

5. Starting in August 1999, the parties submitted written arguments regarding respondent's motion to dismiss some claims as untimely filed. On August 25, 1999, the Commission issued a ruling, which granted respondent's motion.

6. Complainant sent respondent's attorney an e-mail message on September 13, 1999 asking for an agreement to reschedule the hearing. The e-mail text is shown below:

I wonder if you would agree that we re-schedule the hearing in Balele v. UW-Madison Case No. 99-0004-PC-ER. I had plans to be on vacation during the days of the hearing. We can have it in the middle of November or thereafter. Thanks.

7. Respondent's attorney sent complainant a reply e-mail on September 20, 1999, the text of which is shown below:

I don't wish to sound uncooperative, but I would like to keep the hearing dates as scheduled. As the hearing dates were agreed to by you and (respondent's prior attorney) with your individual scheduling conflicts in mind and before the case was transferred to me, I opted to adapt my schedule to fit in the hearing and arranged for the necessary people to be in attendance. Accordingly, I would prefer to go ahead with the hearing as planned. November is not a good time for me, as I have another very involved, week-long hearing scheduled. However, if this is an issue for you, you are free to bring it before the Commission for consideration.

8. On October 1, 1999, complainant wrote to the hearing examiner requesting a status conference. The letter text is shown below in relevant part:

I am asking for a status tele-conference . . . to address my request to the UW-Madison to re-schedule hearing date in this case (sic) till sometime in the middle of December 1999. As usually suggested by this Commission, I contacted Ms. Lynch for my request, but she refused. There are two reasons for my request:

1. At the time of scheduling the hearing of this case, I did not anticipate the other cases I have filed against various agencies would have that many problems. I have responded and continue to respond to numerous motions filed by DER/DMRS, DOA, DNR and DAT&CP objecting to various matters related to cases. It was necessary to cancel my vacation schedule to respond to their motions. This situation has put me behind in preparing for this particular case.

2. The other reason is that one of my cases pending in this Commission *Balele v. UW-System*, No. 98-0159-PC-ER addresses almost the same issues. The case is fully briefed. I believe by December 1999 this Commission will have made a decision on that case. At that time I will be in a position to either dismiss this case or proceed with it, depending on whether I will have made mistakes.

For the reasons stated above, I am asking the Commission to call for a status conference to re-schedule the hearing date. Thanks.

9. A status conference was held by telephone on October 8, 1999, at which time the parties gave oral arguments regarding complainant's request for a hearing postponement. The hearing examiner denied complainant's motion. One reason given for the denial was that the other case cited by complainant, *Balele v. UW-System*, No. 98-0159-PC-ER, was pending resolution of cross-motions for summary judgment and, accordingly, it was uncertain whether the other case would resolve the issues here.

10. Another status conference was held on October 14, 1999, at which time the parties discussed the witnesses which complainant asked to appear at hearing. Also discussed was complainant's outstanding request for certain information from respondent. As to the latter topic, the hearing examiner held that if respondent could not obtain the information in time for the hearing, the hearing would proceed as scheduled but could be continued for an additional date in the future depending on the circumstances.

10. On October 20, 1999, complainant filed the present motion to dismiss the complaint without prejudice. This motion was filed just five calendar days prior to the date when the hearing was to commence. It was filed on the same day as complainant was required to exchange witness lists and hearing exhibits. The filing date was noted in the report of the prehearing conference held on March 17, 1999, as shown below (with same emphasis as contained in the original document):

The parties are reminded that pursuant to s. PC 4.02 and PC 6.02(2), Wis. Adm. Code, copies of exhibits and names of witnesses must be exchanged at least 3 working days before the day established for hearing, or will be subject to exclusion. **This means the information must be**

exchanged at or before 4:30 p.m. on October 20, 1999. A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline.

11. The Conference Report dated March 17, 1999, also included the following information regarding requests to postpone hearing dates (with same emphasis as noted in the original document):

As provided in s. PC 5.02, Wis. Adm. Code, a request to postpone a date for hearing will be granted only upon a showing of good cause. Postponement requests should be in writing, if possible, and the party making the request should indicate the reason for the request and whether the opposing party agrees with the request. Generally speaking, the following are not considered as good cause for granting a hearing postponement: a) waiting an unreasonable amount of time to request postponement after knowing that a reason exists to request the same, b) being unprepared for hearing and [c)] waiting until too close to the hearing date to initiate settlement negotiations or to seek representation.

#### CONCLUSIONS OF LAW

1. It is complainant's burden to demonstrate entitlement to dismissal without prejudice.

2. Complainant failed to meet his burden.

#### OPINION

The Commission first notes that it agrees with the assigned hearing examiner's denial of complainant's postponement request. Requests for postponement are governed by §PC 5.02, Wis. Adm. Code, the text of which is shown below:

CONTINUANCES. (1) REQUIREMENTS. Prior to requesting a continuance of a hearing date, the parties shall seek agreement for a continuance from all other parties in the case. In making the request to the hearing examiner or a commissioner, the party seeking the continuance shall advise the hearing examiner or commissioner if agreement between the parties have been reached. Requests for continuances of a hearing date shall be granted upon a showing of good cause and after consideration of any hardship on the other party. In any case in which a hearing examiner has been designated, the request should be made to the hearing

examiner, if available. The hearing examiner or commissioner may require a presentation of evidence before considering a request.

On September 13, 1999, complainant advanced his first reason for the postponement request saying that he planned to be on vacation during the hearing dates. (See par. 6 of the Findings of Fact.) Clearly, this reason does not meet the good cause showing required under §PC 5.02, Wis. Adm. Code. Complainant agreed to the late October hearing dates on March 17, 1999, and should not have later decided he would go on vacation instead of living up to his obligations in this forum. Respondent's attorney replied on September 20, 1999, stating respondent would not agree with complainant's request and why. (See par. 7 of the Findings of Fact.)

There was no further indication from complainant that he intended to pursue his request for postponement until his letter of October 1, 1999. (See par. 8 of the Findings of Fact.) At this time he said he canceled his vacation plans but still would be unprepared for hearing due to numerous motions in other cases. The respondent here is not responsible for the pending motions in cases complainant filed against other state agencies. The stated reason of working on motions in other cases, accordingly, does not meet the good cause requirement of s. 5.02, Wis. Adm. Code.

The second reason for postponement given by complainant in his letter of October 1, 1999, was his belief that another case, *Balele v. UW-System*, 98-0159-PC-ER, would be resolved in December 1999. Complainant did not indicate that he would abide in the present case by the ruling in the other case. Rather, he says the ruling in the other case will enable him to determine if he made "any mistakes" and then he could decide whether to proceed with the present case. Again, he committed to the October hearing dates six months ago. His attempt to use a different case as a learning tool here is an unpersuasive argument and, in light of respondent's time already spent in hearing preparation, fails to meet the good cause requirement of s. 5.02, Wis. Adm. Code. Furthermore, as noted by the assigned hearing examiner (see par. 9 of the Findings of Fact), there was no certainty that the other case would be resolved as completely or as quickly as complainant represented.

The Commission now turns to complainant's request for dismissal without prejudice. Again, respondent had no notice that complainant did not plan to go forward with the hearing from the examiner's ruling on October 8<sup>th</sup>, until he filed the dismissal request on October 20<sup>th</sup>. The text of complainant's letter is shown below in relevant part:

I am asking the Commission to dismiss the above complaint without prejudice. The main reasons is that I am not prepared for the hearing in this case. I asked the [hearing examiner] and Respondents (sic) to re-schedule the hearing, but both refused to grant my request.

When this case was scheduled, I did not anticipate the lawyers defending my other cases . . . would file such numerous and frivolous motions for which I had to respond to and continue to respond to this date. This situation has put me behind in preparing for this particular case.

As pointed out above I asked (respondent's attorney) to agree to re-schedule the hearing but she refused. I further pleaded by request with [the hearing examiner] to reschedule the hearing, but [the hearing examiner] too refused to grant my request.

For the reasons stated above, I am asking the Commission to dismiss this case without prejudice. Thanks.

Complainant concedes in the above-quoted letter that he was unprepared to go forward with the scheduled hearing.

The respondent filed objections to complainant's request by letter dated October 27, 1999, stating as shown below (in relevant part):

At the teleconference . . . on October 8, 1999, it was decided that Mr. Balele's proposed reasons for postponement did not merit rescheduling the hearing.

Instead of following through with the hearing as ordered, Mr. Balele requested at the last minute that his case be dismissed without prejudice, ostensibly to allow him more time to prepare for the hearing. Mr. Balele, however, should not be so rewarded for engaging in such deplorable tactics. It is serious enough that Mr. Balele would refuse to abide by the [hearing examiner's] decision to proceed with the hearing.

However, the timing of Mr. Balele's actions supports the conclusion that he intentionally, and in bad faith, waited to request dismissal until the Respondent had fully prepared for the hearing. Specifically, Mr. Balele waited until the day on which exhibits and witness lists were to be exchanged, just three [working] days before hearing, to request dismissal of this matter. Based on e-mail messages between myself and Mr. Balele, Mr. Balele knew that by this time the University and I had expended a great deal of time and resources in preparing this case for hearing and were ready to go forward. Mr. Balele's blatant attempt to subvert the process resulted in an inexcusable waste of my time and this Commission's time for the last several months. Even more reprehensible, however, is the fact that he greatly inconvenienced numerous individuals who, pursuant to his request, rearranged their schedules to testify at hearing. In fact, by the time I found out about Mr. Balele's request . . . it was too late for me to notify a witness driving in from Milwaukee to prepare that morning. These facts demonstrate Mr. Balele's complete lack of respect for the Commission, its process, and the other parties involved in the matter.

While the Commission's rules allow for complainants to withdraw cases with the Commission's approval, withdrawal in these situations cannot be without consequences. In fact, section PC 1.12 of the Wisconsin Administrative Code specifically states that "[a]ny dismissal order issued by the Commission shall be with prejudice unless otherwise expressly stated." There is no reason in this case for the Commission to diverge from its standard practice of dismissing matters with prejudice. Mr. Balele alone filed his complaint and requested that it proceed directly to hearing. He also willingly scheduled the hearing for October 25, 26 and 27 with the understanding that it would not be rescheduled for other than exceptional reasons. The [hearing examiner] determined that Mr. Balele's reasons for rescheduling the hearing, including unexpected activity in Mr. Balele's other cases, were insufficient to require changing the hearing dates. Allowing Mr. Balele to accomplish by disrespectful means that which the [hearing examiner] had already denied would render the [hearing examiner's] decision meaningless. Such a result simply cannot be tolerated.

Mr. Balele's blatant attempt to end-run the decision by [the hearing examiner] to proceed with the hearing as scheduled is nothing short of abuse of process, for which the only response is dismissal of his case with prejudice.

The Commission concludes that complainant has not shown entitlement to dismissal without prejudice. None of the reasons advanced for his postponement request constitute good cause under §PC 5.02, Wis. Adm. Code. Furthermore, complainant who has the burden of proof in this case would have been required to put his case in first. Yet he admitted he was unprepared to proceed. Under these circumstances, the respondent would not have been required to put its case on the hearing record as noted in §PC 5.03(8)(a), Wis. Adm. Code., and respondent would have been entitled to dismissal of the claim with prejudice. The equities of the present situation simply do not compel a contrary result.

ORDER

This case is dismissed with prejudice.

Dated: January 19, 2000.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

Commissioner Murphy did not participate in consideration of this matter.

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the



application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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