STATE OF WISCONSIN PERSONNEL COMMISSION

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| **MICHAEL PEARSON,**<br>*Appellant,*<br><br>**v.**<br><br>**President, UNIVERSITY OF WISCONSIN-SYSTEM,**<br>*Respondent.*<br><br>Case No. 84-0219-PC | RULING ON APPELLANT'S MOTION FOR AWARD OF COSTS PURSUANT TO §227.485, STATS. |

This matter is before the commission on appellant's motion for award of costs pursuant to §227.485, Stats. Both parties have filed briefs and supporting documents.

In an "INTERIM RULING ON PETITIONS FOR DECLARATORY RULING" dated August 5, 1996, the commission summarized the background of this case at that time as follows:

> This case commenced as an appeal pursuant to §230.44(1)(d), Stats., of respondent's failure to have appointed appellant to a vacant Maintenance Supervisor 1-Locksmith position. In its final decision and order entered on September 16, 1985, the commission concluded that respondent's decision not to have promoted appellant constituted an abuse of discretion, and that appellant was entitled as a remedy to appointment to the position in question (or a comparable promotional position) when it next became vacant.
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> The status quo as to this position remained unchanged for a number of years until the incumbent (William Critchley) retired in 1995. The appellant subsequently sought to invoke the commission's jurisdiction to enter an order restraining respondent from taking any action with respect to the position other than appellant's appointment. The parties then agreed that respondent would take no action with respect to the position in question while their dispute would be submitted to the commission on the parties' respective petitions for declaratory ruling. Id.

In a nutshell, respondent contended that subsequent to Mr. Critchley's retirement, it had refrained from filling the position he had occupied because it was considering possible changes in its locksmith operation that could eliminate the need to fill the position at all. Appellant contended that respondent had been acting in bad faith to find a way to avoid ap-

pointing him to the vacant position and thus deliberately circumvent the commission's original order. The commission resolved this dispute as follows:

> When Mr. Critchley retired, his position became "vacant" as that term is commonly understood. Since the commission's decision and order required that appellant be appointed to this position when it became vacant, it would appear that respondent should have made the appointment at the time of Mr. Critchley's retirement. However, respondent appears to assert that there is no vacancy until it decides the position should be filled, and that the commission has no authority as a remedy for a §230.44(1)(d), stats., appeal like this to require it to fill a vacant position under the circumstances . . . Section ER-MRS 1.02(34), Wis. Adm. Code, provides the following definition: " 'Vacancy' means a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill the position." In *Givens v. DILHR,* 87-0039-PC (3/10/88), affirmed, *Givens v. WPC,* Dane Co. Cir. Ct. 88CV2029 (1/6/89); the commission addressed the meaning of this rule . . . as follows:
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>> Respondent argues that . . . a "vacancy" does not exist unless there is: (1) a position and (2) a request that the position be filled. In the opinion of the commission, however, respondent tortures the clear language of the code provision to reach this conclusion. In the commission's opinion, such language requires that the appointing authority have the *authority* to initiate an action to fill the position and the *authority* to make a permanent appointment to the position once such an action is initiated in order for the position to be considered vacant. In other words, it is the existence of this authority, not the exercise of it, which triggers the language of the code provision.
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> This precedent conflicts directly with the respondent's approach in the instant case. Furthermore, respondent's contention that an interpretation of the commission's order which would require it to appoint appellant to the vacant position would somehow interfere with its prerogatives to make management decisions about the position in question, and how to deal with the locksmith program, is misplaced. Respondent is free to decide in good faith to merge, downsize, etc., as it sees fit. If such action were to involve the elimination of the Supervisor 1-Locksmith vacancy, that would not be prohibited by the commission's original decision and order in this case. However, appellant is entitled to an immediate promotion to this vacancy. Id, pp. 3-4 (footnote omitted).

The Commission entered the following 'DECLARATION OF RIGHTS":

> In conclusion, the Commission rules that appellant is entitled to an immediate offer of an immediate promotion to the Maintenance Supervisor 1-Locksmith position in question. The Commission will continue to exercise jurisdiction over this matter for the limited purpose of entertaining any petition which may be filed under §227.485, Stats.

Section 227.485(3) provides, *inter alia*, that the prevailing party shall be awarded costs unless "the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Section 227.485(2)(f) provides that "'[s]substantially justified'" means having a reasonable basis in law and fact." In *Sheely v. DHSS*, 150 Wis. 2d 320, 337-38, 442 N.W. 2d 1 (1989), the Court held:

> "To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." Losing a case does not raise the presumption that the agency was not substantially justified. Nor is advancing a "novel but credible extension or interpretation of the law" grounds for finding a position lacking substantial justification." (citations and footnote omitted).

As the appellant notes in his brief in support of his motion, the Commission's ruling on the petitions for a declaratory ruling did not resolve any of the factual disputes between the parties, but "stated that 'the ultimate issue presented by these petitions is a legal one which can be answered without the need to resolve these factual issues.'" *Id.*, p. 3. The legal issue in question involved the interpretation of §ER-MRS 1.02(34), Wis. Adm. Code.[1] The Commission relied on its earlier decision in *Givens v. DILHR*, 87-0039-PC, 3/10/88; affirmed, *Givens v. WPC*, Dane Co. Cir. Ct. 88CV2029, 1/6/89. In a decision on §227.485 costs rendered in *Givens*, the Commission held:

> In its decision on the merits of the instant appeal, the Commission clearly disagreed with repondent's interpretation of §ER-Pers 1.01(15), Wis. Adm. Code[2] . . . and relied on such interpretation in rejecting respondent's layoff of appellant. Although the Commission is of the opinion that its interpreta-

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[1] "'Vacancy' means a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill that position."
[2] Now §ER-MRS 1.02(34), Wis. Adm. Code.

> tion of the language of such rule is correct, it does not necessarily follow that the Commission is of the opinion that respondent's interpretation is clearly against reason. In fact, the Commission concludes in this regard that it is possible that a reasonable person could have interpreted such language as respondent contends it did in reaching the subject layoff decision. It is also apparent from the record that respondent had a very real concern that only by interpreting the code provision as it did would it be possible to plan for projected structural changes or funding cutbacks; that respondent believed that a code provision which eliminated or severely restricted the use of this tool would be contrary to good public policy; and that respondent concluded, therefore, that it was more reasonable to interpret the code provision as it did. Although the Commission does not agree with respondent's conclusion, it does agree that such concern on the part of respondent was reasonable and it was not clearly against reason for respondent to consider the above factors and, after consideration of such factors, to reach the conclusion that it did. *Givens v. DILHR*, 87-0039-PC, 3/28/88.

Similarly, in the instant case, respondent's concerns that an interpretation such as ultimately adopted in *Givens* would interfere with its management prerogatives was not without some reasonable basis. While respondent should have had the benefit of the Commission's ruling in *Givens,*[3] the *stare decisis* effect of an administrative decision is limited:

> The doctrine of stare decisis is not generally applicable to the decisions of administrative tribunals . . . administrative bodies are not ordinarily bound by their prior determinations or the principles or policies on which they are based, and, in the absence of statutory or constitutional barriers, may change, modify, or reverse their policies or decisions, or otherwise abandon earlier precedents and frame new policies.
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> Indeed, all the law requires is that an administrative agency explain the grounds for a modification, and provide a rational and reasonable basis for its action. Thus, an agency must either conform to its own precedents or explain its departure from them. 73A CJS PUBLIC ADMINISTRATIVE LAW AND PROCEDURE §157 (footnotes omitted).

*See also Wis. Power & Light v. Pub. Serv. Comm.*, 148 Wis. 2d 881, 889, 437 N.W. 2d 888 (Ct. App.1989) ("quasi-judicial agencies . . . are not subject to the rule of *stare decisis*."(citation omitted)). The foregoing principle does not mean that the decisions of quasi-judicial administrative agencies like this Commission have no precedential value. A party

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[3] Respondent argues that this decision is digested in the Commission's digest under the heading of "Layoffs . . . which is not readily seen as applicable to this situation." Response to petition for award of attorney's fees, p.5. Neither party cited *Givens* in their briefs submitted prior to the Commission's August 5, 1996, decision.

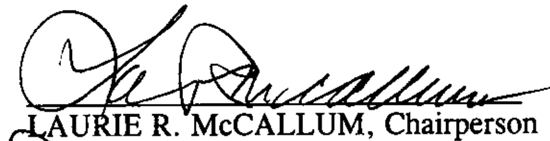
before such an agency can anticipate that the agency will follow its precedents unless, as set forth in CJS, it provides a "rational and reasonable basis" for departing from them. However, if an agency takes a position contrary to a Commission precedent, while it presumably would be subject to rejection by the Commission, it would not be subject to the imposition of costs pursuant to §227,485, Stats., so long as it had a "reasonable basis in law", §227.485(2)(f), Stats., for its position.

ORDER

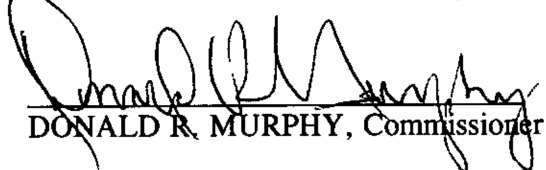
Because the Commission concludes that respondent's position was "substantially justified," §227.485(3), Stats., appellant's motion for award of costs is denied[4].

Dated: February 12, 1997

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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[4] Inasmuch as the Commission is still entertaining proceedings with respect to the question of compliance with its August 5, 1996, ruling, it continues to retain jurisdiction over this matter in that context.