

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION, and
Director, WISCONSIN TECHNICAL
COLLEGE SYSTEMS BOARD,**
Respondents.

**RULING ON
STATEMENT OF
HEARING ISSUE**

Case No. 97-0097-PC-ER

This case is before the Commission to resolve the parties' dispute over the statement of issues for hearing. The final argument was received by the Commission on September 18, 1997.

FINDINGS OF FACT

1. A prehearing conference was held on August 21, 1997, at which time the Commission proposed the following statement of the hearing issues (p. 1-2, Conference Report dated 8/20/97):

- a. Whether respondents discriminated against complainant because of his race when he was not hired for WTCSB's vacant position of Technical Administrator 2, for which complainant was scheduled for interview on February 26, 1997.
Subissue: Whether the absence of a minority individual as part of the interview panel had a disparate impact on complainant due to his race.
- b. Whether respondents discriminated against complainant because of his race and/or in retaliation for his participation in activities protected under the FEA, when he was not hired for WTCSB's vacant position of Technical College Administrator 2, the decision having been made on June 18, 1997.
- c. Whether respondents discriminated against complainant because of his race and/or in retaliation for his participation in activities protected under the FEA, when he was not hired for WTCSB's vacant position of Administrative Officer 3, for which complainant was scheduled for interview on June 17, 1997.

Subissue: Whether the absence of a minority individual as part of the interview panel had a disparate impact on complainant due to his race.

2. By letter dated August 28, 1997, complainant requested an additional hearing issue as shown below:

I have read the Commission's Proposed Hearing Issues and I agree with the Commission. However, I am asking the Commission to add the following issue to the proposed issues:

Whether respondents intentionally and maliciously used discretionary decisions to deny racial minorities career executive positions.

If the Commission and respondents disagree [with] the addition of the above referenced issue, I hereby preserve my right to present the issue at the hearing. I believe the Commission and Respondents will not be prejudiced by the addition of the issue given that it is my burden of providing evidence related to the issue.

3. By letter dated September 18, 1997, respondents DER and DMRS objected to the additional hearing issue proposed by complainant stating as shown below:

a. The issue is inappropriate because it is a class action issue. It is our understanding that the Commission is without jurisdiction to address class action matters; we further understand the Commission's jurisdiction to be limited to resolving issues which pertain to the Complainant who filed the claim. It is our recollection that Complainant was so advised during the Prehearing Conference.

b. In one form or another, the issue already is included within the issues proposed by Commissioner Rogers.

c. Alternatively, the issue is too vague to allow these Respondents to have the benefit of due process to which they are entitled.

4. By letter dated September 17, 1997, the Wisconsin Technical College Systems Board (WTCSB) also objected to complainant's proposed additional issue stating as shown below in relevant part:

The [WTCSB] objects to Mr. Balele's proposed additional issue. Assuming, arguendo, that the Personnel Commission has authority to permit Mr. Balele to pursue a claim on behalf of other, unidentified "racial minorities", the Commission should reject his proposed issue for

hearing because it would unduly enlarge the scope of the hearing beyond the three identified positions in dispute, it fails to identify which career executive positions are in dispute or when decisions regarding those positions were made (e.g., whether the decisions predate the 300-day statute of limitations under the [WFEA]), and it might require WTCSB to defend decisions made by other state agencies.

OPINION

The Commission's jurisdiction under the Fair Employment Act (FEA) (Subch. II, Ch. 111, Stats.) is limited to reviewing claims of discrimination/retaliation raised on an individual basis, as opposed to a class of individuals. The individual nature of these claims is emphasized in the statutory language, for example, s. 111.321, Stats., prohibits employment discrimination "against any individual." The Commission has never processed a discrimination claim as a class action suit and has never interpreted the statute to confer such authority.

The language in the FEA is unlike the Open Housing Law (OHL) which specifically prohibits discrimination against "a class of persons" (§106.04(1m)(h), Stats.). It was the specific reference to "a class of persons" in the OHL which was relied upon in an Attorney General opinion to conclude that the Department of Labor, Industry and Human Relations (DILHR)¹ had discretion to take jurisdiction over class action suits. (OAG 61-81, 70 Op. Att'y. Gen. 250 (1985).) No similar language exists in the FEA.

Jurisdiction to review class actions exists under federal law (Title VII of the Civil Rights Act of 1964) first by court interpretation and later confirmed by legislative developments. See, Sullivan, Zimmer & Richards, *Employment Discrimination 2d Ed.*, Vol. 1, s.11.13. There has been no similar court interpretation or legislative change under the state FEA law.

The additional hearing issue requested by complainant is problematic because it suggests the case is proceeding on a class action basis. In other words, the additional proposed issues suggests complainant would prevail if he showed someone was discriminated against, even if he failed to show he was discriminated against. Accordingly, the Commission denies complainant's request to add his additional proposed hearing issue.²

¹ DILHR is now known as the Department of Workforce Development (DWD).

² The Commission also notes it agrees with respondents that the additional issue proposed by complainant is too vague to meet the notice requirements of §227.44(2), Stats

The impact of this ruling forecloses complainant from presenting the requested additional issue at hearing³ but does not foreclose complainant from presenting proof at hearing that he was discriminated against due to disparate treatment or due to disparate impact. In one of complainant's prior cases, *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; aff'd. *Balele v. George, et al.*, 90 CV 3767 and 94 CV 1177, Dane County Cir. Ct. 2/17/95; the hearing issue was stated in individualized terms (Whether respondent discriminated against complainant . . . when it did not hire complainant for the position of Director, Office of Purchasing Services) and complainant was allowed to present evidence at hearing under the theories of disparate treatment and disparate impact. The same was true in *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92.

ORDER

Complainant's request to add an additional hearing issue is denied and the statement of issues for hearing will be as noted in the Conference Report dated August 20, 1997. The parties will be contacted by letter to schedule further proceedings.

Dated: September 24, 1997.

JMR
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STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Chairperson

Judy M. Rogers
JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter.

³ Complainant's statement in his letter dated August 28, 1997, to the effect that he preserves his "right to present the issue at the hearing" even if the Commission ruled to the contrary is without effect. This ruling forecloses his presentation of the separate issue at hearing.