

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL W. HOPKINS, Complainant,

vs.

**CITY OF KENOSHA and
KENOSHA PROFESSIONAL FIREFIGHTERS LOCAL
414, IAFF, AFL-CIO**, Respondents.

Case 193
No. 59298
MP-3691

Decision No. 30164-B

MICHAEL W. HOPKINS, Complainant,

vs.

**CITY OF KENOSHA and
KENOSHA PROFESSIONAL FIREFIGHTERS LOCAL
414, IAFF, AFL-CIO**, Respondents.

Case 194
No. 59591
MP-3711

Decision No. 30108-C

Appearances:

Michael W. Hopkins, 33326 118th Street, Twin Lakes, Wisconsin 53181, appearing on his own behalf.

Dec. No. 30164-B
Dec. No. 30108-C

Timothy E. Hawks, Hawks, Quindel, Ehlke & Perry, S.C. 700 West Michigan Street, Suite 500, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Kenosha Professional Firefighters Local 414, IAFF, AFL-CIO.

Daniel G. Vliet, Davis & Kuelthau, S.C. 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, 53202-6677, appearing on behalf of the City of Kenosha.

ORDER

On October 20, 2000, Michael W. Hopkins filed a complaint (Case 193) with the Wisconsin Employment Relations Commission alleging that the City of Kenosha and Kenosha Professional Firefighters Local 414, IAFF, AFL-CIO, had committed prohibited practices within the meaning of the Municipal Employment Relations Act by the City's failure to comply with an arbitration award and the Local's failure to fairly represent Hopkins when seeking compliance with the award.

On January 23, 2001, Hopkins filed a second prohibited practices complaint (Case 194) against the City and the Local regarding the City's alleged violation of a collective bargaining agreement and the Local's alleged failure to fairly represent Hopkins in that regard.

Cases 193 and 194 were assigned to Commission Examiner David E. Shaw.

On September 17, 2001, with mediation assistance from Examiner Shaw, the parties (all of who were represented by legal counsel) reached and signed a settlement agreement pursuant to which Case 194 would be dismissed with prejudice after the City and Local took certain action.

By letter dated December 16, 2002, Examiner Shaw advised the attorneys representing the parties that Hopkins had telephonically contacted him and indicated that the City and Local had not complied with the terms of the September 17, 2001 settlement agreement. Examiner Shaw therein further informed the parties that he had advised Hopkins that if Hopkins wanted to request a hearing in Case 194, he should do so in writing. Lastly, the Examiner therein stated his understanding that Case 193 had been settled during the September 17, 2001 meeting between the parties and asked Hopkins' attorney to respond as to the status of Case 193.

In response to the communications with and from Examiner Shaw, neither Hopkins nor his attorney (Walter Stern) took any action.

By letter dated March 26, 2006, the Wisconsin Employment Relations Commission advised Hopkins' attorney that Cases 193 and 194 would be dismissed unless a request to

proceed was received within six months of the March 26 letter. No request was received. On September 28, 2006 (Case 194) and October 12, 2006 (Case 193), the Commission dismissed the complaints. The Order Dismissing Complaint was sent to Hopkins' attorney but not to Hopkins.

On December 18, 2006, the Commission received a telephone message from Hopkins asserting that he had just become aware of the Commission's March 2006 letters and subsequent orders of dismissal and advising the Commission that he objected to the dismissals and wished to proceed to hearing.

By letter dated January 3, 2007, the Commission advised the attorneys it understood to be representing the parties of Hopkins' December 18, 2006 telephone message and asked for a response to Hopkins' request that the complaints proceed to hearing. The Commission further therein advised that, pursuant to the Court of Appeals decision in *ANDERSON V. WERC AND MORAINÉ PARK TECHNICAL COLLEGE*, DEC. 90-2490 (6/91-Unpublished), the Commission believed it lacked jurisdiction to set aside an order dismissing a complaint after the passage of 20 calendar days from the date of issuance.

By letter dated January 9, 2007, Attorney Stern advised the Commission that he had returned the files regarding Cases 193 and 194 to Hopkins; that he "was under the understanding" that Hopkins had directly received copies of the orders of dismissal from the Commission; that he had not represented Hopkins "for awhile"; and that he understood "all of the cases (sic) were resolved(sic) sometime ago, although I may be wrong."

By letter dated April 11, 2007, Attorney Stern further advised the Commission that Hopkins was representing himself; that he wished to correct his previous statement as to the status of the two cases; that Case "192" (sic) was still a "viable case" because the City had made certain overtime payments late; and that "The other case, 192 (sic), has been fully resolved."

Citing *ANDERSON*, the City urges the Commission to deny Hopkins' request to proceed to hearing. Hopkins argues that *ANDERSON* is distinguishable and that he should be allowed to proceed. The Local takes no position.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

Hopkins' request to set aside the Order Dismissing Complaint in Cases 193 and 194 is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of July, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

CITY OF KENOSHA (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING ORDER

Section 111.07(6), Stats. provides in pertinent part:

(6) The commission may also, on its own motion, set aside, modify or change any order . . . at any time within 20 days from the date thereof

This statutory language has been interpreted by the Court as depriving the Commission of jurisdiction to modify any final order after 20 days have passed from the date the order was issued. The Court further concluded that the basis for the request to modify is irrelevant and that, even where fraud or the presence of newly discovered evidence is alleged, the Commission lacks jurisdiction to proceed further. *ANDERSON V. WERC AND MORAINÉ PARK TECHNICAL COLLEGE*, DEC. 90-2490 (6/91-Unpublished).

Hopkins presents several arguments as to why this statutory language (as interpreted in *ANDERSON*) does not prevent the Commission from taking action.

First, he asserts that the Commission failed to give him notice that his complaint was going to be dismissed. While it is by no means clear that this fact, if true, would create an exception to the *ANDERSON* rule, the Commission did give notice of the impending dismissal to the attorney who represented Hopkins in the Cases 193 and 194. Absent notice (of which there was none) from Hopkins or his attorney that the attorney no longer represented him, the Commission was entitled to presume that the attorney continued to represent Hopkins and that the letter to said attorney advising that the complaints would be dismissed provided valid notice to Hopkins. Thus, this argument is rejected.

Second, as to Case 193, Hopkins argues that the Commission has an ongoing role to play because the allegation therein presented is whether the City has complied with a grievance arbitration award issued by a Commission staff arbitrator. In effect, Hopkins views the award as a Commission decision that the Commission has ongoing authority to enforce even if Case 193 was properly dismissed. While Hopkins' understanding of the status of a grievance arbitration award issued by a Commission staff member is a reasonable one, it is not correct. Arbitration awards by members of the Commission staff are not Commission decisions.¹

1/ As a general matter, Commission decisions are decisions issued by the three WERC commissioners that resolve issues that arise under the Wisconsin Employment Peace Act, Municipal Employment Relations Act or State Employment Labor Relations Act in unfair labor practice/prohibited practice complaints and petitions for elections, unit clarifications, union security referenda and declaratory rulings.

Where, as here, a complaint is filed alleging failure to comply with a grievance arbitration award (whether issued by a Commission staff member or not), the Commission has jurisdiction to decide the merits of the complaint unless (as here) the complaint has been dismissed for other reasons. However, the underlying grievance arbitration award is not a Commission decision, and thus the Commission does not have an independent interest in determining whether there has been compliance.

Lastly, Hopkins contends that the City has failed to comply with the terms of a settlement agreement reached by the parties in Case 194. In December 2002, Examiner Shaw wrote the parties (including Hopkins' attorney), informing them that he had telephonically advised Hopkins that if he wished to proceed to hearing because of the City's alleged failure to comply with the Case 194 settlement agreement, he should make that request in writing. Such a request was never received prior to dismissal of Case 194 in September 2006. Thus, even if ANDERSON were not applicable, the alleged failure to comply with the settlement agreement does not provide a valid basis for reopening Case 194 because notice of impending dismissal was provided to Hopkins' attorney of record and no timely objection was raised to such dismissal.

Given all of the foregoing, we conclude that Sec. 111.07(6), Stats. as interpreted by the Court in ANDERSON, governs the disposition of Hopkins' request to proceed. Because Hopkins' request to set aside the orders dismissing his complaints was filed more than 20 days from the dates of issuance, we do not have the authority to grant his request. Therefore, the request is denied.

Dated at Madison, Wisconsin, this 17th day of July, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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