

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF ADMINI-
STRATION, Secretary, DEPARTMENT
OF EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondents.

RULING ON MOTIONS

Case Nos. 00-0104-PC-ER, 00-0077-PC-ER

On December 1, 2000, the Commission issued a ruling in Case No. 00-0104-PC-ER granting respondents' motion to dismiss the claim of whistleblower retaliation (§230.80, et seq., Stats.) and retaining jurisdiction to consider the potential of sanctions under §230.85(3)(b), Stats. Respondents, by cover letter dated December 7, 2000, filed a motion requesting an award of attorney's fees. In a ruling dated February 23, 2001, the Commission granted this motion and ordered complainant to pay the Department of Justice (DOJ) \$257.42 within 30 days of the date of that order—i. e., no later than March 25, 2001.

Case number 00-0104-PC-ER has been consolidated for hearing with a related case, 00-0077-PC-ER. A hearing had been scheduled on these consolidated cases on March 12-14, 2001. On February 28, 2001, the hearing examiner granted on an interlocutory basis respondents' motion to postpone the hearing until complainant has paid the attorney fees as ordered in the Commission's February 23, 2001, ruling. On March 7, 2001, complainant filed a motion to delay enforcement of the Commission's order until the entire case is decided and complainant can obtain judicial review of that order. The parties' motions are before the Commission following receipt of the parties' arguments.

Respondents' position is set forth in a February 28, 2001, email, as follows:

The respondents and DOJ take this position based upon past experience in dealing with you [complainant] concerning similar matters. On April 29,

1997, the Seventh Circuit Court of Appeals entered an order that prohibited you from filing any cases with the Seventh Circuit until you paid the costs awarded previously in four district court cases (\$2683.95 in total) and in one state court case (\$773.05). To my knowledge, and please correct me if I am wrong, you have not as yet paid the costs in any of those cases. More recently, in *Balele v. DER and DMRS*, Case No. 98-0145-PC-ER, the Personnel Commission ordered you to pay the respondents their attorney's fees and costs in the amount of \$398.11, as a sanction for your failure to comply with discovery demands. When you failed to make the required payment, the respondents moved the Commission for addition[al] sanctions because of your failure to comply with the Commission's order. On July 19, 2000, the Commission denied the respondents' motion because the Commission had dismissed the underlying case at the same time as it had ordered the payment of fees and costs, and the Commission decided that it no longer had jurisdiction to enforce its order. As a consequence, the respondents were required to commence a civil action against you in state court in order to collect the fees and costs that were ordered by the Commission to be paid.

In the Commission's opinion, the clear legislative intent underlying the provision in §230.85(3)(b), Stats., which allows the Commission to order the payment of attorney fees and costs upon a finding that a whistleblower complaint was frivolous, is to deter abuse of this statute by the pursuit of frivolous claims. This purpose is frustrated unless there is some means of enforcing orders requiring the payment of attorney fees. *Cf. Minniecheske v. Griesbach*, 161 Wis. 2d 743, 747, 468 N. W. 2d 760 (Ct. App. 1991) ("The purpose of the frivolous claims and appeals statutes is 'to deter litigants from commencing or continuing frivolous actions and to punish those who do.' Without an order prohibiting future filings related to the same issues, these statutes would be virtually useless against a pro se party who cannot pay "[footnote and citations omitted]). Complainant has not contested respondents' assertion that he has failed to pay awards of attorney fees ordered by the federal judiciary. The Commission does not perceive a realistic means of enforcing its order for payment of attorney fees if it does not grant respondents' motion to stay further proceedings unless and until complainant has paid the fees¹ ordered by the Commission.

¹ Because the Commission also believes that an indefinite delay of these proceedings would be prejudicial to respondents, it will issue an order to show cause why these matters should not be dismissed if the complainant does not pay the fees ordered within the time specified in the February 23, 2001, order.

Complainant argues that because the Commission's February 23, 2001, order is non-final and thus not appealable judicially, the Commission should not take steps to enforce this order while the underlying case is still pending before the Commission and he is unable to appeal the order. If the Commission follows complainant's recommended approach and does not take steps to enforce its order while complainant has this case pending, there are possible scenarios under which the Commission's order would never be paid and never reviewed judicially. On the other hand, if complainant pays the fees now and ultimately obtains judicial review and reversal of the Commission's order, it is highly unlikely that the respondent state agencies will fail to repay the money involved. Therefore, the Commission grants respondents' motion and denies complainant's motion.

ORDER

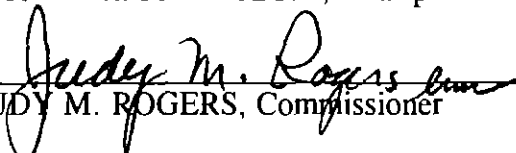
The hearing on the merits of these cases is stayed unless and until complainant satisfies the Commission's February 23, 2001, order requiring the payment of \$257.42 attorney fees within 30 days. If the complainant does not pay the fees within 30 days, the Commission will issue an order to show cause why these cases should not be dismissed.

Dated: March 21, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner