

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ANNETTE ROGERS,
Complainant,

v.

Secretary, DEPARTMENT OF
ADMINISTRATION,
Respondent.

Case Nos. 81-PC-ER-111
82-PC-ER-31,
82-PC-ER-134
82-PC-ER-135

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ANNETTE ROGERS,
Complainant,

v.

Secretary, DEPARTMENT OF
ADMINISTRATION, and Executive
Director, ETHICS BOARD,
Respondents.

Case No. 83-0076-PC-ER

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ANNETTE ROGERS,
Complainant,

v.

Secretary, DEPARTMENT OF
ADMINISTRATION, and Executive
Director, ETHICS BOARD,
Respondents.

Case No. 87-0010-PC-ER

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DECISION
AND
ORDER

INTERIM
DECISION
AND
ORDER

These matters are before the Commission on complainant's petition to reopen those five cases filed before 1984 and respondents' motion to dismiss the 1987 proceeding. The relevant facts appear to be undisputed and are set out below. All parties have been provided an opportunity to file briefs.

FINDINGS OF FACT

1. During 1981 and 1982, the complainant filed four separate claims under the Fair Employment Act (FEA) against the Department of Administration (DOA). Those claims were assigned case numbers 81-PC-ER-111, 82-PC-ER-31, 82-PC-ER-134 and 82-PC-ER-135.

2. In 1983, the complainant filed a claim under the FEA against DOA and the State Ethics Board. That claim was assigned case number 83-0076-PC-ER.

3. After these five cases had been investigated, the parties entered into settlement agreements which directed the Commission to dismiss the cases with prejudice. Included within the agreements were provisions relating to the provision of employment references for the complainant. In addition, the agreement relating to those four cases in which DOA was the sole respondent included the following paragraph:

10. The parties agree that Case Nos. 81-PC-ER-111, 82-PC-ER-31, 134 and 135 shall be dismissed for all purposes except that the State Personnel Commission shall retain jurisdiction over the above-cited cases for the limited purpose of dealing with any allegations of failing to comply with the provisions of this agreement.

4. On July 3, 1985, the Personnel Commission entered an order dismissing the five cases "[b]ased on a settlement agreement entered into by the parties."

5. On January 28, 1987, the complainant filed a claim of discrimination alleging that DOA and the State Ethics Board discriminated against her on the bases of race, handicap and fair employment retaliation in reference

to discharge and conditions of employment. The claim was assigned Case No. 87-0010-PC-ER. The complainant described the details of her allegation as follows:

DOA & Executive Director, R. Roth Judd, State Ethics Board has [sic] breached the June 7, 1985 contract agreement regarding Case # 83-0076-PC-ER (EEOC Charge #s 055812206, 05583033 & 055932924). On May 23, 1985 DOA & Executive Director, State Ethics Board entered into a settlement agreement on Case #s 81-PC-ER-111 (EEOC # 55812206) & 82-PC-ER-31, 143 [sic] & 135 (EEOC # 055830333). R. Roth Judd, Ex. Dir., State Ethics Board has breached the agreement on numerous occasions since March 5, 1986 and at least as early as May, 1986 by providing extremely unfavorable employment references in response to inquiries by prospective employers, despite my written request to him dated 3/5/86.

The Secretary, State of Wisconsin Department of Administration and his agents, Patricia A. Kramer and Thomas L. Herman, and others, have breached the agreement of 5/23/86 on numerous occasions since the signing of the agreement, and at least as early as 5/86 by providing negative and non-positive references relating to me to inquiries from prospective employers.

The breach of the agreements referred to have directly resulted in loss of prospective employment, income, and benefits and have caused me mental anguish, emotional distress and a total loss of further earning capacity.

6. On February 6, 1987, respondent DOA filed a motion to dismiss 87-0010-PC-ER. On February 19, 1987, respondent Ethics Board filed its motion to dismiss the same case.

7. On March 17, 1987, complainant filed a petition to reopen cases 81-PC-ER-111, 82-PC-ER-31, 82-PC-ER-134 and 82-PC-ER-135 based on allegations that the respondents breached the settlement agreement entered into by the parties. DOA and the Ethics Board moved for dismissal of the petition for lack of subject matter jurisdiction on March 24, 1987, and April 8, 1987, respectively.

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over all of these matters with the exception of Case No. 87-0010-PC-ER.

OPINION

The complainant has made two separate efforts to utilize the Personnel Commission¹ as a forum for reviewing the allegation that respondents have breached 1985 settlement agreements. Each is treated separately, below.

Petition to Reopen

The complainant seeks to reopen five cases which were dismissed by the Commission in 1985. The complainant contends that respondents have breached the terms of the settlement agreements that served as the basis for the dismissal orders.

Respondents have properly cited the recent decision of the Commission in Janowski/Conrady v. DER, 86-0125-PC and 86-0126-PC, 10/29/86 as precedent. In Janowski/Conrady, the parties in two cases (81-PC-ER-9 and 81-PC-ER-19) had agreed to dismissal based upon a settlement that called for, inter alia, reallocation of the complainant's positions in the Department of Industry, Labor and Human Relations to a pay range 1-12 classification. The complainants' positions were reallocated to the pay range 1-12 classification but they were later reallocated back to a pay range 1-11 classification as a consequence of a personnel survey. The employes then filed appeals under §230.44(1)(b), Stats., of the reallocation decision. The Commission considered the question of its authority to enforce and consider a settlement agreement previously entered in the 1981 equal rights proceedings:

As noted above, the settlement agreement in question was entered in two Fair Employment Act (FEA) cases. Therefore, the question of the commission's enforcement authority must be considered in the context of its responsibilities under the FEA.

¹ The complainant also filed two notices of claims with the Attorney General under §893.82, Stats., alleging breach of contract. These claims were denied on September 10, 1986.

According to §111.375(2), stats., "...complaints of discrimination or unfair honesty testing against the [state] agency as an employer shall be filed with and processed by the personnel commission under §230.45(1)(b)...." The Attorney General has expressed the opinion that:

"...the Commission possesses the same powers and duties with respect to the processing of discrimination complaints involving a state agency as an employer as does the Department [of Industry, Labor and Human Relations (DILHR)] with respect to discrimination complaints involving an employer other than a state agency...." 68 OAG 403, 405-406 (1979).

DILHR has no enforcement powers under the FEA with respect to its orders; there are specific judicial enforcement actions available, and, in accordance with the foregoing opinion, these provisions apply equally to this Commission. Therefore, the enforcement of Commission orders in discrimination cases is as set forth at §111.39(4)(d), Stats:

"...The order to have the same force as other orders of the department and be enforced as provided in ch. 101. Any person aggrieved by noncompliance with the order may have the order enforced specifically by suit in equity...."

Under Ch. 101. Stats., §101.02(13)(a) provides, inter alia:

"If any employer, employe, owner or other person ...fails, neglects or refuses to obey any lawful order given or made by the department...for each such violation, failure, or refusal, such employer...shall forfeit and pay into the state treasury a sum not less than \$10 nor more than \$100 for each such offense."

Unless otherwise specifically provided by statute forfeitures are recovered in judicial proceedings. Ch. 778, Stats.

Given these explicit, specific provisions for judicial enforcement of Commission orders in FEA cases, and the absence of any statutory reference to any enforcement authority vested in the Commission, there is no basis upon which to conclude there is an implied enforcement authority. Accordingly, with respect to issue #2, the Commission must conclude it does not have authority to enforce the settlement agreement entered in Case Nos. 81-PC-ER-9 and 81-PC-ER-19.

The other issue before the Commission is whether it has the authority "...to consider the settlement agreement...in determining the correctness of the...reallocations?" Obviously, based on the foregoing discussion, the Commission lacks authority to consider the settlement agreement in determining the correctness of the reallocations if this were to involve enforcing the agreement. However, it is difficult to postulate in advance of the hearing for exactly what

purpose the settlement agreement might be offered, and in what context. Therefore, beyond reiterating that the Commission cannot "consider" the agreement for purposes of enforcement, the Commission will not further address issue #3 in advance of the hearing.

The complainant has raised several arguments opposing application of the holding in Janowski/Conrady to the facts of the present case. Her first contention is that that decision arose out of an effort to obtain specific performance of the terms of a settlement agreement in contrast to the present case where complainant

requests that the commission determine that the respondents breached the settlement agreements and order appropriate remedies to make her whole, according to the terms and intent of the agreements, and to effectuate the purposes of the WFEA.

Complainant has specified that she is not seeking specific performance of the 1985 agreements because specific performance would not make her whole. In her petition, the complainant requests the commission to grant her the following relief:

A. Order respondents to pay petitioner's past and future wages lost as a result of respondents; breaches of the SETTLEMENT AGREEMENTS as alleged above.

B. Order respondents to place petitioner in a job comparable to the best of the ones she lost as a result of respondents' breaches of the SETTLEMENT AGREEMENTS as alleged above.

C. Order respondents to compensate petitioner for her lost employment benefits which resulted from respondents breach of the SETTLEMENT AGREEMENTS as alleged above.

D. Order such other relief as will make petitioner whole.

E. Order such other relief as is just and proper under the circumstances.

The remedies available for a breach of a valid settlement agreement are described in 15A Am Jur 2d 808 as follows:

If there is a breach of a compromise agreement by one party, the other party's possible remedies may be divided into three major types: (1) enforcement of the

agreement; (2) treating the agreement as rescinded; and
(3) damages.

Based on the relief requested in her petition, the complainant is seeking a form of damages from the respondent for the alleged breach of the settlement agreement.

However, the only grant of remedial authority to the Commission under the Fair Employment Act is in §111.39(4)(c), Stats., which establishes a prerequisite that the Commission find discrimination:

If, after hearing, the examiner finds that the respondent has engaged in discrimination or unfair honesty testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay.

There has been no finding¹ in any of the five cases filed before 1984 that the respondent discriminated against the complainant. As a result, the Commission may not invoke its remedial authority. None of the other provisions in §111.39, Stats., grant the Commission the power to make an award in the instant cases.

Complainant also argues that respondent DOA should not be permitted to argue that the Commission lacks jurisdiction as to the three 1981 cases because of the language of paragraph ten of the settlement agreement covering those cases:

The parties agree that Case Nos. 81-PC-ER-31, 134 and 135 shall be dismissed for all purposes except that the State Personnel Commission shall retain jurisdiction over the above-cited cases for the limited purpose of dealing with any allegations of failing to comply with the provision of this agreement.

¹ It may be that an actual finding of discrimination is not required to the extent that the parties have, in effect, waived that condition. See s. 227.44(5), Stats. However, such a waiver has not occurred here.

However, as noted above, the Commission cannot award the relief sought by the complainant under these circumstances nor enforce its dismissal order. Regardless of whatever other authority the Commission might have under the above stipulation for retention of jurisdiction, it lacks the statutory authority to provide the relief requested by complainant, and such authority cannot be conferred by the aforesaid stipulation.

For the above reasons, the Commission concludes that it lacks the authority to take those actions sought by the complainant in her petition.

Case No. 87-0010-PC-ER

Complainant has also filed a new complaint of discrimination arising out of respondents' conduct after the 1985 settlement agreement. This complaint is described in finding of fact 5.

Provision of employment references constitutes an employment action that may be reviewed under the provisions of the Fair Employment Act. Here, the complainant has, by checking certain boxes on the face of her complaint, alleged that the manner in which those references were provided was discriminatory based upon complainant's race and handicap and in retaliation for her prior fair employment activities. The complainant has taken those steps necessary for the Commission to investigate whether there is probable cause to believe that the employment references provided by the respondents constituted discrimination. That issue, rather than whether the respondents breached the settlement agreements, will be the subject of the investigation in Case No. 87-0010-PC-ER.


ORDER

Respondents' motion to dismiss complainant's petition in Case Nos. 81-PC-ER-111, 82-PC-ER-31, 82-PC-ER-134, 82-PC-ER-135 and 83-0076-PC-ER is granted. Respondents' motion to dismiss Case No. 87-0010-PC-ER is denied.

Dated: June 11, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

KMS:jmf
RK2/2


LAURIE R. MCCALLUM, Commissioner

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