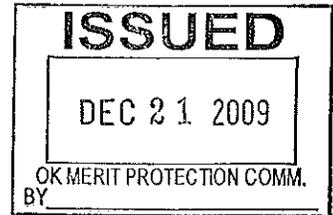


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

JANIE PENNINGTON-CAGLE )  
 )  
 APPELLANT, )  
 )  
 v. )  
 )  
 OKLAHOMA STATE DEPARTMENT )  
 OF HEALTH, )  
 )  
 APPELLEE, )  
 )  
 And )  
 OFFICE OF PERSONNEL )  
 MANAGEMENT, )  
 )  
 INTERVENER. )

CASE NO. MPC-08-139



**Decision Regarding Appellee's Motion to Vacate the Dismissal of Case  
No. MPC 08-139**

On March 19, 2008, Appellant filed an appeal against Appellee alleging a salary inequity existed within her job classification and alleging that she had been discriminated against based on her age. Thereafter, the Executive Director of the Merit Protection Commission (hereinafter "MPC") consolidated the appeal with MPC Case 08-138, Judy Cavnar v. Oklahoma State Department of Health.

The cases were assigned to the undersigned and prehearing was held on December 4, 2008. Over the course of the next few months, various issues arose which resulted in the delay of the hearing which had been scheduled for February 20, 2009.

Appellants and Appellee eventually entered into settlement negotiations and on July 9, 2009, Appellant Pennington-Cagle and Appellee filed a Joint Motion to Dismiss with Prejudice which was granted on July 11, 2009.

Hearing for the remaining Appellant, Judy Cavnar, was convened on September 25, 2009. At that time, Appellee's attorney, Charles Broadway, and Appellant Pennington-Cagle's attorney, Jared Morris, announced that Intervener, Office of Personnel Management (hereinafter "OPM" or "Intervener") had rejected the July 9, 2009, settlement agreement.<sup>1</sup>

The facts indicate that OPM had issued a document titled "Personnel Action" on July 28, 2009, marked "Approved" for the request for the payroll action by Appellee for Appellant Pennington-Cagle. On August 17, 2009, OPM issued a second document, titled "Personnel Action" indicating that the payroll action for Appellant Pennington-Cagle was rejected.

Intervener later explained that the July 28, 2009, approval was based on representations from Appellee that the settlement agreement was a "Merit Protection Commission sanctioned voluntary agreement".<sup>2</sup> The agreement was not a MPC sanctioned agreement and when OPM learned this, it rejected the request on August 17, 2009.

After announcing that OPM had rejected the settlement agreement, Mr. Morris, who also represents Appellant Cavnar, requested a continuance stating that the interest of Appellant Cavnar could be affected by OPM's rejection of Appellant Pennington-Cagle's settlement. The continuance was granted and a briefing schedule was set forth to allow the parties to present their positions.

On September 30, 2009, Appellee filed a Motion to Vacate the Dismissal granted July 11, 2009. Appellant responded to Appellee's motion on October 8, 2009, and on October 16, 2009, the Intervener responded to the Appellant's October 8<sup>th</sup> response. Appellee also filed a reply to Appellant's October 8<sup>th</sup> response.

On November 25, 2009, all parties appeared before the undersigned to present oral argument regarding the Appellee's Motion to Vacate, Appellant's Response, and the Intervener's Response.

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<sup>1</sup> Neither Mr. Broadway nor Mr. Morris were the original attorneys handling the case when it was first appealed to MPC and it appears both assumed the case around the time settlement negotiations were taking place between the Appellee and Appellant Pennington-Cagle.

<sup>2</sup> See OPM form PERSONNEL ACTION dated July 28, 2009, made part of the record at the November 25, 2009 oral arguments.

It is Appellee's position that the parties filed the joint motion to dismiss on July 9, 2009, because the parties reached a settlement they believed to be "concordant with the position staked out and relied upon by the Intervener, OPM."

The Appellee states that in accordance with the terms of the settlement agreement, it tendered a personnel action request to OPM seeking acceptance of a pay rate change. On August 17, 2009, OPM responded to the pay rate change request by rejecting it effective August 1, 2009. Appellee states OPM rejected the pay rate request after it determined that the basis for the personnel action was discordant with prevailing law.

Appellee asserts that the pay rate request, and therefore the settlement upon which the pay rate is based, violated 74 O.S. §840-2.17 and OPM Rule 530:10-7-26 frustrating the original purpose and ends of the settlement agreement and rendering it *ultra vires*.

Appellee asserts both parties mutually misapprehended the prevailing law which is grounds for rescission of the settlement. Accordingly, because the settlement agreement is void or subject to rescission, the order dismissing Appellant Pennington-Cagle's appeal should be vacated:

Appellee also asserts, for the first time during oral arguments on November 25, 2009, that the settlement agreement was reached using the Alternative Dispute Resolution Program as set forth in OAC 455:10-17-1. If that is the case, Appellee argues MPC has retained jurisdiction to enforce the terms of the settlement agreement. It appears, based upon questions from the undersigned to Appellee however, that the Alternative Dispute Resolution Program was not used during settlement negotiations between Appellee and Appellant Pennington-Cagle.

It is Appellant's position that Appellee used its statutory discretion in entering into the settlement agreement and release and that Intervener OPM lacks the statutory authority and standing to challenge Appellee's discretion which is clearly intended by the Legislature. Therefore, Appellant is requesting Appellee's motion be denied, the settlement agreement be enforced and the dismissal be affirmed.

Appellant asserts there was no mutual mistake of law regarding the agreement between Appellant and Appellee because Appellee had full knowledge of the facts at the time it entered into the settlement agreement and Intervener had full knowledge of the facts when it sent the first approval notice on July 28, 2009. Therefore, Appellant argues,

both parties should be estopped from voiding or rescinding the settlement agreement and subsequent dismissal.

Also, Appellant agrees no formal mediation was sought or used by the parties however, argues that the language of OAC 455:10-3-12 dealing with settlement agreements is applicable in this case. That section states:

“Settlement discussions are appropriate and encouraged at any stage of the appeal process. The parties may elect to enter into settlement discussions on their own or through mediation. If settlement is reached and endorsement of the Commission is requested, the agreement shall be put into writing and signed by all parties or representatives. The agreement shall be filed with the Commission and shall be reviewed and approved before dismissal of the appeal will be entertained. If approved, the Commission shall retain jurisdiction to enforce the terms of the agreement over which the Commission has jurisdiction and the agreement shall become part of the record.”

It appears, based upon questions from the undersigned to Appellant however, that no endorsement of the Commission was requested, the agreement was not filed with the Commission, no review was conducted and no approval given. It does not appear therefore that the Commission retained jurisdiction to enforce the terms of the agreement under this rule.

It is undisputed that the Intervener was not privy to any negotiation or settlement conferences between Appellant and Appellee and did not receive certain, pertinent documents.

It is the Intervener’s position that it was not until August, 2009 that it discovered that the terms of the settlement agreement were not concordant with Merit Rule 530:10-7-26 or OPM standards of application of that Merit Rule. On August 17, 2009, the Intervener rejected the request for personnel action submitted for required approval because of the terms of the settlement between Appellant and Appellee.

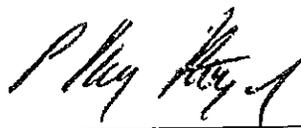
The Intervener argues that both Appellant and Appellee have applied 74 O.S. §840-2.17 and OPM Rule 530:10-7-26 in error and that the settlement agreement cannot be fulfilled in a manner consistent and permitted by the applicable Oklahoma statutes and Merit Rules. The Intervener therefore request Appellee's motion to vacate be granted.

The first question which must be addressed is whether or not MPC has jurisdiction to determine if this agreement is void, subject to rescission, or should be enforced.

Merit Rule 455:10-3-12 specifically sets forth the procedure a party must follow in order to ensure that the Commission retains jurisdiction to enforce the terms of settlement agreements. In this case, that procedure was not followed and the arguments made that the Commission does, in fact, have jurisdiction over this agreement are unpersuasive.

Accordingly, Appellee's Motion to Vacate the Dismissal of Merit Protection Commission Case 08-139, Janie Pennington-Cagle v. Oklahoma Department of Health is **Denied.**

DATED this 21<sup>st</sup>, day of December, 2009.



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P. Kay Floyd, OBA #10300  
Administrative Law Judge  
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