

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEENAH JOINT SCHOOL DISTRICT, Complainant,

v.

NEENAH EDUCATIONAL SUPPORT STAFF ASSOCIATION, Respondent.

Case 16
No. 68265
MP-4451

Decision No. 32726

**NEENAH EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION**, Complainant,

v.

NEENAH JOINT SCHOOL DISTRICT, Respondent.

Case 18
No. 68725
MP-4487

Decision No. 32727

Appearances:

James R. Macy, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the Neenah Joint School District.

Jina Jonen, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Neenah Educational Support Personnel Association.

Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, appearing on behalf of the Neenah Educational Support Personnel Association.

No. 32726
No. 32727

**ORDER DENYING MOTIONS TO RECUSE,
CONSOLIDATE AND DEFER**

On September 4, 2008, the Neenah Joint School District filed a complaint with the Wisconsin Employment Relations Commission alleging that the Neenah Educational Support Staff (sic) Association had committed prohibited practices within the meaning of Sec. 111.70 (3)(b)3, Stats. by failing to make itself available for investigation of the District's interest arbitration petition and failing to provide the District with a preliminary final offer. The complaint was assigned to Marshall Gratz of the Commission's staff for conciliation.

On March 16, 2009, the Neenah Educational Support Personnel Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Neenah Joint School District had committed a prohibited practice within the meaning of Sec. 111.70 (3)(a)4, Stats. by failing to maintain the status quo following expiration of a collective bargaining agreement.

On March 24, 2009, the District moved that the two complaints be consolidated. On March 26, 2009, the District filed an alternative motion asking that the Association's March 16 complaint be deferred to grievance arbitration.

The Association opposed both motions and filed written argument in support of said opposition. The record was closed on April 7, 2009 - the deadline for receipt of any additional argument from the District.

On April 8, 2009, Commissioners Neumann, Gordon and Bauman made disclosures to the parties. By letters dated April 9, 2009, the District asked all three Commissioners to recuse themselves based on the disclosed information. During an April 13, 2009 Commission meeting, each Commissioner elected to participate as a decision-maker.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. The recusal motion is denied.
2. The motion to consolidate is denied.

3. The motion to defer is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

NEENAH SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING ORDER DENYING
MOTIONS TO RECUSE, CONSOLIDATE AND DEFER**

The District's Motion to Recuse

The District asked all Commissioners to recuse themselves based on disclosures¹ made prior to the commencement of the Commission's deliberation on this matter. The District asserted that recusal was appropriate in each instance to "avoid a conflict of interest and eliminate even the appearance of bias in this matter."

¹ Commissioner Neumann's disclosure stated:

I am providing the following standard disclosure in all matters for Commission decision in which WEAC or one of its affiliates is a party.

I was employed by WEAC as staff counsel from approximately June 1977 to approximately March 1982. I am providing this information in the event it may prompt either party to initiate further inquiry and also to dispel any negative perception that might be engendered if I had failed to disclose. However, I do not believe that my WEAC employment, which ended more than 26 years ago, affects my ability to consider and decide the captioned matter impartially and therefore I do not intend to recuse myself.

If you have questions or concerns, please contact WERC General Counsel Peter Davis (telephone: 266-2993; e-mail: peter.davis@werc.state.wi.us) before 11:00 a.m., April 13, 2009.

Commissioner Gordon's disclosure stated:

As parties to the above-captioned matter which will be decided by the Commission, you may have an interest in knowing that in one or more previous campaigns for the Wisconsin State Legislature I have been endorsed by and received campaign contributions from WEAC, PAC and other WEAC affiliated UniServs and organizations, as well as from some individuals employed thereby. This does not affect my view or opinions concerning the pending case. I am making this disclosure to afford any party the opportunity to offer their comments.

If you wish to make any comments regarding this disclosure, they must be received before 11:00 a.m., Monday, April 13, 2009.

Commissioner Bauman's disclosure stated:

As parties to the above-captioned matter which will be decided by the Commission, you may have an interest in knowing that I was a member of the WEAC Board of Directors for a number of years, approximately 1975 to 1978. . .

These relationships (sic) do not bear on my ability to render an impartial decision and I make this disclosure purely for your information. Please contact me by 11:00 a.m., April 13, 2009 if you have any questions.

As reflected in Sec. 227.46(6), Stats.,² a minimal rudiment of due process is a fair and impartial decision-maker. *GUTHRIE V. WERC*, 111 Wis. 2D 447, 454 (1983). Due process can be violated not only when there is bias or unfairness in fact, but also when the risk of bias is impermissibly high. *GUTHRIE, supra.*; *STATE EX. REL. DELUCA V. COMMON COUNCIL*, 72 Wis. 2D. 672, 684 (1976); *DEBAKER V. SHAH*, 194 Wis. 2D. 104 (1995).

However, there is a presumption of honesty and integrity on the part of administrative adjudicators. *GUTHRIE, supra.* at 455; *DELUCA, supra.* at 690. In order to overcome this presumption, the party alleging a denial of due process must demonstrate that, under a realistic appraisal of psychological tendencies and human weakness, there is an impermissibly high risk of bias. *DELUCA*, at 684.

To the extent the District is asserting actual bias as the basis for its recusal request, we reject same. As reflected by the content of our disclosure letters, we are satisfied that we are in fact impartial decision-makers. Indeed, if we felt otherwise, we would simply have not participated in this case and would not have made any pre-participation disclosure.

As to the question of appearance of bias/impermissibly high risk of bias, we look first at the question of whether Commissioner Gordon's receipt of campaign contributions/endorsements from entities related to a party in the litigation are sufficient to create an impermissibly risk of bias. We conclude they are not. In reaching this conclusion, we draw substantial guidance from the Wisconsin Judicial Conduct Advisory Committee Opinion 03-1 (March 22, 2004) which states in pertinent part:

. . . [T]he mere fact of prior support for, or opposition to, a judge's election does not necessarily rise to the level of an appearance of impropriety. Both the public, and knowledgeable persons within the judicial system, are fully aware of, and likely comfortable with, the fact that people will support an individual for public office with various levels of assistance, monetary support, or endorsements. This fact, in and of itself, does not create so close or special a relationship as to require automatic recusal.

The nature and involvement of support, however, can rise to such a level as to require recusal. The judge must always be conscious of the provisions of SCR 60.04(4) and alert to any situations where the judge's knowledge of

² Section 227.46(6), Stats., provides:

(6) The functions of persons presiding at a hearing of participating in proposed or final decisions shall be performed in an impartial manner. A hearing examiner or agency official may at any time disqualify himself or herself. In class 2 and 3 proceedings, on the filing of good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or official, the agency or hearing examiner shall determine the matter as part of the record and decision in the case.

particular facts, circumstances, or personal/professional relationships would reasonably call the judge's impartiality into question. In this analysis, the judge should take into consideration those same factors set forth in Issue I, above ["Recusal is only required for a reasonable period of time after the cessation of the campaign. . .The length of time will vary and must be examined, and determined on a case-by-case basis."] If the judge is aware of such facts or circumstances, the judge should, of course, recuse himself or herself from the specific proceeding.

As evidenced by Committee's Opinion, the level of support received and the time lapse between the receipt and the recusal request are both relevant considerations. Here, the District did not ask for either the level of support (we note that the campaign contributions in question are a matter of public record) or when the contributions/endorsements were received. We are nonetheless satisfied that the level of campaign contributions/endorsements and the timing of receipt (prior to Commissioner Gordon's joining the Commission in 2003) fall far short of creating a sufficient appearance of bias/impermissibly high risk of bias so as to warrant recusal. This conclusion is consistent with the decisions of Commissioner Gordon and Commissioner Bauman not to recuse themselves in CITY OF WAUSAU, DEC. NO. 20916-J (WERC, 9/07) which was affirmed by Circuit Court Judge Patrick J. Madden (CITY OF WAUSAU V. WERC, Case No. 07CV1194(9/08) who stated:

The Court further finds that the Commission did not commit a material error in procedure affecting the fairness of the proceedings where two of the three commissioners participating in the decision had been endorsed by and had received campaign contributions from AFSCME.

We next turn to the question of whether Commissioner Bauman's membership on the WEAC Board of Directors from 1975 to 1978 creates a sufficient appearance of bias/impermissibly high risk of bias so as to warrant recusal. We conclude it does not. Such a relationship 30 years ago falls far short of that standard. We also note that although WEAC is providing legal representation in this matter, the party in this litigation is the Neenah Educational Support Personnel Association.

Lastly, we consider whether Commissioner Neumann's employment as a WEAC lawyer from 1977 to 1982 creates a sufficient appearance of bias/impermissibly high risk of bias so as to warrant recusal. We conclude it does not. Such employment more than 26 years ago falls far short of that standard. We also note that although WEAC is providing legal representation in this matter, the party in this litigation is the Neenah Educational Support Personnel Association.

Given all of the foregoing, the District's recusal requests are denied.

The District's Motion to Consolidate

ERC 10.05 provides:

ERC 10.05 Transfer, consolidation and severance of proceedings.

Whenever the commission finds it necessary, in order to serve the purposes of s. 111.70, Stats., or to avoid unnecessary costs or delay, it may transfer any proceeding before an examiner to another examiner or to the commission. Proceedings under more than one subsection of the Municipal Employment Relations Act may be combined or severed.

The District contends that consolidation is appropriate because the two complaints are directly related to the status of current negotiations for a successor contract between the parties and holding separate hearings creates the potential for “competing and opposite results as well as an unnecessary use of resources.” We do not find these contentions persuasive.

The District's complaint alleges that the Union illegally delayed the interest arbitration process and failed to provide the District with relevant collective bargaining information. The Union's complaint alleges a breach of the status quo during a contract hiatus. We conclude that these two complaints are sufficiently separate that there will be no significant resource savings derived from consolidation and that whatever results are reached are not likely to be interrelated in any significant way. Thus, we deny the motion to consolidate.

The District's Motion to Defer

If the Commission denies its motion to consolidate, the District moves in the alternative to defer the Union's violation of the status quo complaint to grievance arbitration. The Union opposes deferral arguing that grievance arbitration is not available to resolve the status quo dispute because, as a matter of law, grievance arbitration does not survive the expiration of the contract unless the parties agree otherwise- which they have not in this instance.

Grievance arbitration is not part of the status quo that must be maintained during a contract hiatus. GREENFIELD SCHOOLS, DEC. No. 14026-B (WERC, 11/77). Thus, where, as here, the conduct complained of arose during a contract hiatus, a party cannot compel the other

to use a grievance arbitration process to resolve a dispute. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93). The Union has not agreed to use grievance arbitration to resolve the dispute and thus we deny the District's motion to defer.

Dated at Madison, Wisconsin, this 5th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner