

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondents.

**RULING ON
MOTION**

Case No. 98-0145-PC-ER

This matter is before the Commission on respondent's motion for certain sanctions against complainant.

In an "Interim Ruling on Motion for Sanctions" issued on December 3, 1999, the Commission dismissed this matter "except to the extent that the Commission retains jurisdiction to consider reasonable expenses as a sanction." In a ruling issued on February 28, 2000, the Commission: 1) granted respondents' request for reasonable expenses to the extent that complainant was ordered to pay respondents the amount of \$398.11 within 60 days of the date the order was signed, and 2) dismissed the case "for the reasons set forth in the ruling of the Commission issued on December 3, 1999." Complainant filed a petition for rehearing that was denied on April 7, 2000.

On May 10, 2000, respondent filed another motion *in this case*. In its motion, respondent asks that the Commission bar complainant "from filing any more complaints and from proceeding on any complaints already filed against DER/DMRS until he pays in full the amount ordered by the Commission."¹ By letter to the parties dated May 23, 2000, a member of the Commission's staff noted that the motion appeared to raise a

¹ In its motion, respondent contends that complainant has not paid the \$398.11 specified in the Commission's February 28th ruling.

jurisdictional question and provided an opportunity for the parties to file written arguments.

The present case is based on facts related to those present in *Jordan v. DNR*, 96-0078-PC-ER, 1/30/97. In that case, complainant and respondent had entered into a settlement agreement covering three matters filed with the Commission in 1993 and 1994. Based upon that settlement, the Commission dismissed the three cases on February 14, 1996. Several months later, complainant alleged that respondent had failed to comply with the settlement agreement. The Commission held as follows:

On July 3, 1996, complainant filed a charge with the Commission alleging discrimination based on race and sex and retaliation based on whistleblower activities in regard to respondent's alleged failure to fulfill its obligations under the terms of the afore-mentioned settlement agreement.

As a remedy, complainant is requesting specific performance of the agreement as he has interpreted it, or, in the alternative, nullification of the agreement due to his allegation that his consent was obtained through duress. . . .

It is clear, based on the language of the complainant's charge, that his focus in this complaint is on the terms of, and the enforcement of, the settlement agreement. It is also clear, based on Commission precedent, that the Commission does not have the authority to enforce the terms of settlement agreements. *Janowski/Conrady v. DER*, 86-0125, 0126-PC, 10/19/86. Although the *Conrady* and *Janowski* cases were filed as civil service appeals, the issue in those cases relevant here involved the enforcement of an agreement entered into in settlement of two Fair Employment Act (FEA) cases, and the Commission's discussion of this issue included the following:

As noted above, the settlement agreement in question was entered in two Fair Employment Act (FEA) cases. Therefore, the question of the commission's enforcement authority must be considered in the context of its responsibilities under the FEA.

According to §111.375(2), Stats., “.complaints of discrimination or unfair honesty testing against the [state] agency as an employer shall be filed with and processed by the personnel commission under §230.45(1)(b) ” The Attorney General has expressed the opinion that:

“ .the Commission possesses the same powers and duties with respect to the processing of discrimination complaints in-

volving a state agency as an employer as does the Department [of Industry, Labor and Human Relations (DILHR)] with respect to discrimination complaints involving an employer other than a state agency ...” 68 OAG 403, 405-406 (1979).

DILHR has no enforcement powers under the FEA with respect to its orders; there are specific judicial enforcement actions available, and, in accordance with the foregoing opinion, these provisions apply equally to this Commission. Therefore, the enforcement of Commission orders in discrimination cases is as set forth at §111.39(4)(d), stats:

“ The order to have the same force as other orders of the department and be enforced as provided in ch. 101. Any person aggrieved by noncompliance with the order may have the order enforced specifically by suit in equity....”

Under Ch. 101, stats., §101.02(13)(a) provides, inter alia:

“If any employer, employe, owner or other person fails, neglects or refuses to obey any lawful order given or made by the department. for each such violation, failure, or refusal, such employer...shall forfeit and pay into the state treasury a sum not less than \$10 nor more than \$100 for each such offense.”

Unless otherwise specifically provided by statute forfeitures are recovered in judicial proceedings. Ch. 778, stats.

Although the statutory provisions cited in *Janowski/Conrady* have been renumbered since its decision, the language of these provisions relevant here has not changed and the Commission’s rationale in the *Janowski/Conrady* decision is still sound. In addition, it should be noted that complainant not only alleged both in this action and the earlier actions discrimination under the FEA but also retaliation based on whistleblower activities. The provisions in the whistleblower law governing enforcement of Commission orders parallels that of the FEA in providing for judicial enforcement, not enforcement by the Commission. §230.85(5), Stats. As a result, it is concluded here that the Commission does not have the authority to enforce the subject settlement agreement.

Complainant also appears to be requesting that the earlier cases which were dismissed pursuant to the settlement agreement be reopened. In *Haule v. UW*, 85-0166-PC-ER, 8/26/87, the Commission stated as follows, in pertinent part:

Once the Commission issues a final order dismissing a case, the Commission only has jurisdiction to reopen the case on a petition for rehearing if it is filed with the Commission within 20 days of the order (see §227.49, Stats.) In the instant case, regardless of the merits of complainant's arguments in support of his request that his original complaint be reinstated, more than 20 days elapsed between the Commission's February 19, 1986, order of dismissal and complainant's April 15, 1987, request for reinstatement of his original charge of discrimination, and the Commission, therefore, does not have the authority to grant complainant's request.

Here, the earlier cases were dismissed on February 14, 1996, and the present action not filed until July 3, 1996, more than 20 days hence. As a result, the Commission does not have the authority to reopen those earlier cases. *Jordan v. DNR*, 96-0078-PC-ER, 1/30/97

The present case was closed by the Commission pursuant to its February 28th ruling. Complainant's subsequent petition for rehearing was denied on April 7th. The only way for the Commission to consider respondent's May 10th motion is to reopen this proceeding.

Respondent contends that *Jordan* merely stands for the proposition that the Commission has no authority to enforce its orders. While it is true that the Commission's ruling in *Jordan* incorporates such a conclusion, the ruling is broader than that. *Jordan* also indicates that once the specified time period is over, the Commission lacks the authority to reopen a case to deal with a substantive matter, citing *Haule v. UW*, 85-0166-PC-ER, 8/26/87.

The respondent is asking the Commission, in Case No. 98-0145-PC-ER, to take a variety of punitive actions against the complainant, even though the case was closed on February 28th. *Jordan* and *Haule* indicate that this matter has been closed and that the Commission may not reopen it, despite the reasons advanced by respondent.

The Commission does not address the merits of respondent's motion.

ORDER

Respondent's motion is denied.

Dated: July 19, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:980145Cru16


JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter.

Parties:

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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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