STATE OF WISCONSIN PERSONNEL COMMISSION

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PATRICIA BRIDGES,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 85-0170-PC-ER

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DECISION
AND
ORDER

On April 25, 1988, respondent filed a motion for substitution of hearing examiner and statement in support thereof. The statement offers as the basis for the motion respondent's belief that the hearing examiner "strongly interposed himself into the negotiations." Respondent alleges that this interposition took the form of questioning respondent's refusal to include payment of attorney's fees into their settlement offer and initiating a search for alternative sources of funds to pay such fees. On May 3, 1988, complainant filed a response.

The majority of respondent's allegations are so conclusory in nature that it is not possible, without more, to determine what specific, improper action the hearing examiner allegedly engaged in. In the absence of such specificity, it is not possible to reach a conclusion on the underlying motion as it relates to these allegations.

Respondent does specifically allege that the hearing examiner proceeded to explore the availability of funds to pay the complainant's attorney's fees despite the fact that the settlement proposed by counsel for respondent did not include an offer of attorney's fees and that counsel for respondent

"clearly stated" that "further inquiry regarding the availability of Risk Management funds was unnecessary."

If respondent's allegation in this regard is factually accurate, it could be inferred, although it is not a necessary conclusion, that the hearing examiner had implied by his actions that his sympathies lie with the complainant, not the respondent.

In reaching a decision on the matter presented here, the undersigned took into account two very serious policy considerations. First of all, the Commission has always regarded very seriously the right of parties who appear before us to have an impartial hearing and decision of their dispute. If this were the only consideration, it is possible that respondent's motion would be granted simply because a question of impartiality had been raised. However, the second and equally serious consideration involves the integrity of the Commission's process. The Commission must exercise great care not to create or sanction a process which appears to permit or encourage parties to shop for a hearing examiner. The instant matter requires a particularly careful review of this consideration since both the complainant and the hearing examiner are members of the same racial minority. Balancing these two considerations in the context of the instant motion requires a review of the factual setting. The factual basis for respondent's allegations is lacking -- complainant's version of what occurred during the subject proceeding is dramatically different from that filed by complainant and is consistent with the hearing examiner's contention that counsel for respondent participated actively and willingly in each aspect of the proceeding and that the hearing examiner was careful to obtain the parties' concurrences before engaging in any phase of the settlement negotiations; and respondent has neither filed sworn affidavits nor requested an evidentiary hearing.

On balance, the undersigned must conclude that no persuasive showing has been made by respondent that the hearing examiner will be unable to conduct an impartial hearing or reach an impartial decision due to conflict of interest or bias and that the process involved here will be better served by a denial of the subject motion.

Pursuant to §15.06(6), Stats., a majority (at least two) of the commissioners constitutes a quorum. In this case, only two commissioners voted on the instant motion, the undersigned voting against, Chairperson McGilligan voting in favor, with Commissioner Murphy abstaining. Therefore, the motion failed to obtain a majority (two votes) of a quorum, and must be denied, and the Commission's prior order appointing Commissioner Murphy as examiner must stand.

ORDER

Respondent's motion for substitution of hearing examiner filed April 25, 1988, is denied.

Dated: May 17, 1988 STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

DISSENT

As noted in the Decision and Order on May 17, 1988, respondent filed a motion for substitution of hearing examiner and statement in support thereof. The motion was made on the grounds of potential bias. The statement offers as the basis for the motion respondent's belief that the hearing examiner "strongly interposed himself into the negotiations." The statement goes on to list a number of instances where, in the respondent's opinion, the hearing examiner improperly interposed himself into the negotiations. The statement concludes with respondent's belief "that the level of intervention on behalf of the appellant by the hearing examiner was highly inappropriate. The Respondent further believes that because of the examiner's conduct there is a strong possibility of bias or at least a perception of bias." On May 3, 1988, complainant filed a response objecting to the motion.

The Decision and Order signed by Commissioner McCallum on May 17, 1988 states:

> The majority of respondent's allegations are so conclusory in nature that it is not possible, without more, to determine what specific, improper action the hearing examiner allegedly engaged in. In the absence of such specificity, it is not possible to reach a conclusion on the underlying motion as it relates to these allegations.
>
> Respondent does specifically allege that the hearing examiner proceeded to explore the availability of funds to pay the complainant's attorney's fees despite the fact that the settlement proposed by counsel for respondent did not include an offer of attorney's fees and that counsel for respondent "clearly stated" that "further inquiry regarding the availability of Risk Management funds was unnecessary."
>
> If respondent's allegation in this regard is factually accurate, it could be inferred, although it is not a necessary conclusion, that the hearing examiner had implied by his actions that his sympathies lie with the complainant, not the respondent.

Regarding the above quoted language, several observations need be made. With respect to the "conclusory" allegations which "in the absence of such specificity, it is not possible to reach a conclusion in the underlying motion as it relates to these allegations" the Commission did that which it

said was impossible. In other words, although not reflected in Commissioner McCallum's opinion, the Commission discussed these allegations in quite a broad and general sense at its agenda meeting on May 4, 1988 and rejected same. Instead of reaching a conclusion based on respondent's April 25th motion and supporting statement, complainant's objection on May 3, 1988 and the unsworn testimony of Commissioner Murphy, the Commission should have conducted an evidentiary hearing on the matter or at least given respondent an opportunity to file sworn affidavits before reaching a conclusion with respect to these allegations. Having failed to do either, the Commission's determination in the second paragraph of the Decision and Order is flawed.

The undersigned agrees with Commissioner McCallum's opinion that if the allegations are true that the hearing examiner proceeded to explore the availability of funds to pay the complainant's attorney's fees despite the fact respondent's settlement offer did not include any offer of attorney's fees and that if respondent's counsel "clearly stated" that further inquiry in this area was unnecessary it could be inferred, although not necessarily concluded, that the hearing examiner had implied by this actions that his sympathies lie with complainant. The undersigned also agrees with the point that there are two very serious policy considerations involved in reaching a decision in the matter presented herein. First, the parties who appear before us have a right to an impartial hearing and decision of their dispute. (The parties also have a right to the appearance of neutrality or fairness in our decision-making process.) Secondly, the Commission must not create or sanction a process which permits or encourages parties to shop for a hearing examiner. The undersigned disagrees, however, with how these considerations were balanced in the prevailing opinion.

In the first place, there is nothing in the record to indicate that respondent is "shopping" for a hearing examiner. There is also nothing in the record to support a finding that since both the complainant and the hearing examiner are members of the same racial minority respondent feels it can't get a fair hearing. The other Commissioners' comments at the May 4th agenda meeting notwithstanding I have been involved in numerous conciliations and hearings with Attorney Kathryn R. Anderson as counsel and find these comments about her possible motives to be at odds with both her personal and professional reputation.

Secondly, I again point out that the Commission reached its conclusion regarding the ability of the hearing examiner to conduct an impartial hearing or reach an impartial decision based on two letter briefs and the unsworn testimony of the hearing examiner. Absent an evidentiary hearing or giving respondent the opportunity to file an affidavit the Commission proceeded improperly in deciding the motion.

In conclusion, by writing this dissent I do not wish to impugn the integrity of the hearing examiner. That is not at issue here. Simply stated the conciliation process broke down for whatever reason. Unfortunately, one of the parties strongly believes that the hearing examiner's role in that conciliation process contributed to the breakdown. Even the opposing party acknowledges the difficult issues raised by respondent's motion.[1] In order

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[1] Normally, a hearing examiner, who is conducting a hearing on a dispute and also attempting to resolve that dispute through conciliation, should be careful to give the parties an opportunity to freely and/or without prejudice ask him/her to step aside voluntarily as examiner if they feel for whatever reason his/her role in the conciliation makes it inappropriate for the same person to conduct the hearing (if the conciliation failed). There is nothing in the record to indicate if this was done. Failure to give the parties this opportunity in the future could have a chilling effect on the parties' willingness to ask the Commission to assist in conciliation efforts.

to have an impartial hearing, or at least the perception of same (which is equally important, and impossible under the circumstances) I would substitute hearing examiners. Under the particular circumstances herein, such a substitution recognizes the right of parties who appear before us not only to have an impartial hearing and decision of their dispute, but the appearance of same without encouraging or permitting hearing examiner shopping.

Dated: MAY 17, 1988 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Commissioner

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