STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 00-0133-PC-ER

RULING ON MOTIONS AND ORDER TO SHOW CAUSE

This is a complaint of discrimination and retaliation. This ruling addresses the following motions filed by the parties:

1. Motion to dismiss DER and DMRS as respondent parties due to lack of subject matter jurisdiction filed by respondent November 29, 2000.

2. Motion for sanctions based on frivolous/bad faith pleading filed by respondents DER and DMRS on November 29, 2000.

3. Motion to dismiss and/or for sanctions for bad faith prosecution filed by respondents January 23, 2001

4. Cross-motion for judgment on the pleadings and for sanctions filed by complainant February 7, 2001.

The parties were permitted to brief these motions and the schedule for doing so was completed on March 9, 2001. The following findings are based on information in this or other case files or provided by the parties, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1 On October 9, 2000, complainant filed this charge with the Commission alleging that he was discriminated against on the basis of color, national origin or

ancestry, and race, and retaliated against for engaging in protected whistleblower and fair employment activities, when he was not selected after interview for the position of Deputy Director, Bureau of Fee-For-Service in the Department of Health and Family Services.

2. In this charge, complainant represents that DER and DMRS discriminated/retaliated against him by advising "DHFS officials to discriminate against complainant as prohibited under WFEA," and explains this representation as follows:

> Complainant belief was based on past David Vergeront's[1] testimony which implied he hated complainant for filing many complaints against DER and DMRS for which he had to respond to discovery requests. Therefore Complainant alleges that respondents colluded to retaliate and discriminate against him when they failed to appoint him in the position at issue because he had filed complaint in the Commission.

3. In this charge, complainant is apparently relying upon email messages he directed to the Secretary of DER and the Administrator of DMRS as his protected whistleblower disclosures, and represents that he indicated in these emails his belief that respondent DHFS had failed to make an appointment to the subject position within the 60-day period of time specified by statute.

4. Complainant is black and of Tanzanian national origin. Complainant has filed previous equal rights complaints with the Commission and certain officials in DER, DMRS, and DHFS are aware of some of these complaints. Complainant applied for, was certified for, and was interviewed for the subject position.

5. Complainant has represented in his complaint that he was notified by DHFS, "immediately" after he sent the emails to DER and DMRS referenced in ¶3, that he was not the successful candidate for the subject position.

6. In a letter dated December 7, 2000, complainant and counsel for respondents were notified that a prehearing conference had been scheduled to be held on Thursday, January 4, 2001, at 10:00 a.m. by telephone conference call.

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[1] David Vergeront is the chief legal counsel for DER and DMRS.

7 In an email dated December 18, 2000, complainant requested that the prehearing conference be rescheduled since he would be out of town the week of January 1, 2001.

8. After the exchange of numerous emails, the prehearing conference was rescheduled by agreement of the parties for January 10, 2001, at 2:00 p.m. This was confirmed in a letter from the Commission dated December 22, 2000, and directed to complainant and counsel for respondents.

9. The report of the prehearing conference signed and dated by the hearing examiner on January 12, 2001, based on notes prepared January 10, 2001, states as follows, in relevant part:

> Despite initiating the request that this prehearing conference be rescheduled from its original date of January 4, being actively involved in the rescheduling of this conference, and insisting that Attorney Vergeront participate in the conference, Mr. Balele was not present at the phone number he had provided the Commission at the time scheduled for the commencement of the conference call, i.e., 2:00 p.m., or at 2:10 or 2:20 p.m. when the Chairperson re-initiated the call. As a result, Chairperson McCallum conducted the conference without Mr. Balele's participation, and left a message on his voice mail that he should contact her when he got her message to explain his failure to appear After the conference was concluded, Chairperson McCallum left a second message on Mr. Balele's voice mail explaining that the conference had been conducted without his participation, the issue had been established, a briefing schedule on respondents' motions had been set, the date and time for hearing had been scheduled, and he would receive a copy of the conference report. Mr Balele called Chairperson McCallum after the conference at approximately 2:30 p.m. and indicated that he had not appeared for the conference because he had been called into an emergency meeting at 1:30 p.m. without notice and had not had any opportunity to notify the Commission that he would not be at his desk to receive the prehearing conference call. Chairperson McCallum instructed Mr. Balele to obtain a letter from his first-line supervisor to this effect. Mr Balele copied Chairperson McCallum on an email he sent to his first-line supervisor, Michael Leahey, asking Mr. Leahey for a letter explaining that Mr Balele had been in a meeting at 2:01 p.m. Chairperson McCallum emailed Mr. Leahey to explain what Mr Balele had represented to her about the meeting and to clarify what she seeking in a letter from him. Mr. Leahey sent a letter to Chairperson McCallum

> in which he indicated that Mr. Balele "was in a staff meeting from approximately 1:30 PM to 2:15 PM on Wednesday, January 10th. However, the meeting notice was sent to attendees on Friday January 5th. This was not an emergency meeting." In view of Mr. Balele's apparent misrepresentations in regard to the circumstances surrounding his failure to appear at the scheduled prehearing conference, it would be appropriate for the Commission to entertain a motion to dismiss for lack of good faith prosecution of this matter.

10. In an email to Chairperson McCallum dated January 16, 2001, complainant stated as follows, in relevant part:

> Here below is why I said that the meeting was unexpected. Our Bureau staff meetings are usually on Tuesdays at 1:30 p.m.-2:30 p.m. or thereafter The meeting which caused me to miss the teleconference in the above case had been abruptly rescheduled as indicated below.

11. The notice of rescheduling, to which complainant was referring in this email to Chairperson McCallum and which he included as a part of this email, was an email to complainant and others dated Friday, January 5, 2001, at 3:34 p.m. from Karen Torvell which stated as follows:

> The staff meeting has been rescheduled to Wednesday **January 10 from 1:30-3:30** in room 10A Please change your calendar. (emphasis in original)

12. In his post-hearing brief, complainant stated as follows, in relevant part, in regard to his failure to be at his desk at 2:00 p.m. on January 10 for the purpose of participating in the prehearing conference call:

- The Commission's telephone conference had been scheduled Wednesday 10, 2001.
- Usually we have Bureau meetings on Tuesdays. This time we must have had the meeting on Tuesday January 9, 2001 from 1:30-3:00 p.m.
- During the week of January 1-5, 2001, I was out of the office on vacation.
- On Friday January 5, 2000, while away, the Bureau meeting was re-scheduled to January 10, 2001 at the same time 1:30-3:00 p.m. (See Ms. Tovell e-mail)

- The Bureau meeting timeframe overlapped with the Commission's telephone conference.
- I decided to attend the Bureau meeting on January 10, 2001 at 1:30 p.m., expecting to temporarily leave the meeting at 2:00 p.m. to attend the commission's teleconference as scheduled. It takes only a few minutes for the conference.
- While in the Bureau meeting, I **forgot** about the Commission's teleconference scheduled 2:00 p.m.
- At about 2:20 p.m. or thereabout I remembered about teleconference.
- I left the Bureau meeting with intention to go back after the teleconference. As pointed above it takes only a few minutes for teleconferences. Unfortunately the Commission's teleconference was over by the time I got to my desk.
- I have diligently looked in my computer and found no indication I opened or read Ms. Torvell's e-mail on January 8th or 9th rescheduling the Bureau meeting. The only conclusion is that the meeting on Wednesday could have been a surprise to me. That's why I have termed the Bureau meeting as an emergency one.
(emphasis in original)

13. Since July 1, 1996,[2] complainant has filed 35 equal rights complaints with the Commission and in all but one has alleged that he was discriminated or retaliated against when he was not the successful candidate for certain positions. These complaints were filed against one or more of 14 state agencies. Complainant has not prevailed on the merits in any of the complaints he has filed with the Commission. In prosecuting several of his complaints, complainant has demonstrated a pattern of abuse of the Commission's processes, including the pleading and discovery processes, and a pattern of misrepresentation, obfuscation, and prevarication. *See, e.g., Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98 (Balele misrepresented witness's testimony in post-hearing briefs); *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (Balele, serving as the complainant's representative, misrepresented witness's testimony); *Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 (case dismissed and sanctions ordered for Balele's bad faith pleading and engaging in bad faith in discovery process); *Balele v.*

[2] Complainant filed 13 equal rights complaints relating to hiring decisions with the Commission from May 1, 1987 through June 30, 1996.

DATCP, DER & DMRS, 98-0199-PC-ER, 2/11/00 (Balele misrepresented statements made by the hearing examiner, and failed to introduce evidence at hearing he had pledged at prehearing that he would be introducing); *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00 (Balele made statements in post-hearing brief contrary to evidence of record, and hearing testimony not credible); *Balele v. DHFS*, 99-0002-PC-ER, 5/31/00 (gave false testimony, and misrepresented witness testimony and other evidence of record); and *Balele v. DOA, DER & DMRS*, 00-0104-PC-ER, 12/1/00 (complainant engaged in bad faith pleading and, as a result, his whistleblower claim was ruled frivolous and attorney's fees assessed).

Motion to dismiss DER and DMRS as respondent parties due to lack of subject matter jurisdiction.

The action which complainant is challenging here is the failure of DHFS to select him as the successful candidate for the subject position. Although complainant alludes to DER/DMRS's alleged failure to enforce the 60-day appointment provisions of §230.25(2)(b), Stats., in regard to the subject hire, he appears to do so in support of his contention that DER/DMRS enabled or encouraged DHFS to discriminate/retaliate against him by not selecting him for the subject position. As the Commission has ruled in *Balele v. DHSS, DER & DMRS*, 95-0005-PC-ER, 5/15/95, aff'd *Balele v. WPC et al.*, Dane Co. Cir. Ct. (5/6/98), aff'd *Balele v. WPC et al.*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998); and *Balele v. DNR, DER & DMRS*, 95-0029-PC-ER, 6/22/95, DER and DMRS are not necessary parties to an action challenging a post-certification selection decision.

Complainant argues that, since he is alleging that DER and DMRS "colluded" with DHFS to deny him the position, they are necessary parties in this action given the Commission's holding in *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 5/10/99.[3] However, in the cited ruling, the Commission decided as follows:

[3] Complainant cites 8/30/00 as the decision date but the date of the ruling which addresses the issue under discussion here was 5/10/99.

> In regard to issue 1.(a), which relates to DOA's investigation of complainant's use of leave time, it is apparent that the authority to investigate or take disciplinary or other action against complainant if he were found to have been abusing leave requirements was invested in DOA as the employing agency, and not in DER. As a result, DER did not have authority over those conditions of complainant's employment relevant to this issue, and would not be a necessary party for purposes of granting effective relief were complainant to prevail. Possible contact between DER and DOA in regard to complainant's use of leave time in these circumstances could constitute evidence relevant to issue 1.(a), but the possession of relevant evidence by DER does not, in and of itself, require that DER be a party to this action.

This same analysis was applied to DMRS by the Commission in this ruling.

Complainant characterizes this ruling as follows in the brief he filed with the Commission on February 20, 2001:

> DER and DMRS brief in opposition which has been adopted by DHFS, states, among others, that the Commission has similar case in which it dismissed DER and DMRS as to post certification phases. DER and DMRS cited several commission's cases. However, DER and DMRS and their officials did not dispute in their briefs that in *Balele v. DOA, DER & DMRS*, Case No. 99-0001-PC-ER, 99-0026-PC-ER dec'd August 30, 2000, this Commission denied DER and DMRS similar motion. In fact Mr Vergeront vigorously complained at the pre-hearing conference why DER and DMRS were kept as parties. (Balele's affidavit). The Commission's reasoning is that DER/DMRS officials had induced DOA officials to discriminate and retaliate against Balele based on his protected status.

Complainant has misrepresented the holding in the ruling under discussion here. Consistent with this ruling and other Commission precedent, DER and DMRS are not necessary parties to this action and should be dismissed as respondent parties.

Motion for sanctions based on frivolous/bad faith pleading filed by respondents DER and DMRS.

Respondents DER and DMRS argue in support of this motion that complainant named them as respondent parties here even though the Commission has made it clear in previous cases brought by complainant that DER and DMRS are not necessary

parties in cases in which the decision under review is a post-certification selection decision by an appointing authority. *See, Balele v. DNR et al.,* 95-0029-PC-ER, 6/22/95; *Balele v. DHSS*, 93-C-0520C (W.D. Wis. 1994); *Balele v. DHSS [DWD], et al.,* 95-0005-PC-ER, 8/28/97; *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998).

Complainant appears to be arguing in part in this regard that his "disclosure" to DER/DMRS of DHFS's failure to make an appointment within the 60-day time period specified in §230.25(2)(b), Stats., introduced some uncertainty into the determination of necessary parties to this action. However, complainant's primary argument in this regard relies upon a mischaracterization of one of the Commission's earlier rulings. (see above discussion) He sets forth this misrepresentation not only in a written brief but in a sworn affidavit. (affidavit dated 2/7/01 attached to complainant's 2/7/01 filing with the Commission)

The Commission has considered the past actions of a party in assessing whether and what type of sanctions may be appropriate. *Benson v. UW, 98-0179-PC-ER, 11/20/98.* Over a course of years, complainant has engaged in a pattern of obstruction, obfuscation, and prevarication in many of the numerous cases he has filed with the Commission. *See, e.g., Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, [date?] (Balele misrepresented witness's testimony in post-hearing briefs); *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (Balele, serving as the complainant's representative, misrepresented witness's testimony); *Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 (case dismissed and sanctions ordered for Balele's bad faith pleading and engaging in bad faith in discovery process); *Balele v. DATCP, DER & DMRS*, 98-0199-PC-ER, 2/11/00 (Balele misrepresented statements made by the hearing examiner, and failed to introduce evidence at hearing had pledged at prehearing would be introducing); *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00 (Balele made statements in post-hearing brief contrary to evidence of record, and hearing testimony not credible); *Balele v. DHFS*, 99-0002-PC-ER, 5/31/00 (gave false testimony, and misrepresented witness testimony and other evidence of record); and

Balele v. DOA, DER & DMRS, 00-0104-PC-ER, 12/1/00 (complainant engaged in bad faith pleading and, as a result, his whistleblower claim was ruled frivolous and attorney's fees assessed).

The Commission recognizes that complainant is not an attorney. However, the failings of complainant cited above and in the instant action do not require legal expertise to avoid. They simply require bringing and prosecuting an action in good faith and telling the truth, standards to which all parties who appear before the Commission are held.

The Commission concludes that complainant intentionally misrepresented the holding in *Balele v. DOA, DER & DMRS,* 99-0001, 0026-PC-ER, 5/10/99, and that this and his pattern of misconduct merits sanction. Before imposing sanctions the Commission will provide complainant an opportunity, through responding to an order to show cause, to address the contemplated sanction.

Motion to dismiss and/or for sanctions for bad faith prosecution.

Complainant's version of what occurred in regard to the prehearing conference scheduled for and convened on January 10, 2001, contains numerous inconsistencies. For example, complainant stated that he was called into a staff meeting without notice and without an opportunity to notify the Commission. However, complainant also stated that he was expecting the meeting to be held that week on Tuesday, as was the typical practice. If, as complainant has stated, he was expecting the meeting to occur on Tuesday, he had to be aware when the meeting did not occur on Tuesday that it had been rescheduled, and would have had a days' time to determine the date and time of the rescheduled meeting and to notify the Commission when it became apparent he would have a conflict. Complainant also stated that he decided to attend the staff meeting beginning at 1:30 p.m. on January 10 and to leave the meeting at 2:00 p.m. to participate in the prehearing conference. In stating this, complainant admits that he knew prior to 1:30 p.m., 30 minutes before the prehearing conference was scheduled to begin, that he had a conflict; that he took time prior to 1:30 p.m. to formulate a plan to deal with it; and that he felt free to miss part of the meeting to take part in the

prehearing conference. This is inconsistent with his statement that he was called into a staff meeting without notice and without an opportunity to notify the Commission. Finally, the Chairperson was very definite in her instructions to complainant that he obtain a statement from his first-line supervisor to the effect that he was called into a staff meeting without notice and without an opportunity to notify the Commission. However, complainant instead requested from his first-line supervisor, immediately after receiving these specific instructions, a statement that complainant was in a meeting at 2:01 p.m. This further demonstrates complainant's lack of good faith and intent to obfuscate in dealing with this matter

The only possible conclusion to be drawn from these inconsistencies is that complainant has again made intentional misrepresentations in prosecuting a case. Again, complainant will be afforded an opportunity to respond to an order to show cause before a sanction is imposed.

Cross-motion for judgment on the pleadings and for sanctions filed by complainant.

It appears that that the first part of this cross-motion is based on complainant's theory that, because respondents have not specifically disputed certain core facts in the complaint, complainant is entitled to judgment on the pleadings. However, complainant has advanced this argument in several of his other cases and it has been explained to him each time that respondents' failure to refute his contentions does not entitle complainant to a judgment by default. *Balele v. DOR*, 98-0002-PC-ER, 2/24/99; *Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98; *Balele v. DOA, DER & DMRS*, 00-0104-PC_ER, 12/1/00; and *Balele v.* , 99-0002-PC-ER, 5/31/00.

It appears that the second part of this cross-motion is based on respondent DER/DMRS's reference in a brief to complainant leaving the subject staff meeting at 2:00 p.m. when he had actually represented that he had left the meeting at 2:15 p.m. However, if the paragraph in which respondent makes this erroneous reference is reviewed (See DER/DMRS brief of 1/23/01 at page 2, ¶2), it is clear that the reference

to 2:00 p.m. was an inadvertent error by DER/DMRS and not an intentional misrepresentation. In the first sentence of this very same paragraph, DER/DMRS states that " ..Mr. Balele left the meeting at 2:15 p.m."

The final part of this cross-motion is complainant's request for $1 million in sanctions against DER/DMRS for their reference to 2:00 rather than 2:15 p.m. This request is patently outrageous and typical of a pattern complainant has followed in many of his cases of advancing a request for sanctions which is clearly without merit and outside the scope of the Commission's authority. (*See, e.g., Balele v. DOA, DER & DMRS*, 00-0104-PC-ER, 12/1/00; *Balele v. DOR, DER & DMRS*, 00-0077-PC-ER, 10/18/00.)

Sanctions

It appears to the Commission, based on complainant's conduct in this case and his history of misconduct and bad faith before this Commission, that it would be within the realm of the Commission's authority, and an appropriate sanction, to dismiss this action.

In *Verhaagh v. LIRC,* 204 Wis. 2d 154, 554 N. W 2d 678 (Ct. App. 1996), the court held that in an administrative proceeding under the workers' compensation act (WCA), Ch. 102, Stats., DWD has the discretionary authority to decide whether to resolve a claim on the basis of a default by a party in connection with a pleading issue. The employe (Verhaagh) claimed DWD erred when it refused to grant his motion for a default judgment after the employer failed to file its answer to his claim in a timely manner The court of appeals upheld the agency's action. The court looked to §102.18(1)(a), Stats., which provides that "disposition of application *may* be made by a compromise, stipulation, agreement or *default* (emphasis added).[4]" The court held "the use of the term may . . . clearly submits the issue of default orders to the LIRC's discretion." The court went on to hold:

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[4] This language is very similar to a provision in the APA governing proceedings before this commission: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default." §227.44(5), Stats.

> In reviewing an administrative agency's discretionary decision, we defer to the administrative agency as we defer to trial courts because the exercise of discretion is so integral to the efficient functioning of both the administrative agency and the courts. The burden to demonstrate an erroneous exercise of discretion rests on the party claiming the exercise of discretion was improper 204 Wis. 2d at 160-61 (citation omitted)

The court further held that the legal standard for the agency's determination of whether a default was appropriate was not the standard used in judicial proceedings--i. e., not surprise, mistake, or excusable neglect:

> Rather, the agency is entitled to exercise its discretion based upon its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness. *Id.* at 161.

The court specifically rejected Verhaagh's contention that it should apply a liberal interpretation to the WCA to resolve the issue in his (the employe's) favor·

> Finally, we consider Verhaagh's claim that the worker's compensation statute and the liberal interpretation required to provide benefits for employes mandates the granting of Verhaagh's motion for a default judgment. We agree that because the worker's compensation act is a remedial statute, ambiguities in interpretation should be resolved in favor of the employe. Such a rule of construction, however, does not authorize the creation of statutory provisions not adopted by the legislature. The legislature specifically provided that default orders were matters submitted to the sound exercise of discretion by the administrative agency. Section 102.18(1)(a), Stats. There is nothing in the act suggesting that default orders must be granted absent of a showing of excusable neglect. Indeed, the application of the civil law standard to administrative agencies is erroneous. Nothing in the worker's compensation act mandates the granting of a default order based upon the tardy filing of a pleading by a party. *Id.* at 163.

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contested case by stipulation, agreed settlement, consent order or default." §227.44(5), Stats.

In *Baldwin v. LIRC,* 228 Wis. 2d 601, 599 N. W 2d 8 (1999), the supreme court used a similar approach to find discretionary authority for the denial of an employe's motion to withdraw his application for WCA benefits:

> The department's authority to deny a motion to withdraw is necessarily implied from its express authority to manage its calendar under §102.17(1)(a), Stats.[5] First, as the respondents point out, the department's ability to schedule hearings and promptly and efficiently adjudicate claims would be held hostage by an applicant's ability to withdraw his application at any time; chaos would result. For example, even the appellants conceded at oral argument that applying their analysis logically, they could withdraw their application any time before the ALJ's decision. It is not difficult to imagine the mischief this would cause. Second, the appellants' proposed construction would render the department's express authority to manage its calendar a nullity. *See State v. Ozaukee Co. Bd. Of Adj.,* 152 Wis. 2d 552, 559, 449 N. W 2d 47, 50 (Ct. App. 1989 (no part of a statute should be rendered superfluous by interpretation). Third, in adopting this interpretation, we heed our supreme court's directive to refrain from laying down a rule that hamstrings the agency's efficient administration and operation. *See State ex rel Cities Serv. Oil Co. v. Board of Appeals,* 21 Wis. 21d 516, 541, 124 N. W 2d 809, 822 (1963). Finally, allowing applicants the unfettered right to withdraw their applications at any time, without reason, would effectively give them a right to substitute an ALJ or "judge shop," a right ch. 102 does not provide. *Id.,* 616-17.

While dismissal of a claim is a drastic step, the Commission's opinion is influenced by the complainant's repetitive pattern of abuse that continues despite the Commission's observations, admonitions, and the imposition of other penalties in other cases.

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[5] The court indicated earlier in the decision it was relying on this part of this section: "The department shall cause notice of the hearing on the application to be given to each party interested at least 10 days before such hearing. The hearing may be adjourned in the discretion of the department, and hearings may be held at such places as the department designates." 228 Wis. 2d at 615-16. This authority is parallel to the Commission's authority to process complaints under the WFEA. *See* §§111.375(2), 111.39, 227.44, 227.45, Stats.

Respondent also has requested fees and costs, but has cited no authority for the award of fees and costs at this stage of a proceeding based upon the types of actions in which complainant has engaged,[6] and, as a consequence, this request is denied.

ORDER

Before the Commission enters any final orders with regard to this case, it provides complainant the opportunity to show cause,[7] if any he has, why the following sanctions should not be imposed:[8]

1. With regard to any future cases he may file with this Commission, complainant is barred from naming either DER or DMRS as a party respondent without complying with the following requirements:

a) He must serve and file a motion for leave to name DER or DMRS as a party;

b) He must accompany the motion with an affidavit in which he states the facts he relies on in seeking to name DER or DMRS as a party;

c) He must accompany the motion with an explanation of how he believes the case is distinguishable from *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N. W 2d 418 (Ct. App. 1998).

2. The instant case is dismissed with prejudice as a sanction for the following, in the context of a pattern of such misconduct:

a) Frivolous or bad faith pleading with regard to naming DER and DMRS as parties;

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[6] A complainant may be required to pay costs under certain circumstances in connection with a frivolous complaint under the "whistleblower" law, §230.85 (3)(b), Stats., and in certain circumstances with regard to discovery issues, *see* §PC4.03, Wis. Adm. Code, ch. 804, Stats. However, costs can not be awarded for frivolous WFEA claims. *Tatum v. LIRC,* 132 Wis.2d 411, 421-22, 392 N. W 2d 840 (Ct. App. 1986)

[7] The schedule for submitting further materials will be promulgated in separate correspondence.

[8] *See, e. g., Graham v. Secy. H&HS,* 785 F. Supp. 145, 146, 1992 U. S. Dist. LEXIS 2859 (D. Kans. 1992); *Tripati v. Beamon,* 878 F. 2d 351, 354 (10th Cir. 1989).

b) Bad faith prosecution of this matter with regard to making misrepresentations concerning the January 10, 2001, prehearing conference, as set forth above on page 9.

Dated: May 24, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:000133Crul1.1

JUDY M. ROGERS, Commissioner

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