

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NORBERT W. SIEBERS,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 HEALTH & SOCIAL SERVICES,  
 Respondent.

Case No. 87-0028-PC

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DECISION ON  
 MOTION FOR COSTS  
 UNDER §227.485,STATS.

This matter is before the Commission on appellant's motion for costs under §227.485(2), stats., which provides, in part:

In any contested case in which an individual... is the prevailing party and submits a motion for costs under this section, the hearing examiner [here, Commission] 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.

This case was filed as an appeal of a decision with respect to appellant's starting salary. Appellant accepted on January 8, 1987, an offer of employment as a Facilities Repair Worker 3 (FRW 3) at \$8.522 per hour with an effective date of February 2, 1987. However, the state's pay plan was modified as part of the implementation of comparable worth. The Department of Employment Relations (DER) acted with the ratification of the Joint Committee on Employment Relations (JCOER) to change the hourly rate for the FRW 3 classification from \$8.522 to \$8.352 effective February 1, 1987 and respondent accordingly lowered appellant's starting salary to \$8.352 as soon as it was notified of this action on February 11, 1978.

Appellant relied on a theory of equitable estoppel in support of his appeal. The Commission concluded that equitable estoppel was not present because there was nothing in the record (the case was submit-

ted on a stipulation of facts) to show "appellant relied to his detriment on respondent's representation that his salary would be \$8.522 per hour, as opposed to the \$8.352 figure established by the new pay plan."

The Commission also concluded that the stipulated facts did not show that respondent's actions amounted to "a fraud or manifest abuse of discretion," since its initial representation regarding appellant's salary was accurate, and once the change in the pay plan was implemented respondent immediately notified appellant that it would have to change his salary accordingly.

Finally, the Commission stated:

In DOR v. Moebius Printing Co., 89 Wis. 2d 610, 641, 279 N.W. 2d 213 (1970), the Court held:

...where a party seeks to estop the Department of Revenue and the elements of estoppel are clearly present, the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position....

Assuming the elements of estoppel were present, the Commission cannot conclude on this record that it would be unconscionable to allow respondent to revise its earlier representation as to appellant's salary, where his stated reason for going from an LTE job paying \$16.72 per hour to a job paying (ostensibly) \$8.522 per hour was job stability, and subsequent to his acceptance of the second job the starting salary was lowered to \$8.352 per hour due to a change in the pay plan.

Appellant appealed the Commission's adverse decision to Circuit Court. The Court reversed the Commission's decision. It held that detrimental reliance on the original salary representation had been established by the fact that appellant had left his old job and had reported for work with respondent. The Court also concluded with respect to the Commission's finding that the governmental action did not amount to fraud or abuse of discretion, that agency conduct may warrant asserting equitable estoppel against a governmental unit if the conduct would yield an inequitable result or a serious injustice to the individual involved, which would be the case with respect to the appellant under the circumstances:

Petitioner here, once the offer acceptance and mutual promises were made, is similar to the employees already working in that classification. Reducing Petitioner's salary because his reporting date on February 2nd, only one day after the effective date of the Comparable

Worth Legislation and after the employment contract between the State and this individual was created, works a severe injustice to this individual if equitable estoppel is not applied against the State in this instance.

It is certainly in the public interest to implement the concept of comparable worth in the Civil Service arena, but future job applicants would be told of the salary for this position before they accept the position, and give up other employment, unlike the Petitioner here. The public interest will not be unduly harmed if equitable estoppel is applied in this case. It is simply inequitable to lower an employee's salary, even by only \$.17 per hour, after he or she has quit another job and reported for work at the new job, in reliance on the promised salary.

The Petitioner draws our attention to two Dane County Circuit Court cases where equitable estoppel was applied against the State. Porter and Landaal, being Circuit Court Cases, are not binding on this Court. The Commission distinguished both of those cases (Porter v. DOT, No. 79 CV 3420, 3/24/80 and Landaal v. State of Wisconsin, No. 138-392, 11/21/73) on the basis that the State's conduct in those cases was a result of bad information given either from a misrepresentation of the Civil Service Code in Landaal or a representation made with no attempt to verify the accuracy of the representation in Porter. The Commission distinguishes these cases from the instant case on the grounds that the representation in this case was accurate when made but the standard in Green Bay explains that fraud in this context means inequitable. The representation to Petitioner may have been accurate when made, but the injustice that results to the individual is the same regardless of the truth of the representation.

In support of his motion for costs, appellant asserts that respondent's action was "contrary to law" and "wrong as a matter of law," and that:

A violation of the law cannot under any of these circumstances provide "substantial justification." If DHSS had been correct in its interpretation of the law and had honored its original promise made to Mr. Siebers, subsequent litigation would have never ensued.

In short, an unlawful position does not equal substantial justification; nor can it ever.

Respondent's position basically is that its setting appellant's salary rate at the newly-established minimum of the pay range was in accordance with the civil service code, which did not permit any discretion in the matter, and that its actions were "substantially justified" as "having a reasonable basis in law and fact," §227.485(2)(f), stats.

The Commission agrees with respondent on this issue. The test under §227.485, stats., is "essentially one of reasonableness, without more." Behnke v.

DHSS, 146 Wis. 2d 178, 183, 430 N.W. 2d 600 (Ct. App. 1988) (citation omitted); Susie Q. Fish Co. v. DOR, 148 Wis. 2d 862, 866, 436 N.W. 2d 914 (1989). The mere fact that an agency loses a case does not justify an award under §227.485, stats. Behnke, 146 Wis. 2d at 183. In the instant case, the Court's decision relied not on the theory that the government action was fraudulent or an abuse of discretion, but rather that the action

[W]orks a serious injustice to this individual if equitable estoppel is not applied against the State... The representation to Petitioner may have been accurate when made, but the injustice to the individual is the same regardless of the truth of the representation.

Under these circumstances, it must be concluded that respondent had a reasonable basis in law and in fact for its actions.

Furthermore, respondent's litigation posture contesting the application of equitable estoppel was substantially justified. The Commission agreed with respondent but was reversed on review. The Court's decision can be construed as a conclusion the Commission failed to focus sufficiently on the harm to the employe resulting from the government's action, and that notwithstanding that the employer's representation to the employe regarding his salary was accurate when made, and that its action setting his salary at the newly-established minimum of the pay range was dictated by the civil service code and the pay plan, equitable estoppel should be applied. Therefore, while the Court took a different approach toward analyzing the equitable estoppel issue than did the Commission, there is nothing in the Court's decision, or any other basis for, a conclusion that the Commission's decision, which upheld respondent's posture that equitable estoppel should not be applied, did not have "some arguable merit." Behnke, 146 Wis. 2d at 183.

ORDER

Appellant's motion for costs under §227.485(2), stats., is denied.

Dated: June 15, 1990

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:gdt/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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