

affirmed Balele v. DHSS [DWD].
95-0005-PC-ER, 8-28-97; reh'g den 9-24-97
and Balele v. DOT, DER & DMRS.
97-0075-PC-ER, 11-7-97; reh'g den 11-21-97

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

PASTORI M. BALELE,

Petitioner,

v.

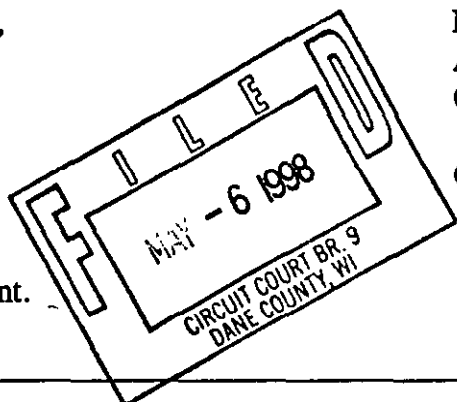
WISCONSIN PERSONNEL
COMMISSION, ET. AL.,

Respondent.

MEMORANDUM DECISION
AND ORDER

Case No.: 97 CV 2724

Case No.: 97 CV 3354



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ADMINISTRATIVE AGENCY REVIEW

PERSONNEL COMMISSION

This matter is before the court for judicial review of decisions of the Wisconsin Personnel Commission (hereinafter "Commission") under the Wisconsin Fair Employment Act (hereinafter "WFEA"), §§111.31-111.395, Wis. Stats., dismissing the discrimination and retaliation complaints of Petitioner Pastori Balele (hereinafter "Balele") against the Wisconsin Department of Employment Relations (hereinafter "DER") and the Wisconsin Division of Merit Recruitment and Selection (hereinafter "DMRS"). The Commission dismissed the complaints on the ground that DER and DMRS were not proper party respondents under the WFEA because they had no statutory authority to control the interview procedures and appointment decisions which were the subject of the complaints.¹

Balele raises numerous issues on review requesting the reversal of the Commission's

¹ At Balele's request, the Commission also dismissed complaints against the Wisconsin Department of Health and Social Services (DHSS), the Wisconsin Department of Workforce Development (DWD), and the Wisconsin Department of Transportation (DOT).

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decision and conclusions of law. First, Balele argues that the Commission's rulings and orders were void as a matter of law. Second, Balele argues that the Commission denied him due process because of his race. Third, Balele argues that the Commission erred when it failed to find that DER and DMRS were employers within the meaning of the WFEA for acts at DOT and DWD. Finally, Balele argues that the Commission abused its discretion through a number of actions, such as dismissing the cases under a summary judgment motion, etc.

PROCEDURAL HISTORY

Upon stipulation, these two cases were consolidated by the court on January 12, 1998. Case No. 97 CV 2724, a retaliation and discrimination complaint, was filed with the Commission on January 13, 1995, alleging that DHSS unlawfully interviewed Balele and unlawfully refused to appoint him to the position of Human Service Administrator 2 (HSA 2), Assistant Bureau Director of Compliance Service. Also alleged was that DER and DMRS unlawfully discriminated and retaliated against him by failing to enforce and implement equal opportunity employment, which perpetuated the status quo of white persons in career executive positions.

On June 5, 1997, DER and DMRS moved the Commission to dismiss the complaint against them on the ground that the complaint failed to state a claim for relief against them under the WFEA because neither agency was the "employer" within the meaning of the WFEA which failed to appoint Balele.

On July 17, 1997, Balele responded to the motion to dismiss on a number of grounds: that DER and DMRS were "employers" within the meaning of the WFEA; that the motion

should be treated as a summary judgment; that the Commission lacked authority to grant summary judgment dismissing a complaint without a hearing; that a Delegation Agreement between DER/DMRS and DHSS delegated full authority to DHSS for "staffing transactions" which is defined in the agreement to mean "original appointments, ..."; and that DER and DMRS had prescribed interview and selection procedures for career executive positions in Chapter 281, Wisconsin Personnel Manual-Staffing.

The Commission issued its decision on August 28, 1997, granting DER/DMRS' motion and dismissing Balele's complaint. Balele petitioned the Commission for rehearing on September 12, 1997. In its decision the Commission relied on an earlier case, Balele v. DNR, et al., Case No. 95-0029-PC-ER (6/22/95). On September 24, 1997, the Commission denied the petition for rehearing on the ground that Balele had offered nothing new in his petition.

The second action, 97 CV 3354, a discrimination and retaliation complaint, was filed with the Commission on June 5, 1997, alleging that DOT unlawfully interviewed Balele and unlawfully refused to appoint him to the position of Highway Program Manager or Bureau Director of Transit and Local Roads. He also alleged that DER and DMRS unlawfully discriminated and retaliated against him by failing to require DOT to have a racial minority on the interview panel, resulting in a disparate impact on racial minorities seeking the position.

On September 8, 1997, DER and DMRS moved to dismiss on the same grounds as the previous case, that, under the WFEA, neither agency was the "employer" that failed to appoint Balele to the Highway Program Manager position. Balele's complaint therefore failed to state a claim for relief as against them. Again, as in the first case, Balele responded, with similar arguments.

On November 7, 1997, the Commission issued its decision, granting DER/DMRS' motion and dismissing Balele's complaint, relying upon its earlier decisions in Balele v. DNR, *supra.*, and Balele v. DHSS, et al., Case No. 95-0005-PC-ER (8/28/97).

On November 17, 1997, Balele petitioned the Commission for rehearing, which was denied on November 21, 1997. He then sought review upon this court.

STANDARD OF REVIEW

The scope of review for this court can be found in §227.57, Wis. Stats.

This court must affirm the Commission's decision "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [Wis. Stat. §227.57]." Wis. Stat. §227.57(2). The court shall treat separately disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion. Wis. Stat. §227.57(3). The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure. If the court finds the Commission had "erroneously interpreted a provision of law and a correct interpretation compels a particular action" the court shall set aside or modify the action. Wis. Stat. §227.57 (5). The court must accord due weight to the "expertise, technical competence, and specialized knowledge" of the Commission, as well as "discretionary authority conferred upon it." Wis. Stat. §227.57(10). The court may reverse and remand the case only if it concludes that the agency's exercise of discretion is: (1) "outside the range of discretion delegated to the agency by law"; (2) "inconsistent with an agency rule,

an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to [its] satisfaction by the agency"; or (3) "otherwise in violation of a constitutional or statutory provision." Barakat v. DHSS, 191 Wis. 2d 769, 782, 530 N.W.2d 392, (Ct. App. 1995), citing §227.57(8), Wis. Stats.

When applying the arbitrary and capricious standard, the court determines "whether the agency's action had a rational basis, not whether the agency acted on the basis of factual findings. Rational choices can be made in a process which considers opinions and predictions based on experience." Sterlingworth Condo. v. State, 205 Wis. 2d 710, 730, 556 N.W.2d 791, (Ct. App. 1996)(citation omitted). "Arbitrary or capricious conduct lacks a rational basis and is the result of an unconsidered, willful or irrational choice rather than a 'sifting and winnowing' process." Wisconsin Prof. Police Ass'n. v. PSC, 205 Wis. 2d 60, 74, 555 N.W.2d 179, (Ct. App. 1996), *citing* Wisconsin Cent. Ltd. v. Public Serv. Comm'n, 170 Wis. 2d 558, 568, 490 N.W.2d 27 (Ct. App. 1992).

The Commission's findings of fact must stand if supported by substantial evidence in the record. Wis. Stat. §227.57(6). "Substantial evidence has been defined to be that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." Boynton Cab Co. v. ILHR Department, 96 Wis. 2d 396, 405, 291 N.W.2d 850 (1980). In other words, "...judicial review under ch. 227 is limited to whether the evidence was such that the agency might reasonably make the finding that it did." Id.

Although the court is not bound by the Commission's interpretations of law, Local No. 695 v. LIRC, 154 Wis. 2d 75, 82, 452 N.W.2d 368, (1990), the Wisconsin Supreme Court set out three levels of deference a court may give to an agency's conclusions of law and statutory

interpretation as summarized in Jicha v. DILHR, 169 Wis. 284, 290-91, 485 N.W.2d 256, (1992):

First, if the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. (Emphasis in original; citations omitted)

The court will apply "great weight" to the Commission upon deciding whether a state agency is an "employer" within the meaning of the WFEA, as this is not an issue of first impression, and the Commission possesses great expertise when making this statutory determination.

DISCUSSION

In its decision, the Commission found that neither DER nor DMRS were proper party respondents within the purview of WFEA, as they had no statutory authority to control the interview procedures and appointment decisions which were the subjects of Balele's complaints.

Subchapter II of the Wisconsin Statutes, entitled **Fair Employment** under the Employment Relations section, is known as the Wisconsin Fair Employment Act, or WFEA. The purpose underlying the WFEA is the prohibition of discriminatory and retaliatory actions by employers regarding the hiring of employees. Under the WFEA, an "employer" is defined as:

...the state and each agency of the state, and² ...any other person engaging in any activity, enterprise or business employing at least one individual.

§111.32(6)(a), Wis. Stats.

§111.375 is entitled **Department to Administer**, and states that, "...complaints of discrimination...shall be filed with and processed by the personnel commission..." §111.375(2), Wis. Stats.

The Commission, in its August 28, 1997 ruling, relied heavily upon its previous decision in Balele v. DNR, DER & DMRS, 95-0029-PC-ER, (6/22/95), as "[a]n essentially identical contention was raised by this complainant and resolved by the Commission." (Record, Index No. 10, Case No. 97 CV 2724) The Commission found that the DNR secretary had the sole statutory authority to make appointments within DNR, and neither DER nor DMRS had any authority in this area, and neither could have any liability for DNR's failure to have appointed Balele. (Id., pp. 1-2)

This court turns to this decision and explanation in order to scrutinize the Commission's statutory interpretation as presented in this case. The Commission's rationale was as follows:

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 "*appoint 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. (emphasis added)(parens in original)

² Excluded are social clubs and fraternal societies. See §111.32(6)(b), Wis. 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)(emphasis added)

(Id., pp. 2-3)

The court is of the opinion that the Commission was both reasonable and correct in its statutory analysis. Based upon a clear reading of the statutes, neither DER nor DMRS qualify as "employers" under the WFEA for the purposes of Balele's complaints. Rather, in both cases consolidated here, the Secretary of DWD and the Secretary of DOT (or their respective delegates) were the appointing authorities for the positions Balele sought. In other words, it was these *Secretaries* that were the "employers" under the meaning of WFEA, not DER and DMRS.

Therefore, the Commission did not error in its interpretation. As such, the court need not address Balele's arguments regarding any abuse of discretion, as the action was properly dismissed and his arguments all relate to improper respondents.

Balele also raised a procedural argument concerning whether the Commission employed summary judgment procedure in making its decision. Balele argues that such a procedure cannot be employed in Chapter 227 proceedings. The court construes the Commission's decision to be a response to the respondent's Motion to Dismiss. The issue involved is one purely of law and


whether the respondents were the proper and necessary parties to Balele's complaints. This issue was raised affirmatively by the respondents and was appropriately addressed by the Commission, thus eliminating the necessity for any fact finding hearing.

CONCLUSION

Based upon the record, applicable law, and judicial scope of review, the court AFFIRMS the Commission's decision in both 97 CV 2724 and 97 CV 3354.

Dated this 6 day of May, 1998.

BY THE COURT:



Honorable Gerald C. Nichol
Circuit Court, Branch 9

c: Pastori Balele
David Rice, Asst. Atty. General
State Personnel Commission