

STATE OF WISCONSIN

PERSONNEL COMMISSION

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PASTORI M. BALELE,

Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY,*
 LABOR AND HUMAN RELATIONS,
 OFFICE OF THE GOVERNOR,
 Administrator, DIVISION OF MERIT
 RECRUITMENT AND SELECTION,
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Secretary, DEPARTMENT OF
 AGRICULTURE, TRADE AND
 CONSUMER PROTECTION,
 Secretary, DEPARTMENT OF
 EMPLOYE TRUST FUNDS,
 Secretary, DEPARTMENT OF REVENUE,
 Secretary, DEPARTMENT OF
 CORRECTIONS,
 Secretary, DEPARTMENT OF
 ADMINISTRATION,
 Secretary, DEPARTMENT OF
 DEVELOPMENT,
 Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 Secretary, DEPARTMENT OF
 PUBLIC INSTRUCTION,
 Commissioner, OFFICE OF THE
 COMMISSIONER OF INSURANCE,
 State Director, WISCONSIN TECHNICAL
 COLLEGE SYSTEM BOARD,
 Chairperson, PUBLIC SERVICE
 COMMISSION,
 Chairperson, WISCONSIN
 GAMING COMMISSION,
 President, UNIVERSITY OF
 WISCONSIN SYSTEM,
 Director, STATE HISTORICAL SOCIETY,
 Executive Director, EDUCATIONAL
 COMMUNICATIONS BOARD,
 Executive Director, STATE
 INVESTMENT BOARD,

Respondents.

Case No. 94-0020-PC-ER

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RULING
ON
DISCOVERY
REQUEST

This matter is before the Commission on the request by respondent Division of Merit Recruitment and Selection (DMRS) to hold all discovery in abeyance until an issue and a hearing date have been set.

The original complaint was filed on February 15, 1994, and alleged discrimination based on race and color and retaliation for engaging in fair employment activities. The complaint specifically identified the Department of Industry, Labor and Human Relations (DILHR), DMRS and the Office of the Governor as respondents. In addition, the complaint referred to "other state agencies." The complaint included a specific allegation regarding the decision of DILHR not to hire the complainant for the "position of Governor's Workforce Excellence." As to DMRS, and the "other state agencies, the original complaint included the following allegations:

B1. The Administrator of the Division of Merit Recruitment and Selection had promulgated to agencies employment practice which allowed agency heads to recruit and hire people as acting, project or limited term employees in career executive/Administrators - Senior executive job group positions without advertising. This practice enabled appointed individuals to learn the details or be groomed in the positions before the positions were advertised. This practice of appointing individuals as acting, project and LTE employees without advertising and allowing them to learn the details of the said positions had disparate impact and disparate treatment on racial minorities seeking promotion in career executive or administrators-senior executive positions.

B2. Since the above practice had been going on for almost six years then and in numerous positions, complainant alleges that respondents had conspired against racial minorities by intentionally disadvantaging them when respondents used the employment practices for the positions.

The complainant requested that the investigation of his complaint be waived so that he could proceed directly to hearing, pursuant to §230.45(1m), Stats. In a letter dated March 7, 1994, responding to a request from the Commission, the complainant identified 18 state agencies in addition to three agencies previously specified in his complaint. On April 22, 1994, complainant filed an amended complaint which listed all 21 of the agencies that are the subject of complainant's allegations. Three days later, complainant filed discovery requests (interrogatories, requests for production of documents, and requests for

admissions) as follows:

1. DILHR (Secretary) - 21 questions
2. Office of the Governor - 12 questions
3. DMRS - 34 questions
4. DILHR (Affirmative Action Office) - 22 questions
5. DILHR (Personnel Office) - 23 questions

On May 17, 1994, respondent DMRS filed a request for a status conference and also requested that the Commission hold all discovery by all parties in abeyance until an issue and a hearing date had been set. Complainant opposes the motion and DMRS and the complainant were provided a brief opportunity to file additional arguments.¹

The respondent identifies four reasons for its request:

1. There are many parties and when considered with the allegations, it is difficult to understand what the Complainant is alleging against DMRS without the benefit of having an issue set.
2. Complainant's contention against DMRS, once reduced to an issue, may be outside of the Commission's jurisdiction and therefore discovery would be unnecessary.
3. Without an issue being set, as requested, there is no way of determining whether a matter is privileged or relevant to the subject matter, or if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. §804.01(2)(a), Wis. Stats.
4. Without an issue being set, as requested, to require DMRS to answer interrogatories would constitute an annoyance, oppression and undue hardship according to §804.01(3)(a), Wis. Stats.

The DMRS request is in the nature of a request to extend the time for responding to interrogatories. Pursuant to §804.08(1)(b), Stats.:

The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories.... The court may allow a shorter or longer time.

¹Because of the brief time period available for the Commission to rule on the request by DMRS, and because the 18 agencies named in the amended complaint had not yet received the complaint and related documents from the Commission's file, the respondent agencies other than DMRS did not receive the letter from the Commission setting the briefing schedule until after that truncated schedule had run.

In exercising its discretion with respect to this request, the Commission notes the policy considerations referenced in 4 Moore's Federal Practice ¶26.56[6]:

[C]ourts will allow discovery on the preliminary issues of ... subject matter jurisdiction.... However, the district court operates within relatively broad limits of discretion, and will dismiss a action where the complaint is facially defective or further discovery appears pointless....

It is common to limit discovery in these cases to facts dealing with jurisdiction, leaving other discovery to await determination of that issue. After all, "the burdens incident to the status of a defendant ought not to be augmented until it is certain that the party involved is properly a defendant." There are cases, however, in which the jurisdictional questions are so intertwined with the merits that the court might prefer to reserve judgment on the jurisdiction until after discovery has been completed.

Respondent DMRS has indicated that, based upon the issue for hearing, it may raise a jurisdictional objection or may seek dismissal upon grounds of res judicata or collateral estoppel. It would be unnecessarily burdensome to require respondent to provide the discovery requested now by the complainant, only to find out in a few weeks² that the claim against DMRS must be dismissed on one of the bases identified above. The Commission notes that by granting the request as to respondent DMRS, the complainant is not precluded from ultimately obtaining the requested discovery. Rather, the existing discovery request is simply being stayed until a conference can be held and an issue for hearing set. Once that occurs, and absent some other basis for delaying discovery, the request will have to be fulfilled.

While DMRS has provided a basis for delaying the requested discovery until an issue for hearing is set, DMRS has failed to identify any reason to justify delaying the discovery until a hearing date has also be established. In addition, the Commission notes that the request was made solely by DMRS and the Commission does not perceive a basis, on materials in the file, to extend the motion by DMRS to all parties. Respondents DILHR and the Office of the Governor have also been the subject of complainant's discovery requests and yet they have not raised any objection to responding to those requests.³

²The Commission anticipates advising the parties promptly of the date for a conference in this matter.

³After DMRS filed its motion, the Office of the Governor concurred with the DMRS request that the Commission schedule the matter for a conference, but made no mention of any problem with responding to complainant's discovery request.

ORDER

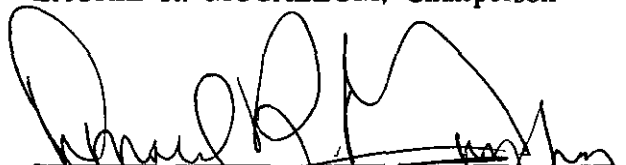
Discovery as to DMRS is stayed until a conference is held and an issue for hearing is set.

Dated: June 2, 1994

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner