STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 13

DEPT. OF EMPLOYMENT RELATIONS,

Petitioner,

- vs -

WISCONSIN PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER

Case #87CV7397

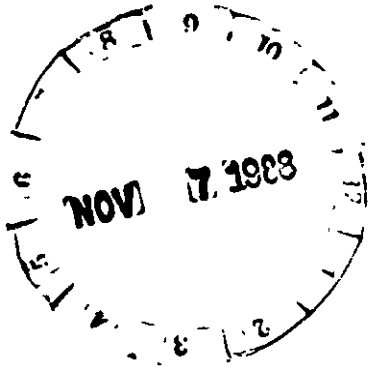
87CV7397

State of Wisconsin
County of Dane
This document is a full, true and
Correct copy of the original on file
and of record in my office and has
been compared by me.
Attest Feb 17, 1988
CYNTHIA FOKAKIS
Clerk of Courts
By Deputy Clerk

In this action the Department of Employment Relations (DER) seeks judicial review of a November 18, 1987 Decision and Order of the Wisconsin Personnel Commission (Commission). In that Decision, the Commission awarded the individual employees who prevailed in their reclassification appeal before the Commission $6,080.26 in fees and costs under sec. 227.485, Wis. Stats., the Wisconsin Equal Access to Justice Act (EATJA). DER does not seek review of the decision of the Commission on the merits of the employees' appeal.

In pertinent part, sec. 227.485 provides as follows:

> "(3) 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.



(5) ... The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245(5) and include an order for payment of costs in the final decision."

Sec. 814.245(5) provides in pertinent part as follows:

"(5) ... the costs shall include all of the following which are applicable:
(a) ... and reasonable attorney or agent fees ...
(b) Any other allowable cost specified under s. 814.04(2).

DER argues that the Commission erred in failing to find that it was substantially justified in taking the position it did on the reclassification issue. In the alternative, it argues that the Commission had no authority to award certain of the costs it did.

This action was commenced pursuant to secs. 227.52 and 227.53, Wis. Stats. The scope of review in this action raising the type of arguments made by DER is governed by sec. 227.57(5) and (6):

"(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand a case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record."

Interpretation of a statute and the application of a statutory standard to the facts present questions of law which this court reviews ab initio. Jaeger Baking Co. v. Kretschmann, 96 Wis. 2d 590, 594 (1980). Substantial evidence is that quantum of relevant evidence that a reasonable mind might accept as adequate to support a finding. Bucyrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 418 (1979). Questions of credibility of witnesses and the weight to be accorded evidence are matters for the agency's determination and will not be passed upon by a reviewing court. City of Superior v. ILHR Department, 84 Wis. 2d 663, 666 (1977).

The Commission's Decision does not set out separately its findings of fact, but the discussion makes clear the factual premises upon which it is based. While the Decision does not use the magic words, "not substantially justified in taking its position", in reaching its conclusion, the Decision does make explicit the standard applied to the facts as found and there is no ambiguity created by the lack of these specific words. The Decision and Order is not defective and need not be set aside for this reason as urged by DER.

The factual support of the Commission's Decision rests on several factors recited in it.

(1) DER followed the routine administrative procedure for reviewing the reclassification request. (Decision, pg. 2)

(2) DER's preliminary review of the request was negative rather than neutral. (Id, pg. 3)

(3) DER's letter of denial identified increases in duties, new duties which were formerly responsibilities of the section chief, changes in duties including evaluation of new federal and state codes and regulations but determined these changes were not significant enough to warrant reclassification. (Id.)

(4) Yet, at the hearing DER failed to produce evidence to justify this position citing several examples of their failure. (Id.)

(5) DER's use of comparables was "superficial" citing various specifics. (Id., pp. 3-4).

(6) DER's specialist was more receptive to general statements of incumbents rather than to the statements of a section chief and bureau head who was very experienced in personnel work. (Id. pg. 4).

DER does not dispute (1), but does argue that there is no substantial evidence to support (2) - (6). Upon a review of the record, this court concludes there is substantial evidence to support each of these findings.

As to (2), the memo of January 17, 1986 is clearly capable of being viewed as "negative". It was sent to Bea Chatman who had originally recommended reclassification. It begins by speaking of "several major concerns." It then goes on to cite a variety of reasons why it "appears" that the reclassification is unwarranted. The language and tone supports a finding that it was something other than neutral.

As to (3) and (4), DER is correct in pointing out that

the burden of proof was on the employees in the reclassification appeal hearing. However, in that hearing DER chose to present facts to support its denial decision. Thus the Commission had the opportunity to evaluate the factual basis given for the reasons for that denial. In the reclassification context, the Commission explicitly and properly placed the burden of proof on the employees. Likewise in the EATJA motion context, the Commission properly placed the burden of showing that DER's position was substantially justified on DER. There is no inconsistency in this, and consideration of DER's evidence in the appeal hearing was both a proper and probably necessary factor to take account of.

The factual finding made was that DER "failed to produce evidence to justify that position." It does not say DER produced no evidence at all. As support for the finding, the Commission cited the evidence on the distinction which DER offered between the concepts of program administration and program management. The Commission had ample basis to conclude that this distinction, on which DER had in part rested its denial decision, was "nebulous" and that DER had failed to present evidence to demonstrate any real practical distinction. The Commission is regularly called upon to review employee job responsibilities and has expertise in making assessments of this kind. In effect, the finding here was a product of assigning weight to

evidence presented on a subject within its expertise. This court will not substitute its judgment on this question. The same can be said concerning the Commission's reference to the Bader position.

As to (5), DER argues that this represents a subjective judgment that has no place in a determination under the EATJA. There is no question that this finding is a product of considering a number of factors bearing upon the quality of the "comparables" investigation by DER and arriving at the ultimate determination. This process may be subjective in the sense that there is no single direct evidence that is used as might be true where the question is "What day of the week did an act occur on?" or "What color was the car?" But this process is nonetheless still fact-finding and might be analogized to a jury's responsibility in answering "Did the defendant substantially perform the contract?" There is ample evidence in the record to permit the Commission to have made this finding. DER's argument misses the point of the proper standard for judicial review of a factual finding made by an agency. Whether that finding is a proper factor to consider under the EATJA goes to an entirely separate issue.

Finally, as to (6), DER argues that this fact "has no support whatsoever in the record." (DER Reply Brief, p. 6) Mr. Tainter testified about his 18 years of personnel

experience. He testified that he, as the head of the employee's Bureau very strongly supported the reclassification request and gave his reasons. Those reasons were based on his firsthand knowledge and were directed at factors which go to the heart of a reclassification decision. The DER specialist notes in her report that she spoke with Mr. Tainter but fails to include any of his observations in the discussion of her decision. This alone is sufficient to show that the finding was based on substantial evidence.

Thus there is no basis to upset any of the factual findings made by the Commission to support its Order. DER also argues that the Commission applied an erroneous standard in assessing costs against it. The principal issue is what is meant by the statutory language, "substantially justified" in subsection (3) of the EATJA. The statute provides a definition in subsection (2)(f) which reads, " 'Substantially justified' means having a reasonable basis in law and fact." The statute further provides,

> "(1) 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." sec. 227.485(1), Wis. Stats.

The Commission, following its own decision in Escalada-Coronel v. DMRS, No. 86-0189-PC (4/2/87), concluded that this statutory standard "falls between an arbitrary

and frivolous action and an automatic award to the successful party." (Comm. Decision, pg. 2). DER argues that the standard should be "whether the agency action, while not frivolous, cannot be said to have some arguable merit." (DER Brief, pg. 10). The Commission in this court and the employees join in arguing that the standard should be "more than reasonable."

In reviewing the decisions of the federal courts that have interpreted the "substantially justified" language of the federal counterpart to Wisconsin's EATJA, those courts have phrased the formulations of the standard in any number of ways. One court in commenting on several of these formulations made the salient point that the difference "appears more semantic than real." Pullen v. Brown, 820 F.2d 105, 108 (4th Cir. 1987). What does clearly emerge from federal case law is that no court has adopted the position espoused here by DER that an agency's action is substantially justified if it has some arguable merit. That is plainly insuffient, and such a standard would be inconsistent with the purpose of EATJA.

> "It is designed to encourage small private plaintiffs and defendants to persevere against or resist the U.S. government if the government takes an unjustified litigating position. And, perhaps more importantly, the statute is meant to discourage the federal government from using its superior litigating resources unreasonably -- it is in this respect an 'anti-bully' law." Battles Farm Co. v. Pierce, 806 F.2d 1098, 1101 (D.C. Cir. 1986).

If only situations where it could be found that the agency

did not have any arguable merit to its position would permit recovery of fees, this would hardly encourage small companies or moderate income individuals to persevere against "the system". Nor would it act as a deterrent of anything other than the most egregious of governmental abuses. Such a reading of the statute would thus violate the canon of statutory interpretation that a construction is favored that will fulfill the purpose of the statute over one that defeats its manifest object. Watkins v. LIRC, 117 Wis. 2d 753, 761 (1984).

In order to fulfill the statutory object, this court in reliance on Phil Smidt & Son, Inc. v. NLRB, 810 F.2d 638, 642 (7th Cir. 1987); Gavette v. Office of Personnel Management, 785 F.2d 1568, 1578-9 (D.C. Cir. 1986); and Whiting v. Bowen, 671 F.Supp. 1219, 1226-7 (W.D. Wis. 1987), would conclude that in order for the agency to demonstrate that its position had a reasonable basis in law and fact, and was therefore "substantially justified", it must show that it had a reasonable basis in truth for the facts it claims justified its position, that it had a reasonable or well accepted theory of the law that it urged as support for its position and that there was a reasonable, material connection between the facts asserted and the legal theory urged. While the Commission's formulation of this standard is not phrased in specifically these terms, it appears that any real

difference is more sematic than real and there is no error in the standard adopted by the Commission.

As noted above, the application of a statute to the facts presents a question of law. Yet, a court reviewing the agency's application should give the agency's decision due weight.

> "Although a determination of whether the facts fulfill a particular legal standard has been labeled a question of law, the Wisconsin Supreme Court has stated that 'when the expertise of the administrative agency is significant to the value judgment (to the determination of a legal question), the agency's decision, although not controlling, should be given weight.' Nottelson v. DILHR, 94 Wis. 2d 106, 117 (1980). This is especially true where the agency applied its experience, technical competence, and specialized knowledge to the decision. Sec. 227.(10) Stats." Monroe v. Funeral Directors Examining Bd., 119 Wis. 2d 385, 388-9 (Ct. App. 1984).

Most of the facts on which the Commission based its decision to award fees and costs can be seen as findings by the Commission that DER failed to adequately investigate and provide evidence to support its denial. (3), (4) and (5) from the listing above fall in this category. A failure of an agency to take proper care in developing the facts on which it will take action effecting the rights of an individual may constitute a lack of reasonable basis in truth for those facts. Assessment of the care taken in this regard involves looking at a continuum of possible conduct ranging from the most blatant disregard for the

accuracy of information to very technical omissions. Here the Commission found the reliance on a distinction between two terms found in position descriptions had not been based on any real practical differences and that this distinction was nebulous. It also found the review made by DER of comparable positions were superficial and cited the failure of the DER staff member to know certain key information about the other positions she used and to be able to support assertions about them she did make. A review of formal position descriptions and of comparable positions are not unusual parts of a reclassification analysis. They are at the very heart of the usual care. The Commission under state law passes upon all appeals from reclassification decisions and in performing that function regularly is exposed to testimony about such reviews. Such experience places the Commission in a particularly advantageous position to evaluate the quality of the manner in which the reviews were performed and their results explained. This court is satisifed that the placement by the Commission of the facts in this case at a place on the continuum where DER's basis in truth for its assertions was not reasonable is deserving of significant weight and should not be overturned.

The Commission also rested its conclusion on its factual determination that DER had been less than impartial in addressing the reclassification request. An agency

whose fact-gathering techniques are found to be predisposed to a particular result can properly be found under the EATJA to have had a reasonable basis in fact for its position. This is especially so where as here, the predisposition is evidenced by a disregard for information inconsistent with the preferred result. The degree of predisposition is a matter that can best be assessed by those who have the benefit of hearing witnesses testify and who have a point of reference derived from reading reports and hearing evidence in other reclassification appeals. Again, the Commission possesses such attributes, and the record in his case does not indicate that it was clearly wrong in its findings regarding DER's predisposition. Giving due weight to the Commission's assessment, the court concludes that the Commission's application of the law to the facts to determine that DER's position was not substantially justified was proper.[1]

DER urges that the court find that the Commission erred by awarding fees for the services of an attorney and for the services of a paralegal and a law clerk and by granting costs for photocopies and tapes of the hearing because these types of fees and costs are not authorized by the statute. The statute authorizes an award for "reasonable attorney or agent fees." DER argues that since

---

1 DER does not argue that "special circumstances exist that would make the award unjust." sec. 227.485(3), Wis. Stats.

paralegals and law clerks are not attorneys, they can only be seen as "agents", if that. Since the statute employs the disjunctive "or", DER then reasons that fees can be awarded for one or the other but not for both.

In reviewing the overall statutory language and purpose in the context of the everyday world of litigation and adversary proceedings to which it applies, a meaning for the language at issue emerges which neither party has suggested. The quoted language from Battles, supra accurately describes the intent of the EATJA. In order to accomplish this purpose, an individual or small business must have an assurance that if they persevere against unjustified governmental action they will be compensated for the costs of their efforts. The statute does not explicitly guarantee they will be made whole, but its generalized language should not be read to confine their award to the narrowest of compensable costs and fees and thereby significantly reduce the incentive for perseverence. Correspondingly, too miserly a view of the amounts recoverable would act to embolden unjustified governmental action rather than to deter it.

These general observations must be laid upon the real world the statute addresses. Parties do not always retain the services of an attorney to represent their interests. While Wisconsin law prohibits the unauthorized practice of law, sec. 757.30, Wis. Stats., non-lawyers are

permitted to act as representatives of taxpayers in dealings with the Department of Revenue and in proceedings before the Tax Appeals Commission. In addition, non-lawyers may be certified to represent clients before a number of federal agencies and, if properly performing services within their certification, to act on behalf of clients within Wisconsin. See generally State ex rel State Bar v. Keller, 21 Wis. 2d 100 (1963). To the extent that a party to a proceeding to which the EATJA applies is properly represented by a non-lawyer, these are the "agents" referred to in the fee award coverage of the statutes. There is no other explanation for why the legislature included fee awards for the services of two categories of representatives.

When a prevailing party is represented by an attorney, the question then becomes what is properly a part of the "attorney fees" that may be awarded. Clearly the term, appearing in a statutory scheme with separate provision for costs and disbursements, is directed to personal services. But the reality of providing modern legal services does not so clearly confine those services to the time personally spent by the attorney. The use of law clerks and paralegals by attorneys, and the separate billing for their services, to more promptly and inexpensively provide services to their clients is an ever increasing practice but is also a practice widely in use at the time the EATJA was enacted. As one federal court pointed out,

> "We believe these payments constitute reasonable expenses of counsel. Moreover, denying compensation for a student law clerk would be counter-productive. As plaintiff's counsel points, out law firms frequently employ student law clerks to perform tasks under attorney supervision as one way of controlling the spiralling costs of litigation. Excluding compensation for fees incurred by employing student law clerks will force attorneys to handle the entire case themselves, achieving the same results but at a much higher cost." Berman vs. Schweiker, 531 F.Supp. 1149, 1154-5 (N.D. Ill. 1982).

This court will not ascribe to the legislature the intent of ignoring the real world of how legal services are now delivered and opting for a choice whereby attorneys in cases which present a potential EATJA fee award should handle them differently than they do other legal matters and without the benefit of modern efficiencies. Indeed, to do so would mean larger awards to be paid from the public purse, a result that can hardly be attributed to the intent of the legislature.

Thus this court concludes that law clerk and paralegal services may properly be awarded under the EATJA's reference to attorney fees. Any potential for abuse that arises from such a reading is not of any great significance, for the only fees that can be awarded are those found to be reasonable. The necessity, time and rate charged in a particular case can properly be addressed under this standard. Here DER has not challenged the amount of the award on any of these grounds and thus inclusion of the

$1,157 in the Commission's Order will be affirmed.

DER also challenges the award of copying charges and the charge for tape recordings of the hearings. It relies on the language of sec. 814.04(2) which begins, "All the necessary disbursements and fees allowed by law" and then goes on to specify a number of particular items. DER argues that only a cost found among those listed is "allowed by law". The Commission and the employees emphasize the "All the necessary disbursements" language to argue that since the costs in question were necessary, they are recoverable. The preceding discussion of legislative intent would logically lead to allowing these costs, but the statutory language precludes such a result.

Sec. 814.245(5)(b) allows for recovery of "Any other allowable cost specified under s. 814.04(2)." (emphasis added). As noted above, this section qualifies the costs recoverable by use of the phrase "allowed by law". If any cost expended which could be found to be necessary were recoverable, there would be no need for the legislature to have listed any specific items. This court reads the "allowed by law" language to restrict the costs recoverable to the categories specified in the listing that follows. The qualifier "necessary" which precedes it acts as a check on the awarding tribunal to insure that only a cost in that listing which is truly necessary in the particular case will be allowed, and the word "all" is intended to make

clear that any and all of the costs listed, if incurred in a particular case, may be recovered in that action. No reference to federal decisions would be appropriate on this issue, because the language of the federal EATJA as to costs and disbursements is different. See 5 U.S.C. 504(b)(1)(A). Wisconsin case law construing sec. 814.04(2) in a different context is in accord with this court's reading. J.F. Ahern Co. v. Building Commission, 114 Wis. 2d 69, 109 (Ct. App. 1983).

Neither the Commission nor the employees have seriously argued that the costs in question here fall within any of the listed items under sec. 814.04(2), and thus this portion of the award must be reversed.

Upon the foregoing discussion

IT IS ORDERED that

(1) The Decision and Order of the Commission dated November 18, 1987 is affirmed in all respects except that the award for photocopies and miscellaneous is reversed.

(2) The total award is reduced to $5,831.71.

Dated this 7th day of November, 1988.

BY THE COURT:

Michael Nowakowski,
Circuit Court Judge, Branch 13