

# MAINE STATE LEGISLATURE

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Unemployment Commission Action without Commissioner  
26 M.R.S.A. § 1081(3)  
Employment Security Commission Action without Commissioner

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To: Emilien A. Levesque, Commissioner  
Manpower Affairs Department

March 21, 1978

From: Patricia M. McDonough  
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Subject: Authority of the Employment Security Commission  
to Act in the Absence of the Commissioner of  
Manpower Affairs

FACTS:

A claimant for unemployment compensation benefits has requested that the Commissioner of Manpower Affairs, who is also the Chairman of the Employment Security Commission, disqualify himself from participating in the decision on his appeal. The claimant contends that certain remarks made to the press by the Commissioner of Manpower Affairs indicate that the Commissioner had pre-judged his case before the hearing was held.

ISSUE:

Whether the Employment Security Law (26 M.R.S.A., Chapter 13) allows the two remaining commissioners to act on disputed benefit cases if the Commissioner of Manpower Affairs is disqualified for interest or bias?

ANSWER:

Yes, providing the two remaining commissioners are in agreement on the decision.

REASON:

It is well established that due process requires that an individual receive a fair hearing before an impartial tribunal. Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L. Ed.2d 423 (1971). A hearing

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officer who exercises judicial or quasi-judicial power may not act on a matter in which he is not wholly free, disinterested and impartial. Nider v. Homan, 89 P.2d 136 (Cal. 1939). A hearing officer must disqualify himself from a proceeding if he "has prejudged the case or has given the reasonable appearance of having prejudged it." Kennecott Copper Corp. v. F.T.C., 467 F.2d 67, 80 (10th Cir. 1972). Any public expressions regarding a pending proceeding, which may reasonably lead to the conclusion that a quasi-judicial officer has pre-judged the issue as to which he is to sit in judgment cannot be approved. Acierno v. Folsom, 377 A.2d 309 (Del. 1975). Therefore, if the remarks of the Commissioner can be construed as indicating a prejudgment of the case on his part, he should disqualify himself from participating in a decision on the case.

Before the Commissioner disqualifies himself, it must be determined whether the remaining commissioners have the authority to act on appeals in the event of the disqualification of the Commissioner of Manpower Affairs. If the statutory provisions do not allow the remaining two commissioners to act on appeals, the "rule of necessity" may require the Commissioner of Manpower Affairs to serve. Davis, Administrative Law Text, § 12.04, 1972. The rule of necessity requires a hearing officer, who could be disqualified for interest or bias in a matter, to act if his failure to act would not allow any decision to be rendered on the matter, Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed 887 (1920). It is recognized that the rule of necessity will be held inapplicable if a way can be found to provide a qualified tribunal to consider the matter. Davis, Administrative Law Text, supra.

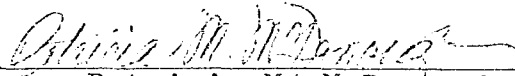
The Employment Security Law, 26 M.R.S.A., § 1081(3) provides:

Quorum. Any 2 commissioners shall constitute a quorum. Whenever the commission hears any case involving a disputed claim for benefits under this chapter, the Commissioner of Manpower Affairs shall act alone in the absence or disqualification of any other member, provided that in the event of illness or extended absence on the part of the Commissioner of Manpower Affairs or in the event of a vacancy in that position, the remaining members may act on appeals and conduct hearings and render a decision provided both members agree.

The statutory language does provide for procedures to be followed by the Employment Security Commission in acting on appeals when the Commissioner of Manpower Affairs is ill, on an extended absence, or when the position is vacant. Prior to 1963, Section 1081 of the Employment Security Law provided that a hearing could not proceed unless the impartial member of the Commission (the Commissioner of Manpower Affairs) was present. P.L. 1963, c. 413, § 3, An Act Amending Certain Provisions of the Employment Security Law, repealed this language and replaced it with the following:

"...provided that in the event of illness or extended absence on the part of the Commissioner of Manpower Affairs or in the event of a vacancy in that position, the remaining members may act on appeals and conduct hearings and render a decision provided both members agree."

In amending the statute, it is clear that the Legislature intended to ensure that the Commission could continue to act on appeals even in the absence of the Commissioner of Manpower Affairs. As the Legislature included a specific procedure for acting on appeals in the absence of the Commissioner of Manpower Affairs, it is apparent that if it becomes necessary for the Commissioner of Manpower Affairs to disqualify himself for reasons of interest or bias, the remaining two commissioners may act on the appeal.

  
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Patricia M. McDonough

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