

TERRY JORDAN
Complainant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES,**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 96-0078-PC-ER

On November 27, 1996, respondent filed a motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim for relief. The parties were given an opportunity to file written arguments relating to the motion and the schedule for filing such arguments was completed on January 15, 1997. The information upon which this ruling is based was supplied by the parties and appears to be undisputed.

On February 5, 1996, the parties entered into a settlement agreement. Pursuant to the terms of this agreement, the Commission dismissed, on February 14, 1996, three charges complainant then had before the Commission, i.e., Case Nos. 93-0041-PC-ER, 94-0123-PC-ER, and 94-0129-PC-ER. This agreement provided as follows, in pertinent part:

FOR AND IN CONSIDERATION of the mutual covenants hereinafter set forth, the Department and Jordan agree as follows:

1. a. The Department will transfer Jordan to the Northern Region Headquarters in Spooner, Wisconsin to the permanent position of a Parks and Recreation Sepcialist-Senior (Management), no later than February 18, 1996. . . .

b. The Department will not take any further disciplinary action against Jordan by virtue of his actions and behavior while he was an

employee in the Department's Western District. All prior discipline contained in Jordan's personnel file shall be removed. . . .

2. Jordan shall be entitled to a moving stipend not to exceed \$600.00

3. As a material inducement to the Department to enter this Settlement Agreement and General Release, Jordan hereby releases, acquits, and forever discharges the State of Wisconsin, the Department of Natural Resources, their employees, managers, supervisors, attorneys and representatives from any claims, demands, liabilities, wages, benefits, awards, suits, damages, rights, losses, payments, attorneys fees, costs, and causes of action arising directly or indirectly out of (1) the facts and allegations contained in his appeals and complaints including amendments thereto filed with the State Personnel Commission and cross-filed with the Equal Employment Opportunity Commission, Case Nos. 93-0041-PC-ER; 94-0123-PC-ER; and 94-0129-PC-ER; (2) facts and allegations contained in his appeals and grievances filed with and against the Employer pursuant to Manual Code 9108.1; and (3) all employment decisions rendered by the Department affecting Jordan. It is the expressed intent of the Department and Jordan to resolve all known and unknown disputes, complaints, claims, appeals, controversies, causes of action and grievances between them.

[4.] b. Jordan agrees not to file any complaint, cause of action, claim, petition, grievance, demand, appeal or request against the State of Wisconsin, Department of Natural Resources, their agents, employees, supervisors, managers, officers, attorneys or representatives, collectively or individually, arising directly or indirectly out of (1) the facts and allegations contained in his appeals and complaints including amendments thereto filed with the State Personnel Commission and cross-filed with the Equal Employment Opportunity commission, Case Nos. 93-0041-PC-ER; 94-0123-PC-ER; and 94-0129-PC-ER; (2) facts and allegations contained in his appeals and grievances filed with and against the Employer, its employees, officers, managers, representatives, attorneys, and supervisors pursuant to Manual code 9108.1; and (3) and all employment decisions made by the Department affecting Jordan before or with any federal, state or local court, commission, board, agency, committee, forum or arbitrator.

6. Jordan affirms that the only consideration for his signing this Settlement Agreement and General Release are the terms stated above; that no other promise or agreement of any kind has been made to or with him by an person or entity whomsoever to cause him to execute this Settlement Agreement and General Release and that he fully understands the meaning and intent of this Settlement Agreement and General Release including but not limited to its final and binding effect.

TERRY JORDAN FURTHER STATES THAT HE HAS CAREFULLY READ THE WITHIN AND FOREGOING SETTLEMENT AGREEMENT AND GENERAL RELEASE AND KNOWS AND UNDERSTANDS THE CONTENTS THEREOF AND THAT HE EXECUTES SAME AS HIS OWN FREE ACT AND DEED.

On July 3, 1996, complainant filed a charge with the Commission alleging discrimination based on race and sex and retaliation based on whistleblower activities in regard to respondent's alleged failure to fulfill its obligations under the terms of the afore-mentioned settlement agreement. In particular, complainant contends in this charge that he should be paid \$390 in moving "expenses" and a Relocation Incentive Award in addition to the \$600 moving "stipend" he was paid; and that his position descriptions and performance evaluations should be removed from his personnel file in addition to the disciplinary records which have been removed. As a remedy, complainant is requesting specific performance of the agreement as he has interpreted it, or, in the alternative, nullification of the agreement due to his allegation that his consent was obtained through duress.

Resolution of this motion requires determining whether the complainant is requesting as his remedy here the enforcement of the terms of the settlement agreement, or whether he is requesting a remedy not dependent upon the terms of the settlement agreement but instead dependent upon the scope of remedies cognizable under the Fair Employment Act. *See, e.g., Rogers v. DOA and Ethics Board, 87-0010-PC-ER, 6/11/87.* It is clear, based on the language of the complainant's charge, that his focus in this complaint is on the terms of, and the enforcement of, the

settlement agreement. It is also clear, based on Commission precedent, that the Commission does not have the authority to enforce the terms of settlement agreements. *Janowski/Conrady v. DER*, 86-0125, 0126-PC, 10/19/86. Although the *Conrady* and *Janowski* cases were filed as civil service appeals, the issue in those cases relevant here involved the enforcement of an agreement entered into in settlement of two Fair Employment Act (FEA) cases, and the Commission's discussion of this issue included the following:

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.

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.

Although the statutory provisions cited in *Janowski/Conrady* have been renumbered since its decision, the language of these provisions relevant here has not changed and the Commission's rationale in the *Janowski/Conrady* decision is still sound. In addition, it should be noted that complainant not only alleged both in this action and the earlier actions discrimination under the FEA but also retaliation based on whistleblower activities. The provisions in the whistleblower law governing enforcement of Commission orders parallels that of the FEA in providing for judicial enforcement, not enforcement by the Commission. §230.85(5), Stats. As a result, it is concluded here that the Commission does not have the authority to enforce the subject settlement agreement.

Complainant also appears to be requesting that the earlier cases which were dismissed pursuant to the settlement agreement be reopened. In *Haule v. UW*, 85-0166-PC-ER, 8/26/87, the Commission stated as follows, in pertinent part:

Once the Commission issues a final order dismissing a case, the Commission only has jurisdiction to reopen the case on a petition for rehearing if it is filed with the Commission within 20 days of the order (see §227.49, Stats.) In the instant case, regardless of the merits of complainant's arguments in support of his request that his original complaint be reinstated, more than 20 days elapsed between the Commission's February 19, 1986, order of dismissal and complainant's April 15, 1987, request for reinstatement of his original charge of discrimination, and the Commission, therefore, does not have the authority to grant complainant's request.

Here, the earlier cases were dismissed on February 14, 1996, and the present action not filed until July 3, 1996, more than 20 days hence. As a result, the Commission does not have the authority to reopen those earlier cases.

Complainant also requests nullification of the settlement agreement based on an allegation of duress, but cites no basis for the Commission's authority to order such nullification. It would have to be assumed that the rationale supporting the conclusion that the Commission has no enforcement authority would apply as well to support the conclusion that the Commission has no nullification authority.

ORDER


Respondent's motion is granted and this complaint is dismissed.

Dated: January 30, 1997

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM
960078Cdec1.doc


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Terry Jordan
16733 S. Smith Bridge Road
Minong, WI 54859

George E. Meyer
Secretary, DNR
101 South Webster Street
PO Box 7921
Madison, WI 53707-7921

NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95