STATE OF WISCONSIN PERSONNEL COMMISSION

ABDULLAH ASADZADEHFARD (ASADI),

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Platteville),

Respondent.

Case No. 85-0058-PC-ER

RULING ON REQUEST FOR SUBSTITUTION

This matter is before the Commission for a ruling on complainant's request for substitution of examiners. The examiner issued a ruling denying the request on September 13, 1991. Pursuant to §PC 5.01(4), Wis. Adm. Code,[1] the matter then was referred to the full commission, and the parties have been provided the opportunity to, and have made, additional submissions.

In the Commission's opinion, the hearing examiner's ruling on request for substitution, a copy of which is attached hereto, contains a correct summary of the law in this area, and correctly addresses complainant's arguments in support of his request for substitution. Without going over in detail each point of the examiner's decision, the Commission agrees that even if one assumed the truth of complainant's allegations concerning the examiner's actions, they do not amount to a showing of bias or prejudice. Complainant's letter filed with the Commission on December 12, 1991, is devoted primarily to a recitation of complainant's disagreement with discovery rulings made by the examiner. Complainant has not established that these rulings are of a nature that would show a lack of impartiality. Therefore, complainant's request for substitu-tion will be denied.

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[1] "If a party deems the presiding authority to be unqualified for reasons of conflict of interest or bias, the party may move in a timely manner for substitution of a different examiner . . . . If a hearing examiner does not grant a motion for substitution, it shall be referred to the commission, which shall determine the sufficiency of the ground alleged."

ORDER

Complainant's request for substitution of examiners is denied.

Dated: January 24, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

STATE OF WISCONSIN PERSONNEL COMMISSION

ABDULLAH ASADI,

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President, UNIVERSITY OF WISCONSIN SYSTEM (Platteville),

Respondent.

Case No. 85-0058-PC-ER

EXAMINER'S RULING ON REQUEST FOR SUBSTITUTION

This matter is before the examiner upon complainant's request for substitution of examiners. After receiving the request, the examiner set a schedule for any additional submissions by the parties.

The statutory basis for the complainant's request is §227.46(6), Stats:

> 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 or 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 procedure for a party to effectuate a substitution of hearing examiners in a matter before the Personnel Commission is further described in §PC 5.01(4), Wis. Adm. Code, which provides:

> If a party deems the presiding authority to be unqualified for reasons of conflict of interest or bias, the party may move in a timely manner for substitution of a different examiner .... The motion shall be accompanied by a written statement setting forth the basis for the motion. If a hearing examiner does not grant a motion for substitution, it shall be referred to the commission, which shall determine the sufficiency of the ground alleged.

In the present case, the complainant filed his motion on July 31, 1991. In his motion, which was in the form of a letter, the complainant listed five bases or reasons for his request and supplied a letter from his wife supporting the request. While, as a technical matter, the complainant did not file an affidavit as

referenced in §227.46(6), Stats., it should be noted that he is appearing *pro se* and the Commission's rule simply refers to supplying a written statement without specifically referencing an affidavit. Therefore, the examiner will proceed to address the reasons set forth in his motion as if they had been found in an affidavit.

The standards to be used in evaluating the complainant's request are not specified in either the Commission's rules or in the applicable statutes. However, guidance in this area may be drawn from the federal Administrative Procedure Act, 5 U.S.C. §556(b) from which the Wisconsin statute is derived. The federal provision was discussed by the court in Long Beach Fed. S. & L. Assn. v. Federal Home Loan Bk. Bd., 189 F. Supp. 589 (D.C. Cal., 1960), reversed on other grounds, 295 F. 2d 403 (CA 9, 1961)[1]:

> The words "upon," "timely," "sufficient," and "good faith," as used in Section 7(a)(3) of the Administrative Procedure Act, are words in common use in the law, and must take their meanings from general law and adjudicated cases inasmuch as no definitions thereof are made in the Administrative Procedure Act, and inasmuch as no period of time before or after any given event is fixed for the filing, or hearing, or review of charges of bias, prejudice, interest, or disqualification, in either the Administrative Procedure Act or the Housing Act of 1954.
>
> "Timely" means at the first reasonable opportunity after discovery of the facts tending to show disqualification. It can mean after commencement of trial or other proceeding when facts upon which the affidavit is based were not known prior thereto.
>
> "Sufficient" means allegations of fact as distinguished from conclusions. And the facts must be such that, taken to be true as stated, they would be sufficient to convince an unbiased, unprejudiced, and disinterested mind. It may be considered sufficient, if made on information and belief and the affidavit must be viewed in light of the whole situation.

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[1] It should be noted that in the Long Beach case, the disqualification efforts were directed at all of the members of the Federal Home Loan Bank Board, rather than at a hearing examiner. Upon reviewing the district court's decision to restrain further administrative proceedings pending action by the Board as to the disqualification request, the court of appeals reversed and held that "the charge of bias and prejudice directed against the majority of the members of a government agency must give way to the necessity of permitting the agency to perform the function which it alone is empowered to perform." 295 F. 2d 403, 408.

> "The word 'upon', as a preposition indicating when something happens or is to be done, means, according to Webster, 'with little or no interval thereafter.'" It means "at the time of" the happening of an event, as, when something is required to be done "upon" the death of a person, it means as soon after the moment of death as preparations and arrangements can reasonably be made.
>
> "Good faith" is of such common use in the law that citations would be superfluous. It means just what it says. It is the opposite of bad faith. It means with good intentions, and that a person advocating a thing in good faith has an abiding and honest belief that the facts advanced are true, and that the legal position taken is sound in law.
>
> If a timely and sufficient affidavit is not filed with the Board, grounds of disqualification are waived under the general rule that disqualification, if not timely raised, is waived.
>
> It follows that before the reviewing court has the jurisdiction to hear and determine the merits of any charges of bias, prejudice, interest or disqualification, a timely and sufficient affidavit to that effect must be filed with the agency, i.e., the Board.
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> Upon the filing of such affidavit, that is, before taking any proceedings on the merits of the matter pending before the agency (Board)--in this case, the question of whether or not a conservator should be appointed--the Board must determine whether or not the affidavits are timely and sufficient, and made in good faith, and in doing so, they must accept the facts therein stated to be true.
>
> If the Board affirmatively so finds, then the Board must, either by itself or by one of its members or a hearing examiner designated for that purpose, proceed to hear the evidence that may be proffered on the merits in support of such charges, and make a determination thereon. (citations omitted)

Also, in a case involving an administrative decisionmaker's prior participation as counsel representing one of the parties in earlier proceedings, Guthrie v. WERC, 111 Wis. 2d 447, 331 N.W. 2d 331 (1983), the court reviewed the conduct on a due process theory in terms of whether the risk of unfairness or bias was impermissibly high, even when there was no bias or unfairness in fact.

While these standards are not identical, the analysis below shows that under any formulation of the standard, the complainant's allegations are in-

sufficient to establish adequate grounds for disqualification.[2] In reaching this conclusion, the examiner has accepted the complainant's allegations of fact as true,[3] except to the extent they are clearly inconsistent with the procedural history of this case.

Procedural history

The complainant filed a charge of discrimination with the Commission on April 24, 1985. An initial determination was issued on September 11, 1986.

After the complainant notified the Commission on October 8, 1986, that he was appealing the "no probable cause" initial determination issued in his case, the Commission sent the complainant letters on October 30, 1986, January 12, 1987 and May 7, 1987 in an effort to determine the status of his case or to schedule a prehearing conference. Complainant indicated that he had had difficulty in obtaining the services of an attorney. By letter dated June 3, 1987, the Commission finally scheduled a prehearing for July 16, 1987, and advised the complainant that he was expected to proceed at that time, "with or without counsel." During the conference, the complainant appeared *pro se*, an issue for hearing was established, the parties identified potential witnesses and the parties agreed to a hearing on October 19 and 20, 1987. The complainant also was to supply respondent with a document to the respondent by July 23, 1987. The undersigned was appointed hearing examiner on August 5, 1987. In a letter dated August 3, 1987, respondent's counsel wrote that complainant had not yet supplied the document which was due on July 23rd. Complainant later mailed the document to the respondent by letter dated August 5th and received by the Commission on August 17th.

On September 2, 1987, the complainant filed his initial discovery request. The examiner convened a telephone conference on September 25th at which time the complainant indicated that he wished to file a motion to compel discovery. The examiner established a schedule for filing papers regarding the motion. The schedule applied to both the complainant and the respondent.

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[2]General discussions of the case law relating to disqualification of hearing officers are found in Davis, Administrative Law Treatise, 2nd Ed., Ch. 19; and Mezines, Stein and Gruff, Administrative Law, §36.02.

[3]For the record, the examiner disagrees with the complainant's characterization of events described in his various allegations. The examiner also specifically denies that he is in fact prejudiced against the complainant in this matter.

The hearing was postponed indefinitely. By memo dated October 21st, the examiner modified the briefing schedule at the complainant's request and on an *ex parte* basis because the complainant stated he had received the respondent's brief four days late. The examiner issued an interim decision and order on November 13, 1987, which granted in part and denied in part, the complainant's motion to compel and respondent's motion for protective order.

By letter dated November 30th, the asked that the November 13th order be revised. During a telephone conference, the examiner listened to the parties' oral arguments regarding the complainant's request and denied the request orally as well as in a written decision issued on December 14th. After both parties mailed correspondence to the examiner in early February of 1988, the examiner issued another order on February 17, 1988, which again denied complainant's request for modification of the November 13th order. On the same date, the examiner issued a letter which read:

> Because it has been four months since the issuance of the ruling on complainant's motion to compel and respondent's motion for protective order, and because it appears that a date for reviewing the materials still has not been set, the complainant is provided a period of ten days from the date of this letter to contact Mr. Tallman by telephone to discuss specific dates for reviewing the materials.
>
> Otherwise I will proceed to schedule the matter for hearing.

The complainant notified the Commission on March 9th that he had made arrangements on March 1st to meet with respondent later in March to view certain materials. Subsequent to that meeting, respondent's counsel requested that a telephone conference be convened with the examiner to discuss several issues which had arisen at the meeting. During that telephone conference the parties were provided an opportunity to offer oral arguments regarding the areas of dispute and on April 7, 1988, the examiner issued a written decision setting forth his ruling which related to, among other things, the method and cost of photocopying requested documents and the confidentiality of the copied documents.

On November 11, 1988, the examiner sent a letter to the complainant requesting him to contact the examiner within 10 days. The examiner's letter was precipitated by the fact that the respondent had informed the examiner

that a letter sent to the complainant had been returned for no forwarding address and by the fact that the examiner's effort to contact the complainant by telephone resulted in a recorded message that the number had been disconnected or was no longer in service. The complainant telephoned the Commission on November 15, 1988 with a new address and telephone number.

In a letter dated January 2, 1989, the complainant raised concerns about the discovery process and his complaint generally. By letter dated January 13, 1989, the Commission advised the parties that a telephone conference had been scheduled for January 24, 1989. The results of the conference were summarized in a letter dated January 24th, which read in part:

> After considering the comments and arguments of the parties, I directed the complainant to prepare a list of 5 to 10 names of persons whose records he wished to review. Mr. Tallman will then assemble the various files of records maintained by the respondent which relate to those persons and their employment by the respondent. The complainant may then contact Mr. Tallman and ask for a verbal summary of the contents of the various files. Whether or not the complainant asks for the summary, the parties will set up a schedule for the complainant to review the files in Platteville. Based on his review, the complainant may then make further requests for the review of such "assembled" files relating to other employes of the respondent. In the alternative, the complainant may choose to review a group of files maintained at a single location regarding a group of employes.

Complainant submitted his list of 10 names and respondent objected to one of the names (Vicki Suhr) as being outside the scope of the complainant's previous discovery request. By letter dated March 1, 1989 to the respondent, the complainant stated he was "making a new discovery request for the files of Ms. Vicki Suhr" and one other person. Subsequent events were summarized by the examiner in a letter dated March 13, 1989:

> Mr. Tallman telephoned me on March 10, 1989 and indicated that he objected to the complainant's discovery request dated March 1, 1989, which refers to files of Ms. Vicki Suhr and Ms. Debbi Parker. Mr. Tallman advised me that he was willing to file a [motion for a] protective order but that he was concerned about further delaying the proceeding. I indicated to Mr. Tallman that I would inform the parties in writing as to how I wished the parties to proceed.
>
> By this letter, I am directing Mr. Asadi to telephone Mr. Tallman within 3 days of the date of this letter in order to set up a date for

> reviewing the files of those eight faculty and instructional academic staff members listed in complainant's January 30th letter. Mr. Tallman has previously indicated that he is available during the week of March 20 and 27. At the time they meet to review these files, the parties are directed to discuss the complainant's discovery request relating to Ms. Suhr and Ms. Parker. If they are unable to reach an agreement, Mr. Tallman may then file a brief motion for protective order with the Commission. The time period for responding to the discovery request shall not commence until such time that the meeting between the parties is held.

After a letter from the complainant dated June 2, 1990, requesting a status conference, the Commission scheduled a telephone conference for July 31, 1990. That conference resulted in a letter from the examiner, dated August 1, 1990, to the parties, which read, in part:

> Therefore, we spent a substantial amount of time discussing the status of the complainant's discovery efforts and I asked for suggestion from the parties in terms of ways to speed up the discovery process.
>
> * * *
>
> After having reviewed the various proposals, I am directing the parties to proceed as follows:
>
> 1. Mr. Tallman is to review 50 files and is to mark each document in the file which is within the scope of the discovery orders.
>
> 2. Another employe or agent of the respondent can then meet with the complainant in Platteville for one day on a trial basis, hand the marked documents to the complainant one by one and make copies of those documents as requested by the complainant.
>
> 3. Assu[m]ing this procedure is effective, Mr. Tallman is then to review the remaining files which are subject to the discovery orders and mark the appropriate pages.
>
> 4. This larger group of files can then be reviewed by the complainant in Platteville for extended periods of time and with someone other than Mr. Tallman.

Respondent subsequently prepared a list of the files which had been assembled for complainant's review. When the examiner telephoned the complainant on September 10, 1990, the complainant stated that he had previously

reviewed many of the files listed by the respondent. By letter dated September 11, 1990, the examiner directed the complainant to prepare a list of those files he had previously reviewed and advised the parties that another status conference would be scheduled regarding the dispute. After the conference, the examiner wrote a letter indicating that the respondent was to preview approximately 35 additional files.

By letter dated December 5, 1990, the examiner wrote the parties as follows:

> Based upon the absence of any response from the parties, I assume that the document review procedure outlined in my previous letters dated August 1st and September 25th has been effective. In the event he has not already done so, Mr. Tallman should review the remaining files which are subject to the discovery orders and mark the appropriate pages. Mr. Tallman should contact the complainant by December 13, 1990, for the purpose of making arrangements for the complainant to review these files. I will assume that the document review process can be completed by March 15, 1991. A member of the the Commission's staff will be contacting you shortly for the purpose of scheduling a telephone conference for the end of march of 1991, to discuss hearing dates.

On December 27, 1990, the Commission received a letter from the complainant which the complainant described as a motion to compel discovery and included a request for a telephone conference. The examiner responded by letter dated January 4, 1991, which summarized the procedural history of the case and concluded:

> In light of the fact that complainant's discovery efforts have already continued for more than 3 years, I can perceive no advantage at this time to convening a telephone conference or ruling formally on what are, for the most part, unspecific contentions set forth in the complainant's letter. The most reasonable approach would appear to be for the complainant to complete the file review procedure established in my letters dated August 1, 1990, and December 5, 1990. If, during the course of that review, the complainant feels the respondent is not complying with the discovery orders previously issued under my signature and if the parties cannot resolve the matter themselves, the complainant may assemble supporting documentation and refile a more specific motion to compel after the file review procedure has been completed.

The examiner wrote another letter to the complainant on January 30, 1991, which stated, in part:

> On January 8, 1991, we had a lengthy telephone conversation during which you indicated you were dissatisfied with my letter of January 4, 1991. You informed me that you would be sending in a letter which very specifically explained the bases for your previous motion to compel ....
>
> During the three week period since our telephone conversation, I have not received the letter you had promised. Therefore, I must consider the procedure described in my January 4th letter to still be operative.

Two days later, the Commission received a letter from the complainant dated January 27, 1990, in which he "listed many violations of the Interim Decision and Order" and reiterated his request for a telephone conference "to attempt to deal with these problems before any more discovery meetings are scheduled."

In a five page letter dated March 5, 1991, the examiner summarized the telephone conference held on February 27th and addressed the complainant's contention that the respondent was not complying with previous interim decisions issued by the Commission. After reviewing the language of the complainant's discovery requests and the interim orders, the examiner wrote:

> The complainant is entitled to obtain discovery of those documents covered by the Commission's November 13th interim decision on his motion to compel. To the extent that the respondent does not possess all or part of a certain document, it clearly cannot be required to produce a document it does not have. The respondent is also not required to give the complainant materials which are beyond the scope of the underlying discovery request. Respondent maintains folders on individual faculty members and academic staff at various locations on the UW-Platteville campus. If after reviewing the material from all of the folders, a document in the respondent's possession and encompassed by a discovery order has not been made available, the statutory remedies available to the complainant are described in §804.12(2), Stats. During the course of discovery, the parties may also ask the hearing examiner to intervene in the discovery process in order to try to resolve, on a more informal basis, disputes which may arise.
>
> The complainant may wish to file an additional written discovery request with the respondent to include materials which are outside the scope of his 1987 request but which still meet the requirements of §804.01(2), Stats. The fact that I have concluded

> elsewhere in this letter that the previous orders of the Commission do not include certain materials within their scope does not mean that these materials are not discoverable if a proper request is filed with the respondent. In light of fact that more than 3 years have elapsed from the beginning of the discovery process, the complainant is directed to file such an additional request within 20 days of the date of this letter. Such a request may be supplemented later if necessary. The complainant may also wish to contact an attorney for assistance in drafting his discovery request.

In a letter dated March 15, 1991, the complainant submitted an additional discovery request to the respondent. The examiner unsuccessfully attempted to reach the parties by telephone and in a letter dated March 25th, directed the parties as follows:

> In light of Mr. Asadi's letter, I am asking him to promptly telephone Mr. Tallman to discuss the new request. If the parties are in agreement, they should then proceed to set up dates for review of the materials. If, however, the respondent raises objections to the request, I ask Mr. Tallman to fully explain is position to Mr. Asadi. If after that explanation and further discussion the parties are still in disagreement, Mr. Tallman should prepare a written response to the discovery request and I will then review the dispute.

Two months later, in a memo dated May 23rd and after having received no contact from either party, the examiner asked the complainant to advise the Commission as to the status of the case. In a letter dated June 3, 1991, the complainant wrote:

> At your request, as outlined in your letter of March 25, 1991, I called Mr. Tallman's office on Monday, April 29, 1991, but Mr. Tallman was not in, and his secretary indicated that he would not be back until Tuesday, May 7, 1991. I left a message for Mr. Tallman with his secretary for him to return my call on May 7 when he returned to his office, and I made time to be near the phone all day, but he did not return my call. I thought that he would communicate with me in writing, but so far I have not heard from him by phone or in writing. He has not answered my letter of March 15, 1991 either. Perhaps your letter of May 23 should have been addressed to him rather than to me. He might acknowledge such a letter. Therefore, I am asking you to find out the status of this case, and to let me know as soon as you find out any information. Thank you.

The respondent responded to complainant's discovery request by letter dated June 5, 1991, that was received by the Commission on June 10th. In a letter dated June 11th, the examiner summarized telephone conversations with each party on the previous day and then went on to write:

> My understanding is that the parties continue to disagree about the appropriateness of certain of the materials requested in complainant's March 15th request. I also understand that the complainant wishes to file a motion to compel the production of the materials.

The schedule established by the examiner required the complainant to file his motion and accompanying arguments by June 27, 1991. On June 28th, the complainant filed a letter requesting the respondent to respond to four additional requests for information "before I make a Motion to Compel Discovery." The requests were for a listing of all files maintained by UW-Platteville on faculty and staff members, the contents of those files, a listing of materials removed from those files since complainant's initial discovery request in 1987 and an explanation as to why these materials were not provided to the complainant as part of his discovery request. By letter dated July 1st, the respondent answered some of the complainants' questions and suggested that other of requested information was unnecessary for the preparation of a motion to compel. Respondent also requested that a date be established by which complainant had to complete discovery.

In a letter dated July 17th, the examiner addressed the appropriateness of the complainant's additional requests for information, reestablished a schedule for complainant to submit his motion to compel and an exchange of briefs and directed the parties to complete discovery in the case by November 15, 1991.

Each of the five reasons for removal as listed by the complainant in his motion are addressed separately, below.

1. Grammatical incident

The complainant explains this reason as follows:

> In the course of several of our telephone conferences Mr Stege has made fun of the way I spoke English and has "corrected" my already correct grammar. During two specific telephone conver-

> sations I said to Mr. Stege that I am entitled to look into the files of other faculty and academic staff. In a loud and sarcastic tone of voice, he replied, "you are not looking into the files, you are looking at them." My wife will verify this, as she was listening to the conversation on the extension.

Complainant's wife described the incident as follows:

> I also want to verify that during several telephone conferences, Mr. Stege took it upon himself to correct Mr. Asadi's use of English. The most recent example of this took place this summer. As I listened to the conversation on the extension, Mr. Asadi made the statement that he was entitled to look into files of faculty and academic staff. Mr. Stege replied in a condescending manner, "You are not looking into the files, you are looking at them."

The complainant's only specific contention on this point is that on two unspecified dates, one during "this summer", the complainant said that he was "entitled to look into the files of other faculty and academic staff" and the examiner replied, in a loud and sarcastic tone, "you are not looking into the files, you are looking at them." If the complainant's contention is accepted as an accurate description of actual events, the isolated comment by the examiner would hardly be a sufficient basis to "convince a disinterested mind" to believe that the examiner was prejudiced towards reaching a certain result in this case, using the Long Beach standard, or to conclude that the risk of bias is impermissibly high, under the Guthrie due process analysis.

2. Telephone conversations with respondent

The complainant's second allegation is that the examiner "has held several telephone conversations with Respondent regarding this case without my knowledge." The complainant does not allege an approximate date or subject matter of these conversations.

While §227.50, Stats., prohibits ex parte communications "relative to the merits" of a contested case, the prohibition does not extend to prohibit all contact with a party or a party's representative when other parties are not present. The complainant has made no allegation that the conversations between the hearing examiner and the respondent related to the merits of the case rather than to procedural or non-substantive matters.

3. Discovery deadlines

The complainant's third allegation reads as follows:

> I am sure that the State of Wisconsin has given the State Personnel Commission the authority to set deadlines for responding to letters, telephone calls, etc., but Mr. Stege has told me that he cannot and will not set deadlines for Respondant's responses to my letters and calls, even when respondent fails to respond for several weeks. One example of this occurred this spring. Both my letter to Respondant of March 15, 1991 and my telephone call of April 29, 1991 went unanswered for more than two and one half months. When I told this to Mr. Stege, he told me that he would not set a deadline for Respondant to reply to my communication. However, he always sets a deadline for me to reply to respondant. This is simply a double standard, yet he tells me he has limited authority over Respondant.

The procedural history of this case, as summarized earlier in this ruling, does not indicate that the examiner establishes deadlines for the complainant but not for the respondent. Depending on the nature of the dispute, the identity of the moving party and what steps may have already been taken, the examiner has on different occasions directed both parties to take the first step in filing a brief or contacting the other side. The file simply does not support the complainant's contention that the examiner has a double standard in terms of setting deadlines.

The only specific allegations raised by the complainant relate to his March 15th letter and his April 29th telephone call. However, nothing in the complainant's allegations or in the file in this matter indicates that the examiner could have known whether or not the respondent had responded to the complainant's communications. Review of the file in this matter indicates that in an effort to obtain a prompt reply to the complainant's March 15th supplemental discovery request, the examiner attempted to contact both parties by telephone, When those attempts were unsuccessful, the examiner wrote a letter on March 25th, directing the complainant to promptly telephone the respondent to discuss the request. The letter went on to lay out the procedure in the event the parties were in agreement with respect to the request, and a different procedure if they disagreed. The complainant's telephone call was, according to the complainant, made on April 29th, five weeks later. The file indicates the examiner first learned of this telephone call on June 6th, when the examiner received complainant's June 3rd letter. On the same day, the examiner was advised that the respondent had mailed out a written response to the complainant's request the previous day and that respondent's representative

was out of the office for the remainder of the week. The following Monday, the examiner spoke with both parties by telephone as indicated in a letter dated June 11, 1991. The letter set a schedule for the complainant to file a formal motion to compel discovery. Given the absence of any allegation by the complainant that the examiner was aware of respondent's failure to reply to either the complainant's March 15, 1991 request or his telephone call of April 29, 1991, and in light of the other correspondence in the case file, there was simply no time during which the examiner could have known about the complainant's telephone call in order to establish a schedule for responding to it. The file also reflects that the examiner did promptly establish a schedule to resolve the issues raised in the complainant's March 15th request.

In addition, to the extent the complainant is referring to the examiner's failure to set time limits for responding to complainant's discovery requests, the applicable statutes already establish time limits within which the party on which the discovery request is served must respond to the request.[4] Nothing in the file suggests the complainant asked the examiner to modify the periods for discovery provided for by statute.

4. Merits of the discovery dispute

In his fourth allegation, the complainant suggests that the examiner intentionally ignored requests by the complainant for certain materials in the respondent's possession:

> Since the original Interim Decision and Order was issued on November 13, 1987, Mr. Stege has asked that I go and see what Respondant will provide me with and if it is not satisfactory to let him know. Even though I was reluctant to do this, I have cooperated to the best of my ability. I wrote Mr. Stege on November 30, 1987, January 29, 1988, January 2, 1989, March 1, 1989, June 2, 1990, December 20, 1990, and January 27, 1991 to tell him that Respondant was removing material from files of faculty and academic staff. Respondant has admitted in several telephone conferences that he has removed materials from these files. I would

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[4]For example, pursuant to §804.09(2), Stats: "The party upon whom the request [for production of documents] is served shall serve a written response within 30 days after service of the request .... The court may allow a shorter or longer time." The Commission's rules provide that: "All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats." §PC 4.03, Wis. Adm. Code.

> like to look at unedited files. In his November 13, 1987 Interim Decision and Order, on page two, under the heading of Faculty Evaluations and Contracts, he himself quotes me from my brief that "in a brief filed in support of his motion, Complainant states that he is 'asking to be allowed to collect evidence from individual faculty members' files for the last ten to fifteen years.'" Then, three and one half years later, he told me that in my original discovery request I did not ask for files and should make another discovery request. I feel that his Interim Decision and Order dated November 13, 1987 speaks for itself and it is obvious that I asked for files. Furthermore, letters that I wrote him on November 30, 1987, January 29, 1988, January 2, 1989, March 1, 1989, June 2, 1990, December 20, 1990 and January 27, 1991 explicitly ask for files again and again. He is deliberately putting me and my family through an unnecessary burden, which is exactly what Respondant wants to do in order to tire me out and drop the case, which will not happen.

The complainant's allegations amount to disagreement with the various interim rulings issued by the examiner and the conclusions reflected in the examiner's letter dated March 5, 1991. Of the various letters from the complainant which are alleged to have made reference to the respondent removing materials from certain files, only some of the listed letters make such references and those allegations were, for the most part, dealt with in subsequent rulings issued by the examiner. For example, the complainant's letters of November 30, 1987, March 1, 1989 and June 2, 1990 make no mention of respondent removing materials from files. In his January 29, 1988 letter, complainant requested modification of the interim order to allow him to look at "each original file rather than altered or artificial ones." That request was specifically addressed in the February 17, 1988 interim decision and order. Complainant's January 2, 1989 letter does refer to letters missing from files. The examiner convened a telephone conference with the parties and directed the respondent to assemble the various files from different locations on campus relating to each of 5 to 10 persons for the complainant to review. This directive was a clear attempt to ensure that the materials that complainant thought were missing from certain files were not to be found in other files maintained for the same person.

In his December 20, 1990 letter, complainant specifically referred to materials missing from files and he makes a motion to compel discovery but he failed to adequately identify what he thought was missing and therefore failed to supply an adequate basis for his motion. The examiner's response, dated

January 4, 1991, directed the parties to proceed with discovery and set forth a procedure for addressing complainant's concerns about missing materials:

> If, during the course of that review, the complainant feels the respondent is not complying with the discovery orders previously issued under my signature and if the parties cannot resolve the matter themselves, the complainant may assemble supporting documentation and refile a more specific motion to compel after the file review procedure has been completed.

Finally, the complainant's January 27, 1991, letter in which he alleged "many violations of the Interim Decision and Order" was the subject of another telephone conference and the complainant's allegations were addressed in the examiner's March 5, 1991 letter.

The complainant's request to review "unedited files" has been repeatedly addressed in various interim decisions and has been rejected. The request fails to recognize that the complainant's motion to compel only granted him discovery of certain materials covering a certain time period rather than a general right to review whole files maintained by the respondent. The complainant's contentions in this area have been specifically considered by the examiner in the letter issued on March 5, 1991.

5. Restricting complainant's opportunity to express himself

Complainant's fifth contention is that "Mr. Stege does not let me express myself during telephone conferences." Complainant fails to provide any specifics as to the dates and circumstances of the conferences when his input was alleged to have been restricted. A review of the file indicates that while in some instances, the examiner has made rulings based on arguments made by the parties during a telephone conference, the parties have typically been provided an opportunity to submit written briefs in support of their positions.

As a general matter, the timing of the complainant's motion to remove the examiner, filed with the Commission on July 31st, does nothing to support his motion. Coming, as it did, soon after the examiner's July 17th letter which addressed the appropriateness of the complainant's additional requests for information, reestablished a schedule for complainant to submit his motion to compel and directed the parties to complete discovery by November 15th, the

complainant's motion must be viewed as being motivated by disagreement with the examiner's ruling rather than by some bias on the part of the examiner.

> Generally, a litigant should not be able to accept a judge initially as satisfactory and then subsequently, during the course of the litigation, seek to disqualify him because the litigant has gained an impression from the rulings of the court that the court's attitude towards his position is unfavorable.

46 Am. Jur. 2d *Judges* §228 (citations omitted). To the extent the complainant is seeking removal of the examiner because the complainant feels the examiner's attitude toward the complainant's discovery efforts is unfavorable, it would be inappropriate to grant the complainant's motion.[5]

Looking at those portions of the the complainant's allegations which form the basis for his substitution request, the examiner concludes that they are not sufficient to support the complainant's request, whatever standard is applied. A disinterested observer looking at the allegations raised could not reasonably conclude that the examiner is biased or prejudiced in this matter or that the examiner has a tendency to favor one party. Likewise, it cannot reasonably be concluded that an impermissibly high risk of unfairness or bias has been shown.

The examiner also notes that the complainant's request is not simply that the undersigned be removed as the hearing examiner, but that "the case be reassigned to a member of a protected class (Black, Hispanic, Asian or Native American.)" This is clearly more than merely a substitution request under §PC 5.01(4). The complainant wants to be able to select his hearing examiner based upon criteria he has established. Nothing in the Commission's rules or in the Wisconsin Administrative Procedure Act (ch. 227, Stats.) provides for the parties to have any input into the selection of the hearing examiner for a particular case, other than the party's right to make a substitution request. To allow a party to decide who is to be selected as the examiner in

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[5]The examiner's initial interim decision, issued on November 13, 1987, cannot be interpreted as representing an unfavorable attitude towards complainant's discovery efforts in that the interim decision granted the complainant's motion to compel, in part. Likewise, the examiner's subsequent rulings and letters which have carefully explained the limits to the complainant's previous discovery requests and which have laid out a procedure for the complainant to supplement his request is hardly indicative of an unfavorable attitude towards complainant's discovery requests.

their case could result in an unfair advantage to that party. This conclusion is supported by the following language in 46 Am. Jur. 2d *Judges*, §173 (citations omitted):

> Prejudice of a judge against the state may disqualify him to sit in a criminal case. The defendant has no right to insist that he be tried before a judge prejudiced in his favor, or before any particular judge;

Similarly, in Matter of Searches Conducted on March 5, 1980, 497 F. Supp. 1283, (E.D. Wis., 1980), the court held that a litigant is entitled to a fair and impartial judge but is not entitled to pick his judge.

For the reasons set out above, the examiner denies the complainant's motion for substitution of examiners. Pursuant to §PC 5.01(4), Wis. Adm. Code, the complainant's motion must now be referred to the Commission.

Dated: September 13, 1991 STATE PERSONNEL COMMISSION

KURT M. STEGE, Hearing Examiner

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