

STATE OF WISCONSIN

PERSONNEL COMMISSION

JAMES GANTHER,
Complainant,

v.

**Secretary, DEPARTMENT OF
REVENUE,**
Respondent.

Case No. 97-0152-PC-ER

**RULING ON
COMPLAINANT'S
MOTIONS FOR
CONTINUANCE AND
FOR SUBSTITUTION OF
HEARING EXAMINER
AND FOR ORDER
COMPELLING
DISCOVERY**

This case is before the Commission to address complainant's motion for continuance and for substitution, dated September 14, 2000, and filed September 18, 2000, and motion for order compelling discovery, dated September 16, 2000, and also filed on September 18, 2000. The Commission has advised complainant that his motions have been denied and that a written ruling would be forthcoming.

This matter was scheduled for hearing on September 21, 2000. The hearing examiner, General Counsel Anthony J. Theodore, held a conference call on September 13, 2000, and at that time denied complainant's request for a postponement. His September 14, 2000, letter summarizes the rationale for the ruling. On September 15, 2000, which was after Mr Theodore's decision and prior to filing this motion, complainant contacted Chairperson McCallum concerning his postponement request. Ms. McCallum summarized this conversation in a September 18, 2000, letter to the parties. After perusing complainant's most recent motions and the aforesaid letters, the Commission agrees with the handling of complainant's postponement request as summarized in those letters. The Commission will address complainant's arguments in this written decision.

Complainant objects to the procedure followed by the examiner in deciding his motion—a three way conference call including both parties. Complainant asserts there is nothing in the Administrative Code indicating that such a conference is required. Holding such a conference call was well within the hearing examiner's exercise of

discretion under the Administrative Procedure Act. While, as complainant points out, no three way conference call was held with regard to an earlier postponement request, the record in this case shows that the circumstances were different when that happened. That request was handled by Kurt Stege, another hearing examiner on the Commission's staff. His letter of June 29, 2000, reflects that the parties agreed to the hearing postponement: "I received separate voice mail messages from both of you on June 19th indicating you agreed to postpone the hearing."

Complainant also relies on the earlier postponement for the argument that since the examiner granted that postponement request, which respondent had requested due to witness unavailability, it was unfair to deny his current request, which also has been based on witness unavailability. However, the earlier situation is distinguishable, because, as just discussed, the parties agreed to the postponement. Also, Mr Theodore's letter of September 14, 2000, states that complainant "declined to provide any more information about the identity of this witness, the role of the witness, or the nature of the conflict with his or her employment, other than to say the witness was not a state employe." Thus complainant did not provide information needed to more fully evaluate his request. Also, as Mr Theodore advised in his letter, there are alternatives to completely postponing a hearing to accommodate a witness's conflict, but these could not be addressed without additional information.

Complainant also contends that there is an additional ground for his postponement request in "that I never agreed to schedule the hearing on this date." However, there it is not required that parties have to agree to the hearing date established by the Commission. Furthermore, Mr. Stege's June 29, 2000, letter indicates that complainant was informed of the tentative date by voicemail and had the opportunity to have objected.

Complainant also states that he needs a postponement so that he can obtain legal representation. This is something that should have been pursued prior to a few days before the hearing. The Commission notes that the prehearing conference report dated March 2, 2000, explicitly advised the parties that "[g]enerally speaking, the following

reasons are not considered as good cause for granting a hearing postponement . . . waiting until too close to the hearing date to . . . seek representation.

Finally, on September 18, 2000, complainant filed with Chairperson McCallum a motion for an order compelling discovery, which included a request for postponement of the hearing until the discovery issue can be resolved. The documents underlying this motion reflect that complainant's discovery request is dated April 24, 2000, and respondent's response is dated May 25, 2000. This motion, filed three days before the hearing, and only after the hearing examiner has denied complainant's request for postponement, comes too late.

With regard to the request for substitution of hearing examiners, complainant states:

In my conversation on September 13, 2000, with Anthony Theodore he refused my request for a continuance in respect to this case. I believe this denial is totally improper and unfair and that he has not provided any reasons that justifies the denial. It appears he has been bullied by Veronica Folstad the attorney for the respondent into denying this request. Based on his decision in this matter, it appears that he cannot be objective in making a decision on this case. Therefore, I am requesting that a different hearing examiner be assigned this case. I also request that Kurt Stege not be substituted.

The basis for complainant's substitution request boils down to dissatisfaction with the examiner's ruling on his postponement request. This is not evidence of bias and does not provide a legitimate reason to substitute examiners. *See, e. g., Mincy & Emery v. DER, 90-0229-PC, 10/3/91.*

ORDER


Complainant's motions are denied.

Dated: October 20, 2000

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner