STATE OF WISCONSIN PERSONNEL COMMISSION

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MARIE IWANSKI,

Appellant/
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 89-0074-PC-ER,
89-0088-PC-ER and
89-0096-PC

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DECISION ON
MOTION IN LIMINE OR
IN ALTERNATIVE FOR
SUBSTITUTION

This matter is before the Commission on appellant/complainant's motion in limine or in the alternative for substitution of tribunal filed November 15, 1991. Respondent filed a response on November 25, 1991.

These cases are scheduled for hearing before the Commission beginning December 9, 1991, on the following issues:

> 89-0096-PC Whether there was just cause for the termination of appellant.
> Sub-issue: Whether the termination constituted excessive discipline.
>
> 89-0074-PC-ER Whether respondent discriminated against complainant on the basis of whistleblower retaliation in violation of §230.83(1), stats., in connection either with her termination or conditions of employment as set forth in the "amended complaint" dated and filed May 4, 1989.
>
> 89-0088-PC-ER Whether respondent discriminated against complainant either on the basis of creed or whistleblower retaliation in violation of the Fair Employment Act and §230.83(1), stats., in connection with the termination.

Appellant/complainant's motion first seeks to exclude any evidence concerning her visits to the Personnel Commission in 1988 and 1989, any conversations she had with Commission staff concerning her employment situation, and any conversations concerning her among Commission staff and

respondent. By way of factual background, appellant/complainant contends in support of the motion that she spoke with a Commission hearing examiner in 1988 about her employment situation, and he mentioned some concerns he had about her mental status to a co-worker, who in turn communicated with a paralegal in the DHSS office of Legal Counsel. Appellant/complainant argues first that this evidence is irrelevant, and second that any probative value it may have is "outweighed by its prejudicial effect on the trier of fact." In the alternative to the motion in limine, appellant/complainant requests that the Commission select an independent arbiter to hear the case.

In opposing the motion, respondent contends that appellant/complainant was terminated from her employment for medical reasons, and that the letter providing notice of termination "specifically refers to an incident involving 'persons from an agency outside the department who expressed concern for your welfare and mental health.'" The letter cites this incident as one of the reasons that respondent required a psychological exam pursuant to §§230.37(2), Stats. Respondent argues that evidence concerning this communication is relevant to the issues of whether it had just cause for terminating appellant/complainant's employment and whether it had legitimate, nondiscriminatory reasons for its actions.

It is perhaps arguable whether an expression of concern about a person's "welfare and mental health" from a layperson would have any probative value with respect to an appeal of a discharge for medical reasons. However, in Case No. 89-0074-PC-ER, complainant has alleged specifically that respondent engaged in retaliatory conduct against complainant in the form of "constant harassment," including "[d]emanding and subjecting the complainant to psychological evaluations for the sole purpose of justifying the retaliatory conduct of the Respondents." The question of the employer's motivation is obviously significant with respect to such a charge, and the Commission cannot conclude at this point in the proceeding that evidence concerning the observations and concerns of Commission staff that were transmitted to the employer and which allegedly were part of respondent's motivation for requiring a psychological exam, would have no probative value.

There are some negative implications to permitting this testimony. One, it puts the Commission in the position of potentially having to evaluate the

credibility of its own staff, as will be discussed further below. However, any such problem can be addressed by appointing a hearing examiner with final decision authority from outside the agency in accordance with §§227.46(1),(3)(a), Stats. Second, the Commission frequently acts in the role of an intermediary or conciliator between employer and employe with respect to a wide range of employment matters. The use of Commission staff as witnesses in the manner apparently being contemplated in this proceeding could have a restrictive effect on this role in the future. However, the evidence sought to be excluded apparently does not fit within the confines of conciliation efforts per se, and no other recognized privilege has been asserted or otherwise appears to be involved. Under such circumstances, in the Commission's opinion, it would not be correct to exclude apparently probative evidence because of these policy factors.

In the alternative to her motion in limine, appellant/complainant requests that the Commission appoint an independent arbiter to hear this case, because the Commission "cannot fairly decide the merits of the issues when its own staff may be called as witnesses." This contention does not appear to involve alleged bias or personal interest in the outcome of the proceeding, but rather unfairness because of the relationship between the adjudicative body and the witnesses in question. In Guthrie v. WERC, 111 Wis. 2d 447, 331 N.W. 2d 331 (19483), the Supreme Court held that due process requires a fair and impartial administrative tribunal, and "that due process can be violated [not] only when there is bias or unfairness in fact. There can also be a denial of due process when the risk of bias is impermissibly high." 111 Wis. 2d at 454. The Court also quoted with approval from Kachian v. Optometry Examining Board, 44 Wis. 2d 1, 12-13, 170 N.W. 2d 743 (1969):

> "From the absence of a statutory mandate it does not follow that a person who is a member of an administrative agency may not or ought not disqualify himself from sitting in a case in which he has a direct financial interest or one which he cannot fairly decide. A common-law duty of disqualification applies where no statutory provisions for disqualification are spelled out." 111 Wis. 2d at 456.

Although there is little specific precedent with respect to the particular circumstances of this case, there is some authority for the proposition that a judge is disqualified because of a familial relationship to a witness in a case,

see 46 Am Jur 2d Judges §152. While in this case, the relationship between the adjudicative body and the witnesses is not familial, it seems obvious that under certain circumstances, even a non-familial relationship between an administrative tribunal and a witness could involve actual unfairness or an impermissibly high risk of unfairness because of the potential that the relationship could color the administrative tribunal's credibility determinations. For example, in United States v. Ferguson, 550 F. Supp. 1256 (S.D.N.Y. 1982), the grand jury testimony of an attorney who in 1975-76 had been a clerk for the Court was submitted in camera on an issue of grand jury abuse. Although that issue apparently was no longer in contention, the defendant argued that the Court should be disqualified because as a practical matter that testimony would be likely to influence the Court's consideration of other issues concerning alleged coerced admissions. The Court decided that disqualification was in order under 28 USC 455(a) ("Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). Due to the intimate nature of his relationship with, and his high esteem for his former clerk, the Court decided that from an objective standard it might reasonably be concluded "that no matter how strongly the Court states that Pomerantz's testimony will not enter into its judgment, nonetheless, in some imperceptible manner his testimony will intrude itself and be considered with respect to the suppression motions." 550 F. Supp. at 1260.

Based on the foregoing, in the Commission's opinion it is appropriate to grant appellant/complainant's alternative motion for the appointment of a new tribunal, and David Nance of the Labor and Industry Review Commission (LIRC) will be appointed as examiner with final decision authority.

ORDER

Appellant/complainant's motion filed November 15, 1991, for an order excluding certain evidence is denied. Her alternative motion for the appointment of an independent hearing tribunal is granted and David Nance of LIRC is appointed as hearing examiner with final decision authority pursuant to §§227.46(1), (3)(a), Stats.

Dated: December 2, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

GERALD F. HODDINOTT, Commissioner