

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondents.

**RULING ON MOTION
FOR SUBSTITUTION**

Case No. 98-0199-PC-ER

On January 24, 2000, complainant filed a motion requesting that the designated hearing examiner, Chairperson Laurie R. McCallum, recuse herself from serving as hearing examiner and from participating in the decision of this matter or, in the alternative, the Commission grant his motion for substitution of hearing examiner and bar Chairperson McCallum from participating in the decision of this case. The following findings are based on information provided by complainant or on evidence of record in the hearings and proceedings to which he makes reference in his motion.

1. Complainant argues that Chairperson McCallum failed to decide a default motion in *Oriedo v. DOC*, 98-0124-PC-ER, which complainant had filed as Mr. Oriedo's representative, and chastised complainant for filing such a motion. The Commission's file in that matter reveals that Chairperson McCallum indicated during the course of proceedings in the case to which complainant makes reference that the Commission had never granted a motion for default judgment on the basis of the type of discovery dispute at issue, and advised both parties that the filing of such motions was

wasting Commission resources and interfering with the integrity of the Commission's process.

2. Complainant appears to point to rulings made by Chairperson McCallum as an additional basis for his motion. Complainant has the ability to appeal such rulings if he feels they are erroneous.

3. Complainant contends that Chairperson McCallum stated during the hearing in the above-cited *Oriedo* case that complainant had "filed too many cases with the Commission." The record in that matter does not indicate that Chairperson McCallum made such a statement. What the record does show is that complainant failed to timely file copies of certain exhibits and that, as a result, Chairperson McCallum excluded them from the hearing record pursuant to §PC 4.02, Wis. Adm. Code. In explaining her ruling, one of the factors noted by the hearing examiner was that, even though complainant attempted to explain his failure by pointing to the fact that he was not an attorney, he had been involved in the litigation of many cases before the Commission and was, as a result, very familiar with the Commission's prehearing filing requirements.

4. In relation to the comments complainant alleges Chairperson McCallum made regarding complainant's failure to prove a conspiracy theory in the above-cited *Oredo* case, the record shows that the hearing examiner's statements were not as complainant has represented, but that Chairperson McCallum did comment on complainant's failure to elicit the testimony he had represented before hearing he would be eliciting from certain witnesses, and did note in essence that this failure evidenced a lack of good faith.

Section PC 5.01, Wis. Adm. Code, states as follows:

(4) MOTIONS FOR SUBSTITUTION OR DISQUALIFICATION OF PERSONS CONDUCTING HEARINGS. 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 or disqualification of the commissioner. 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.

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

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.

Here, complainant is not alleging that Chairperson McCallum has any personal or financial interest in the outcome of this matter, but instead that her demeanor and comments reveal that she cannot act in an impartial manner. Complainant's contentions rely to a significant extent on disagreement with rulings reached by the hearing examiner. This is not a sufficient basis upon which to base a disqualification. *See, Asadi v. UW*, 85-0058-PC-ER, 9/13/91; *King v. DOC*, 94-0057-PC-ER, 11/18/98. The remaining basis for complainant's contentions here consists of statements allegedly made by Chairperson McCallum during hearings or other proceedings in which complainant was involved. The records of such hearings and proceedings do not substantiate that Chairperson McCallum made the statements complainant claims here. Instead, these records show that the Chairperson's statements accurately reflected complainant's failure to satisfy Commission prehearing filing requirements despite his extensive experience with Commission proceedings, and his failure to present evidence he had represented before hearing he intended to present.

As noted in *Balele v. UW System, DER & DMRS*, 98-0159-PC-ER, 11/4/98, complainant has made a practice in this Commission of directing personal attacks against those who disagree with him, including opposing attorneys, hearing examiners, and commissioners, and of relying on false accusations and misrepresentations in doing so. This case offers another example of this continuing practice. The following

excerpt from 46 Am Jur 2d *Judges*, §156 was cited in the above-noted case and continues to represent the Commission's thinking in this regard:

§156. Effect of acts intended to create bias.

. . . A party may not engage in conduct in the course of litigation that might cause any conscientious judge to express his or her disapproval of it, and thereby put the party in a position to urge successful motions to disqualify the judge on the basis that parties, once embroiled in a self-created controversy with a judge, would have a license under which the judge would serve at their will . . .

Chairperson McCallum has determined she is able to participate in Mr. Balele's cases in an impartial manner and, accordingly, she is not required to recuse herself. For all the reasons discussed above, the Commission concludes that complainant has failed to show any justification for the disqualification of Chairperson McCallum.

CONCLUSIONS OF LAW

1. Complainant has the burden to show that Chairperson McCallum is not qualified to serve as a hearing examiner or final decision maker in this matter.
2. Complainant has failed to sustain this burden.

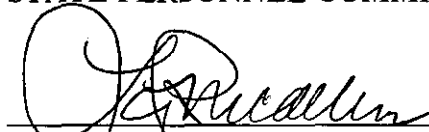
ORDER

This motion for substitution is denied.

Dated: February 11, 2000

LRM.980199Cru13

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

Commissioner Murphy did not participate in the decision of this matter.