STATE OF WISCONSIN PERSONNEL COMMISSION

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FEDERICO ESCALADA-CORONEL

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondent.

Case No. 86-0189-PC

DECISION AND ORDER ON ATTORNEY'S FEES

This case involves an appeal filed on October 30, 1986, pursuant to §230.44(1)(a), stats., of an action of the administrator, DMRS, denying appellant entrance to an exam. Following a hearing on the appeal, the commission entered its final decision and order on November 26, 1986, rejecting the respondent's decision. Subsequently, on December 29, 1986, appellant filed a Motion for Award of Attorney's Fees pursuant to §227.485, stats., the Equal Access to Justice Act (EAJA). Respondent filed a countermotion for costs pursuant to §227.485(10) on January 23, 1987. Both parties have filed briefs and affidavits with respect to the motions.

A copy of the Commission's underlying decision and order entered November 26, 1986, is attached hereto for ease of reference. The decision may be summarized as follows: Appellant filed a timely state application form for an examination for Social Worker 1-Bilingual: Spanish/English - statewide. However, he did not fill in the job classification code or civil service title, although the form required it. Because of this omission, the computer into which the form was entered rejected it, and it was returned to the appellant with an explanation for the action. Appellant entered the

missing information and returned the application form to DMRS, but by this time the application deadline had passed, and DMRS refused to admit him to the exam. Appellant then filed his appeal with the Commission.

In its decision, the Commission stressed the difference in respondent's handling of application forms which are incomplete because, like the appellant's, they lack the applicable job classification code and civil service title, and those which are incomplete because they lack residency information. As to the former, the respondent returns the applications by mail, and refuses to allow the applicant to compete in the exam unless the completed application is returned on or before the exam deadline. With respect to the latter, the respondent contacts the applicant by phone or mail to obtain the missing information, and the applicant is permitted to take the exam if the missing information is supplied on or before the day immediately preceding the exam. The commission went on to decide that on the record before it there was no reasonable basis for this inconsistent treatment, and to conclude that respondent's action denying appellant's application was not a reasonable enforcement of the application deadline.

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.

The first issue is whether the "position" of the state agency referred to in §227.485(3), stats., is the position of the agency on the underlying transaction that triggered the administrative proceeding, its position in the administrative proceeding, or both. While there has been a split of authority by the federal courts which have interpreted the federal law, the Commission is inclined to follow those cases that have looked to the agency's position as to both the underlying transaction and the administrative proceeding. This is consistent with what appears to be the manifest legislative intent of dealing with unreasonable agency action which causes (with respect to matters reaching this Commission) an individual to expend costs. See, e.g., Iowa Exp. Distribution, Inc. v. NLRB, 739 F. 2d 1305, 1309 (8th Cir. 1984):

> "The references in the legislative history to the government's position at both the agency and litigation levels suggest to us, however, that Congress was concerned with unreasonable government activity at whatever level it was encountered.... If we were to limit our consideration of the government's position to merely the stance taken in litigation, no matter how outrageous the underlying government action, the government would be absolved from liability if Justice Department litigators acted reasonably.... The litigation position approach does not address what we must conclude is at least a significant purpose of the EAJA -- to encourage government regulatory agencies only to take actions that have a reasonable basis in law and in fact.
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> We feel that the purpose of the EAJA is best served by interpreting position of the United States to include the government's position at both the prelitigation and litigation levels. We concur in the observation of the court in Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982):
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> > '[T]he Act is intended to proscribe frivolous government action that forces a party to resort to the courts to redress its rights. It would contradict the remedial purpose of the Act to interpret it to isolate and focus upon the reasonableness of only a single element of the government's actions, when the entire factual background may suggest a contrary conclusion.'
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> Id. at 351 n. 7 (emphasis added)...."

As a practical matter, as indeed is the case with respect to the instant matter, its makes little difference how the agency's "position" is defined. See Hoang Ha v. Schweiker, 707 F. 2d 1104, 1106 (9th Cir. 1983):

> "For practical purposes, the distinction between defining 'position' as the litigation position or the underlying agency conduct makes little difference. Courtroom attempts to defend unreasonable agency actions usually will be unreasonable also...."

The Commission must evaluate the agency position to determine whether it was "substantially justified," §227.485(3), stats., which means "having a reasonable basis in law and fact." §227.485(2)(f), stats. The agency has the burden of proof. See, e.g., Iowa Exp. Distribution, Inc. v. NLRB, 739 F. 2d 1305, 1308 (8th Cir. 1984).

The legislative definition of "substantially justified" is the same as has been developed by the federal courts. See, e.g., Hoang Ha v. Schweiker, supra, 707 F. 2d at 1106:

> "The government need not win the case to show that its position is substantially justified; it must show its case had a reasonable basis both in law and in fact. Tyler Business Services, 695 F. 2d at 75, H.R. Rep. No. 1481, 96th Cong., 2d Sess. at 10, 14..." (emphasis added).

The Commission agrees with those federal court decisions that have characterized this standard in the following manner:

> "The standard created by this statute is a new one, not in line with either the common law exceptions to the American rule restricting the award of attorneys' fees, or other statutory standards allowing fee awards in certain cases against the United States. It 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 position was arbitrary and frivolous...."
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> ...The standard, falls in between the common law 'bad faith' exception and an automatic award of attorney's fees to prevailing parties." (emphasis added) Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N.D.Ill. 1982).

This approach to the statutory standard is in keeping with the many federal cases holding that the mere fact that the government loses a

case does not dictate that the government's position was not substantially justified. See, e.g., Grand Blvd. Imp.. Co. v. City of Chicago, 553 F. Supp. 1154, 1162 (N.D.Ill. 1982). Otherwise, there essentially would be an automatic award of fees to the prevailing individual, and there would be no need for the adjudicative agency to evaluate the government's position as the statute requires.

Furthermore, the Commission is of the opinion that this "middle course" is consistent with somewhat analogous Wisconsin case law concerning the standard of bad faith by an insurer in handling a claim. In Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 691, 271 N.W. 2d 368 (1978), the Court held that a claim for bad faith required an absence both of a "reasonable basis" for denying benefits and "the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim...." Under the EAJA standard, the second element is unnecessary, as it is a standard short of "bad faith."

In the decision on the merits of the case at hand, the commission summarized its view as follows:

> "... The respondent has a policy which makes certain exceptions to their stated policy that they will use only the information contained on the form and will not assume responsibility for interpreting or correcting information provided. The issue before the Commission is whether there is a rational basis for the inconsistent treatment of applicants resulting from the application of these exceptions to the stated policy. The Commission concludes that on this record there is no such a rational basis."

Inasmuch as the Commission concluded there was no rational basis for the inconsistent treatment in question, this obviously is a significant argument in support of a similar conclusion that there was no reasonable basis in fact or law for respondent's position from the point of view of costs. There is support in the cases for awarding costs more or less automatically in cases

where such conclusions are made with respect to the merits. See, e.g., Grand Blvd. Imp. Assn. v. City of Chicago, 553 Fed. Supp. 1154, 1163 (N.D.Ill. 1982). However, in the Commission's opinion, while an agency's failure to pass muster as to the merits under a standard such as "arbitrary and capricious" or "abuse of discretion" will usually result in an award of costs under the EAJA, and may perhaps create a presumption that costs should be awarded, such an award should not be automatic. There are a wide range of matters where such standards, or similar standards, are applied to acts of administrative agencies. The adjudicator may disagree with the agency's contentions as to the reasonableness of a purported basis for a particular action, but that does not mean in every instance that in the context of EAJA costs the agency had no reasonable basis for its position or for its assertion of the reasonableness of its position.

For example, in Hoang Ha v. Schweiker, 707 F. 2d 1104, 1106 (9th Cir. 1983), the Court held: "...previously decided cases are surely a factor in determining if the governement's position is reasonable." A factor that must be considered with respect to the instant case is that the respondent was the prevailing party in a prior appeal of an exam, Marxer v. DMRS, Wis. Pers. Comm. No. 86-0070-PC (8/20/86). In that case, the respondent did not permit the appellant to compete in an exam because his application was received after the announced deadline. The commission found that the respondent's policy was not to process late applications, there were no exceptions to this policy, and there were legitimate and substantial reasons of cost and administrative efficiency, which appellant had been unable to contradict, for this policy.

In the instant case, respondent argued that Mr. Escalada-Coronel's application was filed late, because, although it had been submitted before the deadline, it was incomplete and was not returned completely filled out until after the deadline. The commission disagreed with this argument that it should be considered a "late" application.

If the commission had accepted this argument, and had concluded, as in Marxer, that there were no exceptions to the policy of not processing late applications, the appellant might not have prevailed. Similarly, if the commission had accepted the respondent's contentions that the applications lacking residency information were distinguishable from the applications lacking job code information, the respondent might have prevailed. While the commission rejected the respondent's contentions on these points, it cannot be said they lacked some basis, and were not at least arguable. Thus, the previously decided Marxer case lent some support to respondent's position, albeit the commission drew the distinction with respect to late-filed applications discussed above, and declined to hold that Marxer controlled.

The commission also is of the opinion it is appropriate to give at least some weight to the fact 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), where the Court held the defendant Secretary of the Navy lacked the authority to have ordered the plaintiff to active duty following his discharge from the United States Naval Academy, but observed:

> "... Dougherty had not been the first midshipman ever to be ordered to the fleet for active duty upon his discharge from the Academy. The Secretary, thus, did not seek to assert a new interpretation of the extent of his authority. Rather, the Secretary applied a long standing interpretation of his authority under the statutes and the regulations when he fashioned his active duty order in this case...."

Finally, this result is supported to some extent by the Wisconsin cases applying the test for the bad faith handling of an insurance claim, which, as mentioned above, includes as the first element "...an absence of a reasonable basis for denial of policy benefits...," (emphasis added) Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 693, 271 N.W. 2d 368 (1978).

For example, in Benke v. Mukwonago-Vernon Mut. Ins. Co., 110 Wis. 2d 356, 362-363, 329 N.W. 2d 243 (Ct. App. 1982), the Court upheld a jury verdict of bad faith involving the following record:

> "...When the Benkes' arena collapsed, they immediately called their insurer. A man by the name of Mr. Craig told them he was sorry, but the Benkes were not covered. This was said without Mr. Craig first investigating the site or asking the Benkes for facts which might show the collapse as being due to a covered peril. The inference that can be drawn is that Mr. Craig immediately took the posture of the collapse being due to snow. Further, he was not about to be persuaded differently. When the Benkes interjected, during the initial telephone call, that the snow had been shoveled off the roof, Mr. Craig still insisted that the Benkes were not covered.
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> The next day, Mr. Craig did go to the scene to personally view the collapsed arena. However, no facts or proofs were solicited according to the Benkes. An adjuster, who went with Mr.Craig to the scene, indicated in his field notes that wind and snow caused the collapse based on his inspection and conversation with Mr. Benke. Soon, an architect appeared who had been hired on behalf of the insurance company. The architect, Mr. Kopecky, did talk to the Benkes, did spend considerable time at the Benkes' site, did take pictures and measurements and did file a written, detailed report opining that the collapse was due to wind.
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> When Mr. Kopecky submitted his report, however, he was called the same day and was told "that they had never seen a report stating that a building had collapsed due to wind" and that such a report was "irresponsible." This statement, uncontroverted in the record, raises the clear inference, which the jury can accept, that all prior solicited reports had happily resulted in a finding of snow damages and that it

> was irresponsible for an expert to ever ascertain a collapse as being due to wind.
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> Further, Mr. Kopecky was fired and told not to proceed any further. Another expert was hired on behalf of the insurance company. This man, skilled in forensics, filed a report stating that the collapse was due to snow damage.... (footnote omitted)

The record before the Commission concerning the respondent's conduct does not present nearly as egregious a case as set forth above. Nor is it comparable to that contained in Fehring v. Republic Insurance Co., 118 Wis. 2d 299, 347 N.W. 2d 595 (1984), a case involving a claim for water damage to a house caused by burst pipes. There was some question about whether there was any damage to the house's electrical system. There were a number of estimates of the damage -- $8,000; $10-12,000; $15,925; $14,500; $9,642; $13,900, and $1,282. The latter estimate was based on repainting and minor plaster patching, and the contractor who made it never spoke with the insureds and performed only a cursory inspection of the house. The insurer offered $1,282 in the proof of loss form. The jury found bad faith conduct on the part of the insurer.

By citing these cases, the commission does not mean to imply that a party's conduct has to be as exacerbated as the conduct therein before there can be liability for costs under §227.485, stats. However, these cases do assist to some extent in placing the respondent's conduct on the continuum of reasonableness.

In summary, while the respondent's case was far from the strongest, and insufficient to have countered appellant's case and to have avoided the commission's conclusions on the merits discussed above, it also was far from the weakest, and the Commission must conclude that under the EAJA there was a reasonable basis in law and fact for the respondent's position.

The respondent filed a counter-motion for costs under §227.485(10), Stats.:

"If the examiner finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the examiner must find one or more of the following:

(a) The motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency.

(b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

The Commission could hardly conclude appellant's motion for costs to be frivolous, where in the underlying decision on the merits the Commission concluded there was no rational basis "for the inconsistent treatment of applicants resulting from these exceptions to the stated policy...," and this is a case of first impression under the EAJA for the Commission.

ORDER

Both the appellant's motion for costs filed December 29, 1986, and the respondent's counter-motion for costs, filed January 23, 1987, are denied.

Dated: April 2, 1987 STATE PERSONNEL COMMISSION

Dennis P McGilligan
DENNIS P. McGILLIGAN, Chairperson

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

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