

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ANDERSON et al., *
 (Gene Anderson, Joseph Bronner*
 Ruth Kelly, Charles Kirk, *
 Bettie Temperly and *
 LaVern Woodford), *
 *
 Appellants, *
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 v. *
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 Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *
 *
 Respondent. *
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 Case No. 86-0098-PC *
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DECISION AND ORDER
 ON
 MOTION FOR ATTORNEY'S FEES

Appellants, Gene Anderson, Joseph Bronner, Ruth Kelly, Charles Kirk,
 Bettie Temperly and LaVern Woodford appealed, under §230.44(1)(b), Wis.
 Stats., the Department of Employment Relations (DER) decision denying
 reclassification of their positions from Administrative Assistant 5 -
 Supervisor to Administrative Officer 1 - Supervisor. A hearing was held on
 the appeal by this Commission and on September 29, 1987, the Commission
 rejected DER's decision. On September 14, 1987, after receiving the
 Commission's proposed decision in this matter, appellants filed a motion
 for attorney's fees as provided in §227.485, Wis. Stats. In response to
 appellants' motion on October 2, 1987, DER moved for its dismissal with
 prejudice or, alternatively, limitation of cost to time spent by appel-
 lants' counsel within a limit of \$75 per hour.

Wis. Stats. sec. 227.485(3) 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.

As expressed in this section, the determinant is whether respondent's position was "substantially justified" or whether "special circumstances exist" which would make the award unjust.

The term "substantially justified" is defined in sec. 227.485(2)(f) as: "having a reasonable basis in law and fact." And further instruction is found in sec. 227.485(1). It 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.

This Commission in Escalada-Coronel v. DMRS, No. 86-0189-PC (April 2, 1987) said, in determining a state agency's position as prescribed by section 227.485(1), it would analyze its actions at both the prelitigation and litigation level. This Commission also said the state agency has the burden of proof and the standard of "reasonable basis in law and fact" falls between an arbitrary and frivolous action and an automatic award to the successful party.

In reviewing respondent's actions prior to litigation, it appears that respondent followed the routine administrative procedure for reviewing the reclassification request. Upon receipt of the request, respondent assigned the review to one of its personnel specialists, who reviewed the information sent with the request. Afterwards, the personnel specialist requested additional information from appellant's employer. Later, the personnel specialist conducted a full audit, talking with three of the appellants and the appellants' supervisor and bureau director. The specialist also

reviewed organizational charts, position descriptions, classification specifications and carried on discussions with her supervisor about the appropriate classification for appellants' positions.

The remaining question at the prelitigation level is whether respondent meets the test of having a "reasonable basis in law and fact" in regards to its decision to deny reclassification. It is the opinion of this examiner that the substantive portion of respondent's decision was lacking. Examples of such decision making follow: Respondent's preliminary review of the reclassification request, which preceded the field audit, was negative, rather than neutral. In the turn down letter, respondent identified several increases in appellants' duties, several new duties, which were formerly responsibilities of the section chief, acknowledged changes, including evaluating new federal and state codes, regulations, policies and procedures, but determined that these changes were not significant enough in responsibility, complexity, scope or impact for reclassification. During the hearing, respondent failed to produce evidence to justify that position. To illustrate, one of the distinctions made between appellants' positions and AO 1 - Supervisor position was on the basis of the difference between the terms, program administration and program management. Appellants' positions were determined not to have scope, responsibility and discretion described in the term program administration, which is found in the AO 1 - Supervisor classification specification. Respondent's interpretation of these two terms was nebulous and no supporting evidence was provided which demonstrated such distinctions. The evidence presented about the Jules Bader position, which respondents presented as representative of AO 1 - Supervisor position, compared favorably with appellants' positions. Also, respondents use of "comparable"

positions was superficial. The testimony of respondents' personnel specialist clearly shows that she had little knowledge about the specific responsibilities of the "comparable" positions, which were needed to make comparisons with appellants' position. For instance, the specialists did not know whether the comparables had enforcement powers, certification and licensure authority, citation power and non-appealable order authority; she did not know the number of types of codes these positions administered. Other statements made by the specialist concerning these positions about policy involvement were unsupported. Yet these positions were presented by respondent as evidence of the correctness of its position.

Also, it appears the personnel specialist was more receptive to general statements of incumbents about the changes, rather than statements of the section chief and bureau head, who had eighteen years of experience, many of them with respondent, in state personnel work.

Respondent's review of appellants' position was deficient and warrants the granting of appellants' motion as provided.

In regards to attorneys fees, section 814.245(5)(a), Wis. Stats., provides for a maximum hourly rate of \$75.00, adjustable in accordance with cost of living increases. Appellants have submitted information showing a cost of living increase of 4.3% or adjusted maximum hourly rate of \$78.22 per hour, which was unrefuted by respondent. Accordingly, the Commission will adjust appellants' attorneys fees.

ORDER

Appellants are awarded attorneys fees and costs as follows:

Attorney Weston's fee	59.45 x \$78.22/hr = \$4650.18
paralegal's fee	5.80 x \$35.00/hr = \$ 203.00
law clerks's fee	47.70 x \$20.00/hr = \$ 954.00
Subtotal	<u>\$5807.18</u>

Disbursement	
photo copies	\$ 206.55
postage	\$ 19.42
long distance telephone calls	\$ 5.11
miscellaneous	\$ 42.00
Subtotal	\$ 273.08
TOTAL	\$6080.26

Dated: November 18, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

DRM:jmf
JMF07/3

Parties:

Gene Anderson, Joseph Bronner,
Ruth Kelly, Charles Kirk
Bettie Temperly & LaVern Woodford
c/o Attorney Cheryl Rosen Weston
20 North Carroll Street
Madison, WI 53703

John Tries
Secretary, DER
P. O. Box 7850
Madison, WI 53707