

**PASTORI M. BALELE,**  
*Complainant,*

v.

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

**RULING ON MOTION  
TO DISMISS**

Case Nos. 99-0001, 0026-PC-ER

On April 8, 1999, respondents Department of Employment Relations (DER), Division of Merit Recruitment and Selection (DMRS), and Office of the Governor filed a motion to dismiss them as parties to this action<sup>1</sup>. The parties were permitted to file written arguments in regard to this motion, and the final argument was filed on May 3, 1999.

The following statement of issues for hearing has been established in this matter:

1. Whether respondents discriminated against complainant on the basis of color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities in regard to the following:

a. Respondent DOA's investigation of complainant's use of vacation time for participating as a representative in a proceeding before the Commission.

b. Respondent DOA's failure to select complainant for the position of Director, Office of Performance and Evaluation, in March or April of 1998.

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<sup>1</sup> It should be noted that DMRS requested that it be dismissed as a party only as to certain issues.

- c. Respondent DOA's failure to select complainant for the position of Director, Office of Performance and Evaluation, in 1999.
  - d. Respondent DOA's failure to select complainant for the position of Deputy Director, Office of Performance and Evaluation, in approximately May of 1998.
  - e. The failure by respondents DOA and DMRS, some time in 1998, to certify complainant for the position of Administrative Supervisor 1 in the Bureau of Risk Management.
  - f. The failure by respondents DOA and DMRS to certify complainant for a second 1998 vacancy in the position of Administrative Supervisor 1 in the Bureau of Risk Management.
  - g. The decision by respondent DOA not to process complainant's 1998 request for the reclassification of his position.
  - h. The 1998 exchange by DOA management employees of e-mails critical of complainant..
  - i. Respondent DOA's denial in 1998 of complainant's request for access keys.
  - j. Respondent DOA's accusation in 1998 that complainant had improperly used inter-departmental mail to send documents relating to certain administrative proceedings.
2. Whether the use of Achievement History Questionnaires as a part of the certification process for the Administrative Supervisor 1 positions for which complainant competed in 1998 had a disparate impact on racial minorities.
  3. Whether the alleged practice of appointing individuals identified by respondent Office of the Governor to 1998 and 1999 vacancies in the positions of Director and Deputy Director, Office of Performance and Evaluation, had a disparate impact on racial minorities.
  4. Whether the use of the career executive selection process to fill vacancies in the position of Director, Office of Performance and Evaluation, during 1998 and 1999, had a disparate impact on racial minorities.

5. Whether the post-certification selection process utilized by respondent DOA to fill vacancies in the positions of Director and Deputy Director, Office of Performance and Evaluation, during 1998 had a disparate impact on racial minorities.

The Commission's jurisdiction under the Wisconsin Fair Employment Act (FEA) extends only to those employment actions taken by a state agency acting as an employer. §111.375(2), Stats. The Commission has recognized that a state agency other than the employing agency may be a proper party where it has authority over a condition of employment, *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; aff'd Dane Co. Circ. Ct., *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; aff'd Ct. of App., 167 Wis. 2d 205, 2/13/92; including the opportunity to obtain employment, *Novak v. Wis. Supreme Ct.*, 90-0111-PC-ER, 2/7/91; or where it is necessary in order to grant effective relief, *Prill v. DETF & DHSS*, 85-0001-PC-ER, 1/23/89.

Complainant argues that the scope of those state agencies required to defend an action under the FEA should be expanded in view of the definition of respondent in the Commission's administrative rules. Section PC 1.01(17), Wis. Adm. Code, defines respondent to include "the person or state agency whose interests are adverse to those of the petitioner or who will be directly affected by the commission's decision." However, this provision should not be interpreted to require a state agency to defend an action in which it was not involved as an employer, either as the employing agency or in one of the circumstances described in the preceding paragraph. Such an interpretation would be inconsistent with §111.375(2), Stats.

#### Department of Employment Relations

Complainant appears to argue that DER should be required to be a party to this action in view of the role it played in regard to the actions described in issues 1.(g) and 1.(a).

In regard to issue 1.(g), which involves DOA's alleged failure to process complainant's request for the reclassification of his position, it is undisputed that DOA has been delegated authority by DER to process and decide reclassification requests for certain classifications, including the one under consideration here. Since DOA's authority in this regard derives from DER's, DER should remain as a party for purposes of issue 1.(g).

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.

#### Division of Merit and Recruitment and Selection

Complainant appears to be arguing that DMRS should be required to be party to this action as it relates to issues 1.(a), 1.(e), 1.(f), 2., and 4.

It is undisputed that DMRS is a proper party in regard to issues 1.(e), 1.(f), and 2.

Issue 4. relates to the decision to use a particular selection process to fill a career executive position. Section 230.24(2), Stats., provides that the authority for making this decision rests with the appointing authority, not DMRS. As a result, it is concluded that DMRS is not required to remain a party as to issue 4.

Complainant's characterization of DMRS's role in relation to the alleged action which forms the basis for issue 1.(a) is similar to his characterization of the role of DER in such action. Consequently, the analysis would parallel that set forth above

and, as a result, it is concluded that DMRS is not required to remain a party in relation to issue 1.(a).

#### Office of the Governor

Complainant appears to argue that the Office of the Governor is a proper party in regard to issue 3. Although the statutory underpinnings of the executive branch of state government provide for the appointment of the Secretary of DOA by the Governor with confirmation of the appointment by the State Senate (§§15.05(1)(a), 15.10, Stats.), the Governor has no statutory role in the appointment of the civil service employees of the Department of Administration. In addition, the Office of the Governor would not be a necessary party for the granting of effective relief were complainant to prevail here since the appointment at issue was made by DOA. Although, as above, the role of the Office of the Governor in regard to the filling of vacancies in the positions described in issue 3. could be relevant to the question of pre-selection by DOA, the possession of such potentially relevant evidence alone does not require the Office of the Governor to be a party to this action.

#### CONCLUSIONS OF LAW

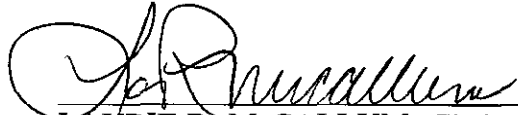
1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that DER and the Office of the Governor are required to remain as parties to this action; and that DMRS is required to remain a party as to issues 1.(a) and 4.
3. Complainant met this burden as to DER in regard to issue 1.(g). Complainant failed to meet this burden as to DER in regard to issue 1.(a), and as to DMRS and the Office of the Governor.

ORDER

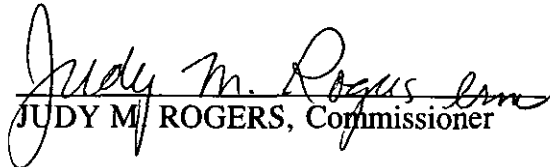
Respondent's Motion to Dismiss is granted as to the Office of the Governor; is granted as to DMRS in relation to issues 1.(a) and 4; and is granted as to DER in relation to issue 1.(a). .

Dated: May 10, 1999

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

• LRM  
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JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the decision of this matter.