STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,

Complainant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES; Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS; and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION;

Respondents.

Case No. 95-0029-PC-ER

RULING ON MOTIONS

This matter is before the Commission to consider three motions:

1) Respondents' DER and DMRS motion to dismiss for failure to state a claim as to those agencies.

2) Complainant's motion to have Attorney Richard Henneger disqualified from serving as the attorney for DNR.

3) Complainant's motion for a preliminary injunction with respect to alleged harassment of black employes by respondent DNR.

This case involves a complaint under both the WFEA (Wisconsin Fair Employment Act) (Subchapter II, Chapter 111, Stats.) on the basis of color, national origin or ancestry, and race, and the "whistleblower" law (Subchapter III, Chapter 230, Stats.). In summary, the complaint alleges that complainant took an exam for a Financial Officer 4 position in the classified civil service within DNR, passed the exam, and was certified and interviewed but not hired. The complaint makes a number of allegations in connection with the foregoing, which will be discussed as material to the various motions.

MOTION TO DISMISS COMPLAINT AS TO DER/DMRS

This motion is grounded on the contention that complainant's claim runs to DNR's failure to have appointed him after he had been examined and certified as eligible for appointment, and that since the DNR secretary has the

sole statutory authority to make appointments within DNR,[1] and neither DER nor DMRS has any statutory authority in this area, neither could have any liability for DNR's failure to have appointed complainant.

Section 230.04(1), Stats., provides: "The [DER] secretary is charged with the effective administration of this subchapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the [personnel] commission, the [DMRS] administrator or appointing authorities, *are reserved to the secretary.*" *(emphasis added)* *Section 230.05(1), Stats.*, provides: "All powers necessary for the effective enforcement of the duties specified for the administrator under this subchapter are reserved to the administrator." (emphasis added) Appointing authorities have the power to "[a]ppoint persons to ... the classified service." (emphasis added) §230.06(1)(b), Stats. These provisions reflect a structure of personnel administration involving a division of authority among the administrator of DMRS, the secretary of DER, and the appointing authorities. Appointing authorities make appointments to the classified service from a list of those *persons who have been examined by DMRS and certified as eligible.* §§230.25(1), (2)(b), Stats.; Seep v. DHSS, 83-0032-PC (10/10/84):

> The administrator is responsible for recruitment, §230.14, Stats., examination, §230.16, Stats., and the certification of eligibles to the appointing authorities, §230.25, Stats.
>
> The appointing authorities have the authority to appoint persons to vacancies, see §§230.06(1)(b), 230.25, Stats.
>
> The point of certification marks the extent of the administrator's legal *authority in the selection process.* The appointing *authority is* generally responsible for actions in the selection process which occur after the point of certification. (footnote omitted)

In Balele v. DHSS, No. 93C 0520C (W.D. Wis. 1994), the Court summarized the civil service structure in a similar fashion:

> Once the division administrator certifies an interview list, the administrator has no further participation in the interview process conducted by the hiring agency or in its hiring process. In exceptional circumstances, the administrator may invalidate an appointment for such things as cheating on the examination, wrongful claims of *preference or erroneous inclusion of the appointee on the certified* register. (Slip opinion, 4-5)

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[1] Subject to delegation of that authority to lower level officials within the agency pursuant to §230.06(2), Stats.

Since neither DER nor DMRS had any authority with respect to the appointment in question which constitutes the subject matter of this complaint, they did not act as the "employer" with respect thereto, and there is no basis to continue them as respondents in this case.

In his brief in opposition to this motion, complainant relies on the inclusion of the word "selection" in the "division of merit recruitment and selection." He equates the word "selection" in the division's title with the division administrator having the power of appointment. This argument is unpersuasive in light of the specific and explicit statutory grant of the power of appointment to the appointing authority by §230.06(1)(b), Stats.: "An appointing authority shall ... appoint persons to the classified service." Whatever scope might arguably be attributed to the word "selection" in isolation, it cannot override this specific grant of appointment powers to the appointing authorities.

Complainant also argues that in Balele v. DHSS & DMRS, 91-0118-PC-ER, DER and DMRS "admitted that they were responsible for the recruitment and selection of employes statewide," and that the "administrator agreed that he was liable for the actions of the appointing authorities." He has not cited to any particular part of the record or the decision in that case. In any event, the Commission is unaware of any aspect of the decision in that case that finds or concludes that these respondents are responsible for appointment decisions.

Complainant further argues:

> [The] Department of Employment Relations Secretary and Division of Merit Recruitment and Selection Administrator knew that racial minorities were grossly underutilized in the job group but deliberately failed to enforce and implement equal opportunity of employment to perpetuate status quo of whites in career executive positions. Since the Division of Merit Recruitment and Selection Administrator and Department of Employment Relations Secretary knew or should have known that the reasons given by the DNR official were not non-job related but condoned DNR action, Division of Merit Recruitment and Selection and Department of Employment Relations acted deliberately to discriminate against racial minorities.

Again, there is nothing in the statutes which gives either the DER secretary or the DMRS administrator any control over the hiring decisions of the appointing authorities. The DER secretary's authority with respect to

affirmative action includes, for example, the establishment of standards for affirmative action plans, §230.04(9)(a), Stats., the review of affirmative action plans for compliance with these standards, §230.04(9)(b), and the power to "[m]onitor, evaluate and make recommendations to each agency to improve its progress toward providing equal opportunity," §230.04(9)(c). However, there is nothing in the statutes giving the secretary any control over appointments made by appointing authorities pursuant to §230.06(1)(b).

Complainant also argues that respondents all conspired to deny him this appointment. However, where DER and DMRS had no statutory authority with respect to this transaction, which was the sole responsibility of DNR, a conclusory allegation that the agencies somehow conspired to deny the appointment is an insufficient basis for making DER and DMRS parties. In deciding a motion to dismiss for failure to state a claim, "[t]he facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted." Phillips v. DHSS, 87-0128-PC-ER (3/15/89), affirmed other grounds, Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

Finally on this issue, complainant points to language in the staffing delegation agreement between DHSS and DMRS attached to an affidavit in Balele v. DHSS, 93C 0520C (W.D. Wis. 1994) and argues as follows:

> On page 1 under (1) GENERAL CONCEPT, the document states:
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> "The DHSS is delegated full authority for all aspects of specified staffing transactions for the classifications identified in (6) except for authority specified not delegated . . ."
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> Now on page 2, Section (3) SCOPE OF DELEGATION of the same document, states:
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> The term "staffing transactions" as used in (1) and elsewhere in this letter, means original appointments, promotions, reinstatements, restorations, and transfers as defined by the Rules of the Department of Employment Relations, Division of Merit Recruitment and Selection. "Component" means . . . . . ."
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> This Commission should take judicial notice that under the law of Principal and Agency, one cannot delegate power or authority which he or she does not possess. (citation omitted). Or said differently, one can delegate only those powers or authority she or he possesses to an agent. DER and DMRS claimed in their delegation document above that they have delegated staffing transactions to DHSS which include

> appointments and promotions and further they have asserted that this role has not changed. (Respondents' Reply brief page 3 para 1). That means DER and DMRS had the original appointment and promotion *authority which they had delegated to other agencies.*

This argument is also unpersuasive. In delegating authority for staffing transactions, which include original appointments and promotions, DMRS can only be delegating authority for that part of the staffing process for which it has the statutory authority -- i.e., recruitment, examination, and certification. The type of transactions identified -- original appointments, promotions, reinstatements, etc. -- identify the types of personnel actions involved for which recruitment, examination, etc., are conducted. Their enumeration cannot be construed as an attempt to delegate the power of appointment to an entity (DHSS) that already possesses it by virtue of §230.06(1)(b), Stats.

The complainant has made a number of arguments that run to the merits and will not be addressed here.

MOTION FOR PRELIMINARY INJUNCTION

Complainant has filed a motion for a preliminary injunction with respect to the following:

1. Prohibit DNR officials, notably Martinelli, Semmann and Henneger from directly or through using DNR white supervisors, to harass and retaliate against blacks and other racial minorities in the DNR who may [be] deemed as complainant's potential witnesses.

2. Prohibit DNR officials, notably Martinelli, Semmann and Henneger from harassing and intimidating DNR equal opportunity of Employment and Affirmative Action Officials and because they are complainant's potential witnesses.

3. Temporary restrain Martinelli, Semmann and Henneger from directly supervising equal Opportunity of employment and Affirmative Action Officers of the Department of Natural Resources so that they can do their statutory assignments. That is they should answer to the DNR Secretary during the trial of the case.

This Commission has no statutory authority under the WFEA to issue preliminary injunctions. Van Rooy v. DILHR & DER, 87-0117-PC, 87-0134-PC-ER (10/1/87). However, complainant also has filed under the whistleblower law,

which does give the Commission the authority to issue interlocutory orders. §230.85(3)(c), Stats.

The factors that must be considered with respect to the issuance of a preliminary injunction are:

1) the probability of ultimate success on the merits;

2) the degree of threatened irreparable injury;

3) the balance of relative damages to the parties. Hruska v. DATCP, 85-0069-PC-ER (8/13/85).

In this case, for the reasons discussed below, there does not appear to be a reasonable probability that complainant will succeed on the merits. Therefore, the Commission will deny the motion for a preliminary injunction without addressing the other factors.

An essential element for a claim under the whistleblower law is that the employe has made a disclosure. Section 230.81(1), Stats., provides, inter alia:

> [T]o obtain protection under §230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:
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> (a) Disclose the information in writing to the employe's supervisor.
>
> (b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing to the governmental unit the Commission determines is appropriate.

Complainant does not appear to assert that he has made a disclosure under either §§230.81(1)(a) or (b). In his reply brief, complainant responds to this issue as follows: "defendants failed to rebut Balele's contention related to Graziano who had communicated her concern with DER Secretary and Greg Jones. Balele also routed Graziano's telephone statement to Greg Jones."

The reference to Ms. Graziano, the DNR Affirmative Action Officer, is with respect to the following allegation in paragraph 11 of the complaint:

> 11. Complainant then waited to get a letter of non-selection from DNR, but the letter never came. Complainant decided to call Graziano, the DNR Equal Opportunity of Employment official/Affirmative Action Officer and asked her if she had signed the By-Pass given that the position was underutilized for racial minorities. Graziano responded that she had been prevented from enforcing equal opportunity of

> employment for Blacks in DNR by Martinelli in concert with the Division Administrator, Semmann, Henneger with the approval of Meyer. Graziano further said that if the complainant wanted Blacks to have equal opportunity of employment as whites in DNR managerial positions he should further lobby with DER Secretary, DER Affirmative Action and DMRS administrator. That is DER and DMRS officials already knew that the DNR top officials were opposed to hiring blacks in managerial positions.

However, there is nothing in complainant's response that suggests that he either filed a disclosure in writing with his supervisor, as required by §230.81(1)(a), or disclosed information to a governmental unit to which he had been referred by the Commission, as required by §230.81(1)(b). Any communications of Graziano's alleged concerns to officials in DER have no legal significance as a disclosure under the whistleblower law.

Since there is nothing in either the complaint or complainant's briefs that even suggests he made a disclosure under the whistleblower law, it does not appear he has any chance of succeeding on this claim, and his motion for a preliminary injunction will be denied on this ground.

MOTION TO DISQUALIFY ATTORNEY HENNEGER AS COUNSEL FOR DNR

A letter complainant filed with the Commission on March 1, 1995, included a request to disallow Mr. Henneger to represent DNR, on the ground that he is a "party in interest" and would have a conflict of interest. Both parties have filed briefs and supporting papers.

In his complaint, complainant identifies Mr. Henneger, DNR legal counsel, as a party respondent.[2] The complaint makes the following allegations with respect to Mr. Henneger:

> 10. But Bazzell, [Administrator, Division of Finance and Planning], according to one DNR official, is not the final authority to hire his immediate assistants. According to one DNR official hiring of DNR managers are approved by Semmann in concert with Administrator of Management Services. Henneger, the legal counsel, provided management with fake reasons to give blacks why they were not hired in managerial positions to keep DNR management predominantly white managers.

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[2] As will be discussed below, Mr. Henneger cannot technically be a party under the WFEA.

> 11. Complainant then waited to get a letter of non-selection from DNR, but the letter never came. Complainant decided to call Graziano, the DNR Equal Opportunity of Employment official/Affirmative Action Officer and asked her if she had signed the By-Pass given that the position was underutilized for racial minorities. Graziano responded that she had been prevented from enforcing equal opportunity of employment for Blacks in DNR by Martinelli in concert with the Division Administrator, Semmann, Henneger with the approval of Meyer.
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> * * *
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> 13. Complainant conducted further investigation and found that the individual selected was promised the position of Deputy Secretary in concert with Henneger and Meyer long before the recruitment. In fact that explained unfounded and fake reason Bazzell gave the complainant for his non-selection. Complainant alleges that Respondents fraudulently and corruptly preselected the individual into the position which had the effect of excluding racial minorities right from the beginning of the selection process.
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> * * *
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> 23. However, since DMRS Administrator and DER Secretary knew the problems with DNR officials that they did not want to implement equal opportunity of employment and failed to intervene when they knew that DNR, without intervention would discriminate against the complainant, complainant alleges that was gross negligence on the part of DMRS Administrator and DER Secretary under Wisconsin and Federal Tort laws. By their failure to intervene, it made easier for Meyer, Semmann, Martinnelli [sic] and Henneger to pressure Bazzell to acquiesce to their demand to discriminate against the complainant because of his race and national origin and retaliated against him because he had file[d] suits against them when they used discriminatory employment practices against the complainant and other racial minorities, charges which were pending in the judicial systems when he was denied the position at issue.

Subsequently, in response to respondent's submission opposing this motion, complainant filed an affidavit dated April 28, 1995, which includes the following:

> 1. Before filing the complaint, I talked to Peter Munoz, one of the Affirmative Action Officers and I heard him say that he had been threatened by Hennegger [sic] either on his own behalf or acting through Semmann, that Hennegger [sic]. I further heard Mr. Munoz state that at one time Henneger had told Munoz that he would get Munoz "ass" out there if he tried to monitor or otherwise ensure equal opportunity of employment in the Department of Natural Resources.

Complainant contends in his brief that Mr. Henneger is not only a party respondent, but also a necessary witness, since complainant will present witnesses at hearing to support these charges, and Mr. Henneger "has to respond and confront plaintiff's witness to rebut the charges against him."

With respect to Mr. Henneger's status as a party respondent, the Commission held in Balele v. DHSS & DMRS, 91-0118-PC-ER (3/19/92), that named individuals are not proper party respondents in these kinds of proceedings:

> The statutes under which the Commission operates preclude the designation of named individuals as parties-respondent. Section 111.375(2), Stats., provides:
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> > This subchapter applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the agency as an employer shall be filed with and processed by the personnel commission under §230.45(1)(b). (emphasis added)
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> Section 111.32(6)(a), Stats., provides:
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> > "Employer" means the state and each agency of the state and ... any other person engaging in any activity, enterprise or business employing at least one individual.
>
> Complainant points out that these statutes do not state, in negative terms, that individuals cannot be named as respondents. However, the same point is made by defining employer for purposes of this agency's jurisdiction. The Commission cannot act without a basis in statutory authority, either express or implied, see City of Appleton v. Transportation Commission, 116 Wis. 2d 352, 357-358, 342 N.W. 2d 68 (Ct. App. 1983).

With respect to Mr. Henneger's status as a potential witness, "[t]he law of evidence reveals no disability on the part of an attorney as to testifying in a proceeding in which he is also an advocate. The attorney may be disqualified not because his testimony is incompetent but because of the dangers and prejudice inherent in the practice." Cottonwood Estates v. Paradise Builders, 128 Ariz. 99, 624 P. 2d 296, 299 (S. Ct. Arizona 1981) (footnote and citations omitted). The Wisconsin Rules of Professional Conduct for Attorneys, §SCR 20:3:7, provide:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) the testimony relates to an uncontested issue;

> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

A "party seeking to have opposing counsel disqualified has the burden of establishing that counsel's continuing in the case would violate the disciplinary rules." Zions First Natl. Bank v. United Health Clubs, 505 F. Supp. 138, 140 (E.D. Pa. 1981). (citations omitted). A motion to disqualify should not be granted "without a clear showing that continued representation is impermissible." id.

In the instant case, Mr. Henneger has denied having any involvement whatsoever in the hiring which is the subject matter of this proceeding. The only specific evidence complainant has identified in support of his allegations with respect to Mr. Henneger's role related to this matter is complainant's own assertion that he personally heard the remarks attributed to Mr. Munoz and Ms. Graziano.

The likelihood that respondent would call Mr. Henneger as a witness presumably will depend on the extent to which complainant can adduce competent evidence in support of his accusations, and the extent to which respondent could oppose any such evidence without calling Mr. Henneger as a witness. In the Commission's opinion, at this point in the process Mr. Henneger's disqualification would not be justified. This is particularly the case since §SCR 20:3:7 is limited to an attorney's "acting as advocate at a trial," and does not address an attorney's participation in pretrial (or prehearing) procedures. See Calebros Enterprises Corp. v. Rivera-Rios, 846 F. 2d 94 (1st Cir. 1988). If, as a result of discovery or other means, it appears there is a more concrete basis to indicate that respondent would call Mr. Henneger as a witness, appropriate action could be taken at that time.

ORDER

1. The motion of respondents DER and DMRS to dismiss this complaint as to them for failure to state a claim is granted, and they are removed as parties respondent. Complainant's motion for sanctions in connection with this motion is denied. Respondent DNR is to respond to complainant's request for admissions, which was addressed to all agencies jointly, within 30 days of the date of this order.

2. Complainant's motion for disqualification of Mr. Henneger is denied.

3. Complainant's motion for a preliminary injunction is denied.

Dated: June 22, 1995

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:rcr