STATE OF WISCONSIN PERSONNEL COMMISSION

DOUGLAS J. SMITH,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondent.

Case No. 90-0032-PC

RULING ON §227.485 MOTION FOR FEES AND COSTS

This matter is before the Commission on appellant's §227.485 motion for fees and costs filed September 1, 1995.

By way of background, this case involves an appeal pursuant to §230.44(1)(a), Stats., of an examination and certification process. In addressing the first stipulated issue for hearing, the Commission concluded that respondent's act of allowing a nonresident to compete for the classified position in question in violation of §230.16(2), Stats.,[1] constituted an illegal action, and, to the extent that respondent had any discretion to exercise in the matter, an abuse of discretion. With respect to the remaining matters in issue, the Commission concluded respondent did not violate §230.14(2), Stats.,[2] and that the development and administration of the exam itself was not in conflict with the requirements of the civil service code. With respect to remedy, the

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[1] "Competitive examinations shall be free and open to all applicants who at the time of application are residents of this state and who have fulfilled the preliminary requirements stated in the examination announcement. To assure that all residents of this state have a fair opportunity to compete, examinations shall be held at such times and places as, in the judgment of the administrator, most nearly meet the convenience of applicants and needs of the service. If a critical need for employes in specific classifications or positions exists, the administrator may open competitive examinations to persons who are not residents of this state."

[2] "The administrator may recruit outside of this state only if the administrator determines that there is a critical shortage of residents in this state possessing the skills or qualifications required for the position."

Commission rejected appellant's request for an appointment to the position in question and the concomitant removal of the incumbent, concluding that there was no showing of "obstruction or falsification" under §230.43(1), Stats.,[3] which, pursuant to §230.44(4)(d), Stats., is a prerequisite for the removal of an incumbent. A second reason for the denial of this remedy was that appellant did not show he would have been in line to have been certified, no less appointed, to the position in question if the non-resident had not been allowed to compete. The only remedy ordered was a cease and desist order against similar action by respondent in the future.

Section 227.485(3), Stats., provides for an award of costs to a prevailing party, such as the appellant, unless it is determined that "the losing party was substantially justified in taking its position or that special circumstances exist that would make an award unjust." Section 227.485(2)(f), Stats., defines "substantially justified" as "having a reasonable basis in law and fact." Respondent has the burden of establishing substantial justification for its position, and to that end can rely on the record established before the Commission. Bracegirdle v. Board of Nursing , 159 Wis. 2d 402, 425, 464 N.W. 2d 111 (Ct. App. 1990). Because the Commission ruled in appellant's favor only on the issue of the violation of §230.16(2), Stats., and the material facts were essentially undisputed, the resolution of this matter comes down to the question of whether respondent had a reasonable basis in law for its decision to allow a nonresident to compete in this selection process.

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[3] "**(1) Obstruction or falsifications of examinations.** (a) Any person who wilfully, alone or in cooperations with one or more persons, defeats, deceives or obstructs any person in respect of the rights of examination or registration under this subchapter or any rules prescribed pursuant thereto, or

(b) Who wilfullly, or corruptly, falsely marks, grades, estimates or reports upon the examination or proper standing of any person examined, registered or certified, pursuant to this subchapter, or aids in so doing, or

(c) Who wilfully or corruptly makes any false representations concerning the same, or concerning the person examined, or

(d) Who wilfully or corruptly furnishes any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any persons so examined, registered or certified, being appointed, employed or promoted, or

(e) Who personates any other person, or permits or aids in any manner any other person to personate him or her in connection with any examination, registration, application or request to be examined or registered, shall for each offense be guilty of a misdemeanor."

While, in its decision on the merits, the Commission concluded that respondent's decision in this regard was illegal and (to the extent the concept was meaningful under the circumstances) an abuse of discretion, it is well established that "[l]osing 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). Even in cases involving a conclusion of an abuse of discretion by the agency, an award of costs under §227.485, Stats., is not automatic. See Murray v. DER, 91-0105-PC (4/6/95); Sierra Club v. Secretary of the Army, 820 F. 2d 513, 517, (1st Cir. 1987):

> The test of reasonableness in the precincts patrolled by the EAJA is different from that applied for purposes of determining whether agency action or inaction is "reasonable" or "unreasonable," i.e., arbitrary and capricious, under, say, the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq . . . Congress was painstaking in creating a distinct legal standard "substantially justified" -- for EAJA use, rather than merely echoing the familiar "arbitrary and capricious" refrain. We have equated that standard with a test of reasonableness -- but it remains, nonetheless, a test tailored to the dictates of the EAJA. (citations and footnote omitted)

To date, no specific authority has surfaced that supports the proposition that an administrative agency may unilaterally decline to enforce a statute it is supposed to enforce on the basis of an attorney general's opinion that the statute is unconstitutional. As was noted in the Commission's decision on the merits, there is substantial authority that an administrative agency must adhere to the statutes within its sphere of authority. Milwaukee Co. v. Schmidt, 52 Wis. 2d 58, 66, 187 N.W. 2d 777 (1971) ("an administrative officer has no discretion to disregard the language of a statute in performing his duties."); Clintonville Transfer Line v. Public Service Commission, 248 Wis. 2d 59, 70, 21 N.W. 2d 5 (1945) ("We find no statutory authority by virtue of which the Public Service Commission may make orders limiting the exercise of its own statutory powers."); Nodell Ins. Corp. v. Glendale, 78 Wis. 2d 416, 426, 254 N.W. 2d 310 (1977) ("administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which [it] derives its existence."). Therefore, the decision on §227.485 costs turns on whether respondent's position can be concluded to have involved "advancing a 'novel but credible extension or interpretation of the law.' "

Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989) (Citation and footnote omitted). If so, its position should be found to have had a reasonable basis in law. Id.

The chain of events that occurred in this case began with a March 16, 1987, attorney general's opinion, provided in response to a request from the legislature (the Committee on Assembly Organization). This document expressed the opinion that "[t]he residency requirement for classified civil service positions, where no similar requirement exists for positions in the unclassified service, constitutes a violation of the equal protection clause." On April 3, 1987, respondent issued a bulletin to all state agencies advising that, based upon the foregoing attorney general's opinion, "until such time as the constitutional problem may be resolved, the State of Wisconsin cannot maintain a residency requirement as a prerequisite to a classified civil service position. Effective immediately, no applicant who applies for a classified position may be rejected because he or she is not a resident." Stipulation of Fact #32. In deciding to suspend the operation of §230.16(2), Stats., respondent was relying on the foregoing attorney general's opinion and the advice of house counsel. The latter's opinion was reflected in a subsequent (March 21, 1988) memo to then DMRS administrator Daniel Wallock. This letter expressed the opinion that:

> [T]he defense of qualified immunity is not available to those public officials who knew or should have known that their conduct violated clearly established federal law. In my opinion the Attorney General's opinion and the cases cited therein clearly established that the statute is unconstitutional. Accordingly, in the event that you or other DMRS staff were sued under [42 USC] 1983 by nonresidents denied the opportunity to take an examination, there is a real possibility that the immunity defense would not be available, which would jeopardize public funds. Finding #27. (emphasis added)

In opposing an award of costs under §227.485, Stats., respondent contends that it was prudent to act in reliance on the authoritative opinion of the attorney general of the unconstitutionality of §230.16(2), Stats., and to decline to enforce that law, thus avoiding both a potential constitutional violation and potential liability in litigation brought under 42 USC 1983.

Respondent's argument is not without a rational basis when viewed in isolation. However, it runs against the grain of fundamental legal and

constitutional principles and must be viewed in that context. In other words, while one could make a rational argument for respondent's approach in an abstract or theoretical basis, as, for example, in a classroom discussion about how government should function, from an historical perspective, this debate was held many years ago and was followed by federal and state constitutional principles of government organization and functioning which foreclose a conclusion that respondent's position on this issue could be deemed as involving the advancement of "a 'novel but credible extension or interpretation of the law.' " Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989) (citation and footnote omitted.)

Many laws the legislature enacts are subject to constitutional scrutiny, and resultant potential liability for the state in a 42 USC 1983 or other claim. Yet it is not the domain of the executive branch to decide which statutes it will or will not enforce, depending on its views of the constitutionality of those statutes. Pursuant to Art. V, §4 of the Wisconsin Constitution, the governor (and by extension the executive branch[4]) "shall take care that the laws be faithfully executed." Section 15.001(1), Stats., provides:

> The legislative branch has the broad objective of determining policies and programs and review of program performance for programs previously authorized, the executive branch carries out the programs and policies and the judicial branch has the responsibility for adjudicating any conflicts which might arise from the interpretation or application of the laws. It is a traditional concept of American government that the 3 branches are to function separately, without intermingling of authority, except as specifically provided by law.

See also 16 AM JUR 2d Constitutional Law §150:

> It is within the especial province and duty of the courts and the courts alone, to say what the law is, and to determine whether a statute or ordinance is constitutional, and no express constitutional authority for such action is necessary, it is a necessary consequence of our system of government. (footnotes omitted)

For an administrative agency to nullify a statute because of a non-judicial opinion of its unconstitutionality is directly contrary to this fundamental structural foundation of the three branches of government.

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[4] The governor appoints the DMRS administrator. §15.173(1)(b), Stats.

Furthermore, the promulgation of the "bulletin" to state agencies, directing them to cease enforcement of §230.16(2), Stats., although not promulgated as a rule, has the appearance of a rule as defined by §227.10(1), Stats.: "Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." See also §227.01(13), Stats. Section 227.10(2), Stats., provides: "No agency may promulgate a rule which conflicts with state law." It appears that respondent thus nullified a statute by action which should have followed the rule-making process, but which itself is prohibited by the Administrative Procedure Act.

Respondent also relies on the stature of an attorney general's opinion. However, while it certainly is reasonable for an agency to give a good deal of weight to an attorney general's opinion, in the final analysis, it only "is entitled to whatever persuasive value it may have," Wood Co. v. Bd. VTAE, 60 Wis. 2d 606, 613, 211 N.W. 2d 617 (1973) (footnote omitted), and there is no authority that an attorney general's opinion can be relied on by the executive branch as a basis for declining to enforce a legislative enactment.[5]

The Commission also notes that the attorney general's opinion was rendered at the request of the legislature in 1987. Section 230.16(2), Stats., could have been amended to delete the residency requirement, if it were deemed appropriate in light of the opinion. Yet three years later in 1990, the provision remained unchanged. This fact reinforces the conclusion that respondent's decision not to enforce §230.16(2), Stats., with respect to the position in question was not substantially justified.

Respondent also objects to an award of costs on the ground that appellant did not make a showing that his income did not exceed the maximum amount set forth in §227.485(2), Stats. Appellant will have 20 days from the date of service of this ruling in which to file and serve an amendment to his application to address this omission. See Olson v. DER, 92-0071-PC (12/5/94).

With respect to the amount of costs to be awarded, §227.485, Stats., provides:

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[5] Section 806.04, Stats., (Uniform Declaratory Judgment Act) provides an explicit way of obtaining a binding judicial pronouncement on the constitutionality of a statute.

> In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this subsection.

In this case, the issue concerning the residency requirement of §230.16(2), Stats., was of more significance for the administration of the civil service as a whole than the more specific questions about whether particular aspects of the exam were administered in accordance with the civil service code. While respondent correctly points out that the bulk of the hearing process before the Commission was focused on the latter questions, only a small percentage of appellant's attorney's fees involve the time period when this case was being processed by the Commission following the remand by the circuit court.[6] While the apportionment of costs among the issues is necessarily somewhat arbitrary, the Commission will assign 50% to the §230.16(2) issue upon which appellant was the prevailing party.

Appellant has been pursuing simultaneously both a circuit court action and this Commission proceeding concerning essentially the same subject matter. It can be inferred that attorney time attributable to the §230.16 issue before the court had direct application to the same issue before the Commission.[7] While it is impossible to separate with any degree of precision the percentage of attorney's time attributable to the various issues, the Commission will follow the overall 50% allocation for the §230.16(2) issue, and attribute 50% of the appellant's attorney's time to that issue.

Pursuant to §227.485(5), Stats., costs are to be determined using "the criteria specified in §814.245(5)." Section 814.245(5)(a)2. provides that "[a]ttorney or agent fees may not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents justifies a higher fee."

Appellant submitted as an exhibit with his application a copy of an article from the October 1993 Wisconsin Lawyer reflecting that, of a random

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[6] As will be explained below, the Commission is not allowing any reimbursement for appellant's claimed "self-representation" costs.

[7] For example, appellant submitted copies of court briefs prepared by his attorney, and the Commission relied to some extent on the court's ruling in reaching its own decision.

sample of Wisconsin attorneys, the 1992 median average hourly rate was $105. While it is reasonable to assume that some of this amount is attributable to an increase in the cost of living, the article does not provide any information on this point.[8] The Commission cannot justify an award in excess of the statutory $75 an hour on the basis of this showing. Accordingly, the appellant will be awarded 50% of the 27.9 hours billed to him by attorneys who rendered advice with respect to this matter, at a rate of $75 an hour, for a total of $1046.25 in attorney's fees.

Section 814.245(5)(a)2., Stats., permits an award of attorney's fees, but it does not provide for payment for appellant's time spent representing himself.[9] Heikkinen v. DOT, 90-0006-PC (4/16/90). The cost of photocopies and hearing tapes are also not covered. §§814.245(5)(a), 814.04(2), Stats; DER v. SPC (Anderson), Dane Co. Cir. Ct., 87CV7397 (11/7/88).

Appellant's costs for filing and serving his parallel circuit court proceeding are not allowable because the statutes (§§227.485(5), 814.245(5), 814.04(2), Stats.) do not cover costs incurred in another proceeding. Cf. Duello v. Bd. of Regents, 176 Wis. 2d 961, 501 N.W. 2d 38 (1993). There was no requirement that appellant had to have pursued his court case. While the Commission has been able to characterize his consultation with counsel as running simultaneously to identical issues raised in both forums, his court costs cannot be viewed in the same light.

Finally, appellant's costs for postage ($.23) and subpoena service ($217.00) are covered by statute and will be allowed. Respondent objects to $25.00 of the latter, which represents attempted service on a witness, on the ground that counsel for respondent had advised Mr. Smith beforehand that that witness had left the state and would be unavailable, and thus the attempt at service was not necessary. Given the limited procedure set forth in §227.485(5), Stats., for processing this type of petition, it seems relatively clear that the legislature envisioned that disputes about the reasonableness of costs

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[8] The article provides certain anecdotal remarks attributing an increase in hourly rates from 1987 to, e.g., "rising overhead costs, especially for labor and technology. With a dwindling pool of qualified law office employes, attorneys have to provide higher pay and more benefits. For a while, attorneys were losing ground in terms of income. Now they're catching up." id, p. 12.

[9] Appellant was formally represented by counsel at certain points in this proceeding, but usually acted on his own behalf, while obtaining the advice of counsel from time to time.

incurred would be resolved in most, if not all cases, on the basis of the paper record submitted by the parties. On the fact of it, it was not unreasonable for appellant to have expended $25 for attempted service of a subpoena on a witness. Whether appellant had a reasonalbe basis for not having relied on counsel's representation that this witness was residing outside the state cannot be determined without engaging in further proceedings of some kind. Assuming that §227.485(5), Stats., does provide a basis for concluding there is implied power to conduct such ancillary proceedings, in light of the relatively small amount of money ($217) involved in subpoena service costs and the even smaller amount ($25) at issue, this dispute will be resolved by simply relying on the facial reasonableness of the item in controversy, and ordering it to be paid as part of the total costs.

Order

Appellant will have 20 days from the date of service in which to file and serve an affidavit or other evidence of his adjusted gross income, in accordance with §227.485(7), Stats. Respondent will have 10 days after service of said document in which to serve and file any objection thereto. In the absence of meritorious objection, an order will be entered finalizing the decision of this case and awarding the foregoing costs.

Dated: October 27, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:lrm

DONALD R. MURPHY, Commissioner

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