STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

JAMES McCREADY,
RONALD PAUL,

Appellants,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 85-0216-PC
85-0217-PC

* * * * * * * * * * * * * * * * *

DECISION AND ORDER ON MOTIONS FOR COSTS

NATURE OF THE CASE

These are consolidated appeals under §230.44(1)(c), Stats., of discharges. The Commission entered a decision and order on May 28, 1987, granting appellants' motion for summary judgment and in so doing rejecting the discharge actions because of the conclusion that the process followed by respondent prior to discharge denied appellants due process of law. Appellants then moved for costs pursuant to §227.485, Stats., and the parties have submitted briefs on those motions.

DECISION

Section 227.485(3), Stats. (1985), provides:

> In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that 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), Stats., defines "substantially justified" as "having a reasonable basis in law and fact." Section 227.485(1), Stats., provides:

> The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act, 5 USC 504.

In Escalada-Coronel v. DMRS, No. 86-0189-PC (April 2, 1987), the Commission concluded that in applying this statute, it should evaluate the "position" of the state agency "as to both the underlying transaction and the administrative proceedings," citing Iowa Exp. Distribution Inc. v. NLRB, 739 F. 2d 1305, 1309 (8th Cir. 1984). The Commission further concluded that the government agency has the burden of proof, and that the standard of "reasonable basis both in law and in fact" was:

> ...intended to serve as a 'middle ground' between an automatic award of fees to a successful party and permitting fees only where the government's was arbitrary and frivolous.... Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N.D. Ill. 1982).

In the Commission's decision of the instant cases, it ruled only on appellants' contention raised in the motions for summary judgment that their right to procedural due process of law was violated by the way in which respondent handled pretermination proceedings. In its brief on costs, respondent suggests that the matter now before the Commission involves two issues:

> ...First, there is Respondent's position that the appellants had to be terminated for misconduct and workrule violations. Second, there is the respondent's position that the predisciplinary hearing provided for adequate due process protections to the appellants....

As to the first issue, this is not before the Commission because the appeals have been resolved on the narrower ground of procedural due process which was all that was raised by the motion for summary judgment. As to the second issue, since the Commission, in deciding whether to award costs under §227.485, Stats., looks at both the justification for the underlying

action and the justification for the agency's position in the subsequent appeal, its scrutiny is not restricted solely to the question of the justification for respondent's "position that the predisciplinary hearing provided for adequate due process protections." Rather, it also will consider whether respondent's position as to how to handle appellants' predisciplinary proceedings at the time was substantially justified.

In its decision of the due process issue in the Paul case, the Commission gave substantial weight to the fact that the agency failed to follow its in-house policy on the handling of pre-disciplinary proceedings. It also considered the facts that management failed to provide notice of what the potential workrule violations were, that management was unable or unwilling to cite any workrule violations during the hearing, by management's specific denial in response to appellant's question at the hearing that he was being charged with a violation of a workrule requiring that a report be filed upon discharge of a firearm, and that not only did management fail to advise appellant as to the degree of potential discipline involved, but that it also actively misled him to believe that no serious discipline was being considered.

In McCready's case also, the Commission considered the agency's failure to follow its in-house disciplinary procedure, its failure to identify the possible workrule violations, and its failure to provide notice of the potential degree of discipline.

In its brief on costs, respondent presents, inter alia, the following arguments:

> ...The respondent was aware through the predisciplinary investigation and hearings that the events were essentially uncontroverted. The real question was what, if any, discipline should be imposed. While the notice and conduct of the hearings was not ideal, the respondent was dealing with officers who were experienced and familiar with the workrules, the procedures for

> discipline, and the policies and procedures which were violated by the appellants' conduct. It may not have been the best handling of a predisciplinary hearing to fail to identify the workrules at issue but the appellants knew the hearings were predisciplinary and not investigatory. In addition, the respondent reasonably relied on the appellants' knowledge that any disciplinary action may lead to termination depending on the conduct. Finally, the respondents did not deny the appellants all aspects of due process. There was a hearing and there was an opportunity to have representation. Therefore, the respondent was substantially justified in taking the position it did.

Respondent never addresses the matter of possible justification for the misrepresentations made to appellant Paul concerning the potential degree of discipline and the agency's intent with regard to charging a violation of a particular work rule. Further, with respect to both Paul and McCready, while it can be inferred from their management status that they would have less need for notice of particular work rule violations than the average employe, it certainly cannot be said on this record that they knew or should have known what work rule violation charges would have been forthcoming from the gatehouse incident. This is particularly true with respect to the charge that they violated work rules in the unauthorized acquisition of the practice ammunition that was used in this incident.

As to the absence of notice of the degree of possible discipline, even if both appellants were aware that theoretically the range of possible discipline could include discharge, this fails to address the practical significance of not knowing that management considered discharge to be a realistic alternative. This problem was exacerbated as to Paul because he had been told specifically that management did not consider the matter to be serious.

Finally, the fact that respondent did not deny appellants all the elements of due process, or that not all of their challenged conduct was

determined to have been improper, does not outweigh the other factors discussed above so as to lead to a conclusion that respondent had a reasonable basis in fact and law for their handling of these predisciplinary proceedings. Respondent's failure to have followed its own policies weighs particularly heavily in this evaluation. In Escalada-Coronel, one of the factors in the Commission's determination that the agency's position was substantially justified was that:

> ...the respondent's handling of this application was not a 'one-shot,' ad hoc determination, but rather was consistent with a relatively long standing interpretation of its authority in this general area under the civil service code. See Dougherty v. Lehman, 711 F. 2d 555, 564, (3d Cir. 1983)....

In the instant matter, respondent's handling of the predisciplinary proceedings was at odds with its own formal policy.

The Commission also concludes that the agency's position at the appeal level was not "substantially justified" in that it did not have a reasonable basis in law and in fact. While the agency's position certainly was not frivolous or arbitrary, it was saddled with some very significant weaknesses. With respect to Paul, respondent's agents misled him as to the potential severity of the matter and as to whether management was going to pursue a particular work rule violation. As to both appellants there were the various failures of notice and failure to follow internal policy as to predisciplinary procedures. There may well be some cases where an employer would have a reasonable basis to contend that the failure to follow internal disciplinary procedures does not amount to a violation of due process. In the Commission's May 28, 1987, decision it concluded that due process did not per se require that internal procedures be followed. However, in these cases, not only were some of the deviations substantial and problematical in their own right, but also the respondent's policy

itself states that the prescribed predisciplinary hearing is "an essential element of due process" (emphasis supplied) and that failure to maintain due process in disciplinary situations may result in management's action being overturned upon later review, (Exhibit D, stipulation).

Moving to specific issues concerning the costs claimed by appellants, respondent objects to allowance of costs for attorney time spent on any activity except the motion for summary judgment. The Commission agrees only to the extent that costs should not be allowed for legal fees accrued before another forum (unemployment compensation).

Section 227.485(3), Stats., provides, inter alia:

> In any contested case in which an individual... is the prevailing party... the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds...." (emphasis supplied)

Section 227.485(5), Stats., incorporates by reference §814.245(5), Stats., which refers to "reasonable" attorney's fees.

Attorneys' fees attributable to these proceedings but not directly related to the motion for summary judgment are not thereby rendered "not in connection with the contested case" or unreasonable. Appellants' attorneys could not be sure that the motion for summary judgment would be granted, and there is nothing in their compilation of time to indicate an unreasonable expenditure of time on non-motion matters. As to the costs connected to the unemployment compensation proceeding (20.3 hours), appellant Paul argues that that proceeding served the ancillary purpose of discovery for the appeals before this Commission. This tangential aspect is insufficient to render these fees "incurred in connection with the contested case," §227.485(3), Stats., and these fees (for 20.3 hours) should not be allowed.

Respondent also objects to the amount of the hourly fee rate ($70) of appellant Paul's second attorney, Mr. Dreps, noting that he was admitted to the bar in 1984, that his hourly rate was more than some of the other more experienced attorneys in the case, and "by his own statement required a supervisory attorney's time which was also claimed." Respondent further objects to any allowance for the supervisory attorney's time (2.6 hours at $110 per hour): "It is highly inappropriate and beyond the intent of §227.485 for the respondent to pay for the in-house training and review of the appellant's attorney"

Finally, respondent argued that the fees should be reduced to $60 per hour which is the amount charged by appellant McCready's attorneys.

It is not unreasonable to allow the time of a more senior attorney who is involved in a case. Regardless of the fact that he was serving in a supervisory capacity, it can be reasonably assumed his involvement in the case was part of the delivery of legal services to the client and served to advance the client's interests.

As to the matter of the allowable rate, §227.485, Stats. states that in determining the amount of costs, the criteria specified in §814.245(5), Stats., should be utilized. Section 814.245(5)(a), Stats., provides, inter alia:

> The amount of fees... shall be based upon prevailing market rates for the kind and quality of the services finished, except that:
>
> * * *
>
> 2. Attorney or agent fees may not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee. (emphasis added)

There has been nothing submitted as to prevailing market rates. Furthermore, the $110 per hour claimed for the supervising attorney is in excess of the $75 statutory maximum, and the Commission can not on this record determine there are factors present which would justify a higher fee. Therefore, the Commission will reduce the hourly rate for Mr. Paul's attorneys to $60, which is the rate charged by Mr. McCready's attorneys, and to which respondent does not object.

ORDER

85-0216-PC Appellant McCready is awarded costs in the amount of $3370.97 which represents the following

Attorney Graylow's fees:	$450.00
Attorney Graylow's expenses:	13.00
	$463.00
Attorney Woods' fees (includes law clerks):	$2886.00
Attorney Woods' expenses:	21.97
	$2907.97

85-0217-PC Appellant Paul is awarded costs in the amount of $5108.15 which represents the following:

Attorney Dreps' fees:	
70.3 hours x $60:	$4218.00
law clerks (18.5 hours x $35):	647.50
Attorney Munson's fees:	
2.6 hours x $60:	156.00
Attorney Dreps' expenses:	86.65
	$5108.15

Dated: September 10, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

LAURIE R. McCALLUM, Commissioner

DONALD R. MURPHY, Commissioner

AJT:jmf
JMF05/3

Parties:

James McCready
Route 1, Box 157
Eden, WI 53019

Ronald L. Paul
Route 1
Fox Lake, WI 53933

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707