

EUGENE J MINCY,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 90-0229-PC

RULING ON
PETITION
FOR
REHEARING

On August 29, 1991, the Commission issued a decision and order in this matter which affirmed the respondent's reallocation decision and dismissed the appeal. On September 20th, the appellant filed a petition for rehearing.

Pursuant to §227.49(1), Stats:

Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities.

The manner in which the Commission may serve its decisions on the parties is prescribed by §227.48(1), Stats:

Every decision when made, signed and filed, shall be served forthwith by personal delivery or mailing of a copy to each party to the proceedings or to the party's attorney of record.

Service of a decision under this section is complete on the date of its mailing regardless of its receipt by the addressee. In re Proposed Incorporation of Pewaukee, 72 Wis. 2d 593, 241 N.W. 2d 603 (1976). In the present case, the appellant did not file his petition for rehearing until the 22nd day after service. Because it was untimely filed, it must be denied.

Even though the petition for rehearing is untimely, the Commission will take the opportunity to more fully explain the reason behind its Final Decision and Order.

This case arises from a reallocation of the appellant's position to the Revenue Auditor 3 classification. On March 15, 1991, the Commission desig-

nated Kurt M. Stege as the hearing examiner for the case. The hearing commenced on March 19th and was completed on March 21st. The parties filed post-hearing briefs. On June 28, 1991, the examiner issued a proposed decision and order in favor of the respondent. On the last day for filing objections to the proposed decision, the appellant requested that the hearing examiner be disqualified and contended that the proposed decision was "inappropriate and incorrect." The appellant filed various documents in support of his disqualification request. The Commission considered the written materials filed by the appellant as well as a responsive brief filed by the respondent, and issued its final decision and order which read, in relevant part, as follows:

After having considered the written materials filed by both Mr. Mincy and by the respondent, the Commission concludes that there is no basis on which to disqualify the examiner.

The Commission adopts the proposed decision and order as its final decision and order in these matters.

The basis for the appellant's request for disqualification of the examiner were various documents indicating that the the examiner had served as personal representative for the estate of his father who died in March of 1985, that the estate had a dispute with the Wisconsin Department of Revenue (DOR) regarding inheritance taxes, that the dispute was pending before DOR for a period from prior to November of 1986 until after December of 1987, and that a closing certificate was issued by DOR on August 17, 1988.

The statutory basis for the appellant's disqualification request is §227.46(6), Stats:

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.

The procedure for a party to effectuate a substitution of hearing examiners in a matter before the Personnel Commission is further described in §PC 5.01(4), Wis. Adm. Code, which provides:

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 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.

In the present case, the appellant's request was made subsequent to the issuance of the proposed decision and order, when the matter was no longer before the examiner for decision-making purposes. The Commission, rather than the examiner, was the proper authority to deal with the request.

One of the requirements identified in §PC 5.01(4), Wis. Adm. Code, is that the substitution request be submitted in a timely manner. The appellant's request was filed after the examiner had presided at the hearing, after the post-hearing briefing schedule had been completed and after a proposed decision had been prepared and issued to the parties.¹ There is no indication that the appellant had just become aware of the examiner's role as a personal representative rather than having discovered it sometime earlier in the proceeding. The timing of the appellant's request suggests that it was precipitated by the contents of the proposed decision and order rather than by appellant's initial awareness of the examiner's role as personal representative for his father's estate.

Generally, a litigant should not be able to accept a judge initially as satisfactory and then subsequently, during the course of the litigation, seek to disqualify him because the litigant has gained an impression from the rulings of the court that the court's attitude towards his position is unfavorable. It has been said that where an express waiver is not required, the disqualification may be waived, or an estoppel may arise, by a failure to assert the dis-

¹Given the timing of his request, the appellant was apparently seeking a new hearing before a different examiner. However, his objections/disqualification request included the statement that "[t]he evidence submitted and oral testimony clearly shows a reallocation to a PR 14 or higher is warranted." This statement suggests that the appellant was satisfied with the state of the record in this matter and merely disagreed with the examiner in terms of his proposed decision and order. It should also be noted that the Commission is bound by the record before it but not by a proposed decision and order. To the extent the Commission disagreed with the proposed decision, the Commission could adopt some or none of it. The Commission must only explain the "basis for each variance" with the proposed decision. §227.46(2), Stats.

qualification in good season, at the earliest available or practicable opportunity, or whenever a knowledge of the disqualification comes to the complaining party.

46 Am. Jur. 2d *Judges* §228 (citations omitted). Here, it appears that the appellant waited until the examiner issued his proposed decision before the appellant raised his allegation that the examiner was biased.

Even if the appellant's disqualification request could be viewed as timely, his allegations would have to be deemed insufficient for the disqualification of the examiner. The fact that the examiner served as a personal representative for an estate that had a protracted dispute with DOR prior to the issuance by DOR of a closing certificate is simply not tied in to any potential for bias with respect to the proper classification of the appellant's position. There is no indication that the examiner had any contact with the appellant in the examiner's role as personal representative. The most that can be said is that the appellant worked in the Fiduciary, Inheritance and Gift Tax Office Audit Section which included at least 11 auditors. There is no indication that the appellant was the DOR employe who audited the estate of the examiner's father. There is also no indication that the examiner had any reason to be dissatisfied with DOR's 1988 determination of inheritance tax for his father's estate or with the conduct of the auditor who audited the inheritance tax return for that estate. The fact that the examiner may have had some familiarity with the inheritance tax audit procedure, and, as a consequence, with some of the duties carried out by the appellant, is not a basis for disqualifying the examiner from hearing the appellant's classification appeal.

The allegations made by the appellant and the materials he filed regarding his disqualification request were not sufficient to support his request and to require the Commission to disqualify the examiner.²

For the reasons set out above, the appellant's petition for rehearing must be denied.

²The Commission did not review the referenced inheritance tax file, take any testimony from DOR employes or review the probate court file before ruling on the appellant's request because 1) the appellant's allegations were insufficient on their face and 2) the party making a substitution/disqualification request, rather than the Commission, is responsible for offering allegations of bias, prejudice or interest sufficient to support the request.

ORDER

The complainant's petition for rehearing is denied.

Dated: October 3, 1991 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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