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JAMES MARTIN, ROGER SWINGEN,  
 JAMES GUNNELSON, JOHN WOLLIN,  
 SAMUEL CLEMONS, and JERROLD  
 SCHULTZ,

Complainants,

v.

Secretary, DEPARTMENT OF  
 CORRECTIONS,

Respondent.

Case Nos. 90-0080, 0083, 0084,  
 0088, 0104, 0116-PC-ER

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RULING  
 ON  
 REQUEST  
 FOR  
 INVESTIGATION

This matter comes before the Commission on complainants' request that these cases be investigated, to which respondent has objected. By way of background, these cases involve complaints of discrimination on the basis of sex and retaliation under the FEA (Fair Employment Act), OSHA (Occupational Safety and Health Act), and the whistleblower law. Following a conference which included counsel for the parties, correspondence from Commission staff dated October 18, 1990, and January 28, 1991, reflect that these matters were scheduled for hearing May 28-30, 1991, pursuant to a stipulation between the parties for a waiver of investigation. Subsequently, the parties agreed to a postponement of this hearing, and it was rescheduled for January 28-30, 1992, and then to February 25-27, 1992. The parties subsequently again agreed to postpone the hearing.

Respondent's objections to the complainant's request for investigation can be summarized as follows:

1. The parties through counsel have stipulated to the waiver; the Commission has no authority to vacate the waiver.
2. Complainants have provided no reason for vacating the waiver
3. Further delay would not serve anyone's interests.

Complainants contend that there was no statutory authority for the waiver of investigation and the Commission is required by statute to investigate these complaints.

With respect to respondent's contention that the Commission lacks the authority to release complainants from their stipulation regarding waiver, §§227.44(4),(5), and (6), Wis. Stats., provide authority to give effect to stipulations, and implicitly, the authority to permit their rescission, see Novak v. DER, 83-0104-PC (1/29/84).

The Commission does not need to address the question of whether the statutory provisions regarding investigations cannot be waived, as complainants contend, see Faust v. Ladysmith-Hawkins Schools System, 88 Wis. 2d 525, 277 N.W. 2d 303 (1979). This potential issue was mooted by a statutory change, effective August 15, 1991. 1991 Wisconsin Act 39, §3049, created §230.45(1m), which gives the Commission authority to waive the investigation and probable cause determination when requested by the complainant. To the extent that the stipulation between the parties arguably was without statutory authorization, the effectuation of this statutory change provided authority for the waiver, see Boggs v. Morden, 117 Wis. 2d 773, 775, 345 N.W. 2d 490 (1984) ("in the absence of clear legislative intent to the contrary, procedural and remedial statutes will be given retroactive application provided vested rights are not disturbed.")

Turning to the more substantive issue, the considerations involved in deciding whether to relieve a party from a stipulation generally are the same in administrative as in judicial proceedings, 73A CJS Public Administrative Bodies and Procedure §139, p 91. In Novak v. DER, 83-0104-PC (2/29/84), the Commission cited Schmidt v. Schmidt, 40 Wis. 2d 649, 654, 162 N.W. 2d 618 (1968):

"The discretion of the trial court to relieve parties from stipulations when improvident or induced by fraud, misunderstanding or mistake, or rendered inequitable by the development of a new situation, is a legal discretion to be exercised in the promotion of justice and equity, and there must be a plain case of fraud, misunderstanding or mistake to justify relief."

Complainants have made neither a showing nor an assertion of "fraud, misunderstanding or mistake." Complainants' request is predicated on the assertion that: "[a]fter further reflection and review, it is the position of the appellants/charging parties that these cases be processed by the Commission as per its standard and usual procedures. Where appropriate, for example, they should be investigated ...." Letter from complainants' counsel dated March 12, 1992. In the absence of any asserted rationale besides a change of

mind, and given that complainants through counsel have stipulated to a waiver of investigation, and a hearing on the merits has been scheduled and rescheduled in reliance on that waiver, the Commission declines to permit rescission of that stipulation.

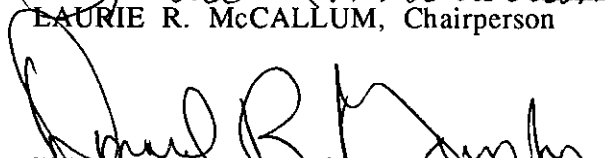
ORDER

Complainants' request for an investigation, construed as a request for rescission of the stipulation between the parties for waiver of investigation and a hearing on the merits, is denied.

Dated: October 16, 1992      STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner