STATE OF WISCONSIN PERSONNEL COMMISSION

AVELINO T. PONTES,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 99-0086-PC-ER

RULING
ON PETITION
FOR REHEARING

This matter is before the Commission to consider complainant's petition for rehearing, filed November 6, 2001, with regard to the Commission's final decision and order dated October 18, 2001. While the Commission has reviewed all arguments complainant submitted in its petition and supporting brief documents, it will only address the points it considers most significant.

Pursuant to §227.49(3), Stats., a petition for rehearing in an administrative proceeding of this nature will only be granted on the basis of:

(a) Some material error of law;
(b) Some material error of fact;
(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.[1]

Complainant's first argument is that the Commission erred by failing to ask him during the hearing about his performance at the Department of Workforce Development (DWD) after his probationary employment was terminated at DOT His argument is based on the fact that he presented his own case at hearing. A hearing examiner may have a role in clarifying the record and ensuring it is complete. In this instance, however, the hearing examiner had no reason to know that complainant's performance in a subsequent job was good or bad or even relevant to the hearing issue. These questions were solely within the realm of the

[1] In his petition, complainant quotes statutory authority (§806.07(1), Stats.) applicable to judicial proceedings rather than to this section of the Administrative Procedure Act.

complainant's knowledge and it is he who should have raised the matter at hearing if he felt it supported his case. Furthermore, in the context of a petition for review, this is not newly discovered evidence.

Complainant also contends there are conflicts between the complainant's supervisor's log concerning complainant's performance (Resp. Exh. 4) and the Commission's findings. This is merely an attempt to reargue in a conclusory fashion the significance of the evidence in this case, and does not establish a material error of fact.

Among the many other points raised in the petition, complainant argues that DOT failed to establish at the hearing "how much DOT was hurt by Pontes' purportedly late project completion." Complainant's brief, p. 7 There is no basis for the argument that an agency is required to show that it suffered a detriment from complainant's failure to meet performance deadlines.

Another point the Commission considered in its final decision and complainant attempts to revive here concerns complainant's request during the middle of the hearing to recess the proceeding while he obtained an expert witness. The Commission discussed this matter as follows, and complainant has not advanced any reason for changing this determination now:

> At some point during the middle of the hearing, complainant, concerned about the problems of proof he had been encountering, asked that the hearing be recessed while he tried to find an expert to study the projects he had been assigned, and to provide opinions about the projects and complainant's work on them. This request was denied by the hearing examiner. In the Commission's opinion, this was an appropriate ruling. While complainant was unrepresented by counsel, he still had the ultimate responsibility to put his case together and to satisfy his burden of proof. The Commission notes that complainant conducted extensive prehearing discovery, and there were five on-the-record hearings held to deal with discovery and related issues. In the prehearing conference report, issued four months before the commencement of the hearing, the parties were explicitly advised that they had to submit names of witnesses and copies of exhibits at least three working days before the hearing pursuant to §PC 4.02, Wis. Adm. Code. Conference Report dated August 8, 2000. Furthermore, it is likely that complainant would have needed a substantial delay to locate an expert, have [him or her] become familiar with the issues in the case, and arrange to come before the Commission to testify. Final decision and order, p. 12-13. (footnote omitted)

Complainant argues that the Commission should change Finding of Fact 27, which quoted from a March 29, 1999, letter that complainant sent to Borth complaining about his conditions of employment and complaining that he was being treated differently than the other employees. The finding notes that he did not attribute (in the letter) any of the things about which he was complaining to a form of WFEA discrimination. Complainant now argues that he was the only black employee in the section, and that it should be inferred he was complaining about discrimination on the basis of his minority status. The Commission notes that the finding is accurate as it stands.

Complainant implies the Commission reached the conclusion he did not engage in a WFEA-protected activity. This is not the case. Rather, after pointing out that there was a question about whether this was a protected activity, the opinion goes on to state that "assuming there had been such an activity, the Commission would conclude, for essentially the same reasons discussed above, that respondent's rationale for terminating complainant's probationary employment was not a pretext for retaliation." Final decision, pp. 17-18.

Complainant argues that the findings do not indicate whether the agency affirmative action officer either was consulted about the termination or approved it. Complainant concludes that the consultation did not occur and respondent thereby violated affirmative action/equal appointment requirements. This argument is unsupported by the record. Complainant had the burden of proof at the hearing, and it was up to him to have pursued this matter during the three days of hearing. Furthermore, this is evidence which complainant could have discovered with due diligence prior to the hearing.

Complainant also contends:

> DOT agents admitted that Pontes had improved at the time they fired him. We believe the Commission should not allow DOT agent behavior to continue in this state especially after the September 11, 2001, terrorism that killed Americans: Blacks, whites, Asians, Indians. It is about time this Commission stops racism in the state agencies. Complainant's brief, p. 6.

Lying to one side the incoherence of this argument, this "improvement" argument was addressed in the Commission's decision as follows:

> Complainant contends that Borth at one point assessed his performance as improving, and that this is inconsistent with the conclusion reached by respondent that his work was not good enough to pass probation. This involves a point where Borth was considering the possibility of extending complainant's probation to maximize the opportunity for complainant to improve his performance sufficiently to pass probation. Borth had been informed that probation could only be extended under two circumstances--the employe's work had been good and got worse, or the work had been bad and was getting better. At that point, Borth indicated that for purposes of extending probation, complainant's work could be characterized as bad and getting better. The Commission does not believe this is significant evidence of pretext. Borth gave this indication in the context of discussing the possibility of extending complainant's probation, and in connection with a desire to facilitate such an extension. Extension of probation would have been for complainant's benefit, because it would have given him even more time to try to demonstrate acceptable performance. Final decision and order, 15-16.

The Commission has considered all the arguments in complainant's 27-page brief and 8 page reply brief. Suffice it to say that complainant has not established any material errors of fact or law or "the discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence." §227.49(3), (a), (b), (c), Stats.

The Commission notes that complainant's petition for rehearing was prepared and filed by Pastori Balele as complainant's representative. Several of the arguments raised in the petition are inappropriate in light of numerous other proceedings in which Mr Balele has either been a party or has served as a party's representative.[2] For instance, complainant recites the language in §806.07(1), Stats., as the basis for granting his petition for rehearing (see footnote 1, above), even though the Commission has issued numerous previous rulings that have addressed Mr. Balele's petitions for rehearing and cite the correct provision, §227.49(3), Stats.[3] In many other previous decisions and rulings, the Commission has informed Mr. Balele

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[2] This is not the first time the Commission has had concerns about Balele's representation of other complainants in this forum. *See, Oriedo v. ECB et al.*, 98-0113-PC-ER, 7/20/99, and *Oriedo v.* DOC, 98-0124-PC-ER, 1/19/00, affirmed *Oriedo v. WPC & DOC*, 00-CV-1116 (Dane Co. Cir. Ct., 3/14/01).

[3] *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 6/17/93; *Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98; *Balele v. UW-Madison*, 99-0169-PC-ER, 4/4/01

that it is inappropriate to base post-hearing arguments on information outside the record.[4] However, complainant's representative continues to do so, as noted above.[5] The Commission also has repeatedly rejected Mr. Balele's contention[6] that an agency's failure to expressly dispute any one of complainant's innumerable arguments operates as an admission of that argument.[7] Finally, complainant bases many of his arguments[8] on bald assertions or conclusions not supported by facts in the record despite previous rulings by the Commission rejecting similar arguments by Mr. Balele.[9]

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[4] *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92; *Balele v. DOA et al.*, 99-0001, 0026-PC-ER, 8/28/00; *Balele v. DOC*, 00-0034-PC-ER, 6/13/01.

[5] See discussion on page 3 of complainant's conclusion that there was no discussion with the agency affirmative action officer.

[6] This argument is raised on the first page of complainant's reply brief in support of the petition for rehearing.

[7] *Balele v. DATCP et al.*, 98-0199-PC-ER, 4/19/00, affirmed, *Balele v. Pers. Comm.*, 00-CV-1108, Dane County Circuit Court (11/20/00); *Balele v. DOA et al.*, 99-0001, 0026-PC-ER, 8/28/00; *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; *Balele v. DOA et al.*, 00-0104-PC-ER, 12/1/00.

[8] Examples of such arguments/conclusions are found in complainant's brief in support of his petition:

> "The rehearing will show that Borth and his cohorts hired Pontes as a guinea pig to demonstrate that Blacks cannot do computer work. This is a myth among some white people." Brief, page 7.
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> "DOT agent e-mail language is typical of how people of one race back-bite an individual of another race. Blacks as well [as] whites do that especially if an individual is new to an establishment." Brief, page 9.
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> "The re-hearing will demonstrate that a good supervisor will interface with a new subordinate at least every morning or as often to see where the project is." Brief, page 11.
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> "The re-hearing will show that Borth and other whites in the unit were very uncomfortable with a black person working side by side with them." Brief, page 11.
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> "The re-hearing will demonstrate that DOT/Borth was disappointed to see Pontes completing projects independently. Borth had expected Pontes to fail." Brief, page 12.

[9] In *Balele v. UW*, 91-0002-PC-ER, 3/9/94, Mr. Balele's "evidence" of pretext was mainly based on unproven assertions of racial hatred. In *Balele v. DOT*, 00-0044-PC-ER, 10/23/01, similar assertions were made in the context of an affidavit filed by Mr. Balele in opposition to a motion for summary judgment.

ORDER

Complainant's petition for rehearing filed November 6, 2001, is denied.

Dated: December 4, 2001.

STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

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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.

2/3/95