

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

GEORGE SHOWSH, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

AGRICULTURE, TRADE AND *

CONSUMER PROTECTION, *

Respondent. *

Case No. 87-0201-PC *

* * * * *

DECISION AND
ORDER ON MOTION
FOR COSTS

This matter is before the Commission on appellant's motion for costs under §227.485, Stats., filed December 22, 1988. Respondent filed objections to said motion on January 12, 1989.

The interim decision and order was issued by the Commission on November 28, 1988. While the Commission will not reiterate this decision at any length, the key elements were as follows:

- 1) The decision upheld respondent's predisciplinary proceedings;
- 2) It upheld the charge that appellant improperly failed to arrange relief coverage for a vacationing inspector on one occasion;
- 3) It concluded that respondent failed to establish just cause with respect to the charge that appellant improperly failed to arrange relief for a vacationing inspector on a different occasion;
- 4) It concluded that respondent failed to establish just cause with respect to the charge that appellant improperly failed to ensure that certain carcasses in a plant were stamped, and improperly failed to file a related report;

5) It modified the five day suspension to a two day suspension.

In determining whether to award fees under §227.485, Stats., the Commission must determine whether the respondent agency's position was "substantially justified," §227.485(3), Stats., which requires a determination of whether there was "a reasonable basis in law and fact," §227.485(2)(f), Stats. for the agency's position. Escalada-Coronel v. DMRS, No. 86-0181-PC (4/2/87).

In the instant case, the agency did not prevail on two of the charges against appellant, and the Commission saw fit to reduce the disciplinary action imposed from a five day suspension to a two day suspension. The first of these charges (failure to have arranged for a relief inspector on one occasion) was the subject of a good deal of conflicting testimony about whose responsibility it was to arrange the relief, and who did or did not tell what to whom. While the Commission ultimately ruled against respondent on this charge, there was at least a reasonable basis in law and fact for respondent's approach on this point.

As to the second charge on which respondent did not prevail (4 above), there again was a good deal of conflicting evidence about the nature of appellant's obligations under the circumstances, and again respondent's position was substantially justified.

Since respondent's position was "substantially justified," the motion for costs cannot be granted. In addition, it is also noted there is an additional reason why this motion must be denied.

Pursuant to §227.485(7), Stats., an individual is not eligible to recover costs "if the person's reported federal adjusted gross income was \$150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case...." Since

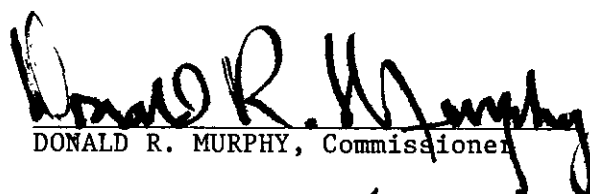
appellant provided neither an assertion, an affidavit, nor any evidence to this effect with his motion, and did not reply to respondent's objection on this ground, the Commission must conclude that appellant is not eligible under this subsection.

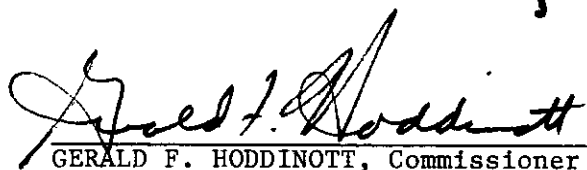
ORDER

Appellant's motion for costs filed December 22, 1988, is denied.

Dated: January 26, 1989 STATE PERSONNEL COMMISSION

AJT:jmf
JMF05/3


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

George Showsh
2849 Josephine Circle
Green Bay, WI 54301

Howard Richards
Secretary, DATCP
P. O. Box 8911
Madison, WI 53708