Wisconsin, this 31st day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner