

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
07-KOSH-0412

KOSHRC 4491-07

COMMISSIONER
DEPARTMENT OF LABOR
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET

COMPLAINANT

v

HOFFMAN ENCLOSURES, INC

RESPONDENT

ORDER OF THE COMMISSION
ON INTERLOCUTORY
APPEAL AND
ORDER REMANDING

After we assigned this case to our hearing officer to commence pretrial proceedings, the parties apparently entered into oral discussions about a settlement agreement. Before the settlement process was completed, and certainly before any stipulation and settlement agreement had been signed by all concerned, counsel for complainant retired from state government.

In her pretrial order which led to this interlocutory appeal, our hearing officer says she was informed the case had settled and so cancelled the scheduled hearing. Before she left, according to the hearing officer's order, labor's attorney contacted Hoffman's representative to tell him she was closing some files and could not recall the terms of the settlement. Labor then sent Hoffman a settlement agreement signed only by the director of compliance. As our hearing officer put it "According to Hoffman, the terms contained in the documents sent...were not the terms agreed upon but were the initial terms offered by Labor which had been rejected by Hoffman."

Thereafter, Hoffman sent labor settlement documents with terms which differed from those labor had previously sent to Hoffman. At this point, it appeared from the record settlement discussions had broken down; in any event, the record does not contain settlement papers signed by all parties.

Hoffman then filed a motion "To Enforce Settlement Agreement" which asked the hearing officer to enter an order accepting a settlement agreement signed only by counsel for respondent; accompanying Hoffman's motion were several papers which it said supported its version of the settlement agreement. In her order the hearing officer said "The Hearing Officer's authority does not extend to contract disputes. Therefore she cannot compel acceptance by either party of the uncertain outcome of negotiations." She said at the next prehearing telephone conference she would decide whether to hold the case "in abeyance while circuit court determines whether there was an agreement or a hearing date will be set if the Respondent does not desire to go into circuit court."

After our hearing officer issued her order, complainant filed a petition asking the full commission for special permission to appeal from portions of the hearing officer's order. 803 KAR 50:010, section 45 (2). In its petition for interlocutory appeal, labor said the hearing officer erred when she denied its motion to strike Hoffman's "alleged 'settlement documents' and purported 'settlement discussions.'" Labor said the hearing officer also erred when she ventured the case may be held in abeyance to await respondent's decision whether to proceed to circuit court. Labor then asked the commission to remand for a hearing on the merits.

We granted complainant's request for interlocutory appeal and asked for briefs. Respondent argues the commission and our hearing officer have the authority to resolve a dispute about whether the parties reached a settlement in this case and if so to make findings

about its terms. While we agree respondent has correctly stated the central issue, from our review of the motions, responses, orders and briefs before us, as well as our understanding of the law, we have reached a different conclusion.

We agree with our hearing officer and hold this review commission and its hearing officers do not have the authority to resolve settlement contract disputes where the parties have not signed and submitted settlement papers. Our statute says we "shall hear and rule on appeals from citations." KRS 338.071 (4). We are a creature of our statute. We are not a court of general jurisdiction. Section 109, Constitution of Kentucky.

As one might expect, the federal review commission has dealt with the question whether a written settlement agreement must be tendered in order for the commission to find the parties have settled and then close the case. In Consolidated Aluminum, the federal review commission, CCH OSHD 25,069, page 30,973, BNA 9 OSHC 1144, 1155, after much litigation and discussion, said:

We therefore conclude that a written settlement agreement is necessary in order to effectuate the service and notice requirements of commission rule...For this reason, we now hold that a settlement agreement between the Secretary and an employer must be reduced to writing and signed by those parties and that the Commission will not consider any settlement agreement that is not submitted in this form. Accordingly, we further conclude, with specific reference to the case now before us, that Judge Chodes [the federal ALJ] was correct in rejecting CONALCO's motion to enforce the oral settlement agreement on the ground that the agreement was not in writing and signed by the parties.

Consolidated Aluminum states the issue before us concisely and expresses our concerns about the proper interpretation of our rules of procedure. Like the federal commission's, our rules state a written settlement agreement must be posted for ten days where employees may see it "before submission to the hearing officer." Section 51 (3), 803 KAR 50:010. To state the obvious, this

posting requirement, section 9 of our rules, can only be accomplished with a written settlement agreement.

While the federal commission said its rules imply a written settlement agreement must be submitted, ours are more specific. On this subject our rules say:

Settlement agreements submitted by the parties shall be accompanied by an appropriate proposed order. Such settlement agreement shall detail the basis for such settlement, either by order or a stipulated agreement properly signed by all parties.

Section 51 (2)

Hoffman says this dispute can be settled according to Kentucky law; we agree. In Commonwealth of Kentucky, Tourism Development Cabinet v Whitworth, Ky, 74 SW3d 695 (2002), some state employees had oral employment contracts with the department of parks. When the personnel board rejected their appeal, the employees claimed they were full time workers, the same employees filed suit in Franklin circuit court. In Franklin circuit the Commonwealth raised the defense of sovereign immunity.

Franklin circuit said an oral contract with the Commonwealth was "void and not capable of being ratified by any subsequent writing..." The court of appeals, reversing Franklin circuit, held the contracts were not void and said a general issue of fact needed to be resolved on remand to Franklin circuit. At 74 SW3d 698.

In its decision the Kentucky supreme court reversed the court of appeals and upheld the circuit court; the supreme court said "KRS 45A.245 (1) provides that any person having a lawfully authorized written contract with the Commonwealth may bring a action against the Commonwealth on the contract..." At 74 SW3d 700.

In Whitworth, our supreme court cited to Bishop v Wood, 426 US 341, 96 S Ct 2074, 48 LE2d 684 (1976), where the US supreme court said "state employees are limited in their

property rights to employment by the constraints in the state legislature which created those rights." Then the Kentucky supreme court said "Legally enforceable contracts with the state are to be in writing." At 74 SW3d 700.

In its decision the Kentucky supreme court in Whitworth cited to Clark County Construction Co v State Highway Commission, Ky, 58 SW2d 388, 390-391 (1933). In the Clark County Construction case, the court said:

Most, if not all jurisdictions, give recognition to the general rule that where a statute directs the manner of making public contracts and specifically prescribes the method of the exercise of the powers of public bodies or officials with respect thereto, such statute is the measure of their authority and any acts beyond the clearly defined limits fixed by the Legislature are void; and where it is required by statute that such contact shall be in writing and the contract itself provides that any modification of its terms shall be in writing, such provisions are mandatory...

(emphasis added)

In Kentucky it would seem the general rule is contracts with the state must be in writing, at least where statutes so require. Our rules of procedure require settlement agreements to be in writing. 803 KAR 50:010, section 51 (2).

In her order our hearing officer said she would need to decide whether to hold the case "in abeyance while the circuit court determines whether there was an agreement..." We reverse our hearing officer on this point.

Our rules of procedure do not provide for a stay of proceedings, or an abeyance, if a party decides on its own initiative to take a matter to circuit court. Hoffman has not to our knowledge filed suit. Should Hoffman file suit, we cannot know if it will seek a stay or whether circuit court would grant one.

If it comes to that, that is if circuit court should decide to stay our proceedings pending a decision, it has that power; we do not.

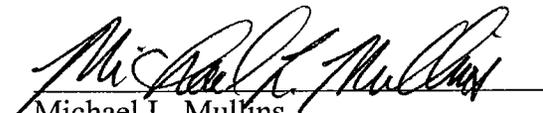
At a trial on the merits of this case, evidence, whether written or oral, "made in compromise negotiations is...not admissible." KRE 408.

This case is remanded to the hearing officer for further proceedings.

It is so ordered.

May 4, 2010.


Faye Liebermann
Chair


Michael L. Mullins
Commissioner


Paul Cecil Green

Certificate of Service

I certify a copy of the foregoing order resolving issues on interlocutory appeal was served this May 4, 2010 on the following in the manner indicated:

By messenger mail:

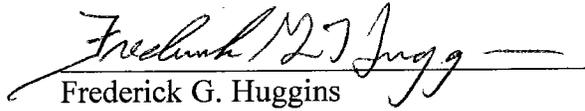
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