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GEORGE SHOWSH,

Appellant,

v.

Secretary, DEPARTMENT OF  
AGRICULTURE, TRADE AND  
CONSUMER PROTECTION,

Respondent.

Case No. 90-0120-PC  
[89-0043-PC]

\* \* \* \* \*

RULING  
ON  
MOTION  
TO MODIFY

This matter is before the Commission on appellant's motion to modify the Personnel Commission's interim decision and order dated April 17, 1990, which was filed, along with a memorandum in support, on June 21, 1991. Following completion of judicial proceedings involving this matter, additional briefs were filed.

The April 17, 1990, interim decision and order which appellant seeks to modify reduced a ten-day suspension to a five-day suspension. Appellant earlier had been suspended for five days in a different disciplinary proceeding which the Commission reduced to a two-day suspension, although it upheld the predisciplinary procedure respondent had followed. Showsh v. DATCP, No. 87-0201-PC (11/28/88). Appellant pursued judicial review of that matter and the Circuit Court held that the procedure violated appellant's Fourteenth Amendment due process rights and rescinded the two-day suspension on that ground. Showsh v. Wisconsin Personnel Commission, Brown Co. Cir. Ct. Br. II No. 89CV445 (6/29/90). On July 12, 1990, the Circuit Court entered the following order:

It is ordered and adjudged the Personnel Commission's action in suspending petitioner without pay is reversed, that petitioner's salary and benefits are restored for the period of his suspension and that the entire matter is remanded to the Personnel Commission for a determination on the question of costs and attorneys fees under §227.485, Stats., in light of the Court's finding that the petitioner was denied due process in violation of his rights under the Fourteenth Amendment.

The Circuit Court's decision was upheld on appeal. Showsh v. Wisconsin Personnel Commission, 90-1985 (Ct. App. 4/2/91).

In the meantime, the Commission's interim decision and order of April 17, 1990, in the instant proceeding (89-0043-PC) was followed by a July 2, 1990, final decision which denied appellant's petition for costs under §227.485, Stats. Appellant petitioned for judicial review of that decision, and it was affirmed. Showsh v. Wisconsin Personnel Commission, Brown Co. Cir. Ct. Br. I No. 90CV1001 (7/25/91). The Court's final decision and order was entered July 26, 1991.

Appellant's basis for his motion is as follows:

Since the appellant's five-day suspension in the above-captioned matter [89-0043-PC] was in part based on the earlier two-day suspension, which has since been rescinded, the appellant believes that the five-day suspension should be modified to reflect rescission of the earlier suspension. Since the respondent follows the concept of progressive discipline and the appellant had no prior discipline, the appellant believes that his five-day suspension should be reduced to a letter of reprimand.

As a legal basis for the action appellant seeks, he cites §806.07(f), Stats.:

On motion and upon such terms as are just, the court may relieve a party or a legal representative from a judgment, order or stipulation for the following reasons:

\* \* \*

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated.

Respondent argues in opposition to this motion that §806.07(f), Stats., applies by its terms only to judicial proceedings, and the Commission has no authority under Chapter 227 to entertain this motion.

In American Brass Co. v. State Board of Health, 245 Wis. 440, 448, 15 N.W. 2d 27 (1944), the Court held: "[n]o proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." (citations omitted). The only means provided by statute for an administrative agency to take action on a case such as this after it has been disposed of by final order is pursuant to §227.49 "Petitions for rehearing in contested cases." This statute requires that a petition for rehearing be filed within 20 days of the service of the final order, or that the Commission order a


rehearing on its own motion within this timeframe. In the absence of action in accordance with this statute, there is no other way a matter can be revisited after the expiration of 20 days from the service of the final order. See Krueger v. DHSS, 89-0070-PC (1/10/90). Section 806.07(f), Stats., applies only to judicial proceedings and cannot be relied on in an administrative proceeding. Gray Well Drilling Co. v. State Board of Health, 263 Wis. 417, 419, 58 N. W. 2d 64 (1953).

Appellant argues that his motion should be granted for equitable reasons. The Commission would only observe, in addition to what was said above, that in the administrative process there is always a tension between interests in equity and interests in finality, see 2 AM JUR 2d Administrative Law §522. In enacting §227.49, Stats., the legislature must have been aware, for example, that there would be cases where newly-discovered evidence might not come to light until 21 days after the service of the final decision. However, the legislature drew the line of demarcation at 20 days after the service of the final decision, and this line must be observed by the Commission in this case regardless of the equitable factors appellant advances.

ORDER

Appellant's motion to modify is denied as outside the boundaries of the Commission's authority.

Dated: December 23, 1991      STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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