STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES, Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 00-0133-PC-ER

RULING ON MOTION FOR RECUSAL AND FINAL DECISION AND ORDER

On October 9, 2000, complainant filed this charge with the Commission alleging that he was discriminated against on the basis of color, national origin or ancestry, and race, and retaliated against for engaging in protected whistleblower and fair employment activities, when he was not selected after interview for the position of Deputy Director, Bureau of Fee-For-Service in the Department of Health and Family Services.

In a ruling and order to show cause issued May 24, 2001, the Commission stated as follows:

> Before the Commission enters any final orders with regard to this case, it provides complainant the opportunity to show cause, if any he has, why the following sanctions should not be imposed:
>
> 1. With regard to any future cases he may file with this Commission, complainant is barred from naming either DER or DMRS as a party respondent without complying with the following requirements:
>
> a) He must serve and file a motion for leave to name DER or DMRS as a party;
>
> b) He must accompany the motion with an affidavit in which he states the facts he relies on in seeking to name DER or DMRS as a party;

c) He must accompany the motion with an explanation of how he believes the case is distinguishable from *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N. W 2d 418 (Ct. App. 1998).

2. The instant case is dismissed with prejudice as a sanction for the following, in the context of a pattern of such misconduct:

a) Frivolous or bad faith pleading with regard to naming DER and DMRS as parties;

b) Bad faith prosecution of this matter with regard to making misrepresentations concerning the January 10, 2001, prehearing conference, as set forth above on page 9.

In his response, complainant did not address the merits, but instead argued that the following actions should be ordered:

1. Declare the Ruling on Motions and Order to Show Cause issued May 25, 2001 as void because the first Lady participated in the decision making and said to the effect that she could have a conflict of interest for cases filed after her husband became Governor

2. To enjoin Ms. McCallum, the First Lady, as decision-maker from ever participating in cases before the Commission because of her conflicts of interest in all cases pending before the Commission.

3. Place the above case to be heard on the merit as a matter of law. (complainant's brief filed June 13, 2001, page 1)

The Commission relies on its findings set forth in its May 24, 2001, ruling, and makes the following findings with regard to complainant's motion for recusal.

FINDINGS OF FACT

1. In numerous cases he has filed with the Commission, the complainant has requested the recusal of one or more of the sitting commissioners. The basis for these requests generally has been that the commissioner had decided previous motions or cases in favor of the respondent.

2. In this matter, respondents filed motions to dismiss for lack of good faith prosecution. In his responsive brief filed February 7, 2001, complainant stated as follows, in pertinent part:

> In fact that goes to the fact Balele does not want Ms. McCallum to preside over all his complaints. Balele has asked the commission to remove McCallum as his decision-maker from his cases. It was illegal on the part on Ms. McCallum to preside over the pre-hearing conference in this case. In fact there was no reason for Mr (sic) McCallum to entertain an allegations that Balele was in the cafeteria other than for her vengeance and stereotype against Balele because of his race, color and for filing complaints in the Commission. This has to stop.

3. Accompanying this brief was an affidavit signed by complainant on February 7, 2001. This affidavit states as follows, in pertinent part:

> (1) I believe Commissioner Judy Rogers and Laurie McCallum hate me because of my race and national origin and for filing cases in the Commission which they were obliged to adjudicate.
>
> (2) I remember to have filed complaint against Judy Rogers in the Office of Attorney Responsibility. At one time I also caused Laurie McCallum to submit to written interrogatories for a case I had filed in the Federal Court. I believe these commissioners have been angry with me for those reasons.
>
> (3) On several cases I have asked Commissioner McCallum to recuse herself from presiding over cases I filed and cases I would file in the future.
>
> (4) I believe in this case commissioner McCallum grabbed this chance to retaliate against me because of the said reasons.

4. While Commissioner Donald R. Murphy, an African-American, was still serving on the Commission (he served from 1980 through 2000), complainant filed a charge against Commissioner Murphy with the Board of Attorneys Professional Responsibility (BAPR). In filing this charge and previous requests for recusal of Commissioner Murphy, complainant had, among other things, accused Commissioner Murphy and the other commissioners of racism and bigotry.

5. BAPR dismissed the charges filed by complainant against Commissioner Murphy and Commissioner Rogers.

6. Chairperson McCallum's husband became Governor of Wisconsin February 1, 2001. Chairperson McCallum, to avoid the potential for an appearance of

a conflict, has recused herself from participating in any substantive way in the decision of any case filed with the Commission on or after February 1, 2001. The charge in this case was filed on October 9, 2000.

7. Chairperson McCallum served as the hearing examiner who presided over the prehearing conference from which the present motion to dismiss for lack of good faith prosecution arises.

8. Chairperson McCallum believes she can participate in the adjudication of this case in an impartial manner.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. Chairperson McCallum does not have a conflict of interest with regard to this case.

3. Complainant has failed to show cause why the proposed sanctions set forth in the Commission's May 24, 2001, ruling should not be imposed.

4. Dismissal of this case is an appropriate sanction for complainant's misconduct, in the context of a pattern of such misconduct, with regard to frivolous or bad faith pleading with regard to naming DER and DMRS as parties, and with regard to bad faith prosecution of this matter resulting from the making of misrepresentations concerning the January 10, 2001, prehearing conference, as set forth in the Commission's May 24, 2001, ruling.

5. In light of complainant's bad faith or frivolous pleading in naming DER and DMRS as parties in this case, in the context of a pattern of such misconduct, the following restrictions are an appropriate response:

> With regard to any future cases he may file with this Commission, complainant is barred from naming either DER or DMRS as a party respondent without complying with the following requirements:

a) He must serve and file a motion for leave to name DER or DMRS as a party;

b) He must accompany the motion with an affidavit in which he states the facts he relies on in seeking to name DER or DMRS as a party;

c) He must accompany the motion with an explanation of how he believes the case is distinguishable from *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N. W 2d 418 (Ct. App. 1998).

OPINION

Complainant asserts that Chairperson McCallum has a conflict of interest in this case because her husband is the Governor. At the time the personnel transaction in question occurred, and this complaint was filed on October 9, 2000, Mr McCallum was Lieutenant Governor. Mr McCallum was inaugurated as Governor on February 1, 2001. He succeeded Governor Thompson, who resigned as Governor.

This analysis begins with the principle that constitutional due process of law requires that an administrative adjudicative body such as this Commission be a fair and impartial decision-maker. *Guthrie v. LIRC,* 111 Wis. 2d 447, 454, 331 N. W 2d 331 (1983); *State ex rel DeLuca v. Common Council,* 72 Wis. 2d 672, 682, 242 N. W. 2d 689 (1976). 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 our system of law has always endeavored to prevent the probability of unfairness." *Guthrie, id. See also, e. g., Baldwin v. LIRC,* 228 Wis. 2d 601, 599 N. W. 2d 8 (Ct. App. 1999).

A number of cases provide some guidance on the question of the degree of risk of bias that is necessary to amount to a violation of due process. In *DeLuca,* the Court addressed the possibility of bias arising out of the combination of investigatory and adjudicative functions. While the case currently before the Commission does not involve a question relating to a combining of functions (e. g., investigative and

adjudicative) such as in *DeLuca,* the court's discussion of the manner of analyzing the degree of risk of bias is useful:

> The Court[1] nevertheless went on to say that not only is a biased decisionmaker constitutionally unacceptable, but, in addition, that the system of due process must endeavor to prevent the probability of unfairness. Circumstances which lead to a *high probability* of bias, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint.
>
> The Court pointed out that, even where the investigative and adjudicative functions are combined, the objector must assume the *heavy burden* of showing that this combination of functions create an unconstitutional risk of unfairness:
>
> > "[The objector] must overcome the presumption of honesty and integrity in those serving as adjudicators; and it must convince that under a *realistic appraisal of psychological tendencies and human weakness*, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."
> >
> > [A]lthough there is no *per se* disqualification because of the combining of the investigatory and the adjudicatory functions, special facts and circumstances may in a proper case impel a court to conclude that the risk of unfairness is intolerably high. 72 Wis. 2d at 672, 684-85 (citation omitted) (emphasis added).

This holding indicates that the party seeking recusal or disqualification has a high burden to carry in order overcome the presumption of honesty and integrity in administrative adjudicators.

Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N. W 2d 838 (1993), involved an issue of impartiality concerning the Chairperson of the Board of Zoning Appeals for the City of Cedarburg. The Court held that comments by the Chairperson[2]

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[1] This is a reference to *Withrow v. Larkin,* 421 U. S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

[2] The chairperson's comments included a reference to Marris's legal position as a "'loophole' in need of 'closing,'" 176 Wis. 2d at 29; a suggestion to the other board members that "they should try to 'get her [Marris] on the Leona Helmsley rule'", 176 Wis. 2d at 27; and a

"indicated that he had prejudged Marris's case and created an impermissibly high risk of bias. Under these circumstances he should have recused himself in order that Marris have a fair hearing." 176 Wis. 2d at 20. In determining whether the Chairperson's comments "created an impermissibly high risk of bias," *id.*, the Court's analysis included the following:

> A *clear* statement "suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision." 176 Wis. 2d at 26 (emphasis added; citation omitted).
>
> [S]ome of the chairperson's comments *clearly* indicated that he has prejudged Marris's case, thus creating an impermissibly high risk of bias. Therefore, we conclude that the chairperson erred when he refused to recuse himself and that he deprived Marris of her right to common law due process. 176 Wis. 2d at 31 (emphasis added)

This emphasis on a clear showing of risk of bias is consistent with the holding in *DeLuca* that the objector to an official's participation in a case carries a "heavy burden," 72 Wis. 2d at 684, to overcome the presumption of honesty and integrity in administrative adjudicative officials, *id.* *See also LeBow v. Optometry Examining Board*, 52 Wis. 2d 569, 574, 191 N.W 2d 47 (1971):

> An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding in which he has a personal or pecuniary interest, [or] where he is related to an interested person within the degree prohibited by statute. [A]n interest to disqualify an administrative officer acting in a judicial capacity may be small, but it must be an interest direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical. (citation and internal quotation marks omitted)

The nature of the asserted conflict in this case can be characterized as either political or pecuniary in nature. The political aspect of a decision favorable to the complainant presumably would be that it would have an adverse effect on the political fortunes of the McCallum administration--e. g., that it would be a political detriment in

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statement questioning "how the board, in analyzing expenditures, could know whether Marris

the next election. At the time the hiring decision at issue in this case was made, Mr. McCallum was the Lieutenant Governor. The Lieutenant Governor has no line function in the executive branch. The position being filled was that of Deputy Director, Bureau of Fee-for-Service in the Department of Health and Family Services (DHFS). Neither the Lieutenant Governor nor the Governor is a party in this case; neither is alleged to have had any role in the personnel transaction in question. In the Commission's opinion, a ruling in favor of complainant's race discrimination and retaliation claim could not have an appreciable effect on the political interests of the McCallum administration. *Cf.* 46 Am Jur 2d Judges §133, p. 234: "Whether relationship of a judge to a public officer who as such is a party to an action will disqualify the judge depends upon whether the personal prestige or political fortunes of the public officer are involved." In the instant case, the Governor is not a party, and his "personal prestige or political fortunes" are not involved in this complaint that arose prior to his becoming Governor and involves a middle echelon administrative position. *Cf. United States v. McKeever*, 906 F.2d 129 (5th Cir 1990) (judge's past service as a reserve police officer, her marriage to a reserve deputy who was not present when the subject warrant requested by the sheriff's department was issued and who did not participate in the search conducted pursuant to the warrant, and the judge's visit to the crime scene after the warrant was issued, were not sufficient to require her disqualification in regard to the issuance of the warrant.); *Bernard v. Coyne*, 31 F.3d 842, (9th Cir. 1994) (judge in bankruptcy proceeding not required to recuse himself, even though married to the United States Trustee within whose jurisdiction the action was brought, since U.S. Trustee performed only perfunctory administrative tasks, rather than discretionary control, over the trustee appointed by the court, and this was not a high profile case in which the U.S. Trustee was directly involved and which could significantly aid or hinder her career.); *In re Faulkner*, 856 F.2d 716 (5th Cir 1988) (impermissible bias found where judge's first cousin was an important participant in certain transactions which formed the basis for the indictments against the defendants, and had

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'bought a door for that building or for another building she built.'" 176 Wis. 2d at 28.

communicated to the judge material facts and her opinions and attitudes about those facts.)

In *Cozzens-Ellis v. UW-Madison,* 87-0070-PC-ER, 2/26/91, the Commission discussed a conflict of interest issue raised with regard to the fact that Chairperson McCallum's husband's was Lieutenant Governor, *vis-à-vis* a WFEA complaint alleging discrimination with regard to certain promotions within the UW-Madison Department of Police and Security. In that case, the Commission concluded that under either the standards expressed in *Spooner Dist. v. NW Educators,* 136 Wis. 2d 263, 269-70, 401 N. W. 2d 578 (1987) ("Facts which might indicate to a reasonable person that the arbitrator may have an interest in the outcome of the arbitration."[3]), or *Hill v. Dept. of Labor and Industries,* 90 Wash. 2d 276, 580 P. 2d 636, 639-40 (1978) ("whether a disinterested person being apprised of the totality of a board member's personal interest in a matter being acted upon would be reasonably justified in thinking partiality may exist."), the conflict of interest objection was not well taken. The Commission discussion included the following:

> [I]t is noteworthy that the Senate unanimously confirmed Ms. McCallum's current appointment notwithstanding that at the time her husband was Lieutenant Governor. Obviously, the Senate, whose members would be as attuned as anyone to conflict of interest problems, perceived none in Ms. McCallum sitting on this Commission and hearing cases involving the state as employer while married to the Lieutenant Governor. This provides additional support for the conclusion that there is no absence of [either] fairness or the appearance of fairness in having Ms. McCallum participate in this matter. *Cozzens-Ellis,* p. 9.

Mr. McCallum had been Lieutenant Governor since he was elected to that position in 1986. Chairperson McCallum has been a member of this Commission since 1982. During the period her husband served as Lieutenant Governor, Chairperson McCallum was reappointed to the Commission three times (1989, 1994, 1999). During the three

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[3] The commission observed that it was "somewhat questionable whether these principles applicable to arbitrators can be applied directly to an issue of alleged impartiality of a quasi-judicial administrative official in a Chapter 227 proceeding", *Cozzens-Ellis,* p. 8, but concluded that even under this test there was no conflict.

confirmation processes relevant to these reappointments, she has been overwhelmingly confirmed by the State Senate. Since *Cozzens-Ellis* was decided in 1991, Chairperson McCallum has been reappointed twice to the Commission, and confirmed twice by the State Senate. In the Commission's opinion, there is no reason to question the viability of the *Cozzens-Ellis* decision.

This case raises the question of whether the situation has so changed due to Mr McCallum's succession to the office of Governor that there is a conflict of interest now, where there was none when he was Lieutenant Governor. The Commission does not perceive that this is the case. It remains that Mr. McCallum was the Lieutenant Governor at the time of the hiring decision in question, and his connection to the decision and its possible relationship to him from a political standpoint are not appreciably different. Complainant's enunciation of the basis for his argument has primarily consisted of conclusory statements such as

> Although Ms. McCallum and the Commission relate to the appearance of conflict of interest in cases filed after her husband became governor, the obvious [sic] is that she had lost impartiality for any case against the state agencies pending in the Commission as of February 1, 2001. She would tend to protect the interest of her husband at all cost.

> Normal people would conclude that Ms. McCallum wants to take advantage of her status as First Lady to dismiss all cases pending against the state to protect the interest of her husband. Complainant's brief in support of motion filed June 13, 2001, p.9.

Complainant also argues that the Governor, through Chairperson McCallum, could now learn the identity of state employees filing complaints which could lead to retaliation by the Governor against these employees. However, the identity of complainants has always been available to a Governor or to any other person as the result of the public records law. This argument has no merit.

While complainant does not directly make the argument that Chairperson McCallum would have a pecuniary interest in this matter through her marriage to the Governor due to the possible effect of the decision on the state treasury, the Commission also will address this possibility.

The possible cost to the state of a decision favorable to complainant could involve back pay and, conceivably, front pay, subject to mitigation with regard to complainant's salary in his current state job. In *Cozzen-Ellis,* which also involved a failure to hire, the Commission held that as "to the potential impact of a decision favorable to complainant on the state treasury, such an impact would have to be considered by any reasonable, disinterested person to be infinitesimal in the context of the overall state budget." *Id.,* p. 8. The Commission sees no reason why this conclusion should be any different now.[4] In *State ex rel Strykowski v. Wilkie,* 81 Wis. 2d 491, 261 N. W 2d 434 (1977), the Court considered an argument that a Patients Compensation Panel deprived the patients who allegedly were injured by malpractice of the right to an impartial decision maker because two of the members of the panel were health care providers. The Court discussed this contention as follows:

> This court has said that to disqualify an adjudicator, a pecuniary interest must be:
>
> a direct certain and immediate interest, and
>
> not one which is indirect, contingent or remote.
>
> The petitioners argue that the panel members who are health care providers are financially interested in panel decisions because they, along with all other health care providers in the state, pay annual assessments to maintain the patients' compensation fund. However, any financial interest inherent in the structure of Chapter 655, Stats., is too remote and speculative to require disqualification. Absent evidence to the contrary, adjudicators must be presumed to be persons of honesty and integrity. 81 Wis. 2d at 515-16 (citations and footnotes omitted).

If the pecuniary interest of these health care providers with regard to a possible malpractice award is too remote and speculative to require disqualification, the impact of a possible award in this case on the state treasury is even more remote and speculative, and does not create a conflict of interest with regard to Chairperson McCallum.

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[4] Also, the complainant is unrepresented by counsel and the state faces no potential liability for attorney's fees.

The Commission believes its conclusion in this case would be the same if it used other objective standards that have been articulated in different contexts.

DeBaker v. Shah, 194 Wis. 2d 104, 116-17, 533 N. W 2d 464 (1995) articulated a "reasonable person" test in the context of a judicial review of an arbitration proceeding:

> Accordingly, we reaffirm the use of the *Richco Structures* reasonable person test in determining whether an arbitrator who has failed to make a disclosure acted in an evidently partial manner contrary to sec. 788.10(1)(b).
>
> To restate the *Richco Structures* standard, "evident partiality" exists only when a *reasonable person* knowing the previously undisclosed information would have had "such doubts" regarding the impartiality of the arbitrator that the person would have taken action on the information. "In other words, a reasonable person would conclude it 'evident,' that is *clear, plain and apparent* [emphasis added] from the undisclosed information, that partiality is so likely that action was required." Put another way, the standard is not simply that a reasonable person, upon learning of the undisclosed information, would investigate further The standard is whether the reasonable person, after further investigation, would conclude that "partiality is so likely that action was required."

Cases concerning questions of bias on the part of judges often utilize a version of the "reasonable person" standard. *In re Mason*, 916 F. 2d 384, 385-86 (7th Cir 1990), involved an interpretation of 28 USC §455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Court's discussion includes the following:

> Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry. An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person. Because some people see goblins behind every tree, a subjective approach would approximate automatic disqualification. A reasonable observer is unconcerned about trivial risks; there is always *some* risk, a probability exceeding 0.0001%, that a judge will disregard the merits. Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-

> shopping, which itself imperil the perceived ability of the judicial system to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will *apply* rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk out of the ordinary.
>
> An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system; as a dispenser rather than a recipient or observer of decisions, the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious. Judges asked to recuse themselves hestitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under §455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.

It has been observed that the standard for a conflict of interest for judges is more stringent than the standard for administrative adjudicative officials. *See Clisham v. Board of Police Commissioners,* 223 Conn. 354, 361-62, 613 A. 2d 254 (1992):

> The applicable due process standards for disqualification of administrative adjudicators do not rise to the heights of those prescribed for judicial disqualification. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator. Moreover, there is a presumption that administrative board members acting in an adjudicative capacity are not biased. To overcome the presumption, the plaintiff . must demonstrate actual bias, rather than mere potential bias, of the board members challenged, unless the circumstances indicate a probability of such bias too high to be constitutionally tolerated. (Internal quotation marks and citations omitted.)

However, even utilizing the standards for judges set forth by such provisions as 28 USC 455(a), or for that matter, the standard for "evident partiality" of arbitrators, discussed above, the Commission does not believe the complainant's objection to

Chairperson McCallum's participation has any merit. The Commission does not think a "well-informed, thoughtful observer" (as opposed to "a hypersensitive or unduly suspicious person"), *In re Mason, supra,* would perceive "a significant risk" that the Chairperson "will resolve the case on a basis other than the merits," *id.*, because her husband became Governor subsequent to both the filing of this case and the actions complained of. No reasonable person could believe that a ruling favorable to the complainant in this case, which involves the appointment of a mid-level employe of DHFS prior to the time the Governor assumed his office, could somehow redound to the detriment of the current Governor, either from a political or a pecuniary standpoint. Similarly, a reasonable person would not conclude it was "'fair, plain, and apparent that partiality is so likely that action was required.'" *DeBaker v. Shah,* 194 Wis. 2d at 117 (citation omitted).

Finally, it should be noted that complainant has made a practice, over the course of filing more than 60 cases with the Commission and prevailing on the merits on none of them, of requesting the recusal of members of the Personnel Commission. Complainant has generally offered the following rationale for these requests: he has taken action against these commissioners which now renders them biased in his cases, the commissioners have decided cases against him in the past, and the commissioners are racist or otherwise biased against him. Complainant has relied on each of these reasons here. (See Findings 2 and 3, above) First of all, a party should not be permitted to cause the disqualification of a judge by his own intentional actions, such as complainant's request that Chairperson McCallum submit to written interrogatories in one of the cases he filed in federal court. (See Finding 3.(2), above) *Wilks v. Israel,* 627 F.2d 32 (7th Cir 1980); *United States v. Hillsberg*, 812 F.2d 328 (7th Cir 1987). Moreover, the allegations of prejudice by complainant stem from the failure of Chairperson McCallum and the other commissioners to agree with complainant regarding the merits of his many complaints. This is clearly not a valid basis for recusal, and his differences with the Commission on this basis are appropriately addressed not through requests for recusal but through petitions for judicial review

(*Andrews, supra)*, with which complainant has been equally unsuccessful. The Commission agrees with the *Andrews* court that we are not ready "to tolerate a system in which disgruntled litigants can wreak havoc with the orderly administration of dispute-resolving tribunals."

ORDER

1. Complainant's request for the removal of Chairperson McCallum from participation in this matter is denied.

2. Due to complainant's failure to show cause why the sanctions which were detailed in the Ruling on Motions and Order to Show Cause issued by the Commission on May 24, 2001, should not be imposed, such Ruling is hereby adopted, and the following orders are entered:

a. With regard to any future cases he may file with this Commission, complainant is barred from naming either DER or DMRS as a party respondent without complying with the following requirements:

1) He must serve and file a motion for leave to name DER or DMRS as a party;

2) He must accompany the motion with an affidavit in which he states the facts he relies on in seeking to name DER or DMRS as a party;

3) He must accompany the motion with an explanation of how he believes the case is distinguishable from *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N. W 2d 418 (Ct. App. 1998).

b. The instant case is dismissed with prejudice as a sanction for the following, in the context of a pattern of such misconduct:

1) Frivolous or bad faith pleading with regard to naming DER and DMRS as parties;

2) Bad faith prosecution of this matter with regard to making misrepresentations concerning the January 10, 2001, prehearing conference.

Dated: August 15, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/AJT:000133Crul3

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for

rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95