STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION,
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
(Case No. 01-0067-PC-ER)
Secretary, DEPARTMENT OF FINANCIAL INSTITUTIONS,
(Case No. 01-0103-PC-ER)
President, UNIVERSITY OF WISCONSIN SYSTEM,
Chancellor, UNIVERSITY OF WISCONSIN - MADISON,
(Case No. 01-0112-PC-ER)
Secretary, DEPARTMENT OF REVENUE,
(Case No. 01-0122-PC-ER)
Chairperson, EDUCATIONAL APPROVAL BOARD, and
Secretary, DEPARTMENT OF VETERANS AFFAIRS,
(Case No. 02-0008-PC-ER)
Secretary, DEPARTMENT OF ADMINISTRATION,
Secretary, DEPARTMENT OF CORRECTIONS,
(Case No. 02-0034-PC-ER)
Respondents.

RULING
ON
MOTIONS
FOR STAY
AND
OTHER
MOTIONS

These matters are before the Commission on a variety of motions/disputes. In all of the cases, respondents have moved to stay any further activity in that particular case and to bar complainant from filing new cases. In Case No. 01-0067-PC-ER, respondents also object to consideration of certain arguments filed by the complainant. In Case No. 01-0103-PC-ER, respondent Department of Financial Institutions also objects to complainant's use of employer-provided email and telephones to conduct the case.

Abbreviations used in this ruling include the following: DOA (Department of Administration); DMRS (Division of Merit Recruitment and Selection); DER (Department of Employment Relations); DFI (Department of Financial Institutions); UW (University of Wisconsin System); UW-Madison (University of Wisconsin-Madison); DOR (Department of Revenue); EAB (Educational Approval Board); DVA (Department of Veterans Affairs); DOC (Department of Corrections).

Additional information regarding the various cases that are the subject of this ruling is set forth below.

Case No. 01-0067-PC-ER (*Balele v. DOA, DER & DMRS*)

The parties agreed to the following statement of issue for hearing in this case:

> Whether respondents discriminated against complainant based on color, national origin/ancestry, or race, or retaliated against complainant for engaging in fair employment activities when complainant was not certified for the position of Director, Office of Performance Evaluation.

The Commission designated a hearing examiner on July 16, 2001, and scheduled a hearing for November of 2001. Prior to the scheduled hearing, respondents moved for an order "(1) holding in abeyance all cases that Complainant has pending against these Respondents [DOA, DER and DMRS], *except Case Nos. 00-0077-PC-ER and 00-0104-PC-ER*; and (2) prohibiting Complainant from bringing any new actions against these Respondents in the future until he pays in full all monies he owes the state of Wisconsin, and/or the agencies of DOA and DER/DMRS." (Emphasis added.)

Complainant has made numerous discovery requests in this matter. He has made three sets of requests of respondents DER and DMRS. While the first set is not

part of the case file, the 2nd and 3rd sets include 44 interrogatories, 10 requests for admissions and 8 requests for production. Complainant has also made three sets of requests of respondent DOA, totaling 69 interrogatories, 35 requests for admission and 46 requests for production. The hearing examiner suspended any outstanding discovery requests until the respondents' motion was resolved.

Case No. 01-0103-PC-ER (*Balele v. DFI*)

The personnel transaction that serves as the basis for the complaint is the hiring decision the Administrative Manager-Administrator, Division of Administrative Services & Technology position. Complainant alleges he was discriminated against based on color, national origin or ancestry, and race, as well as retaliated against for engaging in activities under the Fair Employment Act and the whistleblower law. The motion filed by the Department of Financial Institutions (DFI) is to hold all of complainant's cases against respondent in abeyance and to prohibit complainant from filing new actions against DFI until all monies owed to the State of Wisconsin are paid in full. By email dated August 27, 2001, complainant stated he had no objection to holding discovery until the motion was resolved.

Respondent also takes the position that it is inappropriate for the Personnel Commission to contact complainant at a state telephone number for a prehearing conference or to "accept or respond to emails sent by complainant using a state computer."

Case No. 01-0112-PC-ER (*Balele v. UW System and UW-Madison*)

The complaint is based on five personnel transactions. Complainant alleges he was discriminated against based on race, color and national origin and was retaliated against in violation of the Fair Employment Act with respect to the selection for the position of Assistant Dean for the School of Business at UW-Madison (in approximately July of 2000); for the positions of Director of Financial Reporting - Senior and Controller - Finance at UW System (April 6, 2001, rejection letter); for the position of Direc-

tor of the Office of Research and Sponsor Programs at UW-Madison (in or after April, 2001); and for the position of Provost at UW-Madison (June 7, 2001, rejection letter).

Respondents' motion is to hold this case in abeyance and to prohibit complainant "from bringing any new actions against these Respondents in the future until he pays in full all moneys he owes the State of Wisconsin and/or any agencies of the State." The parties agreed to hold the case in abeyance while the motion was being decided.

Complainant made a discovery request dated July 5, 2001, that included 49 interrogatories (plus subparts), 23 requests for admission, and 43 requests for production of documents.

Case No. 01-0122-PC-ER (*Balele v. DOR*)

The complaint arises from respondent's decision not to select the complainant for the position of Administrative Manager, Bureau Director of Product Development, Lottery Division in July of 2001. Complainant alleges discrimination based on color, national origin and race as well as Fair Employment Act retaliation and whistleblower retaliation.

The motion by respondent Department of Revenue (DOR) is to hold in abeyance all cases complainant has pending against the respondent and to prohibit complainant from bringing any new actions against respondent until he pays monies owed the State.

Complainant made a discovery request dated July 30, 2001, that included 69 interrogatories (plus subparts), 103 requests for admission, and 44 requests for production of documents. Discovery has been stayed until DOR's motion is resolved.

Case No. 02-0008-PC-ER (*Balele v. EAB & DVA*)

This complaint arises from the decision not to select the complainant for the position of Executive Secretary – Educational Approval Board in approximately October of 2001. Complainant alleges that respondents discriminated against him based on color, national origin and race. Complainant has waived the investigation. He filed a discovery request on January 28, 2002, consisting of 104 interrogatories, 37 requests

for admission and 46 requests for production. Respondent's motion is to hold the case in abeyance and prohibit complainant from bringing any new actions against respondents until he pays in full all monies owes the State of Wisconsin. In his May 28, 2002, submission, the complainant also requests "cost[s] against [counsel for EAB and DVA] under rule 11."

Case No. 02-0034-PC-ER (*Balele v. DOA & DOC*)

In contrast to the other cases that are the subject of this ruling, this matter does not arise from one or more selection decisions. Complainant alleges discrimination based on color, national origin and race as well as Fair Employment Act retaliation and whistleblower retaliation arising from respondents' alleged activities of reporting and investigating possible misuse of equipment by complainant, investigating complainant's attendance at a Claims Board proceeding, monitoring his work habits, denying him access to the DOA Building, reducing his vacation hours and constructively discharging him. The materials filed in this matter make it clear that the complainant is no longer employed by the State of Wisconsin.

Respondents' motion is to hold the case in abeyance and to stay discovery until complainant pays all monies he owes to the State of Wisconsin.

I. Aggregated motions for stay

The Commission understands the respondents, as a group, to ask the Commission to issue an order to a) hold in abeyance (i.e. including a stay on all discovery) all of complainant's cases pending against DOA, DER, DMRS, DFI, UW, UW-Madison, DOR, EAB, DVA and DOC, except Case Nos. 00-0077, 0104-PC-ER, and b) prohibit complainant from bringing any new actions against DOA, DER, DMRS, DFI, UW, UW-Madison, DOR, EAB and DVA, c) *until* complainant pays in full all monies owed the State of Wisconsin, including any agencies of the State.

II. Monies owed by complainant to the State of Wisconsin, including agencies thereof

The parties have submitted a variety of materials relating to respondents' motions. Based on its review of those materials, the Personnel Commission understands that the complainant has the following outstanding obligations to the State of Wisconsin, including agencies thereof:

a. *Klauser v. Balele*, 95TJ56 (Dane County), 1/3/1995, $441.00[1]

b. *Balele v. George et al.*, 90CV003767 (Dane County), 3/16/1995, $773.05

c. *Klauser v. Balele*, 95TJ84 (Dane County), 7/13/1995, $970.70

d. *Balele v. DILHR*, U.S. Court of Appeals No. 97-1234, District Court No. 96C782-S, $174.75

e. *Balele v. Barnett et al.*, U.S. Court of Appeals No. 96-1133, District Court No. 95C679-S, $284.55

f. *Balele v. Wis. Pers. Comm.*, 00-CV-2876 (Dane County Circuit Court), memorandum decision and order by Judge DeChambeau issued July 12, 2001, finding complainant's claims frivolous and granting respondent Department of Administration's motion for reasonable attorney's fees and ordering complainant to pay $500.00. Complainant had filed a petition for judicial review of the Commission's ruling in *Balele v.* DOA, 00-0057-PC-ER, 9/20/2000.

g. *State of Wisconsin v. Balele*, 00-CV-2776 (Dane County Circuit Court), order by Judge Higginbotham issued November 2, 2001, entering judgment against complainant in the amount of $1114.91, representing the $398.11 awarded by the Personnel Commission to DER in Case No. 98-0145-PC-ER, as well as $216.80 for costs and $500.00 for attorney fees as a consequence of

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[1] Judgments a. through f. against complainant are due and owing as reflected in an affidavit by David Vergeront, attorney for respondents DER and DMRS, as amended on August 17, 2001. Complainant contends that at least some of judgments a. through e. are no longer applicable and that some improperly included "in-house copying and printing costs." In light of the language of the Commission's order resulting from the present motions, there is no need to address these contentions.

finding that complainant's counterclaim and motion were frivolous. The judgment was affirmed in *State v. Balele*, Court of Appeals, 01-3325, 7/18/02.

h. *Balele v. Wis. Personnel Comm.*, 01-CV-1182 (Dane County Circuit Court), decisions and order by Judge DeChambeau issued February 28, 2002, and May 28, 2002, affirming the Commission's decision in *Balele v. UW-Madison*, 99-0169-PC-ER, 2/26/01, finding the petition for judicial review frivolous, and granting costs and reasonable attorneys' fees to the Personnel Commission in the amount of $500.

The total amount due from complainant to the State of Wisconsin in these various proceedings as of the date of this ruling is $4758.96.[2] The Commission understands that the respondents' motions also encompass any additional financial penalties that may be assessed against the complainant in the future in any other proceedings involving the State of Wisconsin or agencies thereof.

III. Rationale relied upon by respondents for stay

Respondents have all relied on substantially similar arguments to support their requests that these matters be stayed and complainant be barred from filing new actions until he pays monies owed the state. Respondents in Case No. 01-0067-PC-ER offered the following arguments:

> The number of actions [filed by complainant with the Personnel Commission] are but the tip of the iceberg. Each of those actions results in Complainant engaging in extensive discovery. In this particular action, [Complainant] has now served a third set of discovery. The discovery is duplicative from case to case; it poses many of the same interrogatories,

[2] The Personnel Commission has imposed monetary sanctions against complainant in two proceedings. In Case No. 98-0145-PC-ER, by order dated February 28, 2000, the Commission imposed monetary sanctions in the amount of $398.11 for failing to comply with a motion to compel discovery. This amount is included within the $1114.91 referenced by Judge Higginbotham's November 2, 2001, order in *State of Wisconsin v. Balele*, 00-CV-2776 (Dane County Circuit Court). In Case No. 00-0104-PC-ER, the Commission imposed a sanction of $257.42 against complainant for filing a frivolous whistleblower claim. Complainant paid the penalty and that case proceeded to hearing.

> requests many of the same admissions and requests many of the same documents. Complainant calls many state employees as witnesses which has a disruptive impact within the agencies where the witnesses are employed. Further, Complainant's lack of candor and misrepresentations (substantiated by the Personnel Commission in many cases) have cause the increase of agency workloads in terms of time and resources.
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> At the outset Respondents want to set the record straight: *Respondents do not seek to limit Complainant's right to seek relief for discriminatory action.* What Respondents do seek, however, is accountability and responsibility for individuals, including Complainant, who are assessed costs and do not pay.
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> Complainant continues to run up a tab at the taxpayers' expense. Where is there any incentive for Complainant to be more judicious and selective in claims he files and actions he takes in pursuit of the claims? He files, has a hearing, loses and files other actions. And, he doesn't satisfy monies he owes the state. (Emphasis in original.)

Respondents have also referenced a "Petition Requesting the Regulation of Chronic Litigants" that was filed by twelve state agencies with the Personnel Commission on April 27, 2000. The petition specifically named the complainant as a "chronic litigant" and asked the Commission "to control the repetitive filings of those who have an established record of overburdening the Commission and the respondent agencies with frequent, redundant and unmeritorious complaints." Petitioners also stated that it was "not the intent of [the petition] to close the doors of the Commission to legitimate claims." (Petition, p. 2) Petitioners asked the Commission to adopt certain criteria to decide whether a complainant qualified as a chronic litigant and then to "impose conditions for the acceptance of additional complaints from these individuals or simply refuse to accept any more complaints based on their past pattern of abusive behavior." (Petition, p. 22)

The Commission responded to the Petition by letter dated September 27, 2000, and declined to address the matters raised in the Petition outside the context of a contested case proceeding, a petition for declaratory ruling, or through rule-making procedures.

IV Cases filed by complainant with the Personnel Commission

In order to fully understand the rationale relied upon by respondents, it is necessary for the Commission to list the actions initiated by the complainant in this forum. The information set forth below is derived from records maintained by the Commission, including, in some instances, the case files:

1. *Balele v. DETF et al.*, 87-0047-PC-ER, was withdrawn on January 10, 1990.

2. *Balele v. DOA*, 88-0121-PC-ER, was withdrawn on August 10, 1988.

3. *Balele v. DOA & DMRS*, 88-0190-PC-ER. This complaint arose from hiring decisions for an Administrative Officer (AO) 4 position and an AO 5 position. Complainant alleged discrimination based on race and national origin. A hearing was held regarding the AO5 position and, on January 24, 1992, the Commission found "no probable cause" to believe discrimination occurred. Complainant's complaint regarding the AO4 position was dismissed by the Commission on December 3, 1997, based on the existence of a judgment in federal court. The latter decision was affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm., et al.*, 98-CV-0257, 8/20/98; and the Court of Appeals, *Balele v. Wis. Pers. Comm.*, 228 Wis. 2d 511, 597 N.W.2d 774, 1999 Wisc. App. LEXIS 534 (1999)

4. *Balele v. UW-Madison*, 91-0002-PC-ER. This complaint arose from the hiring decision for the position of Director, Office of Purchasing Services. The Commission conducted a hearing held and found no discrimination on March 9, 1994. The Commission's decision was affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94CV1177, 12/17/95.

5. *Balele v. DHSS & DMRS*, 91-0118-PC-ER. This complaint arose from the failure to hire the complainant for two Human Services Administrator 5 – Deputy Administrator career executive positions. Complainant was not certified for the vacancies because he lacked status as a career executive. After conducting a hearing, the Commission decided, on April 30, 1993, that even if he had been certified, the com-

plainant would not have been selected for either vacancy because his qualifications were not comparable to those of the successful candidates.[3] The matter had been presented to the Commission with the following stipulation as noted in the decision:

> Respondent stipulated, for the purpose of this case only, that its decision to use Option 2 [which required the candidate to have previously attained Career Executive status or appointment] to recruit for the Career Executive positions in issue had a disparate impact on minorities, which included complainant. Further, respondents consented to judgment on this issue, provided complainant proved a prima facie case of discrimination. Within that framework, the issues agreed for hearing were: Whether the complainant was qualified for the positions of (a) Human Services Administrator 5 - Deputy Administrator, Division of Vocational Rehabilitation or (b) Human Services Administrator 5 - Deputy Administrator, Division of Community Services, and if so, whether complainant would have been hired for either of these positions if he had been allowed to compete for them. (footnote omitted)

6. *Balele v. DOA et al.*, 93-0144-PC-ER. Complainant alleged discrimination based on color, race and national origin, as well as retaliation based on fair employment activities and under the whistleblower law arising from the decision not to hire him for an Administrative Officer 1 position. The claim was dismissed by the Commission on March 26, 1997, for reasons of issue preclusion. The Commission decision was affirmed by Dane County Circuit Court in *Balele v. Wis. Pers. Comm., et al.*, 97 CV 1389, 10/30/97, and affirmed by Court of Appeals, *Balele v. Wis. Pers. Comm.*, 228 Wis. 2d 511.

7 *Balele v. DILHR et al.*, 94-0020-PC-ER. Complainant named 21 agencies as respondents in this complaint alleging discrimination based on race and color and fair employment retaliation relating to various recruitment and hiring practices as

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[3] Complainant contends that he "prevailed" in Case No. 92-0118-PC-ER. This contention is inaccurate and is typical of complainant's perception that facts are malleable to suit his interests. Complainant did not meet his burden of proof in Case No. 99-0118-PC-ER and the complaint was dismissed. There is no support in the case files for complainant's suggestion that DMRS changed the recruitment procedure for career executive vacancies because of complainant's case. In fact, respondents offered to provide proof that the reason for the change in recruitment procedure was the result of *Caviale v. DHSS*, 744 F.2d 1289 (7th Circuit, 1984). (Respondents' reply brief dated April 12, 2002, in Case No. 02-0034-PC-ER).

well as the failure to hire him for vacancy within the Department of Labor Industry and Human Relations. Complainant withdrew the matter on January 16, 1997

8. *Balele v. DOA*, 94-0090-PC-ER. Complainant alleged discrimination based on race, sec, handicap and national origin arising from the failure to reclassify his position. Complainant withdrew the matter on August 16, 1995.

9. *Balele v. DHSS [DWD],* 95-0005-PC-ER. The complaint arose from decisions not to select complainant for career executive positions. After the Commission ruled that the Department of Employment Relations and the Division of Merit Recruitment and Selection were not proper parties, the matter was dismissed on November 5, 1997, at complainant's request so he could seek judicial review. The Commission's decision was affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm.*, 97-CV-2724, 5/6/98; and affirmed by the Court of Appeals, *Balele v. Pers. Comm., et al.*, 223 Wis. 2d 739, 589 N.W.2d 418 (1998)

10. *Balele v. DNR*, 95-0029-PC-ER. The complaint arose from an appointment decision. Complainant withdrew this matter and it was dismissed on July 24, 1995.

11. *Balele v. DILHR et al.*, 95-0063-PC-ER. Complainant withdrew this matter and it was dismissed on December 20, 1995.

12. *Balele v. HEAB et al.*, 95-0088-PC-ER. Complainant withdrew this matter and it was dismissed on February 15, 1996.

13. *Balele v. DOJ & DOA*, 95-0124-PC-ER Complainant withdrew this matter and it was dismissed on September 28, 1995.

14. *Balele v. DOA et al.*, 96-0156-PC-ER. The complaint arose from a garnishment order. The Commission dismissed the matter on June 4, 1997, for reasons of preclusion and lack of jurisdiction. The Commission's decision was affirmed by Dane County Circuit Court, 97-CV-1297, 12/3/98; and the Court of Appeals, *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 267, 588, N.W.2d 928, 1998 Wisc. App. LEXIS 1333 (1998).

15. *Balele v. DOC et al.*, 97-0012-PC-ER. The complaint arose from the decision not to select complainant for a career executive vacancy. After a hearing, the Commission found for respondent. In its decision dated October 9, 1998, the Commission rejected complainant's characterization of the testimony of two witnesses on separate topics. As to one witness' testimony, the Commission noted: "The Commission can not perceive, under any reasonable interpretation of Ms. Scherer's testimony, how it supports complainant's characterization of it." Complainant also contended that respondent's psychometrics expert, Dr. Dennis Huett, testified that the particular type of selection process used in this case had an adverse impact on minorities. The Commission rejected this characterization and quoted specific, contrary testimony by Dr. Huett.

16. *Balele v. DOT et al.*, 97-0075-PC-ER. The Commission dismissed the matter on November 7, 1997, after dismissing DER and DMRS as parties. The Commission's decision was affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm.*, 97-CV-3354, 5/6/98; and affirmed by the Court of Appeals, *Balele v. Pers. Comm., et al.*, 223 Wis. 2d 739, 589 N.W.2d 418 (1998).

17 *Balele v. WTCSB*, 97-0097-PC-ER. Complainant withdrew his complaint and it was dismissed on December 3, 1997

18. *Balele v. DFI*, 97-0117-PC-ER. Complainant withdrew his complaint and it was dismissed on July 28, 1999.

19. *Balele v. DOR*, 98-0002-PC-ER. Complainant withdrew his complaint and it was dismissed on May 19, 1999.

20. *Balele v. DHFS*, 98-0045-PC-ER. The complaint arose from a the decision not to select the complainant for a career executive Human Resource Manager position. After a hearing on the merits, the Commission found for respondent, and, on November 3, 1999, dismissed the complaint.

21. *Balele v. DNR*, 98-0046-PC-ER. The complaint arose from four non-selection decisions. After the Commission had dismissed, on January 25, 2000, three claims on a motion for summary judgment, the remaining claim was dismissed, on December 13, 2000, by stipulation of the parties.

22. *Balele v. PSC*, 98-0088-PC-ER. Complainant withdrew his complaint and it was dismissed on October 20, 1999.

23. *Balele v. DOT*, 98-0104-PC-ER. The complaint arose from an interview process for a section chief vacancy. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on September 29, 1999.

24. *Balele v. DMRS & DER*, 98-0145-PC-ER. After having granted respondents' motion to compel discovery, complainant failed to comply and the Commission, on February 28, 2000, sanctioned complainant by ordering him to pay $398.11 within 60 days of the date the order was signed. The Commission also dismissed the complaint.

In its December 3rd ruling, the Commission offered the following comments regarding the question of whether the complainant had acted in bad faith with respect to respondents' discovery efforts:

> In the present case, complainant repeatedly failed to adequately answer discovery which caused respondent to initially attempt informal resolution of the problems and, when such attempts were unsuccessful, to pursue formal resolution.
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> An additional fact, which distinguishes *Hudson Diesel* from the present case, is complainant's unacceptable attitude towards his responsibility to answer discovery. His attitude is reflected in his May 24th submission to the Commission wherein he asked that respondents be "enjoined from filing frivolous motions [such as the motion to compel] to [harass] the complainant because of his black race." Another fact, which distinguishes *Hudson Diesel* from the present case, is complainant's bad faith responses to eight interrogatories that go to the heart of both hearing issues. The Commission concludes from all facts present in this case that dismissal of the entire case is an appropriate sanction here. (Footnote omitted)

The Commission's order of February 28, 2000, served as the basis for *State of Wisconsin v. Balele,* Dane County Circuit Court, 00-CV-2776, 8/23/01, which is summarized elsewhere in the present ruling.

25. *Balele v. UW*, 98-0159-PC-ER. The complaint arose from the decision not to select complainant for an unclassified academic position as Senior Vice-President

for Administration and Chief Operating Officer. The Commission granted respondent's motion for summary judgment and dismissed the complaint on October 20, 1999.

26. *Balele v. DATCP et al.*, 98-0199-PC-ER. The complaint arose from the decision not to select complainant for the career executive position of Administrative Manager, Assistant Administrator, Division of Animal Health. The Commission granted respondents' motion for summary judgment and dismissed the complaint on April 19, 2000. The Commission's decision was affirmed in *Balele v. Pers. Comm. et al.*, 00-CV-1108, Dane County Circuit Court, 11/20/00.

27 *Balele v. DOA et al.*, 99-0001-ER. This complaint arose from three separate decisions not to select complainant for vacancies and from a condition of his employment. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on August 28, 2000. The Commission's decision was affirmed in *Balele v. Pers. Comm.*, 00-CV-2877, Dane County Circuit Court, 8/17/01.

28. *Balele v. DHFS*, 99-0002-PC-ER. This complaint arose from a decision not to select complainant for the position of Quality Assurance Manager. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on May 31, 2000. The Commission offered the following comments regarding complainant's credibility:

> The record contains indications that Ms. Prigioni's testimony was truthful and/or more reliable than complainant's was. First, complainant gave inconsistent testimony on a different important subject during the hearing. . . Second, complainant has demonstrated in this proceeding a tendency to present an incomplete (and thereby inaccurate) picture of what people say. For example, in post-hearing briefs he only mentioned a part of Mr. Bauer's testimony . despite the fact that complainant had copies of the hearing tapes.
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> Another example of complainant's demonstrated tendency in this proceeding to present unreliable information stems from his inaccurate summary of *written* materials. Mr. Balele's unreasonable and incorrect interpretation of the *written* text recited above also sheds doubt on his ability to accurately recount what is told to him even when he is provided a written summary of the discussion.

The Commission's decision was affirmed in *Balele v. Pers. Comm. & DHFS*, 00-CV-2206, Dane County Circuit Court, 7/30/01, and the Court of Appeals, *Balele v. Wis. Pers. Comm. & DHFS*, 01-2418, 5/21/02.

29. *Balele v. DOT et al.*, 99-0003-PC-ER. This complaint was dismissed, on June 30, 1999, by stipulation of the parties.

30. *Balele v. UW-Madison*, 99-0004-PC-ER. The complaint arose from multiple non-selection decisions. The Commission denied complainant's request to dismiss the matter without prejudice, and dismissed it with prejudice on January 19, 2000.

31. *Balele v. DOA et al.*, 99-0026-PC-ER. The complaint arose from a non-selection decision. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on August 28, 2000. The Commission's decision was affirmed in *Balele v. Pers. Comm.*, 00-CV-2877, Dane County Circuit Court, 8/17/01.

32. *Balele v. DOT*, 99-0103-PC-ER. The complaint arose from a non-selection decision. The Commission granted respondent's motion for summary judgment and dismissed the complaint on November 15, 2000.

33. *Balele v. DHFS et al.*, 99-0122-PC-ER. Complainant withdrew his complaint and it was dismissed on May 3, 2000.

34. *Balele v. DHFS*, 99-0123-PC-ER. The complaint arose from the decision not to hire the complainant for a career executive position as Deputy Director, Disability Determination Bureau. After a hearing on the merits, the Commission found for respondent, and dismissed the complaint on June 29, 2001.

35. *Balele v. UW-Madison*, 99-0169-PC-ER. The complaint arose from the decision not to select the complainant for the career executive position of Director, Business and Staff Services. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on February 26, 2001. The Commission concluded that the complainant had misrepresented certain testimony:

> Complainant also contends that Harder testified that she wanted to hire someone in a "peer" position to the BASS Director. This is a misrepre-

sentation of her testimony. She said she wanted to use peers for the selection panel.

The Commission's decision was affirmed in *Balele v. Pers. Comm.*, 01-CV-1182, Dane County Circuit Court, 2/28/02.

36. *Balele v. DOR*, 99-0202-PC-ER. The complaint arose from the decisions not to select complainant for two career executive positions as Deputy Administrator of the Lottery Division and Revenue Manager-Tax Processing. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on January 24, 2002. The Commission noted that the complainant had raised arguments that had been rejected in numerous prior cases.

> Complainant has not shown discrimination under a disparate impact theory. The Commission has attempted in prior cases to inform complainant of the required proof under this theory of discrimination. In *Balele v. DNR*, 98-0046-PC-ER, 1/25/00 and *Balele v. UW System*, 98-0159-PC-ER, 10/20/99, he was informed about the need for a sufficient sample size and he was advised that hiring statistics without corresponding information about the applicant pool are insufficient. In *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00, guidance was provided as to when it is inappropriate to combine statistics from separate hiring transactions, he was advised that workforce composition statistics without information regarding selection rates were insufficient and that the degree of disparity is also an important consideration. In *Balele v. UW-Madison*, 99-0169-PC-ER, 2/26/01, he was advised that using himself, as a group of one was insufficient to support a disparate impact analysis. Many of the same concepts are discussed in *Balele v. DOA,* 00-0057-PC-ER, 9/20/00; *Balele v. DOC*, 00-0034-PC-ER, 6/13/01 and *Balele v. DOT*, 99-0103-PC-ER, 11/15/00. The Courts also have attempted to inform complainant of what is required. *See, e.g., Balele v. Pers. Comm., et. al.*, 00-CV-1108 (Dane Co. Cir. Ct., 11/20/00); *Balele v. Wis. Pers. Comm. et. al.*, 00CV2876 (Dane Co. Cir. Ct. 7/12/01); *Balele v. Per Comm. et. al.*, 00CV002877 (Dane Co. Cir Ct. 8/17/01); *Balele v. Wis. Pers. Comm., et. al.*, 00CV2206 (Dane Co. Cir. Ct. 7/30/01).
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> Complainant steadfastly refuses to accept the above guidance as correct.
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> The Commission finds complainant's arguments rife with insufficiencies he has been told about in prior cases. The Commission further notes that some of complainant's arguments are improperly based upon information not contained in the record.

37 *Balele v. DOC*, 00-0007-PC-ER. The complaint arose from a decision not to select the complainant for a career executive position of Correctional Services Manager, Assistant Division Administrator. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on July 13, 2001.

38. *Balele v. UW-Madison*, 00-0012-PC-ER. The complaint arose from the decision not to select the complainant for a career executive position as Director of Purchasing. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on July 2, 2001.

39. *Balele v. DOC*, 00-0034-PC-ER. The complaint arose from a decision not to select the complainant for a career executive position of Purchasing Agent Supervisor 6. After a hearing on the merits, the Commission found for respondent and dismissed the complaint on June 13, 2001.

40. *Baelele v. DOT*, 00-0044-PC-ER. The complaint arose from decisions not to select the complainant for three career executive positions as 1) DOT Manager, Bureau of Field Services, 2) DOT Manager, Bureau of Driver Services, and 3) Deputy Director, Bureau of Vehicle Services. The Commission granted respondent's motion for summary judgment and dismissed the complaint on October 23, 2001.

41. *Balele v. DNR*, 00-0056-PC-ER. The complaint was dismissed, on December 13, 2000, by stipulation of the parties.

42. *Balele v. DOA*, 00-0057-PC-ER. The complaint arose from the decision not to select the complainant for the position of Administrator, Division of State Agency Services. The Commission granted respondent's motion for summary judgment and dismissed the complaint on September 20, 2000. The Commission's decision was affirmed in *Balele v. Pers. Comm. et al.*, 00-CV-2876, Dane County Circuit Court, 5/21/01. In a ruling on July 12, 2001, the circuit court granted a request for monetary sanctions against complainant for filing a frivolous claim. The circuit court's decision was affirmed by the Court of Appeals in *Balele v. Pers. Comm. et al.*, 01-1753, 4/25/02.

43. *Balele v. DOA et al.*, 00-0077-PC-ER. This complaint arose from the decision not to consider the complainant for a career executive position of Director, State Bureau of Procurement. A hearing was held, but no decision has been issued and the case remains open.

44. *Balele v. DNR*, 00-0078-PC-ER. The complaint was dismissed, on December 13, 2000, by stipulation of the parties.

45. *Balele v. DNR*, 00-0087-PC-ER. The complaint arose from the decision not to select complainant for the career executive position of Director, Bureau of Integrated Science Services. The Commission granted respondent's motion for summary judgment and dismissed the complaint on November 19, 2001.

46. *Balele v. DOT*, 00-0088-PC-ER The complaint arose from the decision not to select complainant for the career executive position of DOT Program Chief, payroll and Expenditure Accounting Section. The Commission granted respondent's motion for summary judgment and dismissed the complaint on November 16, 2001.

47 *Balele v. DOA et al.*, 00-0104-PC-ER. This complaint arose from a disciplinary suspension. In a ruling dated December 1, 2000, the Commission granted the respondent's motion to dismiss the whistleblower portion of the case as frivolous and retained jurisdiction to consider the potential of sanctions. The Commission held:

> The Commission has noted difficulties in prior cases in relying on Mr. Balele's representations. He incorrectly represented the content of testimony in *Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98 and in *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (a case in which the complainant was represented by Mr Balele). His answers to discovery requests have been found to have been evasive and made in bad faith, and some of his pleadings have been found to have been made in bad faith, *Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 (for which his case was dismissed and he was ordered to pay fees and costs, *Balele v. DER & DMRS*, 98-0145-PC-ER, 2/28/00).
>
> Mr. Balele's conduct here appears to be a continuation of the pattern discussed in the prior paragraph. Specifically, he knew that he did not allege any wrongdoing on the part of respondents in his e-mail messages to the Governor's office. Yet he claimed that by virtue of those e-mail messages he was protected under the whistleblower law "because he sent the Governor an e-mail accusing Lightbourn of failing to do his ministe-

> rial duty of giving Balele equal consideration for the position of administrator-state agency services." (See ¶5 of the findings of fact.) Furthermore, although respondents made it clear in their brief that they were presuming, for purposes of argument only, the truth of complainant's statement, Mr. Balele proceeded to argue that respondents had conceded that he "reported Mr. Lightbourn to the Governor." (Complainant's brief dated 10/3/00, p. 3) This Commission has repeatedly informed Mr. Balele that a respondent's failure to specifically deny a pleading does not amount to a concession. *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 and *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/20/00.

In a ruling issued on February 23, 2001, the Commission granted respondents' motion for attorney's fees in the amount of $257.42, within 30 days of the date of that ruling, for filing a frivolous whistleblower claim. By ruling issued March 21, 2001, the Commission ordered any hearing in that matter stayed until complainant satisfied the earlier order. After complainant had paid the amounts due, a hearing was held, but no decision has been issued and the case remains open.

48. *Balele v. DHFS et al.*, 00-0133-PC-ER. The complaint arose from a non-selection decision. In a ruling issued on May 24, 2001, on various motions, the Commission found that the complainant had engaged in an additional misrepresentation in his written arguments, had failed to appear at a prehearing conference and was untruthful when explaining his failure to appear:

> The Commission concludes that complainant intentionally misrepresented the holding in *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 5/10/99, and that this and his pattern of misconduct merits sanction.
>
> Complainant's version of what occurred in regard to the prehearing conference scheduled for and convened on January 10, 2001, contains numerous inconsistencies. . . This further demonstrates complainant's lack of good faith and intent to obfuscate in dealing with this matter.
>
> The only possible conclusion to be drawn from these inconsistencies is that complainant has again made intentional misrepresentations in prosecuting a case.

The Commission imposed the following sanctions against complainant in an order dated August 15, 2001:[4]

> a. With regard to any future cases he may file with this Commission, complainant is barred from naming either DER or DMRS as a party respondent without complying with the following requirements:
> 1) He must serve and file a motion for leave to name DER or DMRS as a party;
> 2) He must accompany the motion with an affidavit in which he states the facts he relies on in seeking to name DER or DMRS as a party;
> 3) He must accompany the motion with an explanation of how he believes the case is distinguishable from *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N. W 2d 418 (Ct. App. 1998).
> b. The instant case is dismissed with prejudice as a sanction for the following, in the context of a pattern of such misconduct:
> 1) Frivolous or bad faith pleading with regard to naming DER and DMRS as parties;

---

[4] The Commission also made the following findings as part of its underlying ruling issued on May 24, 2001.

> Since July 1, 1996, complainant has filed 35 equal rights complaints with the Commission and in all but one has alleged that he was discriminated or retaliated against when he was not the successful candidate for certain positions. These complaints were filed against one or more of 14 state agencies. Complainant has not prevailed on the merits in any of the complaints he has filed with the Commission. In prosecuting several of his complaints, complainant has demonstrated a pattern of abuse of the Commission's processes, including the pleading and discovery processes, and a pattern of misrepresentation, obfuscation, and prevarication. *See, e.g., Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98 (Balele misrepresented witness's testimony in post-hearing briefs); *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (Balele, serving as the complainant's representative, misrepresented witness's testimony); *Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 (case dismissed and sanctions ordered for Balele's bad faith pleading and engaging in bad faith in discovery process); *Balele v. DATCP, DER & DMRS*, 98-0199-PC-ER, 2/11/00 (Balele misrepresented statements made by the hearing examiner, and failed to introduce evidence at hearing he had pledged at prehearing that he would be introducing); *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00 (Balele made statements in post-hearing brief contrary to evidence of record, and hearing testimony not credible); *Balele v. DHFS*, 99-0002-PC-ER, 5/31/00 (gave false testimony, and misrepresented witness testimony and other evidence of record); and *Balele v. DOA, DER & DMRS*, 00-0104-PC-ER, 12/1/00 (complainant engaged in bad faith pleading and, as a result, his whistleblower claim was ruled frivolous and attorney's fees assessed). (Footnote omitted.)

2) Bad faith prosecution of this matter with regard to making misrepresentations concerning the January 10, 2001, prehearing conference.

49. *Balele v. DWD*, 01-0032-PC-ER. This complaint arises from two non-selection decisions. A motion for summary judgment is pending.

50. *Balele v. OCI*, 01-0104-PC-ER. This complaint arises from a non-selection decision. Respondent's motions, including a motion similar to the one in Case No. 01-0067-PC-ER, are being held in abeyance until a decision is issued regarding Case No. 01-0067-PC-ER.

The six cases (01-0067, 0103, 0112, 0122-PC-ER, 02-0008, 0034-PC-ER) that are the subject of this ruling have already been summarized above. Complainant has filed a total of 56 cases with the Personnel Commission.

V. Analysis of respondents' motions for stay

A. Authority of the Personnel Commission

The initial question that must be addressed is whether the Commission has the authority to take the steps requested by the respondents. Does the Commission have the power, as an administrative agency to both 1) hold all of complainant's cases (with the exception of Case Nos. 00-0077 and 0104-PC-ER) pending against these respondents in abeyance and to 2) bar complainant from filing new cases against these respondents?

In *American Brass Co. v. State Board of Health*, 245 Wis. 440, 451, 15 N.W.2d 27 (1941), Chief Justice Rosenberry articulated the following concern regarding the authority exercised by an administrative agency:

> [I]f there is to be any safety for the rights of citizens under our constitution and laws, administrative agencies exercising judicial power . must be held to act within the limits prescribed by the statute creating them. They have no general judicial powers. They have only those specifically granted or necessarily implied.

Respondents have not identified any express statutory language that would supply such authority to the Commission and the Commission is unaware of any such lan-

guage. Therefore, the sole question is whether the Commission has implied authority to impose these restrictions.

In contrast to administrative agencies and as described in *City of Sun Prairie v. Davis*, 226 Wis.2d 738, 749-51, 748, 595 N.W.2d 635 (1999), the judiciary has more extensive inherent powers:

> There are generally three areas in which courts have exercised inherent authority. One area of inherent authority is the internal operations of the court.
>
> Courts also have inherent authority to regulate members of the bench and bar.
>
> The final area in which the court exercises inherent authority is ensuring that the court functions efficiently to provide the fair administration of justice. The parties cited several cases in which the courts exercised inherent authority to dispose of causes on their dockets. For example, a municipal court has inherent authority to dispose of constitutional issues raised before it. Courts also have inherent authority to do the following: appoint counsel for indigent parties, determine compensation for court-appointed attorneys, vacate a void judgment because the court had no authority to enter the judgment in the first place, assess the costs to the parties of impaneling a jury, order dismissal of a complaint if the attorney fails to appear for a pretrial conference and the attorney was warned of the possible sanction of dismissal, and order parties to exchange names of lay witnesses. In each of these cases, the court determined that the function in question related to the existence of the court and the orderly and efficient exercise of its jurisdiction.
>
> There are, however, notable situations in which this court determined that courts do not have inherent authority regarding a particular function. Courts do not have inherent authority to expunge juvenile police records which are under the authority of a police chief. Courts also do not have inherent authority to dismiss a criminal case with prejudice prior to attachment of jeopardy on nonconstitutional grounds. (citations omitted)

While it may be interesting to look at how courts have dealt with questions relating to the inherent powers of courts, administrative agencies do not have co-extensive authority. The Commission must keep this distinction in mind when it considers the conclusions reached in the following cases:

1. In *Balele v. Barnett et al.*, 96-1133, 4/29/1997, the United States Court of Appeals for the 7th Circuit issued an order relating to the complainant. The order provided, in part:

> It is ordered, pursuant to Fed. R. Civ. P. 38 and Cir. R. 38, that all federal courts within this Circuit shall accept no further filings from Mr. Pastori M. Balele, individually, with others, or through a representative, until he has complied with these requirements:
>
> Mr. Balele must file a "Motion Pursuant to Court Order Seeking Leave to File" and attach:
>
> (a) a copy of the proposed paper to be filed;
> (b) a copy of this order
> (c) proof of payment of the costs imposed in the following cases [list of 6 actual and a possible 7th case]
> (d) a sworn affidavit by Pastori M. Balele that all costs awarded have been paid in full; and
> (e) a sworn affidavit by Pastori M. Balele certifying that the matters raised in the proposed filing are not frivolous and have not been raised by him in prior suits.
>
> This order shall not apply to filings in criminal or habeas corpus actions. The order also shall not apply to one appeal currently pending in this court, *Balele v. Dept. of Industry, Labor and Human Relations,* No. 97-1234.
>
> Mr. Balele is authorized to submit to this court, no earlier than two years from the date of this order, a motion to modify or rescind the order.
>
> If Mr. Balele disregards the order we enter today, the receiving court may consider contempt charges, or other appropriate sanctions.

2. In *Terra Indus. v. Commonwealth Ins. Co. of Am.*, 981 F. Supp. 581 (N.D. Iowa, 1997), an action brought by an insured against the insurer for damages sustained to the insured's plant following an explosion, the court held that it had the authority to stay litigation pending exhaustion of an appraisal and other procedures under the applicable insurance policy. The could found it had "inherent power to grant a stay in order to control its docket, conserve judicial resources, and provide for a just determination of a case pending before it." 981 F.Supp. 581, 587

3. In *Mack v. Sysco Corporation*, 01 CV 170 (Waushara County Circuit Court, 3/15/2002), the circuit court awarded defendants costs and attorneys fees under the terms of §814.025, Stats., relating to frivolous actions after finding that the plaintiff's conduct demonstrated bad faith and that "his sole purpose is that of harassing and maliciously injuring not only the parties he has sued but the justice system itself." The court went on to note that the plaintiff had previously been ordered by both state and federal courts to pay frivolous claim judgments and sanction amounts but had failed and refused to do so and then entered the following order:

> 1. Richard Mack, or anybody purportedly on his behalf, with few exceptions below detailed, shall not be permitted to file with any circuit judge or clerk of court in Wisconsin any claim, action, motion, petition, request or any other paper either pursuant to the present case or any other case until such time he has paid all sums awarded against him pursuant to this order and any other previous action as costs and attorney fees assessed under Sec. 814.025 Wis. Stats.
>
> 2. Richard Mack shall have the right to appeal this order, but shall be limited to one notice of appeal accompanied by the proper fee, which must be hand delivered for filing with the Waushara County Clerk of Court, clearly labeled as "Notice of Appeal" and shall not be enclosed in any kind of envelope or container.
>
> 3. After receipt of this order, the Clerk of Court shall refuse or dispose of any paper or envelope received from Richard Mack in this or any other matter which does not comply with the above restrictions.
>
> 4. Should Richard Mack or any one on his behalf file any action against any person or entity in any other State of Wisconsin circuit court, the party against whom the claim is made shall have the right to receive from the Waushara County Clerk of Court a certified copy of this Order for filing in the subject court, and upon such filing that court shall have the ability to enforce this order, but only in the event that the Waushara Clerk of Court certifies that Richard Mack has not satisfied in full the sums ordered together with judgment interest according to law.
>
> 5. Richard Mack retains the right to respond in accordance with law to any actions, civil or criminal, filed against him in any court, and is not barred from seeking habeas corpus relief or from challenging his own incarceration.

Mr. Mack had been the subject of order of the 7th Circuit enjoining him from filing any documents in the circuit "unless and until he pays in full the sanctions that have been imposed against him." *Support Systems International, Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995) The court excepted habeas corpus applications and criminal cases in which Mr. Mack was a defendant, and granted Mr. Mack an opportunity, after the passage of 2 years, to move to modify or rescind the order.

4. In *Minnecheske v. Griesbach*, 161 Wis. 2d 743, 468 N.W.2d 760 (Ct. App. 1991), the Court of Appeals affirmed an order entered by the circuit court that prohibited Merlin and Willa Griesbach from filing any civil actions or motions in circuit court against Valley Northern Bank

> relating in any way to issues arising out of the mortgage or those other facts which were the subject of a [specified] foreclosure action without leave of court. In seeking leave of court, the parties must identify all the claims and must certify that they are new claims never before raised and disposed of on the merits by any court. 161 Wis. 2d 743, 747

The court noted that "[w]ithout an order prohibiting future filings related to the same issues, [frivolous claims and appeals statutes such as §814.025(1), Stats.] would be virtually useless against a pro se party who cannot pay." 161 Wis. 2d 743, 748. The court of appeals concluded that the trial court had not abused its discretion or exceeded its authority when it entered the order:

> The courts that have considered similar orders have emphasized that they should be narrowly tailored and rarely issued. We cannot unduly deny a party access to the judicial system.
>
> This order is drafted narrowly enough to strike a balance among the Griesbachs' access to the courts, the bank's interest in res judicata, the taxpayers' right not to have frivolous litigation become an unwarranted drain on their resources and the public interest in maintaining the integrity of the judicial system. 161 Wis. 2d 743, 749 (citations omitted)

5. In *Puchner v. Hepperla*, 241 Wis. 2d 545, 625 N.W.2d 609 (Ct. App. 2001), the plaintiff had previously filed 20 cases in the Court of Appeals relating to post-divorce disputes and had not prevailed in any of the cases. The court concluded

that both cases before it were frivolous under §809.25(3)(c)2, Stats., remanded the matter to the circuit court to determine reasonable fees and costs, and barred plaintiff "from commencing proceedings in this court and the circuit court arising from, relating to or involving [his former wife] until the costs, fees and reasonable attorney's fees are paid in full." 241 Wis. 2d 545, 550-51. The court cited *Minniecheske* for the proposition that a court faced with a litigant who brings frivolous litigation has the authority to limit that litigant's access to the court.

6. In *Lysiak v. Commissioner*, 816 F.2d 311, 313 (7th Cir. 1987), the 7th Circuit Court of Appeals held: "A court faced with a litigant engaged in a pattern of frivolous litigation has the authority to implement a remedy that may include restrictions on that litigant's access to the court."

A court's authority to stay proceedings is described in general terms in the following language from 1 Am. Jur. 2d, Actions §75:

> A stay of an action is a postponement of proceedings in the case until the happening of [a] particular event. The issuance of a stay halts all progress of the action, and no additional step may be taken until the stay is removed.
>
> Every court has the authority to stay proceedings before it to insure that justice is done, or as an incident of its right to provide for efficient and economic use of judicial resources. (Citations omitted)

This power is explained further in 1 Am. Jur. 2d, Actions §76:

> A court's power to stay an action is discretionary, and the grounds for ordering a stay necessarily vary with the circumstances of each case. An action may be stayed pending –
>
> -- substitution of another person for a party who has died during the pendency of the action
>
> -- payment of costs awarded in a prior suit based on the same cause of action.
>
> -- the adjudication or dismissal of a petition in bankruptcy.
>
> -- exhaustion by the plaintiff of administrative remedies.
>
> -- joinder of necessary parties. To preserve the status quo pending appellate review, where the statutes make no provision for a supersedeas or stay of judgment or a final order as a matter of right, the trial court may in its discretion allow a supersedeas or stay. (Citations omitted)

The second guiding principle when evaluating whether an administrative agency has an implied power is that the agency does not get any benefit of the doubt. Instead, any reasonable doubt of the existence of the implied power is resolved against the existence of the authority. According to *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971)

> The rule in other jurisdictions is that "'. a power which is not expressed must be reasonably implied from the express terms of the statute; or, as otherwise state, it must be such as is by fair implication and intendment incident to and included in the authority expressly conferred.'" Consistent with this rule is the proposition that any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority. (citations omitted)

In *Public Intervenor v. DNR*, 177 Wis. 2d 666, 675, 503 N.W.2d 305 (Ct. App. 1993); reversed on other grounds, 184 Wis. 2d 407, 515 N.W.2d 897 (1994), the court of appeals offered the following explanation of the "reasonable doubt" standard to be applied:

> The dissent's "fair implication of a fourth method runs squarely into the supreme court's caution that *"[a]ny reasonable doubt* as to the existence of an implied power in an agency should be resolved against the exercise of such authority." All that is necessary to defeat the existence of an implied power is a reasonable doubt that such a power exists. "Reasonable doubt" is our highest burden of proof. For us to join the dissent's reasoning, we would have to conclude that, beyond a reasonable doubt, the legislature intended to give agencies a fourth method by which to decide contested cases. That is too high a standard to overcome. (citations omitted, emphasis in original)

In *Racine Fire and Police Comm. v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975), the supreme court characterized the laws in this area as a requirement of strict construction: "The effect of his rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted." (citation omitted)

Verhaagh v. LIRC, 204 Wis. 2d 154, 554 N.W.2d 678 (Ct. App. 1996), involved an administrative proceeding under the workers' compensation act, ch. 102,

Stats. The employee (Verhaagh) claimed the Department of Workforce Development erred when it refused to grant his motion for a default judgment after the employer failed to file its answer to his claim in a timely manner. The court of appeals upheld the agency's action. The court looked to §102.18(1)(a), Stats., which provides that "disposition of application may be made by a compromise, stipulation, agreement or default." The court held "the use of the term 'may' . clearly submits the issue of default orders to the LIRC's discretion." The court went on to state:

> In reviewing an administrative agency's discretion decision, we defer to the administrative agency as we defer to trial courts because the exercise of discretion is so integral to the efficient functioning of both the administrative agency and the courts. The burden to demonstrate an erroneous exercise of discretion rests on the party claiming the exercise of discretion was improper. 204 Wis. 2d 154, 160-61. (citation omitted)

The court further held that the legal standard for the agency's determination of whether a default was appropriate was not the standard used in judicial proceedings – i.e., not surprise, mistake, or excusable neglect:

> Rather, the agency is entitled to exercise its discretion based upon its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer's tardiness and the reasons, if any, advanced for the tardiness. 204 Wis. 2d 154, 161

The court specifically rejected Verhaagh's contention that it should apply a liberal interpretation to the workers compensation act to resolve the issue in his, i.e. the employee's, favor:

> Finally, we consider Verhaagh's claim that the worker's compensation statute and the liberal interpretation required to provide benefits for employees mandates the granting of Verhaagh's motion for a default judgment. We agree that because the worker's compensation act is a remedial statute, ambiguities in interpretation should be resolved in favor of the employee. Such a rule of construction, however, does not authorize the creation of statutory provisions not adopted by the legislature. The legislature specifically provided that default orders were matters submitted to the sound exercise of discretion by the administrative agency. Section 102.18(1)(a), Stats. There is nothing in the act suggesting that default orders must be granted absent a showing of excusable neglect.

> Indeed, the application of the civil law standard to administrative agencies is erroneous. Nothing in the worker's compensation act mandates the granting of a default order based upon the tardy filing of a pleading by a party. *Id.* at 163

In *Baldwin v. LIRC*, 228 Wis. 2d 601, 599 N.W.2d 8 (1999), the supreme court used a similar approach to find discretionary authority for the denial of an employee's motion to withdraw his application for worker's compensation benefits:

> We begin our interpretation of ch. 102, Stats., by looking at the statute's plain language and striving to discern the legislature's intent. In ch. 102, the legislature has specifically afforded LIRC the authority to control its calendar and manage its internal affairs. Section 102.17(1)(a), Stats., gives the department discretion to adjourn a hearing and provides in part:
>
> > The department shall cause notice of the hearing on the application to be given to each party interested at least 10 days before such hearing. The hearing may be adjourned in the discretion of the department, and hearings may be held at such places as the department designates.[9]
>
> The department's authority to deny a motion to withdraw is necessarily implied from its express authority to manage its calendar under §102.17(1)(a), Stats. First, as the respondents point out, the department's ability to schedule hearings and promptly and efficiently adjudicate claims would be held hostage by an applicant's ability to withdraw his application at any time; chaos could result. For example, even the appellants conceded at oral argument that applying their analysis logically, they could withdraw their application any time before the ALJ's decision. It is not difficult to imagine the mischief this could cause. Second, the appellants' proposed construction would render the department's express authority to manage its calendar a nullity. *See State v. Ozaukee County Bd. of Adj.*, 152 Wis. 2d 552, 559, 449 N.W.2d 47, 50 (Ct. App. 1989) (no part of a statute should be rendered superfluous by interpretation). Third, in adopting this interpretation, we heed our supreme court's directive to refrain from laying down a rule that hamstrings the agency's efficient administration and operation. *See State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis. 2d 516, 541, 124 N.W.2d 809, 822 (1963). Finally, allowing applicants the unfettered right to withdraw their applications at any time, without reason, would effectively give them a right to substitute an ALJ or "judge shop," a right ch. 102 does not provide. 228 Wis. 2d 601, 615-17 (Citations and footnotes omitted)

> [9] We also note that pursuant to this legislative authority, Wis. Adm. Code DWD 80.09 gives the department discretion to postpone or continue a hearing.

The Personnel Commission has similarly declined to grant a complainant's request to dismiss a matter where the request to dismiss was made after a hearing, after a proposed decision and after oral arguments had been scheduled at complainant's request. *Sleik v. DOCom*, 97-0145-PC-ER, 12/3/99.

In *Rich Vision Centers, Inc. v. Board of Medical Examiners,* 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (Ct. App., 1983), the court held that the power to settle disputes could fairly be implied from the statutes creating the board.

> Administrative agencies only have the power conferred upon them by statute and an act in excess of these powers is void. However, an agency's powers are not limited to those expressly granted in the legislation; rather, "[it] is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers."
>
> No statute expressly authorizes the Board even to settle licensing disputes, let alone spells out conditions governing settlement. We must therefore first decide whether the ability to negotiate settlement of disputes may be implied from the overall statutory scheme. In so doing, we look to the *purpose* of the agency for guidance.
>
> The main purpose of the Board, like other agencies within the Department of Consumer Affairs is to insure that persons engaged in the profession possess and use "the requisite skills and qualifications necessary to provide safe and effective services to the public, " This broad purpose is effectuated mainly by the issuance, renewal or revocation of a license to practice.
>
> Permitting the Board to settle disputes over present or continuing fitness for a license helps to achieve the Legislature's purpose. Settlement negotiations provide the Board greater flexibility. Importantly, settlements provide the means to condition the issuance or renewal of licenses in order best to protect the public. Licensing can be tailored to suit the particular situation. Because conditions are voluntarily accepted by the applicant, enforcement problems are unlikely
>
> Increased efficiency inures to the busy Board possessed of the authority to settle disputes.

> When the Board initially determines that a license should be denied, revoked or suspended, the applicant becomes entitled to a full hearing. Obviously, for both the Board and litigants, the cost of such proceedings may be avoided by settlements and a time savings is also likely to be realized.
>
> Because settlement is administratively efficient and furthers the purpose for which the Board was created, we hold that the Board has the implied power to settle licensing disputes. 144 Cal. App. 3d 110, 114-15 (Citations omitted)

Another case where the administrative agency was found to have authority not explicitly provided by statute is *Balele v. Wis. Personnel Comm.*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998). The court of appeals considered whether the Commission had authority to follow informal summary judgment procedures and dismiss a complaint. The court sustained the use of this process because it found authority for it pursuant to §227.42(1)(d), Stats., which provides that a party to an administrative proceeding is entitled to a hearing only when "there is a dispute of material fact." The court relied on the Commission's finding that "the facts as shown by this additional material (i.e., material presented by Balele in response to the motion for summary judgment), and the allegations of Balele's complaint, even if true, did not state a claim." 223 Wis. 2d 739, 747-48.

The administrative precedent most closely aligned to the present facts relates to proceedings before the Equal Rights Division (ERD) of the Department of Industry Labor and Human Relations (DILHR), the predecessor agency to the Department of Workforce Development. In *Young v. Ron and Lloyd's Red Owl*, 7/29/91, ERD refused to accept a complaint filed by Mike Young after concluding that Mr. Young had committed contempt in prior discrimination complaints investigated or adjudicated by ERD, had previously filed complaints to harass or annoy respondent, had filed a large number (87) of discrimination complaints, had lied in statements and testimony relating to those prior complaints, had been unsuccessful in his previous complaints, had previously filed frivolous complaints, and the most recent filing fit within the pattern of his previous complaints. ERD also found that Mr. Young had engaged in various miscon-

duct, including threats and intimidating behavior, during hearings before the agency and that his conduct impaired the respect due the administrative tribunal. ERD made the following conclusions of law:

> 2. The Department's explicit statutory authority to administer the FEA necessarily implies the authority: (a) to protect the public from persons who use the discrimination complaint process for the purpose of harassment and (b) to protect Department staff from threats and abusive and intimidating behavior.
>
> 3. The Department has certain statutorily-imposed duties in connection with its administration of the FEA, See, e.g., ss. 111.38, 111.39(3) and (4)(a) and 101.22, Stats.; however the Department is statutorily authorized but *not* required to receive complaints charging discrimination under the FEA, s. 111.39(1), Stats.
>
> 4. The Department's rules governing its administration of the FEA require the Department to review and investigate every complaint which is accepted for filing by the Department, ss. Ind. 88.03(1) and Ind 88.06(1), Wis. Adm. Code; however, the rules do *not* require that the Department accept all complaints for filing, s. Ind 88.02, Wis. Adm. Code, and further the rules even direct that complaints not be accepted for filing under certain circumstances, s. Ind. 88.02(4), Wis. Adm. Code.

ERD went on to conclude it had the "discretionary authority to accept or reject filing of discrimination complaints" under the Fair Employment Act, and this discretionary authority authorized ERD to:

> refuse to accept complaints under any of the following circumstances;
>
> a. Where the complainant has committed contempt, within the meaning of ss. 785.06 and 785.01, Stats., in previous discrimination complaints investigated or adjudicated by the Department.
>
> b. Where the complainant has used the process of filing and prosecuting discrimination complaints against a particular respondent for purposes for which the FEA is not designed, and the current complaint against the respondent fits within the complainant's pattern or practice established in those prior complaints.
>
> c. Where the complainant has filed such a large number of discrimination complaints and/or has lied in statements or testimony in connec-

> tion with prior complaints, to such an extent that the Department finds the complainant to lack credibility.
>
> d. Where the complainant has filed a number of discrimination complaints which is significantly greater than other complainants, and few of the complaints have resulted in findings of probable cause and/or none of the complaints has resulted in a final finding of discrimination.
>
> e. Where the complainant has previously filed frivolous discrimination complaints against a particular respondent, and the current ocmplaint against the respondent fits within the complainant's pattern or practice established in these prior complaints.

On August 30, 1991, ERD issued a special order affecting future filings by Mr. Young:

> [T]he Department hereby orders that it will accept filing of a discrimination complaint under the FEA or Open Housing/Public Accommodations Law from Mike Young only if:
>
> 1. The complaint is filed at least 60 days after Young last filed a discrimination complaint under the FEA or Open Housing/Public Accommodations Law; or
> 2. The discrimination alleged in the complaint occurred at least 240 days prior to the filing of the complaint.

The maximum effect of this special order on Mr. Young was to delay his filing of a particular claim for 240 days.

According to the findings set forth in the special order, Mr. Young had filed 87 complaints of discrimination with the Equal Rights Division during a period of slightly more than 3 years and, as a general matter, even though 26 had gone to hearing, none had resulted in a final finding of discrimination. The findings also described staffing levels and caseload of the Equal Rights Division, and noted that no person other than Mr. Young had filed more than 10 discrimination complaints with that agency. The special order included the following language relating to the authority of DILHR to impose such an order:

> 2. The Department has certain statutorily-imposed duties in connection with its administration of the [Fair Employment Act], See, e.g., ss. 11.38, 111.39(3) and (4)(a) and 101.22, Stats., however the Department

is statutorily authorized but *not* required to receive complaints charging discrimination under the FEA, s. 111.39(1), Stats.

3. The Department's rules governing its administration of the FEA require the Department to review and investigate every complaint which is accepted for filing by the Department, ss. Ind. 88.03(1), 88.06(1), Ind 89.05(1) and Ind 89.09(1) Wis. Adm. Code; however, the rules do *not* require that the Department accept all complaints for filing, ss. Ind 88.02 and Ind 89.03(4), Wis. Adm. Code.

4. The Department's discretionary authority to accept or reject filing of discrimination complaints under the FEA authorizes it to refuse to accept complaints where the complainant has filed a number of discrimination complaints which is significantly greater than other complainants, few of the complaints have resulted in findings of probable cause and none of the complaints has resulted in a final finding of discrimination.

5. The Department's discretionary authority to accept or reject filing of discrimination complaints under the FEA permits it to require any complainant to delay filing of a complaint until 60 days after the complainant last filed a complaint, provided that such a delay would not cause the complaint to be barred by the 300-day statute of limitations, s. 111.39(1), Stats.

In January of 2001, Mr. Young attempted to file a claim of race discrimination with ERD which refused to accept the complaint based a failure to satisfy the filing conditions established by the 1991 special order. Mr. Young filed a claim in federal district court, claiming that ERD's action violated his civil rights. The district court granted summary judgment to ERD and Mr. Young appealed. In *Young v. Donoghue,* 01-4045, 2/25/2002, 2002 U.S.App. LEXIS 4808, the 7th Circuit Court of Appeals affirmed but on a different ground. The 7th Circuit held that there were no disputed facts regarding why the defendant had refused to accept the complaint. The court also noted:

> Young also seems to argue (without citing any authority) that he had some sort of absolute entitlement to file a discrimination complaint with the ERD, but the relevant state statutory provision suggests otherwise. *See* Wis. Stat. §106.42(4)(a)1 (ERD "may" receive and investigate a

[5] The Court of Appeals offered the following observation: "That the ERD countenances a system that allows someone to file eighty-seven baseless complaints during a three-year period amazes us."

> complaint charging discrimination by a public place of accommodation or amusement).

The relevant facts in the matters before the Personnel Commission are analogous. All six of the Mr Balele's cases include claims under the same Fair Employment Act that was the subject of the order of ERD in *Young*. The responsibility for processing complaints filed under the FEA is split between the Personnel Commission and DWD's Equal Rights Division. This separation is reflected in the following language of §111.375, Stats:

> (1) Except as provided under sub. (2), this subchapter shall be administered by the department.
> (2) This subchapter applies to each agency of the state except that complaints of discrimination, unfair honesty testing or unfair genetic testing against the agency as an employer shall be filed with and processed by the personnel commission under s. 230.45(1)(b). Decisions of the Personnel Commission are subject to review under ch. 227

In all instances, complainant has alleged employment discrimination by the State of Wisconsin acting as an employer, so his complaints have been processed by the Personnel Commission rather than ERD.

The Commission's authority over FEA complaints is, like that of the Equal Rights Division, premised on §111.39, which provides in part:

> Except as provided under s. 111.375(2), the department shall have the following powers and duties in carrying out this subchapter:
> (1) The department [and, therefore, the Personnel Commission] *may* receive and investigate a complaint charging discrimination, discriminatory practices, unfair honesty testing or unfair genetic testing in a particular case if the complaint is filed with the department [or the Commission] no more than 300 days after the alleged discrimination, unfair honesty testing or unfair genetic testing occurred. (Emphasis added.)

Just as ERD concluded in *Young* that there are certain circumstances under which it will exercise its discretionary authority to accept or reject filing of discrimination complaints, the Personnel Commission concludes that it, too, has the discretion to reject a complaint under certain circumstances. The Commission reaches this conclusion based on the use of the permissive word "may" in §111.39(1), as well as because a quasi-

judicial administrative agency simply must be viewed as having some ability to limit access by individuals who have abused the legal process in the past. It is inconceivable that the Commission would not have the authority to refuse another complaint from an individual who had already filed 50, 100 or 500 complaints with the Commission within a short time period. To conclude otherwise would allow one individual to paralyze the operation of the Commission, in light of its finite resources. Therefore, the Commission finds that it has the authority to limit filings of claims under the Fair Employment Act.

After a complaint has been filed, the Commission has the inherent authority to manage its docket and establish the schedule by which cases will be processed. As noted in *Charles H. Koch, 2 Administrative Law and Practice,* §5.50[2] (2nd ed.):

> (b) Docket management. Agencies have broad discretion to control its own docket. They may impose strict procedural rules to cope with an excessive workload. (Citations omitted.)

This inherent authority is also referenced in 2 Am. Jur. 2d, Administrative Law §335-6:

> An administrative law judge has the power to set the time and place of a hearing, with due regard given to the convenience and necessity of the parties or their representatives. .
>
> A party dies not have a right to insist that a hearing be scheduled on a specific date to avoid inconvenience to its attorney. .
>
> An administrative law judge has the discretion to grant continuances, adjournments, and postponements. An administrative agency possesses broad discretion in determining whether to grant a continuance, and a motion for continuance should be granted whenever justice so requires. However, continuances should not extend beyond a reasonable period of time.
>
> An administrative action may be stayed pending the resolution of a criminal proceeding, but such a stay should be granted only if it is necessary to assure that both proceedings will be fair. (Citations omitted)

As noted above, the Commission exercised this authority in *Balele v. DOA, et al.*, 00-0077, 0104-PC-ER, 3/21/01, where it held complainant's remaining claims in abeyance

until he paid the penalty for filing a frivolous whistleblower claim. The Commission offered the following rationale:

> 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 fees[3] ordered by the Commission.
>
> 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.

> [3]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.

This authority is part of the Commission's inherent authority to exercise control over its docket.

Based upon the analysis above, the Commission concludes that it has the authority to 1) limit the filing of cases alleging a violation of the Fair Employment Act, and 2) hold one or more cases in abeyance.[6]

VI. Are the circumstances appropriate for the Commission to limit complainant's filing of new cases and/or to hold his current proceedings in abeyance until such time as he pays certain monies to the State?

It is difficult to conceive of a set of circumstances that would more strongly support the imposition of sanctions.

Since 1987, the complainant has filed 56 complaints with the Personnel Commission. Since July 1, 1996, when the Commission began maintaining an electronic database of its cases, the complainant has filed 43 cases. Complainant's filings represents 3.5% of all of the complaints received by the Commission during the 6 year period. During this same period, one other person filed 20 complaints with the Commission and the next highest number of complaints by an individual was 12.

Complainant has failed to prevail in any of his cases before the Commission or on appeal.

The complainant has acted improperly during the course of a number of proceedings arising from his own complaints before the Commission. Some of the com-

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[6] In his written arguments, complainant incorrectly cites *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87, for the proposition that the Commission "does not have authority to enforce orders from other forums." However, in *McCready*, the Commission was addressing an unrelated question of whether a successful appellant in a proceeding before the Commission could recover attorneys fees under the specific language of the Equal Access to Justice Act found in §227.485(3), Stats., where the fees in question accrued in an unemployment compensation proceeding in another forum.

plainant's misconduct is described above in the summaries of Case Nos. 97-0012-PC-ER, 98-0145-PC-ER, 99-0002-PC-ER, 99-0169-PC-ER, 99-0202-PC-ER, 00-0104-PC-ER, and 00-0133-PC-ER. Complainant has also acted improperly while representing the interests of other individuals before the Commission. That conduct is the subject of a separate ruling being issued in *Sathasivam v. DOC*, 01-0119-PC-ER.

Complainant still has failed to pay the $398.11 discovery sanction imposed by the Commission in Case No. 98-0145-PC-ER.

In one of the present cases, the complainant has directed ad hominem attacks against counsel for a respondent. He has made the following written comments as part of his submissions in Case No. 01-0103-PC-ER:

> Further, I am asking Attorney Green to curb his ugly language toward me. I know Mr. Green's mind was poisoned when he contacted Attorney Vergeront [counsel for DER and DMRS] for advice. That's not an excuse to lash out unprofessional insults to me. Mr. Green is an adult and should be held responsible for his ugly words toward me. If Mr. Green has personal vendetta against Blacks, he should join the KKK. Nobody will question his sanity there. (Complainant's email response dated August 6, 2001)
>
> In the course of the complaint Complainant served respondent with various requests for discovery. Respondent's attorney, obviously new to procedures in the Personnel Commission, consulted DER and DMRS for information. That's when he talked to Mr. Vergeront who told him that DER had filed a motion to hold all discovery matters in abeyance pending resolution of the issue stated above. DFI lawyer went into an angry binge almost cursing why Pastori M. Balele, a black person, ever had guts to file a complaint against DFI. However, from the language used there was all indication that DFI lawyer had no experience in prosecuting or defending discrimination cases in the Commission. (Complainant's brief dated September 27, 2001, p. 2-3.)
>
> Government lawyers are lazy and that's why even the Attorney General himself will not trust them for major litigation such as *Tobacco* case. (Judicial notice.). (Complainant's brief dated September 27, 2001, pp. 11-12)

Complainant has made extensive use of the discovery process and given the number of cases he has filed before the Commission, the requests have been burden-

some. Case No. 01-0103-PC-ER is relatively typical example of the extensiveness of complainant's discovery. His initial 17-page request was dated June 28, 2001, and it related to the position of "Administrative Manager - Deputy Administrator, Division of Administrative Services." It included 64 numbered interrogatories, 38 requests for admissions and 34 requests for the production of documents. Respondent's response is dated August 8, 2001. Most of the responses indicate that there "is no position 'Administrative Manager - Deputy Administrator, Division of Administrative Services.'" By correspondence dated August 13, 2001, complainant acknowledged that he had misnamed the position in question and he resubmitted his discovery request for the position of "Administrative Manager - Administrator, Division of Administrative Services & Technology." The amended request included 69 numbered interrogatories, 38 requests for admissions and 39 requests for the production of documents.[7]

Complainant's lack of respect for the legal process has also been established in numerous proceedings in other forums. Sanctions have been imposed against him in federal court as well as by two Dane County Circuit Court judges. In *State of Wisconsin v. Balele*, 00-CV-2776, 11/2/01, Judge Higginbotham imposed fees and costs against complainant as a consequence of finding that complainant's counterclaim and motion were frivolous. Judge Higginbotham made the following comments as reflected in a transcript of a hearing held on October 22, 2001.

> Mr. Balele, I am in no way being malicious toward you. But I ask you, sir, to think very carefully and very hard before you choose to file any other action before any commission, before any court. You know what the law is. I strongly suggest that you review the law before you decide to file anything else, because, Mr. Balele, at some point it's really going to get you into some very serious trouble. And if I get another one of these, I'm going to entertain motion for higher costs and higher fees.
>
> This case took up an enormous amount of time and expense, and it's totally frivolous. And I don't want to see you in here again with anything frivolous. I just don't. I'm putting you on notice. You need to figure out what's going on here and stop it. And the State is tired. They're tired and I don't blame them. (pp. 8-10)

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[7] Other examples of the burdensome nature of the complainant's discovery requests are set forth on pages 2 to 5 of this ruling.

All of these circumstances support the imposition of sanctions against the complainant. Over the years, complainant has initiated a plethora of meritless proceedings that show no sign of abating, and in pursuing these proceedings he has engaged in extensive misconduct and abusive practices. *See Balele v DHFS et al.,* 00-0133-PC-ER, 5/24/01.

> Over a course of years, complainant has engaged in a pattern of obstruction, obfuscation, and prevarication in many of the numerous cases he has filed with the Commission
> While dismissal of a claim is a drastic step, the Commission's opinion is influenced by the complainant's repetitive pattern of abuse that continues despite the Commission's observations, admonitions, and the imposition of other penalties in other cases. Slip opinion, pp. 8, 13 (citations omitted)

We recognize there is a constitutional right to access to the legal system. However, "that right is neither absolute nor unconditional." *Village of Tigerton v. Minniecheske,* 211 Wis. 2d 777, 785, 565 N W 2d 586 (Ct. App. 1997); *Puchner v. Hepperla,* 241 Wis. 2d 545, 551, 625 N W 2d 609, 2001 WI App. 50, ¶ 8. By no means have all of complainant's complaints and contentions been frivolous. However, complainant's record in the aggregate reveals a series of cases that involve different personnel transactions, but which are basically repetitious in nature, and are often supported by repetitious legal arguments—e.g., a facet of the hiring process that results in the failure to hire Balele gives rise to a WFEA adverse impact claim because it has a negative effect or adverse impact on Balele. *See, e. g., Balele v. DNR,* 00-0087-PC-ER, 11/19/01. In addition, complainant frequently engages in abusive activities.

In the Commission's judgment, it must impose additional sanctions in order to curb complainant's abuse of its processes. However, the Commission will modify the requested sanctions so they are more closely tailored to the relevant circumstances.

Rather than imposing sanctions until complainant pays all monies owed to the State of Wisconsin including agencies thereof, the Commission will limit the scope of its order to those monetary sanctions that relate to proceedings before the Commission: 1) $500 imposed by Dane County Circuit Court in *Balele v. Wis. Pers. Comm.*, 00-CV-

2876, on the motion of the Department of Administration for reasonable attorney's fees; 2) $1114.91 (including the $398.11 awarded by the Commission to DER in Case No. 98-0145-PC-ER) imposed by Dane County Circuit Court in *State of Wisconsin v. Balele*, 00-CV-2776; and 3) $500 imposed by Dane County Circuit Court in *Balele v. Wis. Personnel Comm.*, 01-CV-1182, upon finding complainant's petition for judicial review frivolous. However, the Commission declines to incorporate requirements with regard to other monies owed by complainant to the State—ie., amounts assessed by the federal and state courts in proceedings not involving the Commission. As noted above, any reasonable doubt as to an agency's possession of implied power must be resolved against the existence of that power. *See, e. g., State ex rel. Farrell v. Schubert,* 52 Wis. 2d 351, 358, 190 N W. 2d 529 (1971). Imposing restrictions on access to the Commission's processes because of complainant's failure to satisfy arrearages imposed by federal and state courts in connection with matters not related to this agency goes beyond the Commission's necessarily implied power to protect its own authority and processes.

The Commission recognizes that circumstances can change, and leaves it open to any party to move for a change in these sanctions. For example, complainant may petition the Commission to reconsider these sanctions if he pays the arrearages in question, or if there is a substantial change in his circumstances that is relevant to these sanctions.

Related to this is the consideration that the indefinite postponement of the complainant's pending cases can be expected, at some point, to have a significant negative effect on a respondent's ability to defend the underlying personnel action. Therefore, respondents will be permitted to ask the Commission to dismiss one or more cases for lack of prosecution when and if the delay has or would have a material effect on its ability to defend.

Motion by DFI (01-0103-PC-ER) arising from complainant's use of employer-provided email and telephones to conduct the case

Respondent DFI takes the position that it is inappropriate for the Personnel Commission to contact complainant at a state telephone number or through his state employee email account:

> [It is inappropriate for the State Personnel Commission to contact complainant at a state telephone number for the prehearing conference. Nor should the Commission accept or respond to emails sent by complainant using a state computer. It is inappropriate for complainant to use state equipment and resources, and taxpayer dollars to fund his frivolous personal litigation. It is also inconceivable that complainant's state employment encompasses the prosecution of his personal litigation. Furthermore, as officers of the court, counsel at this department believes that we are obliged to make every attempt to avoid participating in these questionable activities, and believe the same duties falls upon . the Commission.

The resolution of the respondent's motion could have no practical legal effect on the complainant because he is no longer employed by the State of Wisconsin. Therefore, the issue is moot.[8]

Objection by DMRS and DER in 01-0067-PC-ER to consideration of certain arguments filed by complainant

After respondents filed their reply brief regarding their motion in Case No. 01-0067-PC-ER, the complainant filed a response on October 2, 2002, via email. Respondents objected and asked that it be stricken because he had not been given leave to file the extra response. On October 4, 2001, the Commission indicated that it would address the objection as part of its ruling on respondents' outstanding motion.

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[8] The Commission notes that the Personnel Commission, along with all other state agencies, must list an electronic mail address on its stationery, §16.72(9), Stats., indicating legislative approval for the Commission and other quasi-judicial administrative agencies to correspond with litigants via email. The vast majority of the persons who file appeals and complaints with the Personnel Commission are employed by the State of Wisconsin during the same hours of business as the Commission's office hours. The Commission's rules also expressly provide that petitioners who appear at prehearing conferences, "whether held in person or via telephone, shall do so without loss of state salary." Sec. PC 1.13(1), Wis. Adm. Code.

The Commission denies respondents' objection and has considered the October 2nd submission in light of subsequent events. On November 1st, respondents submitted additional information to the Commission regarding the results in *State of Wisconsin v. Balele*, 00-CV-2776 (Dane County Circuit Court). Complainant responded and respondents replied by letter dated November 6th On December 20th, respondents submitted additional information to the Commission regarding the validity of the judgment in Case No. 95TJ49. Complainant responded on December 22nd Finally, on March 12, 2002, respondents submitted additional information to the Commission, including a citation to a 1995 case and a copy of the February 28, 2002, decision in *Balele v. Wis. Pers. Comm.*, 01CV1182 (Dane County Circuit Court).

In addition to the various subsequent filings in Case No. 01-0067-PC-ER, the motions to stay the present cases were not all filed at the same time. The most recent of these 6 motions was filed in Case No. 02-0008-PC-ER on May 7, 2002. The Commission consolidated the motions because they were obviously related. The overlapping briefing schedules in the various cases serve as another reason for denying respondents' objection to complainant's October 2nd submission in Case No. 01-0067-PC-ER.

Motion by complainant against EAB and DVA (Case No. 02-0008-PC-ER) for costs

In the cover letter to his responsive brief dated May 28, 2002, complainant wrote: "This document also serves as motion for cost[s] against Mr. Rosinski [counsel for respondents EAB and DVA] under rule 11." On page 7 of his brief, complainant argues the following:

> The affidavit of Mr. Vergeront states among others as follows:
>
> "The state has not released, waived or forgiven any of the judgments against Complainant, except the one noted above and further state considers all judgments, except the one noted above, to be due and owing the state at this time.
>
> (Judicial Notice). That is irresponsible, flagrant and reckless perjury. This commission should not allow such behavior in this Commission in the future. *If this commission continues to baby-sit state attorneys, they*

> *will continue to file such frivolous motions in the future. The Commission should punish Mr. Rosinski under rule 11.*
>
> Anyway here is the reason. In April of 2001 Balele applied for a loan at the State Credit Union. The Credit Union refused to extend the loan because Balele had outstanding money judgments against him. On examination of the Credit Union records, Balele found that the Department of Justice had *not* filed papers for satisfaction of judgment for case which Balele's salary had been garnished. Balele e-mailed the Department of Justice asking the Department to file the papers. The Department of Justice responded by issuing a statement that Balele had satisfied the judgment to 95-TJ-49. DOJ document attached a letter that Balele had forgotten about. *The letter essentially allowed the other money judgments to die.* Indeed it has past six (6) years since DOJ filed documents in the circuit court. These filings are now stale. Here they are:
>
> 95TJ56 filed *1/3/95;*
> 90CV003767 filed *3/16/95;*
> 95TJ84 filed *7/13/95;* (Emphasis in original.)

Respondents did not file any substantive response to the complainant's May 28th submission.

The Commission is unable to understand the rationale being relied upon by complainant for his motion. In any event, the complainant's reference to Rule 11[9] of

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[9] Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,- (1)it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

the Federal Rules of Civil Procedure is inapplicable to the proceedings before the Personnel Commission. Therefore, his motion is denied.

ORDER

All of the captioned cases and all other cases that complainant has pending against DOA, DMRS, DER, DFI, UW, UW-Madison, DOR, EAB, DVA or DOC, except Case Nos. 00-0077-PC-ER and 00-0104-PC-ER, are stayed and the complainant is barred from filing any new complaints under the Wisconsin Fair Employment Act against any of those respondents until the complainant has paid all monies due the State of Wisconsin arising from the following three Dane County Circuit Court proceedings: *Balele v. Wis. Pers. Comm.*, 00-CV-2876; State of Wisconsin v. Balele, 00-CV-2776; *Balele v. Wis. Pers. Comm.*, 01-CV-1182. Complainant may petition the Commission to reconsider these sanctions if there is a substantial change in his circumstances that is relevant to these sanctions. Respondents may move to dismiss one or more cases for lack of prosecution when and if the delay has or would have a material effect on the agency's ability to defend.

Dated: July 31, 2002 STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

KMS:010067Crul2.2

KELLI S. THOMPSON, Commissioner

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(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.