

**RAJ KUMRAH AND BRAHAM  
PRADHAN,**

*Complainants,,*

v.

**Secretary, DEPARTMENT OF  
AGRICULTURE, TRADE & CONSUMER  
PROTECTION, and**

**Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,**  
*Respondents.*

Case Nos. 94-0146, 0147-PC-ER

**RULING  
ESTABLISHING ISSUES  
FOR HEARING**

This comes before the Commission as a dispute relating to the framing of the issues for hearing. The parties were permitted to submit proposed statements of the issues for hearing with accompanying argument, and the final proposal with argument was submitted on February 19, 1997. Any factual findings made in this ruling are based on the information provided by the parties, appear to be undisputed, and are made solely for the purposes of rendering this ruling.

1. The issue proposed by the respondents is as follows:

Whether the initial determinations for Kumrah and Pradhan, Case Nos. 94-0146-PC-ER and 94-0147-PC-ER, were correct. If not, what is the probable cause?

2. The issues proposed by the complainants (and proposed by the hearing examiner at the January 8, 1997, prehearing conference) are as follows:

Kumrah: Whether respondents discriminated against complainant on the basis of his race/national origin or in retaliation for his participation in activities protected under the fair Employment Act (FEA) in regard to

the reallocation of his position from Veterinarian Senior (Vet-Sr.) to Vet Sr., effective November 14, 1993.

Pradhan: Whether respondents discriminated against complainant on the basis of his race/national origin or in retaliation for his participation in activities protected under the FEA in regard to the reallocation of his position from Veterinarian 2-Supervisor (Vet 2-Supv.) to Vet Meat Safety Supv, effective November 14, 1993.

Respondent argues that, in the absence of a stipulation by the parties, an appeal of an initial determination finding of no probable cause necessarily results in a hearing on the issue of probable cause, not a hearing on the merits. Section 230.45(1m), Stats., states as follows:

The commission shall waive the investigation and determination of probable cause of any complaint that is filed by a complainant under sub. (1) or s. 103.10(12)(b) at the complainant's request. If the commission waives the investigation and probable cause determination, the commission shall proceed with a hearing on the complaint. The commission's waiver of an investigation and probable cause determination does not affect the commission's right to attempt to resolve the complaint by conference, conciliation or persuasion.

Section PC 2.07(3), Wis. Adm. Code, states as follows:

Within 30 days after the service of an initial determination of no probable cause as to any claim raised in a complaint, a complainant may file, with the commission, a written request for hearing on the issue of probable cause as to that claim. If, after a hearing, the commission finds probable cause as to the claim and reverses the initial determination, the complaint shall be processed under sub. (2).

Pursuant to §PC 2.07(3), Wis. Adm. Code, the only unilateral action available to a complainant who is appealing a no probable cause finding in an initial determination is the request for a hearing on the issue of probable cause. The practice of the Commission has been to permit the parties to proceed to a hearing on the merits if they so stipulate but, consistent with this administrative rule, not to permit this

simply upon the application of one of the parties. *See Volovsek v. DATCP & DER*, 93-0098-PC-ER, 4/16/96.

Section 230.45(1m), Stats., also does not enable a complainant to unilaterally effect the bypass of a hearing on the issue of probable cause upon the appeal of a no probable cause finding in an initial determination. This statutory section links a complainant's unilateral waiver of a probable cause determination with the complainant's unilateral waiver of the investigation of the complaint. Under the facts present here, the complainants did not request waiver of the investigation of their complaints so unilateral waiver of the probable cause determination by the complainants is not available pursuant to §230.45(1m), Stats.

Although it may appear incongruous to require a complainant who has already waited for an investigation to be completed to undergo a two-phase hearing process before obtaining a final decision on the merits, but to permit a complainant who has waived the investigative process to proceed directly to a hearing on the merits, it is not possible to say that the Legislature did not intend this result when §230.45(1m), Stats., was crafted. For example, one of the goals of the legislation may have been to provide an incentive for complainants to waive investigations which would, in turn, permit the conservation and redeployment of state agency staff resources.

Complainants' arguments relating to the public policy goals of judicial and administrative economy were considered. However, public policy considerations such as those advanced by complainants would determine or affect the outcome in situations such as that present here only where multiple interpretations of the language of the relevant statute or administrative rule were tenable. As discussed above, the language of the cited statute and administrative rule appear to dictate a particular result in this case so public policy considerations could have little impact here.

It is not clear why complainants cite Ch. ILHR 218, Wis. Adm. Code, as part of their argument here. As discussed above, it is the Commission's practice to permit the parties to waive the probable cause hearing upon appeal of a no probable cause finding if there is stipulation to that effect. This is the same thing that is accomplished

in §ILHR 208.08(3), Wis. Adm. Code, according to complainants' brief. However, there is no such stipulation here and that part of complainants' argument is puzzling.

The Commission does not adopt the respondent's statement of the issue, however, although it agrees with respondent that the proper issue for hearing is one of probable cause. It appears from respondent's proposed statement of the hearing issue that there may be a fundamental misunderstanding on respondent's part of the purpose of a post-initial determination hearing. It is not limited, as respondent's proposed statement implies, to the four corners of the initial determination and to a review of the correctness of the findings and conclusions of the investigator, but is instead a *de novo* proceeding.

Finally, it should be noted that, in practice, the impact of the two-phase hearing process has proved to be relatively insignificant. In those few situations where both a probable cause hearing and a hearing on the merits have been required, the parties have stipulated to having the record and the arguments in the first hearing serve as all or almost all of the record and the arguments in the second hearing.

Consistent with the above discussion, the issues for hearing are as follows:

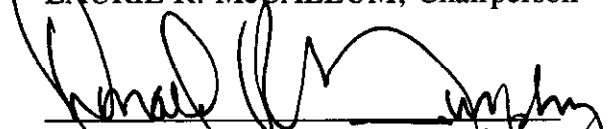
Kumrah: Whether there is probable cause to believe that respondents discriminated against complainant on the basis of his race/national origin or retaliated against him for his participation in activities protected under the fair Employment Act (FEA) in regard to the reallocation of his position from Veterinarian Senior (Vet-Sr.) to Vet Sr., effective November 14, 1993.

Pradhan: Whether there is probable cause to believe that respondents discriminated against complainant on the basis of his race/national origin or retaliated against him for his participation in activities protected under the FEA in regard to the reallocation of his position from Veterinarian 2-Supervisor (Vet 2-Supv.) to Vet Meat Safety Supv, effective November 14, 1993.

Dated: February 27, 1997

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

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