

NATHANIEL HARWELL,
Complainant,

v.

**Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION,**
Respondent.

INTERIM
RULING

Case Nos. 98-0210-PC-ER, 99-0051, 0063,
0096-PC-ER

These matters are before the Commission on the respondent's motion to dismiss for lack of prosecution or, in the alternative, to schedule the matter for hearing as soon as possible, and on complainant's request to proceed with a hearing in Case No. 99-0051-PC-ER.¹

I. Procedural history

Complainant filed Case No. 98-0210-PC-ER on November 23, 1998, alleging race discrimination and whistleblower retaliation regarding a failure to hire or promote, discipline and harassment. The case was cross-filed with the Equal Employment Opportunities Commission (EEOC). Complainant waived investigation pursuant to §230.45(1m), Stats. The whistleblower claim was subsequently dismissed as untimely in a Commission ruling issued on May 13, 1999.

On March 15, 1999, complainant filed Case No. 99-0051-PC-ER, alleging whistleblower retaliation regarding a failure to hire or promote, discipline and harassment. Complainant subsequently waived an investigation.

¹ The Commission regrets the delay in issuing this ruling. Due to the state's ongoing budget problems, the Commission has been understaffed in professional positions by 20% since May 2000, 40% since February 2002, and 60% since January 2003.

On March 29, 1999, complainant filed Case No. 99-0063-PC-ER, alleging race discrimination regarding a failure to hire or promote, discipline and harassment. The case was cross-filed with EEOC.

On May 26, 1999, complainant filed Case No. 99-0096-PC-ER, alleging race discrimination, Fair Employment Act (FEA) retaliation and whistleblower retaliation with respect to discipline. Complainant had waived the investigation.

In a ruling dated June 21, 1999, the Commission ordered the four cases consolidated.

On April 7, 1999, and September 7, 1999, complainant filed "amendments" to one or more of his complaints.

On November 1, 1999, complainant filed a letter with the Commission asking procedural questions about transferring his cases to the EEOC.

In a ruling dated November 5, 1999, the Commission denied complainant's request to amend except as to clarifying two allegations in 99-0063-PC-ER. In an effort to provide some structure to the cases, the Commission summarized the complainant's allegations. The Commission listed a total of 28 incidents between all 4 of complainant's cases that were the bases for his allegations of discrimination and retaliation.

During this period, complainant engaged in a variety of discovery efforts and the Commission issued several rulings and held conferences regarding discovery. Complainant also made an extensive open records request of the Personnel Commission.

In materials filed on July 17, 2001, respondent asked that the case be scheduled for a prompt hearing.

In a ruling dated December 4, 2001, the Commission ordered that "respondent is not required to provide further response to the discovery requests filed by complainant in this matter." Complainant sought reconsideration, which was denied in a ruling issued on October 31, 2002.

The Commission convened a prehearing conference on November 20, 2002. The conference report reflects that complainant said he was not ready to propose spe-

cific issues for hearing and wanted an opportunity to submit his proposal in written form. The Commission provided the parties with the same list as had been part of the Commission's ruling on November 5, 1999. Complainant asked that the conference be reconvened after he filed his proposed issues and agreed to reconvene the conference at 9:00 a.m. on December 9, 2002, in the Commission's offices.

At 8:11 a.m. on December 9th, the Commission received an email from the complainant stating that he had "car trouble" and that he "returned home." He attached a copy of his proposed issues for hearing:

Issues for Hearing (these are all the detail required at this time):

1. Causes of discrimination/retaliation:
 - a. Race
2. Retaliation based on :
 - a. Whistleblowing
3. The acts of discrimination/retaliation:
 - a. Failure to hire or promote,
 - b. Discipline,
 - c. Harassment
 - d. Wrongful firing

The specific acts of discrimination/retaliation include, but is not limited to the acts listed in [the attachment to the November 20th conference report.]

The Commission went ahead and convened the conference. Respondent objected to complainant's proposal and proposed that the issues be based only on the document attached to the November 20th conference report. Complainant was provided until January 6th to file additional arguments regarding the appropriate issues for hearing.

By letter dated December 31, 2002, complainant requested the transfer of all of his cases to the EEOC. The letter included the following observations:

Given that:

1. The staff of the PC is 100% white, which indicates that the PC itself discriminates, and
2. In the last 10 years, the PC has not found in favor of even one African American, and
3. The bias that the PC has shown against me.

I am confident that my cases would not be tried on their merits, but on bias.

In light of complainant's specific request, the Commission sent the cases to the EEOC but noted, in a letter dated January 16, 2003, that the question of the status of the cases before the Commission remained open:

The cases remain open here until disposed of by final order of this Commission. In the meantime, this Commission has to decide on the status of these cases - i.e., should they be dismissed, held in abeyance, or processed further here. The Commission cannot make that decision until it ascertains each party's position on this subject.

Complainant subsequently informed the Commission that he did not receive this correspondence until it was resent to him on March 5, 2003.

In a letter dated January 24, 2003, respondent asked that the cases before the *Personnel Commission* be dismissed for lack of prosecution. Respondent's letter also stated that "if the commission determines dismissal is not appropriate, then the department believes the case should be scheduled for hearing as soon as possible."² It is this letter that is the primary subject of the present ruling.

After receiving the Commission's March 5th correspondence and in a letter dated March 28, 2003, complainant asked that "none of my cases be dismissed . . . [and] that I have an opportunity to pursue all state cases."

By memo dated May 6, 2003, the EEOC returned Case No. 99-0051-PC-ER to the Personnel Commission based on lack of jurisdiction. That case is premised solely on the whistleblower law. On the same date, the Commission received complainant's request to proceed with Case No. 99-0051-PC-ER before the Commission. Complainant asked that he be provided 2 months to prepare for a hearing. In his letter, dated May 5, 2003, complainant stated:

At issue in the whistleblower case is: Retaliation for whistleblowing. That is, my being fired for whistleblowing. Racism and all other issues will be handled by the EEOC.

² The Commission notes that the respondent referred to "the case" rather than "the cases." However, the context of the reference causes the Commission to believe that the respondent was seeking a hearing on the entire matter rather than on just one of complainant's cases.

II. Ruling

Respondent offers the following reasons in support of its motion to dismiss all four cases for lack of prosecution, or in the alternative, to schedule all four cases for hearing: 1) Complainant clearly does not want the Personnel Commission to hear his case; 2) complainant failed to respond to the schedule set forth in the Commission's letter of December 9, 2002;³ 3) the cases have languished for more than four years "largely due to the complainant's delay tactics"; and 4) prejudice to respondent.

The decision whether to dismiss a claim for lack of prosecution is discretionary with the Commission. *See, e.g., Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). However, a case should not be dismissed for failure of prosecution unless the conduct of the party is "egregious," and the party does not have a clear and justifiable excuse" for its course of action. *Id.*, 162 Wis. 2d 261, 275-76.

The Commission notes that it is scheduled to be abolished effective July 1, 2003, subject to the enactment of Senate Bill 44, and its responsibilities to process complaints will be transferred to the Equal Rights Division of the Department of Workforce Development.⁴ Therefore, complainant's statement that he does not want the Personnel Commission to hear his cases due to bias is moot and respondent's initial reason for dismissal is unsupported.

Respondent contends that complainant failed to comply with the Commission's schedule established at the December 9, 2002, conference. However, the complainant preempted the schedule when, in his letter dated December 31st, he requested the immediate transfer of his cases before the Commission to the EEOC.⁵

³ Respondent described complainant's conduct as a "failure to comply with the pre-hearing order requiring written specification of his proposed issues for hearing."

⁴ At the time this ruling was issued by the Commission, SB44 was still pending before the legislature. However there was no indication that the provisions relating to the Personnel Commission would not become law.

⁵ In the event that respondent is suggesting the complainant failed to comply with the schedule set at the November 20th conference, he also complied with that schedule when he emailed his issues on the morning they were due.

Respondent suggests that the complainant has engaged in delay tactics in pursuing these cases before the Commission. More specifically, respondent contends that complainant engaged in delaying tactics by pursuing "unrelated open record requests to the Personnel Commission and abusive discovery tactics." The Commission is unsure what specific conduct serves as the basis for the respondent's motion. The case files show that there have been numerous rulings issued by the Commission relating to specific discovery disputes and that the Commission granted complainant several postponements of the deadline for completing discovery. Respondent has not shown that the complainant's conduct qualifies as "egregious" so as to justify the very harsh penalty of dismissal. The Commission also notes that the complainant has proceeded *pro se* in all of his cases.

Finally, respondent states that it has been prejudiced by the delays in these cases:

The department has been prejudiced by the complainant's recalcitrance. Witnesses have retired, moved out of state, and memories have become cloudy. Holding the case in abeyance, pending the EEOC's decision would further prejudice the department.

Respondent has failed to provide more than this very general comment about the alleged prejudice to its case. The passage of time has presumably disadvantaged the respondent to some degree, but respondent has not given specific evidence of prejudice such that dismissal would be appropriate.

While the Commission declines to find a failure to prosecute, it recognizes that the cases have now been pending for more than 4 years. The complainant waived the investigation of his claims before the Personnel Commission and it is appropriate, at this time, to require him to proceed to hearing on those claims, even though related claims are at the investigative stage before the EEOC. In a ruling issued on June 21, 1999, the Commission ordered consolidation of the four cases, over the complainant's objection. In his letter dated March 28, 2003, complainant wrote:

If the EEOC does not have jurisdiction over my whistleblower case, I want the whistleblower case separated from the rest of my cases. Yes, racism is an integral charge in my whistleblower complaint. However, the

charge of racism in no way inextricably binds all the cases. At the Personnel Commission, I will pursue the racism charge as it directly applies to the whistleblower case.

I want the whistleblower case separated from the rest of my cases.

As noted above, the complainant wants to proceed to a hearing in this forum on his whistleblower claim, while utilizing the EEOC process to pursue parallel federal claims there. The Commission declines to separate the whistleblower case from complainant's other matters before the Commission, especially in light of complainant's most recent reference to racism in the context of his whistleblower claim. The reasons the Commission ordered consolidation in 1999 are at least as persuasive now as they were at that time:

The Commission's rules specifically provide for consolidation "of any case with any other case involving the same parties or one or more issues arising substantially out of the same circumstances or closely related circumstances." §PC 1.10, Wis. Adm. Code. The present cases all involve the same parties, appear to be based upon many of the same facts and involve many of the same legal theories. While the complainant may feel he is at a disadvantage appearing without an attorney, the fact that a party appears *pro se* or by an attorney is not determinative in terms of the issue of consolidation. Here, judicial economy strongly supports consolidation for hearing and for decision. *Harden & Nash v. DRL & DER*, 90-0106-PC-ER, etc., 1/23/96. If complainant were permitted to litigate these cases as suggested in his written arguments, the parties would be forced to create three separate and extensive hearing records.

Furthermore, there is no way of knowing if or when complainant's federal claims would be pursued to completion in the federal forum, where there has been no lawsuit filed. Given the interrelationship of complainant's cases here, it would not make sense to move forward with the whistleblower case before the WPC, as requested by complainant, but not to hear the related race and WFEA retaliation claims at the same time. Therefore, the Commission grants respondent's request that all four of these cases be scheduled promptly for hearing on a consolidated basis.⁶

⁶ Barring an unforeseen change in circumstances, further processing of these cases will be by the ERD.

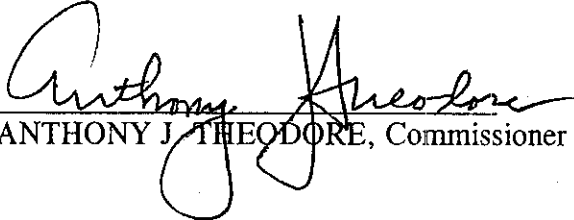
ORDER

Respondent's motion to dismiss for lack of prosecution is denied. Respondent's request that all four of these cases be promptly scheduled for hearing is granted. Complainant's request to proceed with a hearing limited to Case No. 99-0051-PC-ER is denied.

The issues at hearing will track the summary of allegations found in the Commission's ruling issued on November 5, 1999.

Dated: June 26, 2003

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

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Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. *See* 68 Op. Atty. Gen. 323 (1979).