

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
ADMINISTRATION, Secretary,
DEPARTMENT OF EMPLOYMENT
RELATIONS, and Administrator,
DIVISION OF MERIT RECRUITMENT
AND SELECTION,**
Respondents.

RULING ON MOTIONS

Case No. 00-0104-PC-ER

On December 1, 2000, the Commission issued a ruling granting respondents' motion to dismiss the claim of whistleblower retaliation (§230.80, et seq., Stats.) and retained jurisdiction to consider the potential of sanctions under §230.85(3)(b), Stats. Respondents, by cover letter dated December 7, 2000, filed a motion requesting an award of attorney's fees. Complainant, by cover letter dated January 8, 2001, filed a motion for reconsideration of the Commission's ruling of December 1st, a reply to respondents' motion for attorney fees and a cross motion for sanctions "against DOA and its attorney for asking inflated attorney fees." Respondents filed a final brief by letter dated January 8, 2001.

The Commission considered all arguments raised by the parties. Only the main meritorious arguments are addressed in this ruling.

I. Commission's Ruling dated December 1, 2000

The Commission's ruling of December 1, 2000 (hereafter, Prior Ruling), made the following findings, which are pertinent here. Complainant sent an e-mail message to George F. Lightbourn, Secretary of the Department of Administration (DOA) expressing interest in being appointed to the vacant position of Administrator, Division of State Agency Services (see ¶3, Findings of Fact, Prior Ruling). Secretary Lightbourn did not respond to this e-mail

message (see ¶4, Findings of Fact, Prior Ruling). Complainant thereafter on March 9, 2000, sent an e-mail message to the Governor's Office expressing interest in the vacant position with a copy of his prior e-mail to Secretary Lightbourn as an attachment (see ¶6, Findings of Fact, Prior Ruling). Complainant did not allege in his e-mail message to the Governor's Office that Secretary Lightbourn refused to do his ministerial duty of giving complainant equal consideration for the position or that Secretary Lightbourn acted inappropriately in any other way (see ¶11, Findings of Fact, Prior Ruling). It also was noted in the Prior Ruling that despite repeated requests (see pp. 1-2, Prior Ruling) for copies of the aforementioned e-mail to the Governor's Office and its attachment (the claimed whistleblower disclosure) complainant failed to provide the same (see ¶6, Findings of Fact, Prior Ruling).¹

The Opinion section of the Prior Ruling contained the following relevant text (pp. 7-8):

Complainant, in his e-mail messages to the Governor, did not disclose "information" within the meaning of §230.80(5), Stats. He did not allege in the e-mail messages to the Governor that respondents did anything wrong. Rather, he merely expressed interest in a vacant position at DOA. Respondents are entitled to summary judgment on the whistleblower claim. The Commission orders that a copy of this ruling be placed in Mr Balele's personnel file, pursuant to §230.85(3)(b), Stats.

The Commission has noted difficulties in prior cases in relying on Mr Balele's representations. He incorrectly represented the content of testimony in *Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98 and in *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (a case in which the complainant was represented by Mr Balele). His answers to discovery requests have been found to have been evasive and made in bad faith, and some of his pleadings have been found to have been made in bad faith, *Balele v. DER & DMRS*, k98-0145-PC-ER, 12/3/99 (for which his case was dismissed and he was ordered to pay fees and costs, *Balele v. DER & DMRS*, 98-0145-PC-ER, 2/28/00).

Mr. Balele's conduct here appears to be a continuation of the pattern discussed in the prior paragraph. Specifically, he knew that he did not allege any wrongdoing on the part of respondents in his e-mail messages to the Governor's office. Yet he claimed that by virtue of those e-mail messages he was protected under the whistleblower law "because he sent the Governor an e-mail accusing Lightbourn of failing to do his ministerial duty of giving Balele equal

¹ The Commission notes that complainant still has not provided copies of these requested documents.

consideration for the position of administrator-state agency services.” (See ¶5 of the findings of fact.) Furthermore, although respondents made it clear in their brief that they were presuming, for purposes of argument only, the truth of complainant’s statement, Mr Balele proceeded to argue that respondents had conceded that he “reported Mr. Lightbourn to the Governor ” (Complainant’s brief dated 10/3/00, p. 3) This Commission has repeatedly informed Mr. Balele that a respondent’s failure to specifically deny a pleading does not amount to a concession. *Balele v. DHFS*, 99-0002-PC-ER, 5/31/00; *Balele v. DOR*, 98-0002-PC-ER, 2/24/99; *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98 and *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/20/00.

The Commission cannot tolerate such repeated conduct from a party. Accordingly, the Commission retains jurisdiction over the whistleblower claim to consider imposition of sanctions under §230.85(3)(b), Stats., the text of which is noted below in pertinent part:

(b) If the commission finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent’s reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee’s attorney, or assessed so that the employee and the employee’s attorney each pay a portion. To find a complaint frivolous the commission must find that either §814.025(3)(a) or (b) applies or that both §814.025(3)(a) and (b) apply.

II. Complainant’s Motion for Reconsideration²

Complainant contends he thought that his e-mail message to the Governor’s Office with the attached copy of his e-mail message to Secretary Lightbourn “was enough to convey a fact that Lightbourn had refused to consider Balele for the position” (pp. 5 & 8 brief dated 1/8/01). He argued that the Commission erred in not adopting such an inference from the materials submitted for the motion resolved in the Prior Ruling (pp. 9-12 brief dated 1/8/01). The crux of his argument is in the following paragraphs (pp. 9-10 brief dated 1/8/01):

In this case the Commission did not look at totality (sic) of e-mail exchange to determine what a reasonable judge would have concluded from the e-mails. Sure (sic) if the Commission had done so, it would have determined that Balele e-mail (sic) conveyed to the Governor’s office Secretary Lightbourn (sic) had

² Complainant mistakenly called this motion a petition for rehearing which is inappropriate because no final decision has been issued on the whistleblower claim.

refused to do his ministerial duty of giving Balele equal appointment consideration for the position or that Secretary Lightbourn acted inappropriately. By totality of evidence the Governor's office surely wondered why Balele contacted the Governor's (sic) since Lightbourn was the appointing authority. Surely the Governor's office inferred that Lightbourn did not do his ministerial duty – to consider everybody that applied for the position. This is common sense.

Second, Balele e-mail, given the totality of circumstances, implied to the Governor that Lightbourn refused to give Balele equal consideration for the position. In fact the Governor's office, given the totality of circumstances; would have questioned Lightbourn of what took place. The reason is why should an applicant for a position e-mail delegated to Lightbourn contact the Governor (sic). (Judicial Notice of Ruling in *Balele v. DOA*, Case No. 00-0057-PC-ER dec'd 09/20/2000, p. 5, 4th paragraph).³ Reasonable minds would conclude that Lightbourn had refused to do a ministerial duty. Therefore this Commission should have concluded that, with totality of evidence, that Balele's e-mail to the Governor's office accused Lightbourn of refusing to do his duty. This Commission should re-hear the case on its merits.

Third, a reasonable person would conclude that the Governor's office contacted Lightbourn. As admitted by DOA brief cited above, the Governor was not Balele's supervisor. Therefore a reasonable person would have concluded that the Governor's Office had contacted Lightbourn why he did not do his duty (sic). Therefore, reasonable minds would conclude that Lightbourn became angry that Balele had accused him of not doing his job

The above-noted arguments are rejected as being unreasonable inferences from the information provided by the parties. Complainant merely informed the Governor's office that he was interested in a position and (via the attachment) that he had expressed such interest previously to Secretary Lightbourn. It is neither common sense nor reasonable to infer from these facts that that complainant alleged to the Governor's office that Secretary Lightbourn did anything wrong. Complainant's request for reconsideration of the Prior Ruling, accordingly, is denied.

³ Paragraph 4 on page 5 of the ruling in *Balele v. DOA*, 00-0057-PC-ER, 9/20/00, addressed and rejected Mr. Balele's pretext argument that competition was required to fill an unclassified position. The cited text does not address and cannot be cited as support for Mr. Balele's argument that expressing interest in a position by contacting the Governor's office subsumes an allegation of wrongdoing by the appointing authority.

III. The Whistleblower Claim was Frivolous

The Commission retained jurisdiction in the Prior Ruling to determine whether the whistleblower Claim was frivolous and, if so, whether an award for attorney fees and costs would be appropriate. Section 230.85(3)(b), Stats., provides in relevant part:

If the commission finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the commission must find that either §814.025(3)(a) or (b) applies or that both §814.025(3)(a) and (b) apply.

According to §814.025(3), Stats.

In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous the court must find one or more of the following:

- (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
- (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

It is the Commission's unanimous finding that complainant's whistleblower claim was frivolous under §814.025(3)(b), Stats. He knew he did not inform the Governor's office in his e-mails that Secretary Lightbourn failed in the performance of his ministerial or any other duties. The whistleblower complaint, accordingly, was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

IV Request for Attorney's Fees

Respondents request that the Commission order complainant to pay \$257.42 in reasonable and actual attorney's fees. Respondents' attorney prepared a supporting affidavit

showing that he earns \$64.335 per hour (including fringe benefits) and that the amount requested for attorney fees is for less than the total time he spent on the whistleblower claim. Respondents do not seek recovery of their costs associated with the whistleblower claim.

Respondents' request is reasonable. Accordingly, the Commission orders complainant to pay \$257.42 to the Department of Justice within 30 days of the date of this order

V Complainant's cross motion regarding amount of claimed attorney fees

Complainant requests the Commission to issue an order for respondents to pay him one million dollars for "asking attorney fees (sic) which are not allowed by the State" (p. 20, brief dated 1/8/01). His arguments are unpersuasive and, accordingly, his request is denied.

CONCLUSIONS OF LAW

1. The whistleblower claim filed by complainant in this case was frivolous.
2. Respondents met their burden of showing that the requested attorney's fees were reasonable.
3. Complainant did not meet his burden to show entitlement to an award of costs.
4. Complainant did not meet his burden to show that the Commission should reconsider its Prior Ruling.

ORDER

Complainant's request for reconsideration is denied. Complainant's request for costs is denied. Respondents' request for attorney fees is granted. Complainant must pay the sum of \$257.42 to the Department of Justice within 30 calendar days of the date of this order

Dated: February 23, 2001

STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers
JUDY M. ROGERS, Commissioner