

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**RICHARD G. DEMOYA**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS**, Respondent.

Case 8  
No. 66321  
PA(grp)-6

**Decision No. 32026**

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**RICHARD G. DEMOYA**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS**, Respondent.

Case 9  
No. 66353  
PA(grp)-7

**Decision No. 32027**

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**RICHARD G. DEMOYA**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS**, Respondent.

Case 10  
No. 66354  
PA(grp)-8

**Decision No. 32028**

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**Appearances:**

**Thomas E. Hayes**, Attorney, Ste. 3032, 161 West Wisconsin Avenue, Milwaukee, WI 53203-2602, appearing on behalf of Appellant.

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

Dec. No. 32026  
Dec. No. 32027  
Dec. No. 32028

**ORDER GRANTING MOTIONS TO DISMISS**

These matters are before the Wisconsin Employment Relations Commission on Respondent's motions to dismiss. The final submission from the parties was received on January 11, 2007.

In order to more readily differentiate between Mr. deMoya's appeals, including those that have been addressed by the Commission in other rulings, we will refer to No. 66321 as "deMoya V" and No. 66353 as "deMoya VI" and No. 66354 as "deMoya VII." All three cases are before the Commission as the final step in the non-contractual grievance procedure. Respondent has identified three preliminary objections/defenses in each case, contending the claim is moot, untimely and subject to the "management rights" exclusion to the grievance procedure.

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

**FINDINGS OF FACT<sup>1</sup>**

1. Prior to April 2006, Appellant filed three appeals (deMoya I, II and III) against his employer, the Department of Veterans Affairs (DVA), with the Commission.

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

7. The Appellant will not seek reinstatement, a transfer, or otherwise apply for employment with the Respondent prior to November 1, 2006 and for the five year period commencing with that date and further recognizes that the Respondent has no obligation to rehire or hire him at any time. . . .

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. The remaining balances in those accounts on November 2, 2006 will be paid as a lump sum payment. Nothing in this Agreement shall preclude Appellant from extending state service, past November 1, 2006 by reason of employment with another State agency.

13. Until his state service termination date, which will be November 1, 2006, the Appellant will be subject to the Respondent's work rules and policies, including, but not limited to, the policy applicable to outside employment. . . .

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<sup>1</sup> These findings are made solely for the purpose of deciding Respondent's motions.

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

3. Appellant filed another appeal (deMoya IV) with the Commission on August 15, 2006.

4. Appellant's resignation from DVA was effective August 25, 2006 but he continued in pay status through November 1, 2006.

5. Appellant filed deMoya V on September 20, 2006, seeking to invoke the Commission's authority to serve as the final step in the non-contractual grievance procedure. Appellant described the grievance at the 3<sup>rd</sup> step as follows:

DVA management has directed that I will not receive direct support services<sup>2</sup> from DVA staff as are provided to any other employee. Such treatment of an employee is unacceptable.

6. Appellant filed deMoya VI, another 4<sup>th</sup> step grievance, on October 2. Appellant described the 3<sup>rd</sup> step grievance as follows:

On September 1, 2006 I requested (through my attorney) six hours of work time (not vacation, personal holiday, or sabbatical), pursuant to Chapter ER 46.09 of the Wisconsin Administrative Code to investigate and prepare two grievances. On September 6, 2006 Mr. Rosinski, on behalf of DVA management denied that request.

By letter dated October 27, 2006, Appellant amended his claim by adding "the alleged denial by WDVA of work time to investigate, prepare, and present my grievances for the pay periods, September 27-30, 2006, October 1-14, 2006, and October 15-28, 2006."

7. Appellant filed deMoya VII, another 4<sup>th</sup> step grievance, on October 4. He described the 3<sup>rd</sup> step grievance as follows:

I planned to attend the NASDVA conference in Salt Lake City from September 10-14, 2006 while on my personal time, at my expense and with the intent to get an update on veterans issues and to network for a position in the veterans' community. I was to attend as an associate member which I had done for many years. On September 8, 2006, DVA canceled my membership without cause, leaving me unable to attend. I believe this is retaliation for my previous submission of grievances to DVA and WERC.

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<sup>2</sup> Appellant subsequently clarified his allegation by stating that Respondent's conduct had prevented him from seeking "counseling from employees in the Bureau of Administrative Services which include the Employee Assistance Program (EAP) and transition assistance for employees who have submitted a resignation."

8. On October 23, 2006, the Commission issued an order dismissing deMoya IV for lack of subject matter jurisdiction. Finding of Fact 9 in the Commission's ruling included the statement that deMoya V, VI and VII "are being held in abeyance pending resolution of the motions in deMoya IV."

9. Beginning no later than November 2, 2006, Appellant has had no employment relationship with DVA.

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

### CONCLUSIONS OF LAW

1. Respondent, as the moving party, has the burden to show that the claims before the Commission should be dismissed based on mootness.

2. The Respondent has met that burden.

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

### ORDER<sup>3</sup>

Respondent's motions are granted and deMoya V, VI and VII are dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22<sup>nd</sup> day of February, 2007

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chair Judith Neumann did not participate.

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<sup>3</sup> Upon 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 V, VI and VII)**

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS**

These matters are before the Commission on a motion to dismiss. Respondent contends that all three cases are moot, were untimely filed and are subject to the “management rights” exclusion to the non-contractual grievance procedure.

Respondent’s contention that these matters are moot arises from the fact that Mr. DeMoya has retired and is no longer employed by DVA. “An issue is moot when its resolution will have no practical effect on the underlying controversy.” STATE EX REL. OLSON V. LITSCHER, 2000 WI APP 61, 233 WIS. 2d 685, 608 N.W.2d 425. “In other words, a moot question is one which circumstances have rendered purely academic.” ID.

The relevant facts of these matters are substantially identical to those in LOOMIS V. UW, CASE NO. 92-0035-PC (PERS. COMM. 2/15/96) and PARRISH V. UW-M, CASE NO. 84-0163-PC (PERS. COMM. 12/6/84) where in each instance, the appellant had filed a grievance but left employment with the agency by the time of the ruling on a motion to dismiss the grievance as moot. In PARRISH, the Commission wrote:

In the present case, the appellant is no longer employed by respondent UW-Milwaukee. Any ruling by the Commission at the fourth step of the grievance procedure could not affect the appellant’s current or past working conditions. Unless the appellant was to be reemployed by the respondent some time in the future, the circumstances that generated the appeal could not recur. These facts are readily distinguishable from those in WATKINS V. ILHR DEPARTMENT, 69 WIS. 2D 782, 233 N.W.2d 360 (1975), where the complainant was still employed by the same employer, still represented by the same union and in a position to be affected by future transfer decisions. In STATE EX REL. ELLENBURG V. GAGNON, 76 WIS. 2d 532, 251 N.W.2d 773 (1977), the mere possibility that Mr. Ellenburg would again be incarcerated and again be disciplined for violating the false communication rule was apparently not enough for the Court to change its conclusion. For the same reason, the instant case meets the definition of mootness.

Appellant is no longer in an employment relationship with DVA. He is not in a position to obtain the “direct support services” that are available to DVA employees, and he is not in a position to take work time to investigate or otherwise prepare his grievances. The conference that he allegedly was prevented from attending has already been held. Nothing that can be done now could have an effect on the disputes underlying his grievances.

Because all three of these cases are moot, there is no reason to address Respondent’s timeliness objections or the contention that the subjects of the grievances fall within the scope of management rights.

In his written arguments, the Appellant states that he seeks monetary damages for his claim that the WERC has “denied him due process for its failing to act on these appeals in a timely manner” because he had never agreed to hold cases V, VI and VII in abeyance while the Commission issued its ruling on the motion that was pending in deMoya IV. This is not a proper forum for seeking “monetary damages” for the Commission’s own conduct. In addition and as has been explained to the Appellant in previous correspondence, the claim is unfounded.

Dated at Madison, Wisconsin, this 22<sup>nd</sup> day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.