STATE OF WISCONSIN PERSONNEL COMMISSION

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JERRY D. SCHAEFFER, *
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Complainant, *
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v. *
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Adjutant General, DEPARTMENT *
OF MILITARY AFFAIRS, *
*
Respondent. *
*
Case No. 82-PC-ER-30 *
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DECISION
AND ORDER
ON PETITION
FOR REHEARING

This matter is before the Commission on complainant's petition for rehearing filed July 16, 1987. The Commission has had the benefit of each party's written arguments with respect to the petition. The petition for rehearing relates to the Commission's decision and order entered June 24, 1987, which ruled favorably on respondent's motion to dismiss which was based on the preclusive effect of a prior federal District Court adjudication in Schaeffer v. Matera, No. 85-C-857-C (W.D. Wis. 1986).

The respondent objects to the petition on the ground that the Commission's June 24, 1987, decision and order was not a final order as contemplated by §227.49(1), Stats. While the Commission agrees that said order was not "final", it is of the opinion that it has inherent implied authority to reconsider a non-final decision under certain circumstances, at least as long as it still has jurisdiction over the case. Therefore, the Commission will consider the petition on the merits.

The petition for rehearing contends, inter alia:

> As grounds for the petition, Major Schaeffer states that the Commission's Decision and Order contains material errors of fact and law. In an ironic twist of argument, complainant has now been told by the Personnel Commission, as he was by the federal

district court, that he has not prevailed because he failed to offer evidence in support of the merits of his claim while he was arguing legal issues. He asks for the opportunity to correct that injustice.

To put the matter more simply, his basic ground for asking for rehearing is that he has never had the opportunity to present his full case in any forum through no fault of his own and he would like to correct the Commissioners' mistaken conclusions in that regard. The assumptions made by the commissioners concerning the adjudication of his case in federal district court are not supported by the record or any of the parties' many, many briefs over the past two years. The federal court's decision is not res judicata because complainant did not have a "full" opportunity in federal court to litigate his complaint.

Complainant would like the opportunity to establish that, contrary to the Commissioners' Decision (p. 9), the points in his amended complaint were not considered as evidence by the federal district court. Also contrary to the Commissioners' Decision (p. 9), complainant was not "put on notice" by the federal Magistrate that his decision would be based on the merits of complainant's case, and not on the legal issues. When complainant received the Magistrate's decision it was far beyond the time for submitting affidavits. The only time that complainant has been put on timely notice that the merits of his complaint were to be considered was during the Commission investigation.

Complainant asks the Commission, further, for permission to submit "new evidence," e.g., affidavits in support of all of the allegations in complainant's federal complaint. As in the federal court, when he replied to respondent's motion to dismiss in this forum he was not arguing the merits of his case because the respondent's motion did not put the merits into issue. Complainant has been seeking a hearing on the merits for five years now. Obviously he would have submitted affidavits from all possible witnesses with his brief if he had had any inkling whatsoever that the Commission would base its decision on the "record."

In its June 24th decision, the reason for the Commission's ruling in favor of respondent was not because complainant failed to present affidavits or other evidence relating to the merits. Respondent had not moved for summary judgment, but had moved for dismissal on the ground of the preclusive effect of the federal court decision, and such evidence would not have been appropriate. While certain language on page 9 of the Commission's decision may appear to suggest otherwise, this was not the Commission's intent.

The Commission's decision included the following language at pp. 8-9:

> The complainant does not dispute the respondent's argument on pages 5 and 6 of its opening brief that the federal and state claims are based on the same factual situation; i.e., the same cause of action. Instead, he argues that the federal theory of relief was couched in terms of deprivation of constitutional rights, and that the federal claim did not rest on an alleged violation of the federal Rehabilitation Act. Complainant further argues that the facts which the magistrate found and on which he based his recommendation do not determine the truth or falsity of complainant's allegations in the state proceeding concerning discrimination on the basis of handicap. Complainant states in his brief as follows:
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> > The Magistrate's findings of fact may or may not support a conclusion based on the Mindes analysis, that complainant has no constitutional claim; whether complainant prevails on appeal remains to be seen. However, a review of the specifics of the Magistrate's finding clearly shows that they do not support a conclusion that complainant cannot meet a Burdine burden of proof in regards to his Wisconsin Fair Employment Act claim.
>
> In conclusion, the complainant argues that because the theory and analysis of a discrimination case before the Personnel Commission where the Title VII burden of proof sequence is applicable is different than the Mindes test used by the Magistrate, he is entitled to a hearing before the Commission on the merits of his claim.
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> The Commission rejects complainant's contentions. In the first place, complainant ignores the point made above that it is the facts to which the doctrine of res judicata applies, not the theories of relief. Secondly, although the complainant may have different theories of relief in the federal and state proceedings, the record is clear that the facts offered to prove both claims are basically the same. The complainant at page 4 of his brief discusses the possibility he could at a full hearing on the merits of his complaint establish some additional facts to prove his case. However, complainant offers no new evidence to support his claim. The allegedly new points covered in his brief at page 4 were previously included in his amended complaint in the federal proceedings and in the discrimination charge filed with the Personnel Commission. They also were included in the decisions rendered in said forums to date. Complainant argues that he was not put on notice of the need to litigate the facts and did not have a full and fair opportunity to litigate his case before the federal court. However, the record indicates otherwise. In fact, as noted above, the court noted: "It is not enough to simply suggest that a witness might say something at trial that would tend to prove complainant's claim. Complainant must come forward with genuine facts showing there is a genuine issue for trial. Complainant has had ample opportunity to conduct discovery to determine whether any evidence exists to

> support his claim of bias. He does not suggest any. Therefore, I can assume that at trial, the jury could find the same facts as the Magistrate did." The complainant was put on notice by the Magistrate that he did not have enough facts to prove bias and retaliation in his termination. He simply has not pointed out any new evidence to support his claim to the court or to the Commission.

The Commission's references in the foregoing to complainant's failure to point to "new evidence" related to complainant's contention that the federal proceeding did not involve the same cause of action as the state proceeding, and that he did not have a full opportunity to present his claim in the federal proceeding. The Commission was noting that while complainant in effect argued that the state and federal claims have different factual underpinnings, he had not specifically pointed out how this was the case. The Commission did not mean to suggest that it was incumbent on complainant to have come forward with affidavits or other evidence on the merits in opposition to respondent's motion to dismiss.

Therefore, while the Commission has considered complainant's petition for rehearing, it concludes that neither rehearing nor reconsideration of its June 24, 1987, decision is warranted at this time, and enters the following

ORDER

Complainant's petition for rehearing filed July 16 1987, is denied.

Dated: 8/7, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
JMF04/2

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