STATE OF WISCONSIN | PERSONNEL COMMISSION

JULIA T. DOLPHIN,

Complainant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 79-PC-ER-31

INTERIM ORDER

A proposed decision and order was issued by the hearing examiner in this matter in February, 1983 and respondent's subsequent request for oral argument was granted. At the conclusion of oral arguments before the Commission on May 11, 1983, the respondent filed a motion which read as follows:

> (1) Respondent's attorney has been advised that on Monday, May 2, 1983, the hearing examiner in this matter was observed having lunch with the complainant, Julia Dolphin.
>
> (2) That the lunch occurred at the Pfister Hotel in Milwaukee, Wisconsin, and was part of a consumer conference sponsored by the Pharmaceutical Council on patient drug information.
>
> (3) Respondent's attorney has been further advised that prior to sitting with Julia Dolphin, the hearing examiner stated that she was finished with the Dolphin case and would have no more contact on the case.
>
> (4) Based upon this information, respondent hereby moves the Commission to issue an order prohibiting the Commission and any of its staff who may be working on this case from contacting or consulting in any fashion

> the hearing examiner about this case because such contact is a conflict of interest.

Complainant opposed the motion. The hearing examiner subsequently filed a letter summarizing the events of May 2nd:

> I was indeed observed lunching with Julia Dolphin at a table for eight in the Grand Ballroom of the Pfister Hotel, Milwaukee, along with approximately 500 other persons. Mary Kay Ryan, who observed me, was seated at a table nearby. I was unaware, prior to seeing them at the conference, that either party would be in attendance. I had been invited to attend as a "friend" of the Center for Public Representation.
>
> The eight of us engaged in impersonal conversation related to the subject matter of the conference, namely consumer concerns, especially from the perspective of "older adults," in the drug and health care industries. Two of the conference speakers were at our table, and most of our luncheon conversation focused on their area of expertise.
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> * * *
>
> The motion is inaccurate in that I did not state to Ms. Ryan that I "would have no more contact on the case"; I said that I had concluded my part in the case.
>
> .... There is no basis in fact for the allegation that I have a friendship with the complainant, nor do I have such a friendship. The May 2nd encounter was my first and only contact with the complainant away from the business environment of the Personnel Commission. In the course of the long, drawn-out hearing I maintained the same friendly demeanor with all the parties and their witnesses and attorneys. Had I seen Ms. Ryan before I literally "bumped into" Ms. Dolphin at the conference, and had Ms. Ryan asked me to join her table for lunch, I would have felt equally free to do so. There was absolutely no conflict of interest; my conduct was not unfair or inappropriate or prejudicial to either party, nor was it unusual in the light of customary social contacts (i.e., non-business contacts away from the professional arena) between attorneys, judges, and parties to contested cases.

With the exception of the hearing examiner's comments to Ms. Ryan, there does not appear to be any disagreement as to what occurred on May 2, 1983. While there is some dispute as to the nature of those comments, the distinctions between the two versions do not appear to be material to the resolution of respondent's motion.

The respondent has cited numerous cases in support of his motion. The cases are all premised on the Fifth Amendment due process right to an impartial and disinterested tribunal. In In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955), the Supreme Court held that a judge who had acted as a grand jury could not "then try the very persons accused [of contempt] as a result of his investigation." 349 U.S. 133, 137. The Court concluded that "the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness." 349 U.S. 138. In the case of Offutt v. United States, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954), the Court reviewed a criminal contempt order imposed against an attorney for his conduct during an abortion trial:

> Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones .... [T]hese interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor. 348 U.S. 11, 12

The same judge subsequently found the attorney guilty of criminal contempt for his conduct during the trial and ordered him placed in custody for a ten-day period. On review, the Supreme Court remanded the matter to the trial level and directed that a different judge be assigned to sit in a second hearing on the contempt charge.

The Supreme Court has also overturned judgments of a court where the judge had a "direct and substantial pecuniary interest" in reaching a particular conclusion. In Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927), the Court reviewed a liquor conviction imposed by a mayor of a village, without a jury, where the mayor also had a right to

share in the fines collected as a consequence of the conviction. The Court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. 273 U.S. 510, 273 (citation omitted).

Disqualification in the context of Wisconsin administrative proceeding is provided for in §227.09(6), Stats., which states:

> (6) The functions of persons presiding at a hearing or 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 in 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.

The statute fails to provide a definition of "personal bias or other disqualification", so it is helpful to look elsewhere within the statutes in interpreting the provision. The standards for use by a judge in a civil or criminal action in determining whether or not to disqualify himself or herself are set forth in §757.19(2), Stats., which provides:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
>
> (b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
>
> (c) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
>
> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
>
> (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

These provisions apply to courts of records and municipal courts and therefore are not binding in an administrative proceeding.

In the present case, the events of May 2, 1983 are not sufficient to justify the disqualification of the hearing examiner. It is clear that the examiner attended a conference that was attended by approximately 500 other people, including the complainant and May Kay Ryan, a division administrator within the respondent agency. The conference was held three months after the examiner had issued a proposed decision and order but before the Commission had issued a final decision. The examiner lunched with the complainant and six other persons and engaged in an "impersonal conversation related to the subject matter of the conference." The examiner also spoke with Ms. Ryan and indicated to her that her role in the proceedings had come to an end. Nothing in the documents submitted suggest that the examiner has a close friendship with the complainant or is otherwise biased. In fact, the examiner specifically states that the luncheon was the "first and only contact with the complainant away from the business environment of the Personnel Commission". Therefore, the respondent has failed to show that the examiner is now biased and, therefore, unable to act in an impartial manner as required by §227.09(6), Stats.

The facts in the present case do not even remotely resemble the facts in the Supreme Court cases cited by the respondent. No pecuniary interest has been alleged here, nor is it alleged that the examiner has had personal familiarity with the facts of the complaint.

In reaching its decision to deny the respondent's motion, the Commission is aware of a counteracting constitutional right described in Falke v. Industrial Comm., 17 Wis. 2d 289, 295 (1962):

> We have held there is a constitutional right to the benefit of demeanor evidence which is lost if an administrative agency decides the controversy without the benefit of participation of the hearing officer who heard such testimony, and credibility of a witness is a substantial element of the case. Wright v. Industrial Commm., 10 Wis. 2d 653 (1960); Shawley v. Industrial Comm., 16 Wis. 2d 535 (1962).

See also, Appleton v. DILHR, 67 Wis. 2d 162 (1975) and Transamerica Ins. Co. v. DILHR, 54 Wis. 2d 272 (1972). In her proposed decision and order, the examiner has specifically indicated that the evaluation of the credibility of witnesses plays an important role in the present case. Granting the respondent's motion would preclude the Commission from consulting with the examiner with respect to her impressions of the material witnesses on which she based her conclusions of credibility.

For the reasons set out above, the respondent's motion must be denied.

ORDER

The respondent's motion for an order prohibiting the Commission and staff from consulting with or contacting the hearing examiner regarding this case is hereby denied.

Dated: May 26, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

KMS:lmr

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