

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3043

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICAH ORIEDO,

PETITIONER-APPELLANT,

V.

**WISCONSIN PERSONNEL COMMISSION, DEPARTMENT OF
EMPLOYMENT RELATIONS, DIVISION OF MERIT
RECRUITING AND SELECTION, AND DEPARTMENT OF
PUBLIC INSTRUCTION,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

DEININGER, J. Micah Oriedo appeals an order which dismissed his appeal of a decision by the Wisconsin Personnel Commission. Oriedo claims that the Commission's order dismissing two respondents is appealable, even

though the Commission had not conducted proceedings on the merits of his employment discrimination claim. We disagree. The decision of the Commission is a preliminary one and therefore not reviewable. Accordingly, we affirm the order of dismissal.

BACKGROUND

Oriedo filed a complaint with the Wisconsin Personnel Commission alleging that the Department of Public Instruction (DPI), the Department of Employment Relations (DER) and the Division of Merit Recruitment and Selection (DMRS) discriminated against him by failing to hire him for the position of Education Consultant-Science Education with the DPI. The DER and the DMRS moved the Commission to dismiss them as parties because Oriedo's complaint did not state a claim against them upon which relief could be granted. The Commission granted the motion to dismiss, concluding that "[t]here is nothing in the statutes which gives either the DER secretary or the DMRS administrator any control over hiring decisions of the appointing authorities." Oriedo appealed the Commission's decision dismissing the DER and the DMRS to the Dane County Circuit Court.

The circuit court concluded that the Commission's decision was preliminary and therefore non-appealable. The circuit court noted that the order lacked the essential characteristics of a reviewable order including findings of fact and conclusions of law. In addition, the court determined that the dismissal did not affect a substantial interest of Oriedo's because Oriedo could appeal after the Commission concluded its proceedings on the merits. Oriedo now appeals the circuit court's order dismissing his petition for judicial review.

ANALYSIS

The right to judicial review of an administrative determination is purely statutory and is outlined in Chapter 227 of the Wisconsin statutes.¹ *Madison Landfills, Inc. v. DNR*, 180 Wis.2d 129, 138, 509 N.W.2d 300, 304 (Ct. App. 1993). This appeal, therefore, presents a question of law which we review de novo. See *Waste Management v. DNR*, 128 Wis.2d 59, 81, 381 N.W.2d 318, 328 (1986). In order for an administrative agency decision to be reviewable under Chapter 227, the order must be: “(1) a final decision, (2) made in writing accompanied by findings of fact and conclusions of law, (3) adversely affecting the substantial interest of any person and (4) review [must be] sought by a person aggrieved by the decision.” *Madison Landfills, Inc.*, 180 Wis.2d at 138, 509 N.W.2d at 304. If a decision does not meet the elements for reviewability, the court cannot consider the merits of the case but must dismiss the petition for review. See *State v. WERC*, 65 Wis.2d 624, 630, 223 N.W.2d 543, 547 (1974).

A final agency decision is one which conclusively determines “the further legal rights of the person seeking review.” *Waste Management*, 128 Wis.2d at 90, 381 N.W.2d at 332. Conversely, an order is preliminary or

¹ See, e.g., section 227.47(1), STATS., (“[E]very ... final decision of an agency ... shall be in writing accompanied by findings of fact and conclusions of law.”); section 227.52, STATS., (“Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter”); section 227.53(1), STATS., (“Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.”).

interlocutory when “the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action.” ***Pasch v. DOR***, 58 Wis.2d 346, 354, 206 N.W.2d 157, 161 (1973). The distinction is consistent with the legislature’s intent that judicial review be available only for final decisions “entered at the end of the *contested proceedings* and ... based on *findings* made pursuant to the evidence submitted in a formal hearing” ***Wisconsin Tel. Co. v. Wisconsin Employment Relations Bd.***, 253 Wis. 584, 593, 34 N.W.2d 844, 848 (1948). The policy of excluding procedural or preliminary decisions from judicial review is designed to prevent administrative proceedings from being “constantly interrupted and shifted back and forth between the agencies and the courts.... [Such a process] would seriously hamper the efficient conduct of administrative proceedings.” ***WERC***, 65 Wis.2d at 637, 223 N.W.2d at 550. For these reasons, “[c]ourts are averse to review interim steps in an administrative proceeding.” ***Wisconsin Tel. Co.***, 253 Wis. at 591, 34 N.W.2d at 847 (quoted source omitted).

The Commission’s decision to dismiss the DER and the DMRS has no characteristics of a final and reviewable decision. Oriedo’s discrimination claim has been retained by the Commission for action on the merits, and Oriedo’s substantial rights are as yet undetermined, and will remain so until the Commission issues a decision on the merits of his claim. Oriedo’s claim against the DPI may ultimately prove successful, and this opportunity for success on the merits also supports the conclusion that the Commission’s order dismissing DER and DMRS was interlocutory and not final. *See Pasch*, 58 Wis.2d at 357, 206 N.W.2d at 162-63.

Oriedo contends that the decision to dismiss is final as to the DER and the DMRS since they will no longer participate in the administrative

proceedings. *See* § 808.03(1), STATS. His argument fails, however, because the finality of agency decisions is not determined in terms of a single issue or party. So long as the merits of his claim remain before the Commission, Oriedo is not entitled to a separate court hearing and appeal of each component of the Commission's action. *See Pasch*, 58 Wis.2d at 358, 206 N.W.2d at 163 (all issues arising out of a claim “constitute one proceeding before the commission” and all issues are to be raised on appeal of the Commission's determination in that proceeding); *see also YMCA v. DOR*, 141 Wis.2d 907, 912, 417 N.W.2d 39, 42 (Ct. App. 1987) (an agency's failure to address certain issues presented to it by an appellant does not prevent the agency's decision from being final; appellant may raise unaddressed issues on appeal of the agency's final decision).

Oriedo's argument on this point correctly implies that an important factor in determining reviewability is whether the party appealing the agency decision will have a later opportunity for judicial review. *Pasch*, 58 Wis.2d at 357, 206 N.W.2d at 162. Review of whether the Commission properly dismissed the DER and the DMRS will be available once proceedings on the merits of Oriedo's claim are concluded. Therefore, as the circuit court noted, the “right to challenge the dismissal of these agencies is not lost; it is simply deferred.” Since Oriedo has not made a substantial showing that judicial review at a later time would be inadequate, the Commission's interlocutory order is not subject to review at this time. *See Pasch*, 58 Wis.2d at 357, 206 N.W.2d at 162; *State ex rel. Thompson v. Nash*, 27 Wis.2d 183, 194, 133 N.W.2d 769, 776 (1965) (courts should not interfere with procedural aspects of agency proceedings absent a substantial showing that there has been a denial of due process that cannot be adequately remedied on review of the agency's final decision).

CONCLUSION

For the reasons discussed above, we affirm the circuit court's order dismissing Oriedo's petition for review.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

