

STATE OF WISCONSIN

PERSONNEL COMMISSION

ANANDA SATHASIVAM,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING ON
RESPONDENT'S MOTION
TO EXCLUDE
COMPLAINANT'S
REPRESENTATIVE**

Case No. 01-0119-PC-ER

This matter is before the Commission on respondent's motion filed February 6, 2002, to exclude complainant's representative. The parties' representatives have filed briefs and supporting documents. The following findings appear to be undisputed on the basis of the documents submitted by the parties.

FINDINGS OF FACT

1. Complainant has retained Pastori Balele to represent him in this WFEA (Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats.) proceeding before the Commission.

2. Balele is not an attorney and is not licensed to practice law in this state, and the provision of professional legal advice is not incidental to his usual or ordinary business or employment.

3. Complainant and Balele have agreed that Balele is to be paid \$20 an hour for acting as complainant's representative.

3. As complainant's representative, Balele has been representing complainant for all purposes, and performing such functions as preparing and serving discovery requests and responses, and engaging in communications with respondent's attorney and the Commission concerning legal issues, in which communications he has made legal arguments and cited cases and statutory and administrative rule provisions.

4. Balele notified respondent on January 14, 2002, that he would be representing complainant at a deposition of complainant scheduled for January 23, 2002, and demanded that respondent pay Balele \$100 per hour and \$200 in advance plus travel expenses for attending the deposition and representing complainant. As a result of these and other demands by Balele, respondent canceled the deposition.

5. As part of the discovery process in this case, Balele inspected documents held by respondent and requested numerous copies. On December 21, 2001, he delivered a check written by complainant to respondent for \$115.95, as payment for those copies at \$.15 per page, and was given the copies by DOC. Later that day Balele sent the following email to the Commission:

I am asking for a telephone conference to address why DOC charges for documents requested as discovery materials for cases filed in the Commission. Further by this email I am asking DOC not to cash Mr. Sathasivam's check for 115.95 I just drop off at DOC. Above all I would like Mr. Sathasivam to stop payment at his bank for that check immediately till this motion is resolved by the Commission.

Before we can issue another check for that amount, DOC and other agencies have to prove that they require the Commission to pay for in-house printing cost when investigating cases. Sathasivam, as complainant in the Commission, is actually representing the State as a "private attorney general." DOC would not charge the Attorney General printing cost for representing DOC or any other agency in the Commission. *Watkins v. LIRC*, 117 Wis. 2d 753, 764, 345 N. W 2d 482 (1984); *Weinhagen v. Hayes*, 179 Wis. 62, 190 N. W 2d 1002 (1922).

6. Complainant stopped payment on that check.¹

7. Balele has been assessed costs in various proceedings before this agency and state and federal courts. He is in arrears for approximately \$4219.80 (excluding interest).

¹ It appears that DOC subsequently deducted the amount of the stopped check from complainant's salary.

OPINION

The Commission's rules provide at s. PC 1.04(1), Wis. Adm. Code, that "A party is entitled to appear in person or by or with the party's representative in any case before the commission *except as otherwise provided by law.*" (emphasis added) Section PC 1.02(18) defines "representative" as "an attorney or any other agent of a party who has been authorized by the party to provide representation, *where authorized by law.*" (emphasis added) Thus, the rules provide wide latitude for representation before the Commission, with the proviso that representation which is otherwise unlawful is not allowed.

Section 757.30(1), Stats., provides in relevant part as follows:

Every person, who without having first obtained a license to practice law as an attorney of a court of record in this state, as provided by law, practices law within the meaning of (2) shall be fined not less than \$50 nor more than \$500 or imprisoned not more than one year in the county jail or both, and in addition may be punished as for a contempt.²

Since Balele does not have a license to practice law as an attorney, his representation of complainant is in violation of this statute if such representation constitutes the "practice [of] law within the meaning of [s. 757.30(2)]." *Id.* It further follows that if Balele is practicing without a license in violation of s. 757.30, Stats., this representation *would not be* "authorized by law" under s. PC 1.02(18), Wis. Adm. Code, and *would be* "otherwise prohibited by law" under s. PC 1.04(1).

Section 757.30(2), Stats., provides in relevant part as follows:

Every person who appears as agent, representative or attorney, for or on behalf of any other person in any action or proceeding before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or *who otherwise, in or out of court, for compensation or pecuniary reward gives professional legal advice not incidental to his or her usual or ordinary business, or renders any legal service for any other person* shall be deemed to be practicing law within the meaning of this section. (emphasis added)

² Respondent asserts it has referred the matter of complainant's legal activities to the district attorney.

Since a commission proceeding is not a judicial proceeding, Balele's representation is not covered as occurring "in any action or proceeding before any court of record, court commissioner or judicial proceeding," *id.* Balele argues that since the Commission is not a judicial body, this is conclusive: "The dispositive argument against DOC . . . is that the Personnel Commission is neither a court nor a judicial tribunal. It is an administrative agency just like DOR, DOC, DOA and others." Complainant's brief, p. 10. This ignores the reach of the statute, which is not limited to court proceedings. It also covers anyone who, "in or out of court, for compensation or pecuniary award, gives professional legal advice not incidental to his or her usual or ordinary business, or renders any legal service to any other person." *Id.*

It is clear that in representing complainant before this Commission, Balele has been providing professional legal advice and rendering legal services. This can be illustrated by a few excerpts from Balele's brief:

Mr. Sathasivam wrote the Commission to excuse itself from investigating the case. Instead Mr. Sathasivam would be represented by Mr. Balele. Balele offered that Sathasivam pay him \$20 for the time he would spend either at the Commission or when writing the brief. . . . Mr. Balele became a full and authorized representative of Mr. Sathasivam.

Balele developed and served extensive discovery on DOC.
Balele signed the discovery document. DOC responded.

As to discovery Balele discovered that DOC responses were full of either gaps or not fully answered questions. Further, DOC responses revealed that new information was required from DOC. Balele served a second request for discovery with DOC.

At the prehearing conference, Balele informed the Commission that he would amend Sathasivam's complaint. [An amended complaint was filed January 8, 2002.]

This clearly falls within the parameters of s. 757.30(2), Stats. *See, e. g., State ex rel. State Bar of Wisconsin v. Keller*, 16 Wis. 2d 377, 387, 114 N. W. 2d 796 (1962); *vacated other grounds, Keller v. Wisconsin ex rel. State Bar of Wisconsin*, 374 U. S. 102, 83 S. Ct. 1686, 10 L. Ed. 2d 1026, 1963 U. S. LEXIS 1280 (1963). In

that case the Court applied this statute (then s. 256.30(2), Stats.), and held it included activities before administrative agencies, and that the practice of law included giving legal advice to clients to inform them of their rights and obligations, preparing documents for clients requiring knowledge of legal principles not possessed by ordinary laypersons, and “the appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of the law.”

Because the illegal practice of law includes the element of compensation—i.e., s. 757.30(2), Stats., provides in part: “who otherwise, in or out of court, for *compensation or pecuniary reward* gives professional legal advice” (emphasis added)—it is not surprising that respondent makes the following point in his brief: “it’s logical to interpret the Commission rule on representation as not barring laypersons from acting in a manner consistent with the tasks performed by Mr. Balele in this case unless a compensation element is present. When a compensation element is added, the Commission’s rule and the criminal law are both violated.” Respondent’s brief in support of motion to exclude, p. 8. However, Balele opposes this conclusion.

Balele’s attempt to distinguish his situation is unpersuasive. He in effect argues that individuals representing complainants in WFEA proceedings are somehow exempt from the statutory prohibitions against the unauthorized practice of law. He argues that the “Supreme Court has carved out special treatment for WFEA complaints especially those dealing with race discrimination.” Complainant’s brief in opposition to respondent’s motion, p. 14. He cites *Watkins v. LIRC*, 117 Wis. 2d 753, 764, 345 N. W. 2d 482 (1984), where the Supreme Court held that the WFEA provides implied authority to award attorney’s fees to prevailing complainants. In support of that conclusion, the Court stated that a “complainant who files a complaint . . . is acting as a ‘private attorney general’ to enforce the rights of the public and to implement a public policy that the legislature considered to be of major importance. The aggregate effect of such individual actions enforces the public’s right to be free from discriminatory practices in employment, which in turn effectuate the legislative purpose of outlawing

such practices.” Balele apparently argues that this concept legitimizes the unlawful practice of law, a subject in no way before the Court in *Watkins*³, and a subject on which *Watkins* sheds no light whatsoever. See also *Oriedo v. Madison Area Technical College*, Case No. 199604324 (LIRC, July 1998).

Balele takes another step along this same path as he cites case law that attorney’s fees awardable under the WFEA can include compensation to non-lawyers who are employed by and supervised by attorneys. He goes on to argue: “Therefore Balele[’s] claim for \$20 compensation is reasonable. Balele is not on state time when representing Mr. Sathasivam.” Complainant’s brief, p. 15. The issue before the Commission is not whether \$20 per hour for Balele’s services is a reasonable fee, but whether Balele’s representation is “authorized by law,” s. PC 1.02(13), Wis. Adm. Code, and hence permissible under the Commission’s rules.

Not only does Balele’s representation of complainant violate ss. PC 1.02(18) and PC 1.04(1), Wis. Adm. Code, but also Balele’s handling of complainant’s payment for document copying as a result of discovery constitutes egregious misconduct.

It is undisputed from the briefs filed on this motion that Balele asked DOC to provide copies of documents he had inspected as part of the discovery process. After having tendered a check to DOC and having picked up the documents, complainant directed his client to stop payment of the check. Complainant describes this process, as follows .

DOC officials demanded that Complainant to pre-pay for the documents before release⁴ Indeed, Mr. Sathasivam wrote the check \$115.95. Balele took vacation hour and drove to DOC to get the documents.

On his way back, Balele thought that DOC was giving Sathasivam and Balele hard time for the prepaid documents. The reason was that Balele believed that the Commission had not paid for

3 Ms. Watkins was represented by counsel.

4 The cost of copying documents in response to a discovery request normally rests with the party making the request. *Asadi v. UWPlatteville*, 85-0115-PC-ER, 4/7/88.

the discovered materials one inch thick.⁵ Balele believed that DOC did not charge the Commission for printing and production of documents. Balele emailed Pultz not to cash the check. At the same time Balele asked Mr. Sathasivam to stop payment. Balele copied the email to the Commission.

Complainant's brief in opposition to respondent's motion, pp. 5-6.

In the Commission's opinion, Balele's orchestration of this situation was highly improper. Laying to one side the fact that Balele's rationale for arguing complainant should not have to pay copying costs to DOC is without merit, if he disagreed with DOC's position that it would not provide copies without payment of copying costs, he could have brought on a discovery motion with regard to this question.⁶ Rather, he engaged in chicanery by tendering complainant's check in payment for the copying costs to enable him to obtain the copies, but then stopping payment on this check. Furthermore, Balele's argument that he should be exempt from the requirement to pay copying costs for copies of inspected documents he requested from DOC is completely inapposite. He again argues that "Mr. Sathasivam was a private attorney general proceeding to enforce the will of the Wisconsin public. *Watkins*." Complainant's brief, p. 18. In this context, he also analogizes complainant to a state agency like this Commission:

As pointed before Mr. Sathasivam was proceeding as a "private attorney general" enforcing the rights of the public and was therefore implementing public policy that the legislature considered to be of major importance." As such he was in a capacity of a state agency just like the Personnel Commission. *Watkins v. LIRC*, 117 Wis. 2d 753, 345 N. W. 2d 482 (1984). If DOC did not charge the Commission a cent, it was not supposed not to charge Sathasivam a red cent. Complainant's brief, pp. 19-20.

⁵ This is a reference to documents respondent provided to this Commission as part of its investigation prior to the time complainant waived investigation. See ss PC 2.05(1), Wis. Adm. Code; 230.45(1m), Wis. Stats.

⁶ The Commission has adopted by reference the provisions of Ch. 804, Stats., "Depositions and Discovery." S. PC 4.03, Wis. Adm. Code.

Suffice it to say that *Watkins* dealt with the issue of whether a prevailing WFEA complainant is entitled to attorney's fees, and in no way, by analogy or otherwise, provides authority for Balele's claim that complainant was entitled to free copies during the discovery process.

Another incident that occurred in the discovery phase of this case involves Balele's demand that respondent pay in advance his fees for attending a deposition of complainant. There is no authority for requiring a party to pay in advance the opposing party's costs of representation at a deposition. While the Commission has the authority to award costs in connection with discovery under certain circumstances, there is no authority to award such costs against a state agency, *Wis. DOT v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N. W. 2d 664 (1993). Also, costs can not be awarded under the WFEA unless and until complainant were to prevail on the merits of his complaint.

Because Balele's representation of complainant violates the Commission's rules due to the fact Balele is being paid for his activities, he should be prohibited from participating in such an arrangement in this case. Respondent also argues that he should be barred more generally from appearing in any representative capacity, even without payment of fees, because of the specific misconduct in which he has engaged. That is, if Balele did not have an arrangement involving compensation for his services, presumably he would no longer be engaged in the unlawful act of the unauthorized practice of law, and his representation would not be in violation of any specific provision of the Commission's rules, but he would still be in a position to engage in misconduct as a representative. Respondent's request for a broader prohibition against Balele acting in any representative capacity, even without a remuneration arrangement, raises the issue of whether such a prohibition would be within the scope of the Commission's implied powers. In the Commission's opinion, it has the implied statutory authority to take this action, and it is warranted.

The general rule governing implied powers of administrative agencies is that an agency has only those powers that the legislature expressly grants, or that are

necessarily implied. Any reasonable doubt as to the existence of an implied power should be resolved against the exercise of such authority. *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455, 461-62, 329 N. W. 2d 143 (1983).

The Administrative Procedure Act (APA, Subch. III, Ch. 227, Stats.) provides agencies with relatively broad authority to control the conduct of administrative proceedings. For example, s. 227.46(1)(e), Stats., gives the hearing examiner general authority to “[r]egulate the course of the hearing.” Section PC 5.03(8)(d), Wis. Adm. Code, provides that “[t]he hearing examiner or the commission may exclude persons other than witnesses from the hearing for misconduct.” The Commission’s authority to regulate the conduct of hearings could be crippled if it were held the Commission did not have the power to decide whether a representative of a party should be allowed to act in that capacity. It is necessarily implied from the Commission’s general authority to regulate the conduct of hearings that the Commission can prohibit a representative from practice when his conduct interferes substantially with the conduct of the hearing. *Cf. Jackson v. City of Milwaukee Public Library*, Case No. 8950041 (LIRC, 1990) (Assuming without deciding that agency has authority to bar a particular representative, a party’s choice of a representative could only be limited for a compelling reason).

In this case, Balele has engaged in egregious conduct, as discussed above. In addition, the Commission considers Balele’s long history of involvement in proceedings before this agency, both on his own behalf and as a representative. In *Balele v. DHFS, DER & DMRS*, 00-0133-PC-ER, 5/24/01, the Commission summarized this record as follows:

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). *Id.*, p. 5 (footnote omitted)

Also, in the decision that included this summary, the Commission held that Balele had engaged in frivolous or bad faith pleading and bad faith prosecution in connection with certain misrepresentations concerning his activities in connection with a prehearing conference. In light of this background, and the misconduct involved in this case, the Commission concludes that Balele should be barred from representing the complainant in this case. The Commission will also address respondent's contention that Balele should be barred from acting in a representative capacity in any other cases before the Commission.

One purpose of the regulation of the practice of law is to protect the public. See, e. g., *State ex rel. State Bar of Wisconsin v. Keller*, 16 Wis. 2d 377, 387, 114 N. W. 2d 796 (1962); *vacated other grounds, Keller v. Wisconsin ex rel. State Bar of Wisconsin*, 374 U. S. 102, 83 S. Ct. 1686, 10 L. Ed. 2d 1026, 1963 U. S. LEXIS 1280 (1963); *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 206, 109 N. W. 2d 685 (1961) (Duty of court to regulate practice of law and to restrain such practice by laymen is primarily to protect interests of public). In light of Balele's record of practice before this Commission, both on his own cases and those where he has

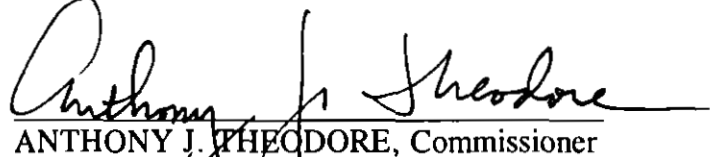
represented others, barring him from representation of others would serve a dual function of protecting individuals like complainant in this case, who otherwise might be represented by Balele, and protecting the Commission's processes from Balele's improper activities as discussed above. Furthermore, Balele's record of ignoring arrearages in costs levied by courts and this Commission demonstrates contempt for the legal process and is inconsistent with being allowed to represent others in this forum, either with or without remuneration.

ORDER

Pastori Balele is barred from representing the complainant in this case. He also is barred from representing anyone else in any proceeding now pending or which may be filed in the future with this Commission. He may petition the Commission for relief from this ruling on the basis of a future material change in circumstances.

Dated: July 31, 2002

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

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KELLI S. THOMPSON, Commissioner