

STATE OF WISCONSIN

PERSONNEL COMMISSION

**GARY PATERA,**  
*Complainant,*

v.

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

**RULING  
ON  
OBJECTION TO  
PARTICIPATION**

Case No. 00-0146-PC-ER

This matter is before the Commission on complainant's objection to participation by one or more Commissioners in the consideration of his case. Complainant claims that respondent discriminated against him based on disability when it discharged him from his employment in January of 2000. Respondent filed a motion to dismiss the case as untimely. On September 24, 2001, the Commission deferred ruling on the motion pending the completion of an evidentiary hearing. The following facts appear to be undisputed.

#### FINDINGS OF FACT

1. By order dated December 6, 2001, former Commissioner Laurie R. McCallum was designated as the hearing examiner for the hearing in this matter that was held on December 7, 2001. The hearing was held on the following issue:

Whether a reasonable person in complainant's position would have understood by the end of the meeting on January 6, 2000, that an official and final decision had been made to terminate his employment.

2. Former Commissioner McCallum is the spouse of current Governor Scott McCallum.

3. In August of 2001, Governor McCallum nominated Anthony J. Theodore for appointment to a vacancy on the Personnel Commission. Mr. Theodore began serving in that capacity later that month.

4. Former Commissioner McCallum presided during the hearing on December 7, 2001.

5. At the conclusion of the hearing, the parties agreed to a post-hearing briefing schedule.

6. The briefing schedule had not been completed by January, 2002, when former Commissioner McCallum resigned her appointment to the Personnel Commission.

7 In March of 2002, Governor McCallum nominated Kelli S. Thompson for appointment to a vacancy on the Personnel Commission. Ms. Thompson began serving in that capacity later that month.

8. The post-hearing briefing schedule concluded in May of 2002.

9. By cover letter dated June 11, 2002, the Commission issued a proposed decision in this matter and provided the parties an opportunity to file objections or to request oral argument. The cover letter was signed by the Commission's General Counsel and contained the following language: "Former Chairperson Laurie R. McCallum was the designated hearing examiner in this matter and, while she no longer serves as an employee of the Personnel Commission, she prepared the proposed ruling."

10. Complainant filed objections to the proposed decision and requested oral argument before the Commission.

11. By letter dated September 23, 2002, the Commission advised the parties that Commissioner Thompson had been appointed to the Commission and provided the parties a period of 10 calendar days to raise any objection to participation by Commissioner Thompson in the consideration of this matter.

12. By letter dated October 1, 2002, complainant objected to participation by Commissioner Thompson "in any decision in this matter "

13. By letter dated October 9, 2002, the Commission informed the parties that it had granted complainant's request for oral argument, scheduled the argument for December 11, 2002, and established a schedule by which the parties could offer

additional arguments regarding complainant's objection to participation by Commissioner Thompson.

14. Governor McCallum was an unsuccessful candidate for election to the position of Governor for the State of Wisconsin for the term commencing January 6, 2003.

15. As of the date this ruling is issued, Mr. Theodore and Ms. Thompson are the 2 Commissioners serving on the Personnel Commission. The remaining Commissioner position is vacant.

### OPINION

Complainant describes his objection that is the subject of this ruling as follows:

I would object to anyone appointed to the commission by Governor McCallum, due to the fact that his wife has submitted a Proposed Decision in this case, as it seems rather obvious that a conflict of interest issue is created by this.

Even though the complainant's objection only references Commissioner Thompson, the basis he relies upon also applies to Commissioner Theodore. Both of the two sitting commissioners were appointed to the Commission by Governor McCallum, the spouse of former Commissioner McCallum. Therefore, the Commission must address complainant's objection as if it referenced both Commissioner Thompson *and* Commissioner Theodore.

Even if the complainant could establish that Commissioners Thompson and Theodore should be disqualified because of possible bias or self-interest,<sup>1</sup> the absence of any other method for reaching a determination in this matter requires that both remain as decision-makers. The "rule of necessity" applies to the particular circumstances that

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<sup>1</sup> One could argue that any actual or perceived conflict of interest that Commissioner Thompson or Commissioner Theodore might have in terms of deciding this case has been eliminated by the results of the recent gubernatorial election. The spouse of former Commissioner McCallum was defeated in his election bid. As a consequence, whatever interest Commissioners Thompson and Theodore might have had to affirm former Commissioner McCallum's analysis of this matter so as to curry favor with Governor McCallum is inconsistent with the reality that a new governor will be appointed in approximately 6 weeks.

are present in this matter. As explained in 2 Am. Jur. 2d *Administrative Law* §43 (1994):

Due process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make. Under such circumstances, the so-called "rule of necessity" permits an adjudicative body to proceed in spite of its possible bias or self-interest. An officer, otherwise disqualified, may still act, if his or her failure to act would necessarily result in a failure of justice. Thus, an officer exercising judicial or quasi-judicial functions may act in a proceeding wherein the officer is disqualified by interest, relationship, or the like, if his or her jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that the officer's refusal to act would absolutely prevent a determination of the proceeding. (footnotes omitted)

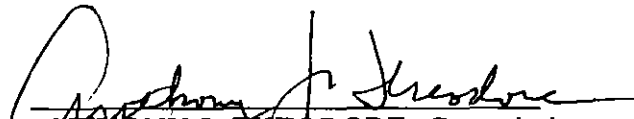
Commissioners Thompson and Theodore are currently the only 2 members of the Commission. If, pursuant to disqualification, they are unable to act, the Commission is unable to act. Yet, pursuant to §111.375(2), Stats., the Personnel Commission has sole jurisdiction over discrimination complaints filed under the Wisconsin Fair Employment Act against the State of Wisconsin as an employer. If the Commission is unable to rule on the complainant's case, the case cannot be decided elsewhere. Under these circumstances, the rule of necessity applies and requires Commissioners Thompson and Theodore to rule on the pending matter.

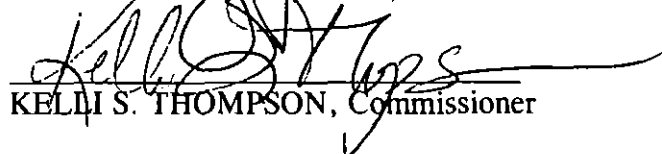
#### ORDER

Complainant's objection to participation by Commissioners Thompson and Theodore is overruled. Oral argument relating to the proposed decision is already scheduled.

Dated: Nov 18, 2002 STATE PERSONNEL COMMISSION

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ANTHONY J. THEODORE, Commissioner

  
KELLI S. THOMPSON, Commissioner