

EUGENE KRUEGER,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES

Respondent.

Case No. 89-0070-PC

RULING ON
MOTION
TO
DISMISS

This matter is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction filed November 2, 1989. Both parties have filed briefs. The underlying facts necessary for decision of the motion do not appear to be in dispute and are set forth as follows:

FINDINGS OF FACT

1. On February 5, 1987, appellant filed with this Commission an appeal of his discharge from employment by respondent. This appeal was assigned Case No. 87-0017-PC.

2. The parties to the foregoing appeal entered into a "Settlement Agreement and Release" which contained the following operative elements:

THEREFORE, it is agreed as follows:

1.) The appellant shall submit a letter of resignation from his position of Officer 4, Farm Manager, Oneida and Winnebago State Farms. The resignation shall be effective February 4, 1987.

2.) The Respondent shall accept the resignation letter under paragraph one.

3.) The Respondent shall remove from the Appellant's personnel file the February 2, 1987 letter terminating his employment effective February 4, 1987.

4.) The Appellant shall not apply for any position or otherwise seek reemployment with the Department of Health and Social Services (DHSS) for a period of three years beginning with

the date that this Settlement Agreement and Release is fully signed.

5.) If the Appellant applies for a position or otherwise seeks reemployment with the Department of Health and Social Services after the completion of the three year period described under paragraph 4, the Respondent will not consider the Appellant's employment record as Farm Manager at Oneida and Winnebago State Farms in assessing his qualifications and suitability for employment.

6) The Respondent shall return to the Appellant the auger and fertilizer pump which the Appellant loaned to Oneida State Farm, any personal effects including clothing which he left on Oneida State Farm at the time of his termination and a bellhousing (black) which belonged to the Appellant but was also left on Oneida State Farm at the time of his termination.

7.) In consideration for the actions of the Respondent described in paragraphs two, three, five and six, the Appellant shall withdraw and cause to be dismissed any appeal, complaint or action or right of action against the Respondent which arises out of his employment in the position of Farm Manager of Oneida and Winnebago State Farms. Such dismissals shall be with prejudice.

8.) In consideration for the actions of the parties described in paragraphs one through seven the parties grant to each other, their heirs, and assigns, including the Respondent's officers, employes and agents, and their successors and assigns, a mutual release and discharge from any and all claims, demands, damages, actions, or causes of action, which they have asserted, which they may have asserted, or which they could have asserted which relate in any manner to the Appellant's employment with the Department of Health and Social Services, whether or not based on state or federal law, and whether or not said claim, demand, damages, action, or cause of action now exists or may hereafter accrue, is known or unknown, or is anticipated or unanticipated. Said release and discharge extend to and include, without limitation because of enumeration, any claims, demands, damages, action or causes of action based on the Wisconsin Fair Employment Act, . 111.31-111-395, Wis. Stats.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 983; or other manner in title 42 of the United States Code; and also including any entitlement to attorney's fees.

3. The foregoing document was signed by the parties and their attorneys and was filed with the Commission on November 5, 1987.

4. The Commission entered the following order on November 18, 1987:

"Pursuant to a settlement agreement entered into by the parties, this matter is dismissed with prejudice."

5. In a letter addressed to the Commission and respondent dated January 30, 1989, and filed with this Commission February 1, 1989, appellant through counsel stated as follows:

RE: Krueger v. DHSS
Case No. 87-0017-PC

To Whom It May Concern:"

Please be advised that this office has been retained by Mr. and Mrs. Eugene Krueger with respect to the above-captioned matter.

In October, 1987, Eugene Krueger and your department entered into a Settlement Agreement and Release concerning this termination from employment as an officer at the Oneida and Winnebago State Farms. Under paragraph 6 of that same agreement, the Department of Health and Social Services was obligated to return to Mr. Krueger an auger and fertilizer pump and any personal effects that he left on the Oneida State Farm. To date, Mr. Krueger has received none of these items. Specifically, Mr. Krueger is missing four (4) uniforms including Levis and shirts, a liquid fertilizer pump with nodules and fittings, a pair of work boots, a pair of rubbers, an auger for a John Deere Combine, and a bellhousing unit for a 4-speed truck transmission.

I must demand your immediate attention to this breach of the agreement. If I do not hear from you within seven (7) days from your receipt of this letter, I intend to initiate legal action for damages. Thank you for your attention in this matter.

6. By letter to the Commission dated June 22, 1989, and filed June 23, 1989, appellant through counsel stated (as material) as follows:

RE: Krueger v. DHSS
Case No. 87-0017-PC

To Whom It May Concern:

Please be advised that this office has been retained by and appears on behalf of Eugene Krueger in regard to the above-entitled matter. Please be further advised that this letter serves as Mr. Krueger's appeal to a decision made the Department of Health and Social Services on or about February 2, 1987.

Mr. Krueger bases his appeal on the grounds that the decision made by the Department was not based on just cause.

By way of brief review, a predisciplinary hearing was held in regard to actions allegedly taken by Eugene Krueger while in the employment of the State of Wisconsin on January 28, 1987. A letter of termination was issued to Mr. Krueger on or about February 2, 1987. On March 4, 1987 by letter from his attorney at that time, James Pressentin, Mr. Krueger appealed the decision of the Department of Health and Social Services. A pre-hearing conference was held on March 11, 1987 and a hearing scheduled initially for June 15 through the 17 of 1987. That hearing was later rescheduled for July 15 through July 17, 1987. Ultimately, the hearing on the appeal was never held inasmuch as the parties entered into a settlement agreement.

It is Mr. Krueger's position that certain terms of that settlement agreement binding the State of Wisconsin have not been met and therefore he submits this letter requesting an appeal of the February 2, 1987 termination.

This appeal was assigned Case No. 89-0070-PC.

DISCUSSION

Respondent contends that the Commission has no statutory authority to hear an appeal of an alleged breach of a settlement agreement, that the appeal was filed more than 30 days after any alleged breach and hence was untimely under § 230.44(3), stats., that the Commission has no statutory authority to enforce its own orders, and that the Commission lacks statutory authority to reopen the original appeal proceeding.

In his brief in response, appellant first asserts that he is not appealing the alleged breach of the settlement agreement but rather is appealing the February 1987 discharge. He then argues that the appeal was timely filed.

There is no dispute that the original appeal in this matter was filed in a timely fashion as conceded in the respondent's brief. The question in this instance is whether the appeal filed on January 22-23, 1989 constitutes a timely appeal.

While it is true that the appellant wrote to the Commission in January of 1989, it was the intention of that correspondence to afford the Commission [sic] an opportunity to remedy its breach. The correspondence and telephone communications between that date and June 22, 1989 quite clearly outline a series of events designed to afford the respondent every opportunity to fulfill the requirements of the settlement agreement signed in November of 1987. What is equally clear is that the appellant [SIC] had no intention, or at least no ability, to fulfill those obligations

inasmuch as the materials which the appellant sought pursuant to his rights under the settlement agreement had been disposed of. It wasn't until approximately June 22, 1989 that appellant first became aware that the items which he was entitled to under the settlement agreement were no longer available to him. His appeal was made in a timely fashion and in fact, within twenty-four (24) hours of learning of said circumstances.

The respondent ought to be estopped from alleging the appeal is untimely. In light of the actions it took, first of all in failing to return the various items and secondly, in failing to disclose that it had in fact discarded those items at some point and time, it misled the appellant and concealed from him the information necessary to file a "timely" appeal.

This argument constitutes a non sequitur. If appellant is appealing, as he has stated, the termination which occurred in February, 1987, his appeal has to be timely with respect to that transaction, not with respect to the time he allegedly became aware that respondent was unwilling or unable to return some of the items set forth in the settlement agreement. The fact that appellant's original appeal, filed in 1987, was timely, is immaterial because that proceeding was dismissed with prejudice in 1987.

Appellant next argues that the Commission has the authority to reopen the original appeal:

Section 230.44(4)(c), Wis. Stats., provides:

"After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of the appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the commission's decision." (emphasis added)

Respondent cites this section as support for the proposition that the Personnel Commission lacks the authority to enforce its own orders. Respondent fails to recognize, however, that the language clearly outlines orders which are entered after conducting a hearing on an appeal. An enforceable order is one which is issued after the Commission rejects or modifies the action.

In the instant case, there was no hearing. The Commission neither rejected nor modified any action. The Commission never acted. The hearing was waived and the appeal dismissed based upon a settlement agreement. The statute does not deal with the enforcement of a dismissal. This statute is designed to enforce an order of the Commission directing that an action be rejected or modified.

There is nothing that prevents an agency from reopening and reconsidering its orders on a particular problem. Union State Bank v. Galecki, 142 Wis. 2d. 118, 417 N.W. 2d. 60 (1987). What the appellant proposes the Commission do in this case is to withdraw its order for dismissal and permit a hearing de novo on appeal. In light of the actions of the respondent in failing to live up to the agreement entered into in November of 1987 (which in turn was the basis for the dismissal), it seems equitable and just that such an action be taken by the Commission.

Laying to one side for the moment the question of the significance of the distinction between an order entered after a hearing and one entered pursuant to stipulation, and assuming arguendo a timely appeal, there remains the question of whether there is any authority for the Commission to reopen the original appeal some two years after having dismissed it with prejudice. Obviously, the vehicle of a petition for rehearing is unavailable because that requires that a petition be filed within 20 days after service of the final order, §227.49(1), stats. The Commission is not aware of any other source of authority for reopening a closed appeal, and appellant has cited none, other than as follows:

"There is nothing that prevents an agency from reopening and reconsidering its orders on a particular problem. Union State Bank v. Galecki, 142 Wis. 2d 118, 417 N.W. 2d 60 (1987)..."


There are two difficulties with this argument. First, an administrative agency has to have authority for its actions; it is not simply a question of being able to do anything that it is not explicitly prohibited from doing. See American Brass Co. v. Wisconsin State Bd of Health, 245 Wis. 440, 15 N.W. 2d 27 (1944). Second, Union State Bank v. Galecki, supra, is inapposite to appellant's contention. In that case, the Wisconsin Banking Review Board acted in 1980 to deny an application by the M & I People's Bank of Coloma to open a branch bank in the Town of Dakota. This decision was based on economic grounds. In

1985, following substantive statutory and rule changes, the Board granted an application by M&I to open a branch bank at a location near, but not identical to, the original site. The Court of Appeals noted that each licensing application is a new and separate proceeding in rejecting an argument that the Board was somehow bound by its 1980 decision. What appellant in the instant case is attempting is not akin to another licensing application; rather, he is trying to reopen a contested case class three proceeding that was resolved and dismissed with prejudice two years ago.


ORDER

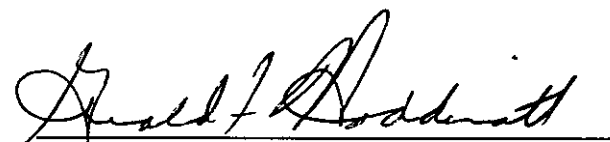
In conclusion, inasmuch as the Commission lacks the authority to reopen the original appeal or to entertain the current appeal, this matter must be and it hereby is dismissed.

Dated: January 10, 1990 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

AJT:gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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