

STATE OF WISCONSIN

PERSONNEL COMMISSION

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BRUCE POWERS,

                  Appellant,

v.

President, UNIVERSITY OF  
WISCONSIN SYSTEM (Madison),

                  Respondent.

Case No.      88-0029-PC

\* \* \* \* \*

RULING ON  
PETITION  
FOR COSTS  
UNDER  
§227.485, STATS.

This matter is before the Commission on appellant's motion to tax attorney's fees, costs, disbursements and expenses filed May 21, 1990.

This case involves an appeal pursuant to §230.44(1)(c), Stats., of a suspension without pay for 30 days. On May 7, 1990, the Commission entered its "interim" decision on the merits. On May 10, 1990, this decision was served on the parties by mail along with a letter advising that the prevailing party had 30 days to submit an itemized application for fees and other expenses, which should be in compliance with §227.485(5), stats., and P.C. 5.05, Wis. Adm. Code, and the losing party had 15 working days thereafter in which to respond. On May 22, 1990, appellant filed a motion to tax attorney's fees, costs, disbursements and expenses accompanied by copies of statements from his attorney. On June 11, 1990, respondent filed a response to the aforesaid motion, setting forth its arguments in opposition to the motion. The Commission considered this matter at its next regularly scheduled meeting on June 13, 1990, and voted to deny the motion, with the written decision to be drafted. By letter to the Commission dated June 22, 1990, appellant's attorney advised that he intended to reply to respondent's response, and that said reply would be filed "subject to

your approval" by June 29, 1990. In light of the foregoing circumstances, and because neither §227.485(5), stats., nor the Commission's letter of May 10, 1990, provides for a reply, the Commission declines to consider a reply.

The Commission decision on the merits reduced the discipline imposed to a written reprimand. The Commission concluded that respondent had not sustained its burden of proof with respect to one of the two incidents of alleged misconduct but had sustained its burden as to the second.

Pursuant to §227.485(3), Stats., one basis for not awarding costs to a prevailing party is a determination that the losing party was "substantially justified in taking its position." The term "substantially justified" is defined as "having a reasonable basis in law and fact." §227.485(2)(f), Stats.

The critical and factual issue on which the instant case turned was what occurred during an altercation in a hallway involving appellant and another employe, between whom there had been a long history of animosity. Their accounts of this incident were basically diametrically opposed. While the Commission concluded that respondent had not sustained its burden of proving that appellant had pushed or tripped the other employe, it noted that both of the employes' accounts of what occurred "leave a great deal to be desired in terms of credibility."

While the Commission resolved this issue against respondent, who had the burden of proof, this is not incompatible with a conclusion that respondent had a reasonable basis in fact for its decision to suspend appellant. Respondent was aware of the long-standing animosity between these employes, it had conducted an internal investigation of this incident, and it made its own credibility determinations with respect to the conflicting accounts of appellant and the other employe. Respondent clearly had a reasonable basis in fact for its decision, albeit the Commission concluded it had not sustained its burden

of proof at the actual hearing. The fact that an agency loses a case "does not raise the presumption that the agency was not substantially justified." Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989).

There are a number of other issues raised by this motion which the Commission need not address in light of its conclusion that respondent's action was "substantially justified."

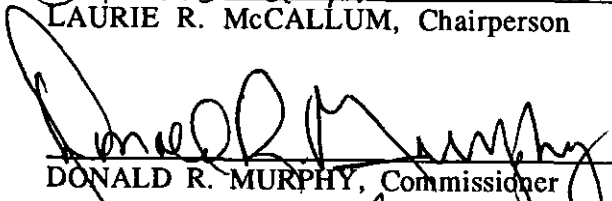
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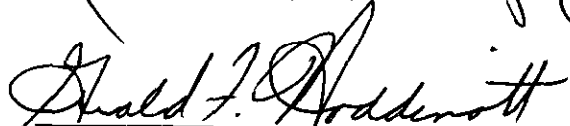
Appellant's motion for costs filed May 21, 1990, is denied.

Dated: June 27, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Bruce Powers  
Route 1, Box 834  
Poynette, WI 53955

Kenneth Shaw  
President, UW System  
1700 Van Hise Hall  
1220 Linden Drive  
Madison, WI 53706