STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD DEMOYA, Appellant,

v.

Secretary, DEPARTMENT OF VETERANS AFFAIRS, Respondent.

Case 7
No. 66211
PA(grp)-5

Decision No. 31873

Appearances:

Thomas E. Hayes, Attorney, Suite 3032, 161 West Wisconsin Avenue, Milwaukee, Wisconsin 53203-2602, appearing on behalf of Richard DeMoya.

John Rosinski, Chief Legal Counsel, P. O. Box 7843, Madison, Wisconsin 53707-7843, appearing on behalf of the Department of Veterans Affairs.

ORDER GRANTING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on the Department of Veterans Affairs' motion to dismiss the appeal for lack of subject matter jurisdiction and on Appellant's motion for preliminary injunction. Respondent has also raised a timeliness objection. The final date for submitting written arguments was October 6, 2006. In order to readily differentiate this matter from other actions that have been filed by Mr. deMoya with the Commission, we will refer to the present case as deMoya IV.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Appellant has worked as a career executive employee of the Department of Veterans Affairs (DVA). By letter dated September 30, 2005, he submitted his resignation, to be effective June 1, 2006.

2. Appellant subsequently filed two appeals of various personnel actions to the Commission. He filed No. 65270 (deMoya I) on October 28, 2005 and No. 65324 (deMoya II) on November 3, 2005. In a ruling issued on March 7, 2006, the Commission

dismissed deMoya II for lack of subject matter jurisdiction. The same ruling also dismissed one of the Appellant's claims in deMoya I for lack of jurisdiction but Appellant was allowed to proceed with claims "that he was constructively discharged and that his September 26, 2005 [career executive] reassignment was an unreasonable and improper exercise of discretion."

3. On March 24, 2006, the Appellant filed a third appeal (deMoya III), No. 65782, in which he alleged that DVA had improperly refused to consider his request to transfer to another agency. Appellant wrote that the appeal satisfied the 30-day filing period for a final step non-contractual grievance. He never submitted a filing fee for deMoya III.

4. In April of 2006, the parties entered into a settlement agreement that included the following language:

> 12. The Appellant's resignation date from his employment with the Respondent will be August 25, 2006. The Appellant will be permitted to extend state service until November 1, 2006 through the use of any accumulated balances in his vacation, personal holiday, and termination/sabbatical leave accounts. . . .
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> 17. The parties recognize that this agreement is a public record and is subject to the state public records law of the State of Wisconsin and that therefore the Respondent will respond to any requests for production of this document as required by that law. However, both parties agree that they will not initiate or otherwise respond to any contacts with members of the media, public or other employees of the Respondent or otherwise cause this agreement to be publicized.

Pursuant to the terms of the agreement, Appellant withdrew his remaining claims before the Commission and they were dismissed on May 15, 2006.

5. Appellant filed a first step grievance with DVA on July 28, 2006. The document described the nature of the grievance as follows:

> Based upon information provided to me by Mr. Russ [illegible] on June 29, 2006, Mr. John Scocos [DVA Secretary] and Mr. Ken Wendt (Agent of DVA) did violate the terms of the settlement agreement between Mr. Richard deMoya and DVA, to wit, paragraph 17 of that agreement.

The grievance sought "renegotiation of paragraphs 12-14 of the settlement agreement."

6. Respondent's Deputy Secretary, William Kloster responded on August 4, 2006:

> I received your grievance on 1 August and immediately forwarded it to the Office of Legal Counsel. They have informed me that this is not a matter to be resolved through the grievance process. Your attorney has been notified of the grievance and requested to provide further information for resolution through your attorney and the WDVA Office of Legal Counsel as agreed to by those parties.
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> Your grievance is denied through this process and I will take no further action. Resolution of your complaint regarding the implementation of the settlement agreement will be addressed by Legal Counsel and your attorney.

7. Appellant filed this appeal (deMoya IV) on August 15, 2006. It read, in part:

> Pursuant to Chapter 230.44, Wisconsin State Statutes; Chapter ER 45, Wisconsin Administrative Code; and Section 430.030 of the Wisconsin Human Resources Handbook, the purpose of this letter is to appeal the action/non-action by the Wisconsin Department of Veterans Affairs (WDVA) which abused discretion by failing to follow agency and state grievance procedures. . . .
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> Due to the alleged breach of the Settlement Agreement by Secretary Scocos, I request relief by withdrawing my resignation. Because of the short period of time in which to adjudicate this appeal, I request that the WERC take the appropriate actions to authorize a deferral of my resignation date until such time that the appeal process may be reconciled.

While Appellant's letter of appeal reached the Commission on August 15, Appellant did not submit the requisite filing fee until August 30, 2006.

8. Appellant's employment is scheduled to cease on November 1, 2006.

9. Appellant filed additional appeals with the Commission on September 20 (deMoya V), October 2 (deMoya VI) and October 4 (deMoya VII). These three cases are being held in abeyance pending resolution of the motions in deMoya IV.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Appellant has the burden to establish that the Commission has subject matter jurisdiction in this matter.

2. He has failed to sustain his burden.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER[1]

This matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

[1] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Veterans Affairs (deMoya IV)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

Appellant's fundamental contention in this matter (deMoya IV) is that Respondent violated the terms of agreement that the parties reached in April 2006, settling two cases (deMoya I and deMoya III) that were before the Commission at that time. Appellant also contends that Respondent failed to follow agency and state grievance procedures when responding to his August 4 grievance. Respondent has moved to dismiss the matter for lack of subject matter jurisdiction and as untimely filed, while Appellant seeks a preliminary injunction "to stay further implementation of the April, 2006 settlement agreement."

A. Subject matter jurisdiction and timeliness objection

At the time the parties entered into their settlement agreement in April 2006, the Appellant had already filed three separate appeals with the Commission. One of those appeals (deMoya II) had been dismissed on Respondent's jurisdictional objection. The same March 7, 2006 order of the Commission also dismissed one of the claims that Appellant had raised in deMoya I. However, he was permitted to proceed with two claims; 1) that he had been constructively discharged and 2) that a career executive reassignment on September 26, 2005 had been unreasonable and an improper exercise of discretion. The Commission's authority over the constructive discharge allegation was premised on Sec. 230.44(1)(c), Stats., while the Commission's authority to review a career executive reassignment was based on Sec. ER-MRS 30.10(2), Wis. Adm. Code. A few weeks later, on March 24, 2006, the Appellant filed a third appeal (deMoya III) in which he alleged that DVA had improperly refused to consider his request to transfer to another agency. In his letter of appeal in deMoya III, the Appellant stated that this was a "direct appeal" of the transfer action/inaction to the Commission. While he suggested that the appeal satisfied the 30-day filing period for a final step non-contractual grievance, he never submitted the requisite filing fee and the matter was dismissed after the settlement agreement and pursuant to the Appellant's request before he specifically identified its jurisdictional basis.[2] The Commission was never in a position to address the apparent absence of jurisdiction before Appellant withdrew the appeal.[3]

An attempt by deMoya to rely upon the jurisdiction that was exercised by the Commission in deMoya I in order to open a new appeal and enforce the terms of the settlement agreement reached in deMoya I must be considered in the context of the authority under which

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[2] As established by Sec. 230.45(3), Stats., and Sec. PC 3.02(2), Wis. Adm. Code, payment of the filing fee is a jurisdictional requirement for invoking the Commission's authority under 230.45(1)(c) as the final arbiter in the state employee grievance procedure.

[3] The Appellant has not specifically asked that the Commission re-open deMoya I or deMoya III, both of which were dismissed by orders dated May 15, 2006. However, and to the extent that formally re-opening the two closed cases was his intention when he filed deMoya IV, the Commission lacks the authority to do so. KRUEGER V. DHSS, CASE NO. 89-0070-PC (PERS. COMM. 1/10/90).

the agreement was entered. JANOWSKI & CONRADY V. DER, CASE NOS. 86-0125, 0126-PC (PERS. COMM. 10/29/86).

If, in the present matter, the Commission is viewed as exercising the authority obtained as a result of the 230.44(1)(c) claim that was dismissed as a consequence of the settlement agreement, the question is whether the Commission has the authority to enforce an order that was issued in such a case. The only relevant statutory provision is 230.44(4)(c):

> After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or the arbitrator 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.

The only statutory provision relating to enforcement of a Commission order issued pursuant to its authority under 230.44(1)(c) is 230.44(4)(c), which reads, in part:

> 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 decision of the commission or the arbitrator.[4]

Even if the reference in (4)(c) to an "action that is brought and served" can be construed to mean taking an appeal with the WERC, the 60 days would have commenced on May 15, 2006, the date of the dismissal order which was the Commission's final exercise of authority in the matter. Mr. deMoya submitted the materials in the present matter on August 15 which is more than 60 days after the dismissal order. Consequently, the Commission lacks authority to enforce the settlement agreement in the context of a 230.44(1)(c), appeal.

Next, we look at whether the Commission has some enforcement authority arising from the dismissal order entered with respect to Appellant's career executive reassignment claim in deMoya I that he pursued pursuant to the Commission's authority under Sec. ER-MRS 30.10(2), Wis. Adm. Code.[5] Nothing in ch. ER-MRS 30 describes the method for enforcing such a decision or, more importantly, authorizes the Commission to hear an enforcement

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[4] The references to "arbitration" and "arbitrator" in this paragraph presumably refer to a proceeding conducted under 230.44(4)(bm), which is unrelated to deMoya I, II, III or IV.

[5] The rule provides:

> (2) Career executive reassignment by the appointing authority, as defined under s. ER-MRS 30.07(1) and referred to in sub. (1), is authorized without limitation. However, an employee with permanent status in the career executive program may appeal the reassignment to the Wisconsin Employment Relations Commission if it is alleged that such reassignment either constitutes an unreasonable and improper exercise of an appointing authority's discretion or is prohibited by s. 230.18, Stats.

claim. Administrative agencies "have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." STATE EX REL. FARRELL V. SCHUBERT, 52 WIS.2d 351, 190 N.W.2d 529 (1971). In light of the absence of any statutory grant of authority, we conclude that the Commission lacks the power to enforce a settlement agreement reached in an appeal reviewing a career executive reassignment.

The Appellant has also advanced arguments suggesting that the subject encompassed by deMoya IV is conduct by the Respondent that may properly be appealed directly to the Commission.

In his reply brief, Appellant argues that his grievance falls within the Commission jurisdiction "under Secs. 230.44(1)(a), 230.05(2) and 230.05(14) [sic]" because the authority to enter into the April 2006 settlement agreement with Appellant had been "delegated" to Respondent DVA by the Administrator of the Division of Merit Recruitment and Selection (hereafter DMRS).

The Commission has authority under 230.44(1)(a) to hear an "[a]ppeal of a personnel decision under this subchapter made by the administrator [of DMRS] or by an appointing authority under authority delegated by the administrator under s. 230.05(2)." The latter subsection grants authority to the Administrator to "delegate, in writing, any of his or her functions set forth in this subchapter to an appointing authority."

As correctly pointed out by the Respondent, there is no basis to conclude that the Administrator has the power to enter into settlement agreements on behalf of other agencies of the State or that such authority has been delegated to the agencies by the Administrator. The "powers and duties" of the DMRS Administrator under subch. II of ch. 230, Stats., relate to the State civil service and are set forth in Sec. 230.05. Appellant's written argument makes reference to 230.05(14), but the section only includes subsections (1) through (8). Therefore, the Commission assumes that Appellant intended to refer to subsection (4), which provides:

> The administrator may issue enforceable orders on all matters relating to the administration, enforcement and effect of the provisions of this subchapter for which responsibility is specifically charged to the administrator and the rules prescribed thereunder. Any action brought against the appointing authority for failure to comply with the order of the administrator shall be brought and served within 60 days after the date on which the administrator's order was issued. Such orders may be appealed to the commission under s. 230.44(1)(a).

However, none of the submissions in this matter provide a basis for concluding that this is an appeal of an enforceable order that was issued by the Administrator. The April 2006 settlement agreement certainly does not qualify as an order of the Administrator and the Commission is unaware of any language in subch. II of ch. 230, Stats., indicating that the Administrator is responsible for entering into every settlement agreement that relates to a claim

filed with the Commission pursuant to the Commission's authority under 230.44 or .45, Stats. In addition, and to the extent deMoya IV could be construed as a 230.44(1)(a) appeal, it would be untimely because it was not filed within the 30-day period specified in 230.44(3), Stats. The appeal reached the Commission on August 15, 2006, which was more than 30 days after June 29, the date that Appellant was allegedly notified of a breach of the settlement agreement. Filing a non-contractual grievance does not toll the period for filing an appeal under 230.44(1), Stats. AUSTIN-ERICKSON v. DHFS & DER, CASE NO. 97-0113-PC (PERS. COMM., 2/25/98).

Appellant's remaining jurisdictional argument in this matter is based on 230.45(1)(c), Stats., which grants the Commission the authority to "serve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)." The latter subsection provides that the Director of the Office of State Employment Relations (OSER) "shall establish, by rule, the scope and minimum requirements of a state employee grievance procedure relating to conditions of employment." OSER's administrative rules relating to the grievance procedure are found in ch. ER 46. They establish a variety of limitations on the subject matter of grievances that may be processed by the Commission as the "final step arbiter." One such limitation is found in Sec. ER 46.07(1):

> If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step . . . , the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II of ch. 230. Stats., or the rules of the administrator promulgated under that subchapter, subchs. I and II of ch. 230, Stats., or the rules of the director promulgated under those subchapters, or written agency rules, policies, or procedures. . . .

Appellant's letter of appeal indicates he wants the Commission to determine whether Respondent improperly processed the Appellant's July 28 grievance *and* whether Respondent engaged in conduct that violated the settlement agreement (and, if so, to order Respondent to renegotiate the agreement).

Processing the grievance.

In his letter of appeal, Mr. deMoya contends that Respondent failed "to follow agency and state grievance procedures." The only additional description of this allegation is the following sentence in Appellant's brief: "Insofar as the Respondent *refused to permit the Appellant's grievance to be arbitrated*, that decision is properly within the purview of sec. 230.045(1)(c)." However, the appeal documents show there has been no "refusal to permit . . . [the] grievance to be arbitrated." It is the Commission that serves as the "final step arbiter" in the non-contractual grievance procedure. We understand that the Appellant is dissatisfied with the employer's response to his grievance, which sought renegotiation of the

settlement agreement. Nevertheless, Deputy Secretary Kloster's[6] letter in response to the grievance indicated that it had been denied and that he would take no further action on the matter. Mr. Kloster's letter served as the employer's third step response and the Appellant promptly sought review with the Commission. The grievance was denied at the third step and was appealed to the Commission. To the extent that the subject matter of the grievance, i.e. whether Respondent acted in a way to violate the terms of the settlement agreement so that it should be renegotiated, falls within the scope of Commission's authority, it is now our responsibility to determine whether the matter falls inside or outside of the various limitations imposed by the Wisconsin Statutes as well as ch. ER 46, Wis. Adm. Code.[7]

Enforcing the settlement agreement.

Is a question of compliance with a settlement agreement that was reached in the context of other proceedings before the Commission the proper subject of a final step grievance? As already noted, the Commission may only serve as the final arbiter under sec. 230.45(1)(c), Stats., when the subject of the grievance is a "condition of employment."[8] OSER's administrative rules further limit the Commission's authority to those matters where the grievant has alleged that the employer "abused its discretion in applying": a) Subch. II of ch. 230 Stats.; b) administrative rules of either OSER or DMRS that were promulgated under subch. II; c) DVA's written rules; d) DVA's written policies; or e) DVA's written procedures.[9]

Appellant contends that the Respondent allegedly violated the terms of the settlement agreement, the agency abused its discretion in applying Sec. ER 21.02(2), an administrative rule promulgated by OSER, which provides:

> (2) After an employee submits a resignation letter, neither the employee nor the appointing authority can withdraw, stop or change the resignation date or other terms of the resignation except by mutual written agreement.

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[6] The Commission understands that the Deputy Secretary was acting on behalf of DVA's Secretary.

[7] Given the very limited nature of the Appellant's brief it is impossible to determine if he is contending that Respondent violated a specific procedural requirement. Even if the Commission concluded, for example, that DVA should have formally processed the grievance at the first and second steps before the Deputy Secretary issued his August 9 letter that served as the final response by the agency, the only effect would be to delay the Commission's ability to address the more substantive topic raised by the grievance, i.e. whether the Commission has the authority to enforce the settlement agreement.

[8] Sec. 230.04(14), Stats.

[9] Sec. ER 46.07(1), Wis. Adm. Code.

Mr. deMoya suggests that the settlement agreement was "an instrument used to modify the Appellant's original [September 2005] resignation letter, within the purview of ER 21.02." However, the April 2006 Settlement Agreement was entered into in the context of pending litigation and is something altogether different than a resignation letter.

Appellant has otherwise not identified any specific rules/policies/procedures that were violated by Respondent's alleged action of telling people about the settlement agreement and the Commission is unaware of any rule, policy or procedure that relates to this topic. The Commission lacks subject matter jurisdiction as the final step in the grievance procedure because Mr. deMoya has not satisfied the requirements of Sec. ER 46.07(1).

For all of the above reasons, the Commission lacks subject matter jurisdiction in deMoya IV.

B. Motion for preliminary injunction

Mr. deMoya sought a preliminary injunction in this matter to enjoin "further implementation of the parties' April, 2006 Settlement Agreement." More specifically, he sought a stay of the effective date for his resignation which is scheduled to occur on November 1, 2006. Even if the Commission had subject matter jurisdiction over Appellant's civil service appeal pursuant to Sec. 230.45(1), Stats., the Commission would lack the authority to issue a preliminary injunction. VAN ROOY V. DILHR & DER, CASE NOS. 87-0117-PC, 87-0134-PC-ER (PERS. COMM. 10/1/87); LYONS V. DHSS, CASE NO. 79-81-PC (PERS. COMM. 4/26/79), AFFIRMED BY DANE COUNTY CIRCUIT COURT, DHSS V. WIS. PERS. COMM. (LYONS), 80-CV-1948, 7/14/81.[10]

Dated at Madison, Wisconsin, this 23rd day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Chair person Judith Neumann did not participate.

[10] Appellant refers to HRUSKA V. DATCP, CASE NOS. 85-0069, 70, 71-PC-ER (PERS. COMM. 8/13/85) in support of his motion. The Hruska ruling arose from a "whistleblower" claim filed under Sec. 230.85, Stats. The authority to receive and process whistleblower complaints rests with the Division of Equal Rights in the Department of Workforce Development, as provided in Sec. 230.05(1e), Stats., rather than with the Commission.