

GARY PATERA,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Stout),**
Respondent.

HEARING EXAMINER'S
RULING ON MOTIONS

Case No. 00-0146-PC-ER

A telephone conference was held on November 21, 2001, with Judy M. Rogers, Commissioner, presiding as the assigned hearing examiner. One topic discussed was Mr. Patera's objection to respondent's request to have certain witnesses appear by telephone. The other topic discussed was Mr. Patera's request for postponement of the hearing scheduled for December 7, 2001, such request raised for the first time yesterday. Mr. Patera appeared personally. Respondent appeared by Attorney Tomas L. Stafford.

The scheduled hearing is limited to evidence regarding respondent's prior motion to dismiss contending that the complaint was filed untimely. The Commission issued a ruling dated September 24, 2001, finding that disputed facts exists on the timeliness issue which would be better resolved at a hearing.

A conference was held on October 25, 2001, to establish a statement of the issue for hearing and to select a hearing date (see Conference Report dated 10/31/01). The parties agreed to a hearing on December 7, 2001, starting at 10:00 a.m. Included in the Conference Report is the following text regarding requests for hearing postponement:

As provided in §PC 5.02, Wis. Adm. Code, a request to postpone a date for hearing will be granted only upon a showing of good cause. Postponement requests should be in writing, if possible, and the party making the request should indicate the reason for the request and whether the opposing party agrees with the request. Generally speaking, the following reasons are not considered as good cause for granting a hearing postponement: a) waiting an unreasonable amount of time to request postponement after knowing that a reason exists to

request the same, b) being unprepared for hearing, and c) waiting until too close to the hearing date to initiate settlement negotiations or to seek representation.

I. Request for Hearing Postponement - Denied

Mr. Patera requested postponement of the hearing because he wishes to be represented by an attorney and the attorney is unavailable for hearing until February or March 2002. Respondent objected to the postponement request and indicated it was ready to proceed as scheduled. After hearing arguments from the parties (summarized below) the examiner denied Mr. Patera's request.

I reminded Mr. Patera that he had been previously advised in writing that waiting too long to retain an attorney is not considered good cause for obtaining a hearing postponement. (See Conference Report information cited in prior section of this ruling.) He indicated that he first sought representation in March 2001 but that attorney was unwilling to represent him unless he prevailed on the timeliness issue. Mr. Patera wrote to the same attorney on October 4, 2001, asking if he would change his mind. On or about October 11, 2001, the attorney responded reaffirming that he was not interested in representing Mr. Patera until after the timeliness issue is resolved.

Mr. Patera did nothing to attempt to seek representation between October 11 and November 12, 2001, mainly due to his ongoing problem with finances related to his divorce. He also had started a new job and was ineligible to take vacation to meet with an attorney during normal work hours until the first week in November. He did not attempt to speak to attorneys by telephone about potential representation during this period solely due to his financial situation.

The hearing examiner denied the request for postponement finding that Mr. Patera had not shown good cause, within the meaning of §PC 5.02, Wis. Adm. Code. Mr. Patera, at the conference on October 25, 2001, agreed to a hearing date of December 7, 2001, knowing that he did not have an attorney and that he was experiencing financial difficulties. He never indicated prior to November 20, 2001, that he might wish to hire an attorney and, accordingly, did not want the hearing held as soon as December 7, 2001. Once he decided that he wanted

and could afford an attorney, he still did not alert the Commission or opposing party to a potential need for a postponement until he actually found an attorney that he wished to hire.

II. Witness Appearance by Telephone

Respondent requested permission for some witnesses to appear by telephone due to the fact that all witnesses work out of town. Respondent does not wish to unnecessarily incur expenses relating to travel and lodging. Complainant objected to taking any testimony by telephone.

There are six potential witnesses for the hearing as follows: 1) Wayne Argo, Director of Human Resources; 2) Mike Abrahamson, Maintenance Supervisor; 3) Donna Weber; Affirmative Action Advisor; 4) Mark Anthon; Union Representative for Mr. Patera; and 5) Mr. Patera. All were present at a meeting and what was said at the meeting is disputed. Respondent requested permission to have Mr. Moats and Mr. Anthon appear by telephone.

Mr. Patera argued that he wanted all witnesses to appear in person so that all aspects of credibility could be assessed. He noted that "body language" is something that could not be assessed if the witness appeared by telephone.

The examiner asked what role Mr. Moats and Mr. Anthon had at the meeting. Both parties agreed that Mr. Anthon did not even speak at the meeting. Mr. Patera indicated that Mr. Moats spoke at the meeting and appeared to have the "most sway" in the discussion. Based on the differing levels of involvement at the meeting, the examiner ruled that Mr. Anthon could appear by telephone but that Mr. Moats should appear in person.

Respondent then requested permission to have Mr. Abrahamson appear by telephone. Both parties agreed that Mr. Abrahamson was "not vocal" at the meeting. Respondent noted that this request was consistent with the examiner's ruling about Mr. Anthon and would result in respondent's saving the travel and lodging expenses of a witness who does not need to appear in person. Mr. Patera maintained his objection to any witness appearing by telephone. The examiner granted the request for Mr. Abrahamson to appear by telephone noting that when the costs of his appearance were balanced against the importance of his personal appearance when he did not even speak at the meeting, that such factors weighed in respondent's favor.

III. Other Matters Discussed

I reminded Mr. Patera that he has the burden of proof at hearing and would be required to present his witnesses and exhibits before respondent would be expected to put in their case. I asked if Mr. Patera had contacted any of his witnesses to advise them of the need to appear for hearing on the established dated. He said he was unsure who his witnesses would be and had not contacted any of them.

Attorney Stafford graciously agreed to have the witnesses available at hearing (as noted in the prior section) and he would make them available for complainant's case in chief. In other words, there is no need for Mr. Patera to make arrangements for the Commission to send letters of appearance for those witnesses.

Dated: November 21, 2001.

STATE PERSONNEL COMMISSION

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JUDY M. ROGERS, Commissioner