

PASTORI M. BALELE,
Complainant,

v.

**State Director, WISCONSIN TECHNICAL
COLLEGE SYSTEMS BOARD,
Secretary, DEPARTMENT OF FINAN-
CIAL INSTITUTIONS,
Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,
Secretary, DEPARTMENT OF NATURAL
RESOURCES,
Chairperson, PUBLIC SERVICE COM-
MISSION,
Secretary, DEPARTMENT OF TRANS-
PORTATION,
Secretary, DEPARTMENT OF REVE-
NUE,
Secretary, DEPARTMENT OF EM-
PLOYMENT RELATIONS,
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION, and
President, UNIVERSITY OF WISCONSIN
SYSTEM,**
Respondents.

**RULING ON MOTION
TO PRIORITIZE
PROCESSING OF CASE
NO. 98-0145-PC-ER**

Case Nos. 97-0097-PC-ER, 97-0117-PC-ER,
98-0002-PC-ER, 98-0045-PC-ER, 98-0046-
PC-ER, 98-0088-PC-ER, 98-0104-PC-ER,
98-0145-PC-ER, 98-0159-PC-ER

This matter is before the Commission on complainant's motion to hold all the other cases in abeyance while Case No. 98-0145-PC-ER is given priority. Complainant states the reasons for this request in his letter dated September 14, 1998, as follows:

The reason is that most of the evidence I intend to present [sic] in the above case will most likely be used in other cases. In fact once this case is heard, most of the issues raised in other cases will have been resolved or can be stipulated by the parties or Commission's decision will have stare decisis [sic]. (citation omitted)

Counsel for the respondents oppose this motion.

Complainant's motion raises an issue requiring that the Commission exercise its discretion. The Commission has the authority to decide how to hear and prioritize cases pending before it.

The following is a brief summary of each of these cases:

Balele v. DER & DMRS, 98-0145-PC-ER

In this case complainant alleges respondents discriminated against him in connection with the use of an AHQ as a screening device for a career executive position within DER for which he was not certified. The alleged bases of discrimination are color, race, national origin, age, sex, and WFEA retaliation.

Balele v. UW System, 98-0159-PC-ER

This case originally involved DER and DMRS as parties as well as the UW System. Complainant claims that after an AHQ screen he was not certified for an interview for an unclassified academic vacancy. The Commission concluded that DER and DMRS did not have any statutory authority with regard to the staffing or hiring for such an unclassified position, and by order dated November 4, 1998, dismissed DER & DMRS as parties. The case remains pending against the UW System. The alleged bases of discrimination are color, race, national origin, and WFEA retaliation.

Balele v. DFI, 97-0117-PC-ER

In this case, complainant alleges that DFI, DER and DMRS discriminated against him when DFI failed to hire him after he had been certified for consideration on the basis of an AHQ screen. On August 26, 1998, the Commission entered an order dismissing DER and DMRS as parties on the ground that neither agency had any statutory authority with respect to DFI's decision as to whom to appoint. Following this decision, DFI and complainant agreed to hold this case in abeyance pending a Court of Appeals decision in another matter on the issue of whether DER and DMRS were proper parties in earlier proceedings before the Commission. The alleged bases of discrimination are color, race, national origin, and WFEA and whistleblower retaliation.

Balele v. WTCSB, 97-0097-PC-ER

In this case, complainant alleges that he was certified for three vacancies at WTCSB but was not hired. On December 3, 1997, the Commission dismissed DER and DMRS as parties because of the conclusion that DPI's post-certification decisions related to the hiring process are exclusively vested by statute in DPI, and not DER or DMRS. The alleged bases of discrimination are color, race, and WFEA and whistleblower retaliation. The parties have stipulated to holding this case in abeyance pending a Court of Appeals decision in another matter on the issue of whether DER and DMRS were proper parties in earlier proceedings before this Commission.

Balele v. DOR, 98-0002-PC-ER

In this case complainant alleges that he applied and was certified by DMRS for a vacant Administrative Officer 3 position at DOR, and was not hired after DOR required candidates to respond to another question. On September 9, 1998, the Commission entered an order dismissing DER and DMRS as party respondents because they had no statutory authority with regard to DOR's appointment decision. The alleged bases of discrimination are color, race, national origin, and WFEA retaliation.

Balele v. DOT, 98-0104-PC-ER

In this case complainant alleges that he was certified for a career executive position at DOT, and that he declined to be interviewed after he showed up for an interview and found that DOT had assembled an interview panel consisting of two white persons and no minorities. The alleged bases of discrimination are color, race, national origin, and WFEA retaliation.

Balele v. PSC, 98-0088-PC-ER

In this case complainant alleges that he was certified for a career executive position at PSC, and that he declined to be interviewed by an all white interview panel. On September 11, 1998, the Commission entered an order dismissing DER and DMRS as parties because these agencies have no statutory authority over an appointment process after the certification stage. The alleged bases of discrimination are color, race, and WFEA retaliation.

Balele v. DNR, 98-0046-PC-ER

In this case, complainant alleges he was certified for interviews for four career executive positions at DNR, and after the interviews he was not hired. On September 9, 1998, the Commission entered an order dismissing DER and DMRS as parties because these agencies had no statutory authority beyond the certification process. The alleged bases of discrimination are color, race, national origin and WFEA retaliation.

Balele v. DHFS, 98-0045-PC-ER

In this case complainant alleges he was not selected for two positions at DHFS. On September 9, 1998, the Commission dismissed DER and DMRS as party respondents on the ground that complainant's complaint ran to post-certification actions by DHFS with respect to which DER and DMRS had no statutory authority. The alleged bases of discrimination are color, race and national origin.

The respondent's opposition to complainant's motion includes the following:

First, except for the fact that Complainant is the same, there is no commonality between Case No. 98-0145-PC-ER and all of the other cases. The cases that Complainant seeks to hold in abeyance are "post-certification", i.e., selection cases from which DER and DMRS already have been dismissed as parties by the Commission; the correctness of those decisions has been upheld in Circuit Court. On the other hand, Case No. 98-0145-PC-ER involves Complainant's challenge to the AHQ technique. Thus, the issues are not the same and, therefore, there is no reason for litigating one case because the result of that case will not impact on others.

Secondly, because the issues are not the same, the primary thrust of discovery will be different in Case No. 98-0145-PC-ER and the other cases. Thus, the discovery in Case No. 98-0145-PC-ER will seek information and documents regarding "pre-certification", while discovery in the other cases will be directed at post-certification items. In any event, there is very little, if any, relevant and material discovery items that Complainant does not already have from years and years of litigious efforts. The only exception might be certain reports or statistics developed on a periodic (usually biennial) basis and/or correspondence or documents unique to each of the above-referenced cases; discovery of those items requires a case approach. Therefore, no efficiencies of resources (time, money or "person power") can be achieved by holding the other cases in abeyance while Case No. 98-0145-PC-ER goes forward. (October 7, 1998, letter from DER/DMRS)

Respondent's arguments appear to have a good deal of persuasive force. The post-certification cases do not involve DER/DMRS and were decisions made by various appointing authorities. Additionally, Case No. 98-0145-PC-ER has bases of discrimination (sex and age) not found in the other cases.

In his reply to the respondents' arguments, complainant first argues as follows:

First [respondents] do not allege that prioritizing the hearing of the above case is prejudicial to their case. Absence of prejudice renders all other reasons useless. Brownelli v. McCaughtry, 182 Wis. 2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). (Complainant's letter dated October 19, 1998)

Brownelli v. McCaughtry, involves a tort suit brought by a state prison inmate with regard to his medical treatment. The Court held that, in general, "an inmate has a claim against a prison employee who negligently fails to obtain medical attention for the inmate and that failure causes the inmate to sustain a serious illness or injury," 182 Wis. 2d at 375, and that the inmate's complaint was sufficient to state a negligence claim. The Court went on to determine that the prison officials had been entitled to summary judgment based on the record evidence. The Commission is unable to discern that *Brownelli* has any relevance to the instant case.

Complainant's argument also fails to take into account that his motion is opposed not only by DER/DMRS, but also by all the respondents. The other respondents would all suffer potential prejudice by holding their cases in abeyance if for no other reason because their exposure to potential back pay liability would be increased commensurately.

Complainant also argues that he was seeking career executive positions in all of the cases, and that he is alleging that all of respondents were underutilized for minorities in career executive positions. It does not follow from this that it would promote administrative efficiency to first try the case against DER/DMRS while holding the others in abeyance. Each agency has its own percentages of utilization and has its own authority under the civil service code to make appointment decisions.

Complainant goes on to argue as follows:

Third complaint allege that DER and DMRS had manipulated state policy to allow other agencies to exclude blacks in certification and selection panel. This case will review if indeed other agencies followed the advice of DER/DMRS. Further at the moment complainant does not know if the person selected for DER/DMRS was or was not a career executive. The same applies for cases in other agencies. Still, complainant alleged that DER and DMRS keeps records of career executive information for

other agencies. Therefore, the information can be used for other cases, instead of asking each agency to provide the same. In fact if it is found that there were no black career executive in DER and DMRS the conclusion will be that DER and DMRS flunked and encouraged other agencies to deny complainant career executive position to keep status quo in DER and DMRS and other agencies all white people career executives. That by itself shows discrimination because the absence of Blacks in career executive positions in any agency is by itself deemed discriminatory. Teamsters v. United States, 431 U.S. 324 (1977). Therefore complainant will make discovery whether DER, DMRS and other respondent agencies had Blacks in career executive positions and other top management positions. (Complainant's October 19, 1998, letter)

These arguments do little if anything to support complainant's motion. If complainant believes he can obtain statistics on the appointing authorities' career executive utilization, he is free to propound an interrogatory to DER/DMRS regardless of whether the other cases are active or inactive. The argument that a showing of no black career executives in DER/DMRS would be dispositive of the other cases simply does not follow.¹

The Commission has considered all of the parties other arguments but has only discussed above those considered most germane to the decision of this motion.

¹ Complainant's citation of *Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977) for the proposition that "the absence of Blacks in career executive positions in any agency is by itself deemed discriminatory" is inapposite. The Court held:

In any event, our cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. 431 U.S. at 339-40, 52 L.Ed.2d at 417-18 (citations and footnotes omitted)

ORDER

Complainant's motion to hold in abeyance the above-captioned cases, except Case No. 98-0145-PC-ER, while proceeding to process Case No. 98-0145-PC-ER is denied.

Dated: December 18, 1998.

AJT:rjb:980145+Crull

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



JUDY M. ROGERS, Commissioner