

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

JOHN H. GIVENS, III, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

INDUSTRY, LABOR AND HUMAN \*

RELATIONS, \*

Respondent. \*

Case No. 87-0039-PC \*

\* \* \* \* \*

DECISION  
AND  
ORDER

In this appeal, appellant has challenged, pursuant to §230.44(1)(c), Stats., respondent's decision to lay appellant off from his position as a Job Service District Director. In an Interim Decision and Order dated March 10, 1988, the Commission rejected respondent's action in this regard, remanded the matter to respondent for action in accordance with the Commission's decision, and retained jurisdiction over the appeal solely for the purpose of ruling on appellant's "Application for Costs," filed on February 22, 1988. The instant decision and order constitutes a decision by the Commission of appellant's application and a final disposition by the Commission of the appeal.

Appellant's "Application for Costs" was filed pursuant to §227.485, Stats. Section 227.485(3), Stats., 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."

This Commission in Escalada-Coronel v. DMRS, Case No. 86-0189-PC (April 2, 1987) said, in determining a state agency's position as prescribed by §227.485, Stats., it would analyze its actions at both the prelitigation and litigation level. This Commission also said that 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 its decision on the merits of the instant appeal, the Commission clearly disagreed with respondent's interpretation of §ER-Pers 1.01(15), Wis. Adm. Code, i.e., the provision defining a "vacancy" in a classified position, and relied on such interpretation in rejecting respondent's layoff of appellant. Although the Commission is of the opinion that its interpretation 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 felt that this was a critical management tool; 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. Finally, the Commission gives some weight, as it did in the Escalada-Coronel case cited above, to the fact that the respondent's interpretation of the code provision and application of such interpretation 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.

The Commission concludes that there was a reasonable basis in law and fact for respondent's actions which form the basis of the instant appeal, that respondent was substantially justified in taking the position that it did in regard to the subject layoff, and in subsequent proceedings before the Commission, and that appellant's application for costs must be denied.

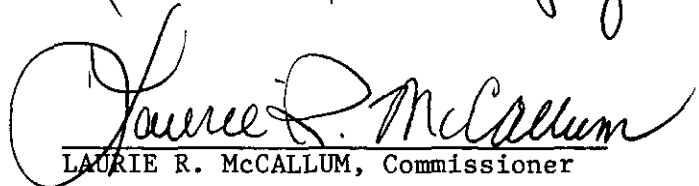
ORDER

The appellant's "application for costs" is denied.

Dated: March 28, 1988 STATE PERSONNEL COMMISSION

LRM:jmf  
JMF02/2

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

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