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NICHOLAS PIERCE,

Complainant,

v.

Executive Director, WISCONSIN  
LOTTERY,<sup>1</sup> and Secretary,  
DEPARTMENT OF EMPLOYMENT  
RELATIONS,

Respondents.

Case No. 91-0136-PC-ER

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RULING  
ON  
MOTION TO DISQUALIFY

This matter is before the Commission on complainant's Motion to Disqualify Barbara Nichols as attorney for respondent Department of Employment Relations. A hearing was held on the Motion on April 30, 1993, before hearing examiner Donald R. Murphy, Commissioner.

Findings of Fact

1. On July 1, 1988, complainant began employment with the Wisconsin Lottery as Chief of Internal Security.
2. Complainant was of the belief that his current position was a transfer from his former positions as Sergeant in the State Patrol and that he would continue under the protection or hazardous category of the retirement system.
3. Complainant testified that Ron Kuhn, Director of Security and his immediate supervisor told him their legal staff person was working on legislation to place his position in the hazardous category.
4. Complainant believed Barbara Nichols was the only staff legal counsel.

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<sup>1</sup> Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the position that is the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

5. Barbara Nichols joined the Wisconsin Lottery as Legal Counsel in March of 1988.

6. Part of Nichols' assignment as Legal Counsel for the Wisconsin Lottery was to draft proposed legislation and amendments pertinent to the Lottery.

7. Included in Nichols' legislative proposals was an amendment which would provide the Lottery security employees with arrest/police power.

8. Nichols gave the proposed legislation to the Lottery's Director of Administration and Operations, Bernard Mrazik, completing her assignment.

9. It is Nichols' understanding that none of the proposed legislation was enacted by the Legislature.

10. When Nichols left the Wisconsin Lottery in March of 1989, she handed out her private practice business cards to many Lottery employees, including complainant.

11. Complainant was in the office corridor when Nichols gave him her card.

12. During the brief stop in the corridor, complainant congratulated Nichols, wished her well and told her that he was concerned about his employment with the Lottery and would commence legal action if the matter wasn't resolved. At the end of the conversation, complainant had Nichols' business card in his hand.

13. In July of 1991, complainant retained Attorney Daphne Webb to pursue claims against the Lottery regarding his employment status and protective occupation status.

14. In February of 1992, Nichols returned to the Wisconsin Lottery and remained there until October of 1992.

15. While with the Lottery in 1992, Nichols represented that agency in this current case now before the Commission.

16. In October of 1992, Nichols moved to the legal staff of respondent Department of Employment Relations, where one of her assignments is this case.

The issue presented is whether an attorney-client relationship existed between Barbara Nichols and Nicholas Pierce which would cause Nichols to be disqualified from representing the Department of Employment Relations in this matter.

In attorney disqualification cases, Wisconsin applies the "substantial relationship" test. Berg v. Marine Trust Co., 141 Wis. 2d 878, 416 N.W. 2d 643 (1988). Under this test, an attorney will be disqualified if (1) an attorney represents a party in a matter in which the adverse party is that attorneys' former client and (2) if the subject matter of the two representations are "substantially related." Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F. 2d 221, 223 (7th Cir. 1978).

In this case, complainant argues that he formed an attorney-client relationship with Nichols: "there need not be a contract, there need not be an exchange of money, there need not be an exchange of confidential information and there need not be an express agreement--the entire relationship can be implied." According to complainant, this implied relationship came into existence when Nichols offered to represent him. Again, according to complainant, this offer occurred on the eve of Nichols' departure from the Lottery during his conversation with Nichols congratulating her on her new position in private practice. In support, complainant points to his testimony of the conversation which he had with Nichols.

Contrary to complainant's argument, it is the Commission's belief that no attorney-client relationship was formed between the complainant and Nichols during their conversation on the eve of her departure from the Lottery. The circumstance, subject and substance of the conversation were too casual, common, and conjectural to warrant such a finding. See Security Bank v. Klicker, 142 Wis. 2d 289, 298, 418 N.W. 2d 27 (Ct. App. 1987); 7 AmJur 2d Attorneys at Law §118 (Attorney-client relationship may be implied from conduct and "is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession." (footnotes omitted)).

Complainant also argues that Nichols should be disqualified to act as attorney for DER because she may be a witness in this matter and this multiple involvement would be improper. Based on the record before the Commission, it does not appear that Ms. Nichols' possible testimony would involve anything of substance. In the absence of any identification by complainant of significant matters about which Ms. Nichols would testify, the Commission must conclude that this basis for disqualification is also insufficient.

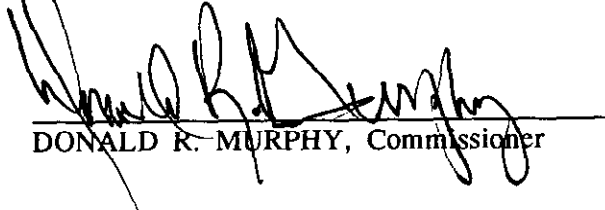
Order

Complainant's Motion to Disqualify Barbara Nichols as counsel to DER in this matter is denied.

Dated: September 17, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM/lrm

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner