STATE OF WISCONSIN PERSONNEL COMMISSION

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GEORGE SHOWSH,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 87-0201-PC

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DECISION ON MOTION FOR FEES AND COSTS

This matter is before the Commission on appellant's motion for fees and costs pursuant to §227.485, Wis. Stats. Both parties have filed briefs.

This matter was precipitated by appellant's appeal, pursuant to §230.44(1)(c), Wis. Stats., of a suspension of five days without pay. On November 28, 1988, the Commission entered a decision and order which had the effect of adopting part of the proposed decision and order that had been issued by a hearing examiner, but rejected the proposed conclusion that the pre-disciplinary hearing had been constitutionally inadequate. It also rejected the proposed decision's recommendation with respect to the merits that the five-day suspension be reduced to a written reprimand, which was based in large part on respondent's failure to have met its burden of proof as to certain of the allegations of misconduct against appellant, and instead reduced the suspension from five days to two days. Subsequently, in an order entered on January 26, 1989, the Commission denied appellant's motion for costs under §227.485, Wis. Stats., pointing out that as to the factual matters as to which respondent had failed to meet its burden of proof, there had been a good deal of conflicting evidence, and respondent had been substantially justified in its position.

After this, the Brown County Circuit Court in a June 29, 1990, decision reversed the Commission's conclusion that the predisciplinary hearing had been adequate. The Court held that because of the due process violation, the entire disciplinary action had to be rejected, and that "[t]he question of costs

and attorney fees must be re-examined in light of my finding that Dr. Showsh was denied due process and that the Commission's order is now rescinded." DATCP appealed the Circuit Court decision, and the Court of Appeals, District III, affirmed the Circuit Court in a decision dated April 2, 1991.

The Commission has already determined that respondent was "substantially justified" in taking its action of suspension, and this conclusion was not overturned on judicial review. Rather, the Circuit Court noted that the question of costs and fees had to be re-examined in light of the decision regarding procedural due process. The Court of Appeals held that:

> The trial court properly remanded the issue of whether Showsh was entitled to recover costs and fees under §227.485, Stats., in light of its decision. The issue presented by that statute is whether the 'losing party was substantially justified in taking its position,' or whether 'special circumstances exist that would make the award unjust.' The trial court's decision that the department violated Showsh's procedural due process rights substantially affects the commission's determinations on these issues. Therefore, it was appropriate for the trial court to remand this question for re-examination in light of its decision. p. 4.

Therefore, based on the current posture of this matter and the parties' contentions with respect to appellant's motion, the main issue before the Commission is whether respondent's handling of the predisciplinary process prior to the imposition of the suspension was "substantially justified" as "having a reasonable basis in law and fact," §227.485(2)(f), Wis Stats.

In support of his motion, appellant argues as follows:

> The DATCP did not have a reasonable basis in law for imposing a five day suspension. At the time Dr. Showsh was suspended in November 1987 Loudermill had been clearly established law for over two years. Loudermill held that a public employee with a property interest in his or her employment must receive notice and an opportunity to be heard prior to being deprived of that property interest. The only recognized exception to this rule is where exigent circumstances necessitate quick action or where it is impractical to provide any meaningful predisciplinary hearing....
>
> There is no doubt that at the time of his suspension Dr. Showsh had a property interest in his employment by virtue of the just cause provision in the civil service statutes. There is also no dispute that Dr. Showsh was suspended for a period of five days without prior notice or a meaningful opportunity to be heard as required by the due process clause. Thus, the only circumstances which would have relieved the DATCP of its obligation to notify Dr. Showsh of the allegations against him and provide a meaningful hearing would have been the necessity

> for quick action. However, as the circuit court found, such circumstances clearly did not exist. pp. 5-6.

There are two areas of oversimplification in this argument. First, while appellant unquestionably "had a property interest in his employment," there was a significant legal question whether a suspension of five days without pay was a substantial enough impairment of that property interest to trigger the protection of the due process clause. This particular issue was not addressed by Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), which dealt with a complete termination of employment. While the Commission ultimately concluded that a five-day suspension gave rise to a Fourteenth Amendment property interest, it noted that:

> [T]here is a split of authority with regard to the question of whether a suspension without pay involves the kind of deprivation of property that is protected by the due process clause. See, e.g., Carter v. Western Reserve Psychiatric Habilitation Center, 767 F. 2d 270, 272 (n. 1) (Cir. 1985) (two day suspension held de minimis and not protected by due process); Bailey v. Kirk, 777 F. 2d 567, 574-575 (10th Cir. 1985) (four and five day suspensions involve property interest under Fourteenth Amendment); Zannis v. City of Birmingham, 1 IER Cases 796, 798 (N.D. Ala. 1986) (six day suspension covered by Fourteenth Amendment).

If this issue had been resolved in favor of respondent, and it had been concluded that Fourteenth Amendment due process protection did not apply to appellant's suspension, then no predisciplinary process would have been required, and respondent's procedure would have been upheld regardless of its extensiveness. Since the threshold question of the applicability of the due process clause to this transaction turned on a legal issue as to which there was conflicting precedent, it cannot be concluded that respondent's position did not have a reasonable basis in law.

Furthermore, even when the due process clause is applied to this transaction, it is by no means obvious that respondent failed to provide appellant with adequate notice of the charges against him. Clearly, a five-day suspension without pay does not necessarily require the same panoply of procedural protection as does a complete termination of employment: "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent

proceedings."[1] Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113 (1971). (citations omitted) While appellant was not given formal notice of the charges against him, the Commission specifically found that:

> 21. Sometime in October 1987, Mr. Dennison met with appellant. He told appellant that there was a possibility that disciplinary action would ensue, although he did not state specifically that appellant was the target of the possible discipline. Mr. Dennison told appellant that it was a meeting to gather as much information as possible, and asked him what he had to say about his involvement in the incidents or "situations around the June 29th and July missed inspections." He did not advise appellant he had a right to be represented at said meeting.

It can be inferred from this that appellant, as the supervisor involved in the missed inspections, and being aware that management was looking into these matters in a disciplinary context, should have had at least some level of awareness that management was concerned about the missed inspections, that disciplinary action was being considered, and that he might be implicated as the responsible supervisor. Therefore, while the reviewing courts ultimately determined that the notice was inadequate from the standpoint of the Fourteenth Amendment due process requirement, it must be concluded from the foregoing that management had a reasonable basis in fact and law for its actions. As the Supreme Court noted in Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989): "[l]osing a case does not raise the presumption that the agency was not substantially justified." (citation omitted)

Because the Commission concludes that respondent's position was "substantially justified," it does not address the other issues raised by this motion.

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[1] Pursuant to §230.44(1)(c), Stats., appellant had the right to and did appeal his suspension, and received a contested case, trial-type hearing at which the employer had the burden of proof.

ORDER

Appellant's motion for fees and costs pursuant to §227.485, Wis. Stats., is denied.

Dated: September 5, 1991

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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