

DOROTHY CARR

Petitioner,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**

Respondent.

**RULING ON
DISCOVERY MOTION**

Case Nos. 01-0174-PC-ER & 02-0022-PC

The respondent filed a motion on June 17, 2002, opposing petitioner's request to conduct discovery in the above captioned cases. Petitioner has filed complaints in other forums referencing at least some of the personnel actions alleged in the complaint and appeal filed with the Personnel Commission. Respondent is objecting to any discovery by petitioner in the cases filed with the Personnel Commission

The findings of fact are made solely for the purposes of this motion and appear to be undisputed, unless otherwise noted.

FINDINGS OF FACT

1. The plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) on December 10, 2001, and asked that a copy be cross-filed with the Personnel Commission (Commission).

2. The Commission first received a copy of the complaint on December 13, 2001, and it was assigned Case No. 01-0174-PC-ER. Complainant perfected the complaint on January 11, 2002.

3. In her complaint, the petitioner alleged race and disability discrimination by respondent, and retaliation for a) requesting an accommodation, b) filing a charge with the EEOC in 1998 and c) for filing a discrimination claim in federal court. These allegations included a refusal to transfer, the loss of various monetary and non-monetary benefits, and the requirement that complainant submit to an independent medical examination.

4. The allegations that are the subject of Case No. 01-0174-PC-ER are being investigated and processed by the EEOC rather than by the Personnel Commission.

5. On April 24, 2002, petitioner also filed an appeal, Case No. 02-0022-PC, with the Commission. The appeal was based on the termination of petitioner's employment with respondent. Petitioner alleged the termination was without just cause, in violation of her mandatory restoration rights, and that it was illegal, arbitrary and capricious. The appeal also stated:

[The petitioner] requests amendment of her discrimination complaint, filed on November 30, 2001, to expressly include an appeal of her non-selection for the Officer 2 and Supervising Youth Counselor position, the continuing violations of her mandatory restoration rights, and the continuing violations of the merit-selection process.

6. On April 29, 2002, the petitioner amended her complaint. The additional allegations included a refusal to transfer, a requirement that petitioner submit to an independent medical examination and provide a medical release, and termination of petitioner's employment.

7. Petitioner filed an amended appeal with the Personnel Commission on June 5, 2002. The amended appeal included allegations regarding the pre-termination hearing and termination of petitioner's employment.

8. The petitioner has filed proceedings in other forums that relate to some of the same personnel actions that are the subject of her proceedings before the Personnel Commission.

OPINION

The petitioner has filed a complaint and an appeal with the Personnel Commission. The complaint was initially filed with the EEOC and cross-filed with the Personnel Commission. As a consequence, the Personnel Commission is not actively investigating the allegations in the complaint and has indicated that it will defer processing of the allegations until the EEOC concludes its investigation.

Petitioner has indicated that she intends to conduct discovery in Case Nos. 01-0174-PC-ER and 02-0022-PC.

Respondent objects and offers the following argument in support of its objections:

The Department respectfully suggests that because the EEOC has initiated its investigation, the Personnel Commission should follow its regular practice and defer to the EEOC and hold the Personnel Commission charge in abeyance until the EEOC's investigation and administrative process have been completed. To do otherwise is to duplicate the parties' efforts and the use of resources by cooperating agencies. (Brief dated June 17, 2002)

The issue is whether the parties should engage in discovery in the EEOC charge *and* the Personnel Commission charge simultaneously. Common sense and the appropriate use of the parties' limited resources suggest that the answer is no. The answer is that the Personnel Commission should not permit discovery in this forum while the parties and the EEOC are doing the same thing. The Personnel Commission should, as is its practice, defer further proceedings until the EEOC and the federal court proceedings in the Eastern District Court are resolved. (Brief dated July 12, 2002)

It is the standard practice of the Personnel Commission not to simultaneously investigate a complaint while the EEOC is investigating the same complaint, unless the complaint identifies a basis of discrimination the EEOC does not have the authority to consider. However, the fact that the Personnel Commission is not actively investigating a complaint does not bar a petitioner from exercising her discovery rights relating to that complaint or to an appeal that the petitioner also has pending before the Personnel Commission.

The topic of discovery is addressed in very general terms in the Commission's Administrative rules. Pursuant to §PC 4.03, Wis. Adm. Code:

All parties to a case before the commission may obtain discovery and preserve testimony as provided by Ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by Ch. 804, Stats. For good cause, the commission or the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, to compel discovery.

The Commission's discovery rule is not restricted to appeals filed pursuant to §230.44(1), Stats., and, therefore, should be applied to any contested case filed with the Commission under §230.45, Stats., including complaints of discrimination. *Friedman v. UW*, 84-0033-PC-ER, 8/1/84. In *Germain v. DHSS*, 91-0083-PC-ER, 5/14/92, the Com-

mission disagreed with complainant's argument that discovery was not available to a party to a Fair Employment Act claim during the investigative stage of the proceeding. The Personnel Commission rejected complainant's request that no discovery could be permitted prior to a prehearing conference.

In the present case, the respondent has not contested the types of discovery devices used by petitioner, but argues that discovery in the Personnel Commission proceedings should be barred because of similar or identical cases filed in other forums.

There is nothing in the Commission's rules or in Chapter 804 of the Statutes, that acts to limit discovery while a complaint is being investigated by the EEOC. Respondent has cited no statute, rule or case law in support of its objection to discovery. It is not apparent from the materials in the Commission case files that the related proceedings in other forums present allegations that are co-extensive with those that serve as the basis for the two cases before the Commission. Petitioner has not yet filed an actual discovery request, so it is impossible to determine whether she is seeking information that may have been already provided to her in another forum. Protective orders may be issued under the circumstances described in §PC 4.03, Wis. Adm. Code, and §804.01(3), Stats. Respondent has not established a factual basis for such an order.


ORDER

Respondent's general objection to any discovery by petitioner is overruled.

Dated: 10/31, 2002.

KST:010174Cru2

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner


KELLI S. THOMPSON, Commissioner