STATE OF WISCONSIN PERSONNEL COMMISSION

PAUL GEEN,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 97-0100-PC-ER

DECISION

This case is before the Commission to determine whether the case should be dismissed based on a settlement agreement reached by the parties. The parties presented their views on this issue during a tape-recorded proceeding on January 11, 1999 (as more fully explained in the Findings of Fact below). The facts recited below are undisputed by the parties, unless specifically noted to the contrary.

FINDINGS OF FACT

1. Mr. Geen filed this discrimination complaint on June 27, 1997. A summary of the basic facts underpinning the complaint is recited here. Mr. Geen began employment with respondent as a Resident Care Technician 2 (RCT-2) at Mendota Mental Health Institute (MMHI) on May 2, 1993. On July 24, 1994, he transferred laterally to a Security Officer 3 position at MMHI. On June 25, 1995, he transferred laterally to a Psychiatric Care Technician 1 (PCT-1) position at MMHI, a protective occupation under §§40.02(48) & 40.65, Stats. Respondent requires individuals to complete a physical fitness test before achieving permanent status in a PCT-1 position, including a 1.5-mile run to ensure cardiovascular fitness for the job. Complainant requested that respondent test his cardiovascular fitness in some way other than a run due to a claimed disability with his right foot. Respondent granted this request-allowing complainant to demonstrate his cardiovascular fitness using a Rockport Fitness Walking Test, which he was unable to pass despite repeated attempts. Respondent then

removed complainant from the PCT-1 position and reinstated him to a position in his prior classification (RCT-2).

2. On August 11, 1998, an Initial Determination was issued which held that there was probable cause to believe respondent failed to accommodate complainant's claimed disability. The basis for this finding was that the Rockport Fitness Walking Test was to be administered on a level surface whereas respondent administered the test the second time on a surface that was not flat.

3. The parties agreed to the following statement of the hearing issue (see Conference Report dated October 23, 1998):

> Whether respondent failed to reasonably accommodate any disability when complainant was administered a physical fitness test for a Psychiatric Care Technician position in 1997.

Respondent disputed that complainant had a disability covered under the Fair Employment Act (FEA). Respondent further disputed that the problem complainant had with his right heel was the cause of his failure to pass the Rockport Fitness Walking Test. Respondent instead contends that complainant's weight (which is part of a mathematical formula determining the success or failure of the person taking the test) was the reason he did not pass.

4. A hearing on the merits was scheduled for January 11-12, 1999. On January 8, 1999 (a Friday), complainant telephoned respondent's attorney and said he would be willing to settle the case under specific terms. On the same day (January 8th), respondent's attorney received authority to settle under conditions agreed to by complainant. In the late afternoon on the same date, the parties telephoned the hearing examiner but she was away from work for a medical appointment. The parties then (still on January 8th) left a message on the hearing examiner's home answering machine saying the case was settled and the parties would appear the following Monday (January 11th) to put the terms of the agreement on the record.

5. The parties appeared for hearing on January 11, 1999, at which time complainant said he changed his mind about the settlement and wished to proceed with a hearing on the merits. This was the first time respondent was aware that complainant had changed his mind. The hearing examiner went on the record. Respondent's counsel recited

the terms of the settlement agreement reached orally on January 8, 1999 (see ¶7 below). Both parties understood and accepted the terms of the agreement on January 8, 1999.

6. The basic reason why complainant changed his mind was he thought more about his case over the weekend and concluded he had a strong case. He also felt he "had nothing to lose" by going forward with a hearing on the merits because as PCT-1 vacancies occurred he could apply for them and attempt to pass the physical requirements again. His reasoning presumed that for future vacancies respondent again would grant another accommodation request to use the Rockport Fitness Walking Test in lieu of a running test. Respondent, however, indicated that an alternative to the running test might not be granted for future vacancies.

7. The terms of the settlement agreement reached on January 8, 1999 are recited in this paragraph.

> Respondent agreed to allow complainant 6 months from the signature date of this Commission decision to satisfactorily complete the physical requirements of the PCT-1 position, which includes sit-ups, push-ups and an aerobic test. The aerobic test usually is a 1.5 mile run, but respondent will allow complainant to attempt to qualify by using the Rockport Fitness Test. Respondent agrees to allow complainant two chances to complete the Rockport Fitness Test on a level (flat), outside track.
>
> If complainant successfully completes the physical requirements of the PCT-1 position within the time frame specified above, respondent agrees to reinstate complainant into the next available PCT-1 position. Respondent's policy requires an incumbent of a PCT-1 position to perform successfully for 12 months before reclassifying the position to a PCT-2. Respondent will give complainant credit for the time he already has spent as a PCT-1 (almost a year already spent as a PCT-1) when calculating the 12 month period for reclassification to a PCT-2. Respondent agrees to provide complainant with any salary increases to which he may be entitled upon reinstatement as a PCT-1 and upon reclassification to a PCT-2.
>
> If complainant does not successfully complete the physical requirements of the PCT position within the time-frame specified above, respondent will not place complainant into the next available PCT-1 position and complainant agrees not to file a new discrimination complaint regarding the additional testing opportunity given as part of this settlement.

In exchange for the above-noted settlement terms complainant agreed to withdraw his present discrimination case.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to §230.45(1)(b), Stats.

2. There is insufficient basis to overturn the settlement agreement reached on January 8, 1999.

OPINION

It is undisputed that the parties reached a settlement agreement late Friday on January 8, 1999, the terms of which were fully understood and agreed to by both parties. The question is whether complainant may change his mind and (at the last minute) attempt to revive a hearing on the merits. The Commission answers this question in the negative.

The law favors the resolution of disputes through settlement rather than through litigation (15A Am Jur. 2d *Compromise and Settlement* §5). Litigation under the Fair Employment Act (FEA) is no exception. (See, for example, §111.39(4)(b), Stats., which gives the Commission the power to attempt to eliminate discriminatory practices through "conference, conciliation or persuasion.") Unless settlements are honored, parties would have no incentive to attempt to settle cases and they would be unable to rely upon any settlement agreement reached.

A settlement agreement is a contract and (among other things) requires a definitive offer and acceptance by the parties. Once the parties settle a disputed claim, neither party will be permitted to repudiate it in the absence of any element of fraud or bad faith. (15A Am Jur. 2d *Compromise and Settlement* §7) This is not a new concept. The Commission previously has rejected a party's attempt to repudiate a settlement agreement. See, *Garner v. SPD*, 88-0015-PC & 88-0183-PC-ER, 8/11/93, citing *Krueger v.Herman Mutual Insurance Co.*, 30 Wis. 2d 31,38, 193 NW 2d 592 (1966) and *Carey v. Dairyland Mutual Insurance Co.*, 41 Wis. 2d 107, 163 NW 2d 200 (1968).

The settlement reached by the parties on January 8, 1999, appears to be a reasonable attempt to resolve the alleged discriminatory practice and does not appear contrary to the

policies underlying the FEA (as noted in §111.31, Stats.). Complainant did not allege that the agreement was procured by fraud or by bad faith. In fact, it was complainant who approached respondent and suggested the terms of the agreement. There was a "meeting of the minds" as to all terms of the settlement agreement. Complainant's attempt to change his mind at the last minute due to his reassessment of the strength of his case is insufficient reason to set aside the settlement agreement.

ORDER

This case is dismissed based on the settlement agreement reached by the parties as recited in this decision.

Dated: January 13, 1999.

STATE PERSONNEL COMMISSION

Laurie R. McCallum/jmr
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers
JUDY M. ROGERS, Commissioner

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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.)

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