

STATE OF WISCONSIN

PERSONNEL COMMISSION

DENNIS J. SHESKEY,
Complainant,

v.

**Chairperson, PERSONNEL
COMMISSION,**
Respondent.

**RULING ON
JURISDICTION
AND
RULING ON
DISQUALIFICATION
MOTION**

Case No. 99-0075-PC-ER

This case is before the Commission to resolve complainant's disqualification motion and a jurisdictional issue. The facts recited below appear to be undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. On April 5, 1999, the Commission received complainant's discrimination complaint, which was assigned case number 99-0075-PC-ER. The allegations raised in the complaint are shown below:

I allege that the Personnel Commission dismissal, based on untimely filing of 98-0054-PC-ER (6/3/98) was not based on the facts of the case and ignored established precedent. I further allege the Commission knew its decision was undefendable (sic) but dismissed the complaint. While I tried to wait for a decision to my appeal, I am confident it will be upheld. I allege that the Commission was retaliating against me because of the number of my complaints and the number of different allegations, including claims of FEA discrimination. I also alleged that 98-0045-PC was wrongly postponed until after a decision of my appeal. I allege that the Commission knew their decision in 98-0054-PC-ER would be overturn (sic) and therefore should not have postponed 98-0045-PC waiting for a decision that was known in advance.

2. On March 9, 1998, complainant filed a complaint against DER, which was assigned case number 98-0054-PC-ER. The Commission dismissed the complaint as untimely filed in *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98, rehrq. denied 7/22/98. Complainant filed

an appeal of the Commission's decision in circuit court. The circuit court affirmed the Commission's decision in *Sheskey v. Wis. Pers. Comm.*, 98-CV-2196 (Dane County, 4/27/99). One of the allegations in this complaint involved "denial of recall rights" when in 1997, Elaine Zimmerman transferred into the position complainant held prior to respondent complying with his layoff request effective in August 1995.

3. Case number 98-0045-PC is an appeal filed by complainant as a fourth step grievance against DER. In this appeal, complainant complained that he was not recalled when Ms. Zimmerman transferred into his position in 1997. DER moved for dismissal and the parties filed briefs. A Commission hearing examiner placed a stay on this case pending the outcome of the circuit court appeal noted in the prior paragraph. The stay has been lifted as of this writing due to issuance of the court decision.

4. Complainant has never been employed by the Personnel Commission.

5. Complainant wrote to the Commission on May 5, 1999 regarding his "discovery request" in *Sheskey v. PC*, 99-0075-PC-ER, as follows:

1. What prior Commission decisions, if any, held the time period for filing a discrimination complaint started before a complainant was aware of the adverse action(s) alleged to be discriminatory?

Please note that all of the decisions previously cited by the Commission, except for *Sprenger*, involved situations where the complainant was fully aware of the adverse employment actions when the period of limitations started.

2. On what date did the period of limitations for the recall allegations start and end? In other words, what would have been the last date that the Commission would have ruled [that] Complainant's recall allegations were timely filed?

6. On May 10, 1999, the Commission received a letter from complainant which he characterized as a "Disqualification motion PC 5.01(4)". The full letter text is shown below:

As I filed a discrimination complaint against the Personnel Commission concerning their decisions, I request that the Personnel Commission be disqualified from any proceedings concerning my complaints.

CONCLUSIONS OF LAW

1. It is complainant's burden to establish sufficient facts to support a disqualification request under §§PC 5.01(3) and (4), Wis. Adm. Code.
2. He has failed to meet his burden under #1 above.
3. It is complainant's burden to establish that the Commission has jurisdiction over the allegations raised.
4. He has failed to meet his burden under #3 above.

OPINION

I. Disqualification Motion

Complainant filed a disqualification motion under §PC 5.01(4), Wis. Adm. Code. The code provisions pertinent to this motion are noted below:

PC 5.01 HEARING EXAMINERS. . . .

PC 5.01 (3): DISQUALIFICATION. If a presiding authority is unqualified to preside for reasons of conflict of interest or personal bias, the presiding authority shall withdraw and notify the commission and the parties of the disqualification.

PC 5.01 (4): MOTIONS FOR SUBSTITUTION OR DISQUALIFICATION OF PERSONS CONDUCTING HEARINGS. If any party deems the presiding authority to be unqualified for reasons of conflict of interest or bias, the party may move in a timely manner for substitution of a different examiner or disqualification of the commissioner. The motion shall be accompanied by a written statement setting forth the basis for the motion. If a hearing examiner does not grant a motion for substitution, it shall be referred to the commission, which shall determine the sufficiency of the ground alleged.

The basis for complainant's request is that he filed this case (99-0075-PC-ER) against the Personnel Commission. The claim here is that the Commission has a conflict of interest in resolving the present jurisdictional issue. The Commission disagrees.

The legal principles regarding the jurisdictional issue posed here (as discussed later in this ruling) are clear-cut and of long standing. Complainant's arguments on the jurisdictional issue could be viewed as a sham or as frivolous if filed by an attorney on complainant's

behalf.¹ The complainant is not represented by counsel which may explain why the complaint was filed in the first instance, but does not change the fact that the suit is without merit. All Commissioners feel they are able to preside over complainant's cases in a neutral manner. There is no room for bias to enter the legal analysis under these circumstances. Furthermore, complainant's right to a decision based on correct legal principles and not on bias is protected due to the fact that he may request review of the Commission's decision by the court system. Accordingly, complainant's disqualification motion is denied.

II. Jurisdiction

Complainant contends the Commission has jurisdiction over the present case. His supporting argument was contained in his letter dated April 19, 1999, and is shown below in relevant part:

My complaint is directly and solely against the Commission and involves personnel transactions. Even if the Personnel Commission feels it lacks jurisdiction for my complaint, the Commission should still render a decision . . . I will explain why the Commission does have authority to hear this complaint.

The Commission is already considering 98-0106-PC-ER which includes ETF and there is no direct employment relationship between ETF and myself. Furthermore, I have found nothing in the state statutes or the administrative code which limits discrimination charges to only an employee's employing agency. WI stats. (sic) 111.32(6)(a) clearly indicates a state employee's employer is the state and each agency of the state;

“Employer’ means the state and each agency of the state and, except as provided for in par. (B), any other person engaging in any activity, enterprise or business employing at least one individual.”

Clearly the legislative intent was to provide state employees redress for discrimination against any state agency regardless of their employing agency. If the legislature wanted to limit complaints to an employee's employing agency they would have done so. Clearly the legislature recognized the need to include

¹ The Commission as an administrative body is not held to the same standard as exists for disqualification of a judge under §757.19, Stats. It is instructive to note, however, that under §757.19(2)(b), Stats., a judge who is a party to a case need not disqualify himself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

complaints like 98-0106-PC-ER where ETF is alleged to be discriminating in the terms and conditions of employment by their selective and unequal administration of employee benefits. The complaint against the Commission is no different; The (sic) Commission is discriminating in the terms and conditions of employment by making personnel decisions which completely contradicts established court precedent.

The Commission is an “agency of the state” within the meaning of s. 111.32(6)(a), Stats. However, the inquiry does not end there. Additional statutory provisions must be considered as noted below in relevant part (emphasis added).

Section 111.321, Stats.: PROHIBITED BASES OF DISCRIMINATION. Subject to ss. 111.33 to 111.36, no employer . . . or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed . . .

Section 111.322, Stats.: DISCRIMINATORY ACTIONS PROHIBITED. Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

(1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms conditions or privileges or employment or labor organization membership because of any basis enumerated in s. 111.321.

* * *

(3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Thus, §111.321 prohibits “any act of employment discrimination as specified in §111.322,” and §111.322 states “it is an act of employment discrimination” to take any of the enumerated adverse employment actions on a prohibited basis. The prohibition on retaliation, §111.322(3), uses the language “[t]o discharge or otherwise discriminate against any individual because he or she . . . has made a complaint.” (Emphasis added.) The FEA at §111.322(1) enumerates “act[s] of employment discrimination” as, *inter alia*:

To refuse to hire, employ . . . to bar or terminate from employment . . . any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment.

The Commission has not refused to hire or employ complainant. The complainant has never been a Commission employe and, accordingly, the Commission *as an employer* has never barred complainant from employment; nor has the Commission *as an employer* made decisions regarding complainant's entitlement to promotions or to compensation. The complainant's sole contact with the Commission has been in its role as an impartial decision-maker in the context of litigation filed by complainant with the Commission.

The remaining question is whether the Commission's role in complainant's cases constitutes an adverse term, condition or privilege of employment, within the meaning of §111.322(1), Stats. The Commission answers this question in the negative for reasons discussed in the following paragraphs.

The Commission consistently has held that litigation is not a term, condition or privilege of employment protected under the FEA.² In *Larsen v. DOC*, 91-0063-PC-ER, 7/11/91, Ms. Larsen was employed by the Department of Corrections (DOC). DOC moved to dismiss Ms. Larsen's requested amendment to add an allegation that DOC violated the FEA by asking her irrelevant personal questions at a deposition. The Commission granted DOC's motion stating as shown below (emphasis added):

In the Commission's opinion, once the employer and employe become opposing litigants in a statutorily-provided proceeding before a third party agency, this context basically is not that of an employment relationship, and the employer's actions as a litigant in that litigation normally would not implicate any "terms, conditions, or privileges of employment." The proceeding may arise out of the employment, but the relationship between the parties in the conduct of the litigation is not that of employer and employe.

The present case is further removed from any employment relationship than the situation presented in *Larsen*. Specifically, the *Larsen* case involved DOC as the agency of the

² In accord, *Balele v. DOA, DHFS & DOJ*, 96-0156-PC-ER, 6/4/97; *Marfilus v. UW-Madison*, 96-0047-PC-ER, 5/14/96 and *Huff v. UW-System*, 96-0013-PC-ER, 5/2/96.

state that employed Ms. Larsen. In the present case, complainant has never been employed by the Commission and his only interaction with the Commission has been in the Commission's role as the adjudicative body for litigation which he filed with the Commission. Accordingly, there is no viable rationale for deviating from the Commission's prior ruling in *Larsen*.

Also see *Poole v. DILHR*, 83-0064-PC-ER, 12/6/85, where the complainant alleged discrimination against the Commission based on his perception that the Commission delayed investigation of his discrimination complaint. The Commission stated in *Poole*, as shown below in relevant part:

The Commission's relationship to the complainant was clearly not an employment relationship. Complainant's contentions therefore are beyond the Commission's authority to consider.

The Commission also wishes to address complainant's argument, which is repeated below:

Clearly the legislative intent was to provide state employees redress for discrimination against any state agency regardless of their employing agency. If the legislature wanted to limit complaints to an employee's employing agency they would have done so. Clearly the legislature recognized the need to include complainants like 98-0106-PC-ER where ETF is alleged to be discriminating in the terms and conditions of employment by their selective and unequal administration of employee benefits. The complaint against the Commission is no different; The (sic) Commission is discriminating in the terms and conditions of employment by making personnel decisions which completely contradicts established court precedent.

The Commission's role in the present case is materially different from the role played by the *Department of Employee Trust Funds (DETF)* in *Sheskey v. DETF & DER*, 98-0106-PC-ER. DETF is an administrative agency which determines entitlement to disability benefits for all state employees. The entitlement to disability benefits could be considered as a term or

condition of employment akin to compensation and, in this regard, DETF may be acting as complainant's employer in reaching an employment-related decision.³


Complainant's "discovery request" is denied because this case is dismissed.

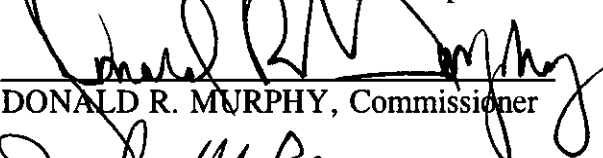
ORDER

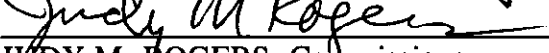
Complainant's disqualification motion is denied and this case is dismissed for lack of jurisdiction.

Dated: May 24, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

JMR990075Cru11.doc

Parties:

Dennis J. Sheskey
217 Gilman Street
Verona, WI 53593

Laurie R. McCallum
Chairperson, Personnel Commission
131 W. Wilson St., Suite 1004
Madison, WI 53703

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

³ The issue of whether DETF is a proper party in *Sheskey v. DETF and DER*, 98-0106-PC-ER, is pending resolution. The matter had been placed on the meeting agenda for 5/9/99, but was deferred because complainant's disqualification motion was filed prior to the Commission considering the pending motions.

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