EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

David Gerald Schrankler
1009 Gilbert Rd Apt #6
Madison WI 53711

Complainant

vs.

Best Buy Stores, L.P.
2452 E Springs Dr
Madison WI 53704

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION FOR RECUSAL

CASE NO. 20122001

BACKGROUND

On December 30, 2011, the Complainant, David Schrankler, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint charged that the Respondent, Best Buy Stores LP, discriminated against him on the basis of arrest record when it suspended his employment without pay in August of 2011. The Respondent denied that it discriminated against the Complainant on the basis of his arrest record and contended that the crime for which the Complainant was arrested was substantially related to the duties and requirements of his employment and as such, the decision to suspend the Complainant was protected.

The complaint was assigned to a Division Investigator/Conciliator for investigation and issuance of an Initial Determination. Subsequent to her investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of arrest record in employment. The Complainant timely appealed the finding of no probable cause to the Hearing Examiner.

After providing the parties with the opportunity to conduct discovery and to supplement the record, the Hearing Examiner issued a Decision and Order on Review of the Initial Determination on February 13, 2014, concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his arrest record and reversing the Initial Determination's contrary conclusion. The complaint was transferred to conciliation.

Efforts at conciliation were unsuccessful. The complaint was transferred to the Hearing Examiner for further proceedings on the merits of the complaint.

On April 2, 2014, the Hearing Examiner held a Pre-Hearing Conference in the above-captioned matter. The purpose of the Pre-Hearing Conference is to establish the issues for hearing, a time and date for the hearing, and to establish various other interim dates.

At the Pre-Hearing Conference, the Hearing Examiner, on the record, disclosed a prior employment relationship with counsel for the Complainant. The Hearing Examiner indicated that he had employed counsel for the Complainant as a secretary in the mid-1980s for a period of one year or so while the Hearing Examiner was in private practice. The Hearing Examiner further indicated that he had virtually no contact, either professional or personal, with counsel for the Complainant since that relationship was terminated by counsel's attendance at law school. The Hearing Examiner did indicate that he may have provided a reference of good character for counsel for the Complainant at the point that she was seeking admission to the bar, though memories on this point were not clear.

Counsel for the Respondent asked several general questions about the timeframe and nature of the relationship and indicated that she would advise the Respondent of the information. On April 14, 2014, the Respondent moved that the Hearing Examiner recuse himself from further proceedings in this matter stating as grounds the appearance of a lack of impartiality on the part of the Hearing Examiner. On April 16, 2014, the Hearing Examiner issued a Briefing Schedule to give both parties the opportunity to supplement the record on this point.

DECISION

It is axiomatic that the parties in judicial and, by extension, administrative hearings have a right to a fair and impartial hearing including a fair and impartial presiding official. In the case of judicial proceedings in Wisconsin, Wis. Stats. Sec. 757.19(2)(a) through (g) sets forth the circumstances in which a judge must disqualify himself or herself from acting in any particular proceeding. In addition, the Rule of the Supreme Court Sec. 60 sets forth standards of conduct for judicial officials (60.04(4) re: recusal). Violations of Rule 60 may be enforced through a complaint filed with the Judicial Commission and where warranted penalties may be imposed.

These requirements are limited to judges and other judicial authorities and are not directly related to the performance of quasi-judicial officials such as Administrative Law Judges or Hearing Examiners. However, the concepts embodied in Rule 60 and Wis. Stats. Sec. 757.19(2)(a) through (g) especially (g) establish a framework to consider issues of fairness and impartiality in the administrative context. As the Court in Guthrie v. WERC (111 Wis. 2d 447 (1983); 331 NW 2d 331 (1983)) recognizes, there is a due process consideration to administrative proceedings that permits the courts to exercise an oversight authority. In Guthrie, Justice Heffernan recognizes that Rule 60 and Wis. Stats. Section 757.19(2) do not apply to regulate the conduct of administrative officials, but concludes that there is a fundamental due process right in administrative proceedings to a fair and impartial process.

In Wisconsin, not only is there a common law due process right to a fair and impartial proceeding, but the Wisconsin Administrative Procedure Act (Wis. Stats. Sec. 227.46(6)) establishes a statutory right to a fair and impartial process. That same right is embodied in the Rules of the Equal Opportunities Commission at Rule 7.24. Given all of these provisions and the cases decided pursuant to them, the question comes down to what are the standards by which the Hearing Examiner must consider his or her conduct when it comes to the fairness and

impartiality of Commission proceedings. First, there is no question that where there is actual bias, be it of a financial, personal or philosophical nature, the Hearing Examiner must disqualify himself or herself. That is not the question presented by the Respondent's Motion for Disqualification. The heart of the Respondent's motion focuses on the question of whether there is a sufficient relationship between the Hearing Examiner and Complainant's counsel based upon an employment relationship from the late 1980s that a reasonable, well-informed person might have a reasonable concern for the impartiality of the proceedings.

The first step in this analysis is determining whether the presiding official believes that he or she is capable of being impartial. In the circumstances of this case, as noted by the parties, the Hearing Examiner, at the Pre-Hearing Conference, stated that he did not feel that his prior employment of Complainant's counsel required his disqualification. Nothing in the intervening time has altered the Hearing Examiner's determination that he will be able to act in an impartial manner in the present matter. Neither has the Respondent presented any evidence to indicate that there is an objective lack of impartiality.

In this regard, the Hearing Examiner states that his employment of Complainant's counsel ended approximately 25-30 years ago, that he's has had only sporadic public contact with Complainant's counsel in the intervening years and that he's never had any professional relationship or contact with the Complainant's counsel since she left her employment with the present Hearing Examiner in the 1980s. To clarify, Complainant's counsel was employed on a part-time basis by the present Hearing Examiner when he was in private practice. Complainant's counsel left her employment as a secretary/reader for the Hearing Examiner to attend law school. Complainant's counsel has never held any relationship with the Hearing Examiner while he has been employed by the Department of Civil Rights or its predecessor, the Madison Equal Opportunities Commission.

Given the fact that the Hearing Examiner's employment of the Complainant's counsel ceased approximately 25-30 years ago and that the Hearing Examiner has had only sporadic social and public contact with the Complainant's counsel and has had no professional relationship with Complainant's counsel since she left the private employment of the Hearing Examiner, the Hearing Examiner sees no issue in presiding over this matter. There are many attorneys representing Complainants and/or Respondents, including several with Respondent's firm, that the Hearing Examiner has had more contact with during the period of his employment as Hearing Examiner than he has had with Complainant's counsel. As the Court of Appeals noted in Peterson v. Marquette University and Orman, Docket No. 94-2178(1995), any personal interest in a matter must be substantial and not remote. In Peterson, the plaintiff contended that the judge should have recused himself because he was a Marquette Law School graduate. In determining that there was no requirement for the judge to have recused himself, the Court of Appeals noted that the judge had graduated some 33 years prior and that the law school was not a party.

The issue presented by the Respondent is not whether the Hearing Examiner believes himself to be incapable of fairly presiding over these proceedings, but rather, from the Respondent's point of view, would a reasonable person believe the Hearing Examiner is able to fairly adjudicate the present matter. In this regard, the Hearing Examiner presumes that the Respondent holds itself out as an example of such a reasonable person. If that was all that was required there would be no need to discuss this matter further. By its filing of the motion to

disqualify, the Respondent is stating that it does not believe the Hearing Examiner is capable of acting fairly in this matter.

That either party can put itself in the position of the law's vaunted "reasonable person" does not provide for a framework in which to consider such questions. If that were the case, any party who was disappointed in an earlier outcome in a proceeding, as the Respondent appears to be having failed to successfully defend the Initial Determination's conclusion that there was no probable cause to believe that discrimination had occurred, could challenge a subsequent appearance in the same matter.

To determine whether a reasonable person might find the Hearing Examiner's participation in this matter a problem, the Hearing Examiner will fall back upon the burden of proof and various inferences mined from the case law. First, it seems clear that once the Hearing Examiner has stated his or her belief in his or her ability to proceed in a matter without prejudice, the burden falls upon the moving party, in this instance the Respondent, to demonstrate the likelihood of potential bias. It is not clear whether the standard of proof is by the greater weight of the credible evidence or some higher burden. In this matter, the Hearing Examiner will use the lesser standard, the greater weight of the credible evidence, to determine whether a reasonable person might be concerned over his continued participation.

Before examining the arguments forwarded by the Respondent, the Hearing Examiner notes that case law establishes that "(t)here is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings." Nu-Roc Nursing Home, Inc. v. DHSS, (200 Wis. 2d 405, 415, 546 N.W.2d 562 (Ct. App. 1996)). Nothing in the record indicates that this presumption should not be applied in the present matter. It is the Respondent's burden to overcome that presumption.

The Respondent presents two arguments in furtherance of its contention that a reasonable person would find that there is an impermissibly high likelihood of bias on the part of the Hearing Examiner in this matter. The Hearing Examiner will address these arguments in the order presented in the Respondent's reply brief.

The first contention made by the Respondent is that the past employment relationship between the Hearing Examiner and Complainant's counsel presents the likelihood of bias. The Respondent does not indicate whether this would be bias favoring the Complainant because of the past relationship or against the Respondent due to the past relationship. The Respondent does not explain how the past relationship of employment is likely to favor the Complainant, i.e., by favoring the Complainant's legal positions contrary to the law, by favoring the Complainant in procedural rulings or by disregarding the arguments of the Respondent in favor of those propounded by the Complainant because of a past employment relationship. There is nothing in the record indicating why the fact of the relationship should or would create an unfair advantage favoring the Complainant other than mere personal familiarity. In its reply brief the Respondent contends that a reasonable person "could" conclude that the past employment relationship between the Hearing Examiner and Complainant's counsel might give rise to impermissible bias. Given an objective test, speculation that one "could" find impermissible bias falls short of the proof necessary to overcome the presumption of honesty and integrity.

The Respondent seems particularly disturbed by the fact that the Hearing Examiner may have signed a letter of fitness to practice law on behalf of Complainant's counsel and by the

mere fact that the Hearing Examiner appears to remember the employment of Complainant's counsel at all. As to the first point, certifying that one believes that one is sufficiently moral to practice law does not reveal anything about the nature of one's employment relationships or anything more than a belief in one's basic competency. The Hearing Examiner cannot conclude that such an endorsement demonstrates the kind of close personal or professional relationship that might reasonably be seen to motivate partiality on the part of the Hearing Examiner.

As to the second point, the Hearing Examiner sees nothing unusual or sinister in the fact of his remembering his employment of an individual from 25 or 30 years before. Had the Respondent inquired of the Hearing Examiner, he could recite the names of his secretaries dating back to 1976 and provide some details of each of their employments. The Hearing Examiner simply has a good memory for such details. Though the Respondent had the opportunity to conduct discovery with regard to this point, it did not. There is nothing in the record that indicates that the Respondent performed any investigation at all concerning its allegations of a potential bias or the scant facts upon which the Respondent rests its motion.

The second point raised by the Respondent concerns the timing of the Hearing Examiner's disclosure of his past relationship with Complainant's counsel. The Respondent appears to contend that the fact that the Hearing Examiner did not disclose his past employment of Complainant's counsel prior to his review of the Initial Determination's finding of no probable cause points to the likelihood of bias on the part of the Hearing Examiner. The Respondent professes to be troubled and disturbed by the failure of notice. In setting forth the grounds for its concern, the Respondent rests heavily on Wis. Stats Sec. 757.19(2). This is the same provision that it argues not to control the actions of the Hearing Examiner as argued for by the Complainant.

Though Sec. 757.19(2) applies to judicial and not administrative officials, it does provide reasonable guidance in determining the standards and procedures that represent a reasonable approach to these questions. The Hearing Examiner was undoubtedly wrong in not notifying the parties of the potential for a question of recusal prior to acting upon the Complainant's appeal of the Initial Determination. However, that failure of judgment does not equate with a lack of impartiality. The Decision and Order of the Hearing Examiner, though contrary to the interests of the Respondent, should have dispelled any notion of partiality on the part of the Hearing Examiner. It represents an analysis of the facts, the applicable law and the respective burdens of proof. For the Respondent to now cry foul, seems to be an attempt to take a second bite of the apple rather than acceptance of a decision with which it disagrees.

The Hearing Examiner has promptly rectified his earlier error by making a full disclosure on the record and giving the Respondent the opportunity to make further inquiry and argument with respect to the past employment relationship of the Hearing Examiner and Complainant's counsel. Though the Respondent may be unhappy about the Hearing Examiner's failure to timely notify the parties of what he saw as a relationship that should be disclosed, nothing in this record demonstrates that an earlier disclosure would have resulted in any other outcome.

The Hearing Examiner is sympathetic to the concerns of the Respondent in this matter. However, the record in this matter simply does not present any basis for determining that an employment relationship from 25 to 30 years ago presents an impermissibly high risk of partiality in the present matter. The Hearing Examiner has practiced law on his own, in office-sharing relationships with other attorneys and as the Hearing Examiner for 32 years, and as

with any attorney has a wide range of professional and personal relationships with other attorneys and individuals. Clearly, not every one of these relationships create the type of close personal bond that gives rise to the risk of partiality in the performance of the duties of Hearing Examiner. The law does not require its judges or quasi-judicial officials to have been isolated from other professionals either prior to coming to their offices or even since becoming a presiding official. What it does anticipate is that those who preside over the courts or administrative agencies will be able to preside fairly and where their relationships interfere with such impartial execution of their duties that judges and other presiding officials will act to preserve their integrity and independence. In this regard, whenever a former client or other individual with a past close relationship to the Hearing Examiner has appeared before him, the Hearing Examiner has disclosed the relationship, as he did here, and where appropriate, disqualified himself from further action.

The Hearing Examiner counts as friends and professional acquaintances and colleagues members of many different firms and offices representing both Complainants and Respondents. Some of those individuals are members of Respondent's counsels own firm. That these relationships can coexist with the Hearing Examiner's duty to perform independently and without favoritism has, in the opinion of the Hearing Examiner, been demonstrated consistently over his years as a Hearing Examiner. They are no more unusual than Judges who preside over cases in which a former partner might appear or where a contributor to a judge's campaign appears as a party.

In the present matter, the Hearing Examiner disclosed a distant relationship because he believed that the parties, both the Respondent and the Complainant, had a right to know of the relationship. However, knowledge of that relationship or the relationship itself do not necessarily create the type of impermissibly close contact that might give rise to legitimate concerns over the Hearing Examiner's ability to perform his duties impartially.

Given the lack of any continuing contact between the Hearing Examiner and Complainant's counsel, and the passage of time since the employment relationship's termination, the Hearing Examiner concludes that a reasonable person with knowledge of the facts and circumstances would not believe that there is any likelihood of a lack of impartiality or of favoritism towards the Complainant given the record in this matter.

The Respondent's motion for disqualification is denied.

Signed and dated this 26th day of August, 2014.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Amy F Scarr
Jason A Kunschke