STATE OF WISCONSIN PERSONNEL COMMISSION

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GEORGE ELDER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 79-PC-ER-89

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ORDER

This matter is before the Commission on a motion to vacate the dismissal order dated January 22, 1981, and to reopen the case. Complainant alleges that the respondent has failed to fulfill its part of the settlement agreement on which the dismissal was based.

The Commission's Order dated January 22, 1981, dismissing the appeal, reads as follows:

> "On the basis of the stipulation entered on the record on January 6, 1981, the transcript of which is on file herein, and the terms of which are incorporated by reference as if fully set forth, this appeal is dismissed with prejudice."

On October 1, 1981, counsel for the appellant filed its motion to vacate the order of dismissal and to reopen the case and the charge of discrimination, alleging that the terms of the stipulation were not fulfilled in good faith. Attached to the appellant's motion was a completed Charge of Discrimination, signed and notarized on September 8, 1981. The charge alleges discrimination on the basis of age, sex and retaliation with respect to the discharge of the appellant from the position of Fiscal Clerk I on July 10, 1981.

Appellant's arguments in support of his motion are based on case from other jurisdictions holding that agencies have either inherent or implied powers to reopen their own orders. This topic is dealt with at length in

73 ALR 2d 939 in an annotation on the question "whether an administrative agency, in the absence of specific statutory grant of authority, has power to rehear, reopen, and reconsider a cause previously determined by a final decision." 73 ALR 2d 939, 941.

The cases cited in the ALR annotation are fairly equally divided between cases finding that an agency has the inherent or implied power to reopen and those cases reaching the opposite result. In addition, in many of the cases supporting the appellant's position, the power to reopen was found to exist only until the time for perfecting an appeal has run. Appellant cites Wittenberg v. Board of Liquor Control, 80 N.E. 2d 711, 714 (Ohio, 1948) as holding that the Ohio Liquor Control Board had the inherent, implied power to reopen a case which it had previously dismissed, and to hold a hearing on the merits. In Wittenberg, a complaint had been filed against a night club operator and was scheduled for hearing. On the morning of the hearing the prosecuting witnesses failed to appear before the Liquor Board, so the board orally dismissed the matter. That same afternoon the witnesses appeared and the board granted a motion to reopen the proceeding. The facts presented in the Wittenberg case are clearly not comparable to those that appear here.

There is no case law from Wisconsin specifically addressing the question of whether an administrative agency in this state has the authority to reopen a case under the circumstances here presented. A specific procedure for petitioning an agency for rehearing a contested case is found in s.227.12(1), Wis. Stats. However, this motion does not purport to be, nor does it meet the criteria for, a petition for rehearing.

In State ex rel. Farrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W. 2d 529 (1971) the Supreme Court held:

> " '[A] power which is not expressed must be reasonably implied from the express terms of the statute; or, as otherwise stated, 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.)

The inconsistency of the rulings noted in the ALR annotation plus the lack of any explicit statutory authority justifies the conclusion that there is at least a reasonable doubt as to the existence of the power to reopen this case.

In the present case, furthermore, the appellant has the option of seeking enforcement of the stipulation. See s.111.36(3)(d), Wis. Stats. Clearly, an enforcement action would be consistent with the allegation that the respondent has failed to fulfill its part of the settlement agreement.

ORDER

Based upon the above analysis the Commission denies appellant's motion to vacate and reopen. To the extent that the appellant's motion seeks to amend his charge of discrimination filed on June 4, 1979, pursuant to s.PC 4.02(4), Wis. Adm. Code, the Commission also denies such amendment due to the dismissal of that complaint pursuant to stipulation. However, the Commission will consider those documents filed on October 1, 1981 and attached to appellant's motion as a new discrimination complaint and will process the complaint accordingly.

Dated: March 19, 1982

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

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