STATE OF WISCONSIN PERSONNEL COMMISSION

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RODNEY A. ARNESON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 90-0184-PC

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DECISION ON FEES AND FINAL ORDER

The Commission entered an interim decision and order on February 6, 1992, adopting the proposed decision and order, which had rejected respondent's disciplinary action, but retaining jurisdiction with respect to appellant's petition for costs filed under §227.485, Stats. Both parties have filed arguments on the matter of costs.

The basis for the decision on the merits rejecting the disciplinary action was respondent's failure to have afforded appellant an adequate predisciplinary hearing.[1] In order for respondent to avoid an award of costs under §227.485, Stats., the Commission must be able to determine that respondent's actions with respect to the predisciplinary process were "substantially justified" as "having a reasonable basis in law and fact," §227.485(2)(f), Stats.

Respondent contends that: "[i]t is clearly within the realm of legitimate legal debate viewed from the standpoint of reasonable advocacy[2] for the University to assert that Due Process requires less in a situation involving demotion than in a situation involving termination. This argument finds its basis in the language of Loudermill itself." It is correct that less elaborate procedures are necessary for less substantial property deprivations, see

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[1] The proposed decision observed that respondent's failure to have provided an adequate predisciplinary hearing voided the disciplinary action, but nevertheless went on to address the merits, even though it was not absolutely necessary, because a plenary hearing had been held.

[2] Respondent cites Behnke v. DHSS, 146 Wis. 2d 178, 183-84, 430 N.W. 2d 600 (Ct. App. 1988), for this standard. However, the Supreme Court in Sheely v. DHSS, 150 Wis. 2d 320, 338, n.10, 442 N.W. 2d 1 (1989), noted its disagreement with this enunciation of the standard by the Court of Appeals.

Showsh v. DATCP, 87-0201-PC (9/5/91) ("a five-day suspension without pay does not necessarily require the same panoply of procedural protection as does a complete termination of employment."). Nevertheless, there are certain minimum requirements for any property interest deprivation in the employment context.

In Showsh v. Wisconsin Personnel Commission, No. 90-1985 (Ct. App., 1991) (unpublished), the Court of Appeals upheld a Circuit Court decision reversing the Commission's decision that the predisciplinary proceeding followed there had been adequate. The Circuit Court had pointed out that, at a minimum under Loudermill, the employe is entitled to notice of the charges against him or her and is entitled to an opportunity to respond prior to the disciplinary action. Showsh v. Wisconsin Personnel Commission, Brown Co. Circuit Court No. 89CV445 (6/29/90). The Court of Appeals held:

> Before a person may be deprived of a protected property interest, he must be given notice of the charges against him and a meaningful opportunity to respond. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985).

The Court observed that a key reason why adequate notice is important is that it gives the employe an opportunity not only to respond to the substance of the alleged misconduct, but also to try to persuade the employer to impose a lesser penalty.

In the instant case, after appellant had heard rumors in the workplace about a sexual harassment complaint against him, he inquired of the personnel coordinator about this, and she confirmed it. At the ensuing predisciplinary meeting, the Commission found that:

> Jezwinski [the personnel coordinator] asked Arneson questions about his interaction with the employe and her sister regarding taking photos. Jezwinski told Arneson very little about the employe's allegations, except to the extent they were corroborated by Arneson's statements.
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> Only parts of the employe's allegations were provided Arneson. Before the meeting ended, Jezwinski told Arneson she did not know what was going to happen, that she was going to consult with others and that any level of discipline — reprimand, suspension or termination — was possible.

* * *

> It is clear Thoftne [appellant's supervisor] and Jezwinski's meeting with Arneson was focused on corroborating the employe's allegations of sexual harassment, instead of providing Arneson a pre-disciplinary hearing. Proposed decision, pp 4, 6.

Thus, appellant received only selectively fragmentary notice of the charges against him, and he had no notice that any possible discipline against him was being considered until the end of the meeting. At this point, it was of little or no value with respect to allowing him "to present reasons why proposed action should not be taken," Loudermill, 470 U.S. at 546, 84 L.Ed. 2d at 506, or, as the Court of Appeals put it in Showsh, "to have persuaded the decision maker to impose a lesser penalty notwithstanding justification for the suspension." Showsh at pp. 3-4.

In summary, when the instant case is juxtaposed with Showsh, where §227.485 costs were denied, several factors stand out:

1) In Showsh, the Commission first noted that there was a split of reported authority on the question of whether the degree of property deprivation (a five day suspension) was significant enough to implicate Fourteenth Amendment protection, and then went on to state:

> If this issue had been resolved in favor of respondent, and it had been concluded that Fourteenth Amendment due process protection did not apply to appellant's suspension, then no predisciplinary process would have been required, and respondent's procedure would have been upheld regardless of its extensiveness. Since the threshold question of the applicability of the due process clause to this transaction turned on a legal issue as to which there was conflicting precedent, it cannot be concluded that respondent's position did not have a reasonable basis in law.

In the instant case, the discipline combined a thirty day suspension with a demotion from a supervisory to a non-supervisory position. Perhaps not surprisingly under these circumstances, respondent has not contested that this degree of discipline represents a property interest protected by the Fourteenth Amendment. Thus, respondent in the present case does not have a similar threshold legal theory, with supporting case law, on which to base its contention that its actions were "substantially justified."

2) The difference in penalties (five day suspension versus a thirty day suspension and an involuntary demotion from a supervisory to a non-supervisory position) is also material to a comparison of the procedural protections extended to the employes, because, as noted above, these vary with the degree of property deprivation involved. The facts of this case indicate a more extensive procedure was required than under the facts present in Showsh.

3) In this case, the employe was given no notice that disciplinary action was being considered at all until at the end of the predisciplinary hearing. In Showsh, the employe was told at the beginning of the hearing that disciplinary action might ensue, and the Commission found that it could "be inferred from this that appellant, as the supervisor involved in the missing inspections, and being aware that management was looking into these matters in a disciplinary context, should have had at least some level of awareness that management was concerned about the missed inspections, disciplinary action was being considered, and that he might be implicated as the responsible supervisor." While Mr. Arneson knew the employe in question had made a complaint of sexual harassment against him, he did not know how seriously management was taking this, i.e., whether any disciplinary action was being considered, until the end of the hearing.

4) Even though Mr. Showsh did not have full notice of the charges against him, he knew the employer was concerned about the missing inspections, which were a relatively discrete matter All Mr. Arneson knew was that the employe in question had made a complaint against him concerning sexual harassment. He was not given notice of her specific allegations.

What emerges from this record is that management met with Mr. Arneson on March 23, 1991, not to conduct a predisciplinary hearing where he would have the opportunity to respond to the charges against him, but rather as part of its investigation of the sexual harassment complaint. As the proposed decision found, the meeting was "focused on corroborating the employe's allegations of sexual harassment, instead of providing Arneson a pre-disciplinary hearing." p.6. Particularly in light of the employer's failure to have provided notice of the charges against him, and to have provided any warning that disciplinary action of any kind was being considered, the

Commission cannot conclude that respondent's actions were "substantially justified" as "having a reasonable basis in law and fact," §227.485(2)(f), Stats.

Respondent objects to the $110 hour rate for appellant's attorney as in excess of the $75 hour permitted by §814.245(5)(a)2., Stats. This restriction is qualified by the proviso: "unless the court determines that an increase in the cost of living or a special factor ... justifies a higher fee." With respect to the cost of living factor, appellant has not made any showing concerning changes in the cost of living since the law was adopted. Therefore, it is speculative whether $110 is representative of the change in the cost of living during this period. Cf. Anderson v. DER, 86-0098-PC (11/11/87); affd., DER v. Pers. Commn., Dane Co. Cir. Ct. No. 87CV7397 (11/7/88) ("Appellants have submitted information showing a cost of living increase of 4.3%.").

With respect to any other criterion or "special factor" that possibly could justify a fee in excess of $75/hour, appellant has submitted affidavits that tend to show that $110 is a reasonable fee under the circumstances. However, §814.245(5)(a)2., Stats., is not couched in terms of a market-based fee. To the contrary, §814.245(5), Stats., specifically provides:

> (5) If the court awards costs under sub. (3), the costs shall include ...:
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> (a) ... reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:
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> 2. Attorney 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. (emphasis added)

Since the statute explicitly provides for attorney's fees at $75/hour as an exception to a market rate approach, it is obvious that the rate established by the market is not a "special factor" that would justify a fee in excess of $75/hour.

Appellant also contends that a fee higher than $75/hour is justified by the presence of a form of contingency fee contract. However, it also is unlike-

ly that the presence of a contingency fee contract would be considered a "special factor" that would justify a fee in excess of $75. In Board of Regents v. Personnel Commission, 147 Wis. 2d 406, 433 N.W. 2d 273 (Ct. App. 1988), the Court considered whether the term "reasonable attorney fees" in §230.85(3)(a)4., Stats., could include a multiplier based on a contingency fee arrangement. The Court expressed grave concerns about the policy implications of using a multiplier based on a contingency fee contract. Also, the Court pointed out that prior to the promulgation of §230.85(3)(a)4., Stats., the Supreme Court already had provided guidance as to the criteria to be considered in determining the reasonableness of an attorney fee. One of the eight criteria was "[w]hether the fee is fixed or contingent." Board of Regents, 147 Wis. 2d at 415. Thus the Court concluded that: "[b]y 1984, the term 'reasonable attorney fees' had acquired a meaning that did not include the use of [sic] multiplier. "id. If the concept of a reasonable fee already reflects the factor of whether a fee is fixed or contingent, it seems unlikely that the presence of a contingent fee contract would be considered a special factor that could justify a higher fee than the $75 (possibly inflation-adjusted) that the legislature already determined was a reasonable fee. Every fee arrangement must be either fixed or contingent. If the legislative intent with respect to §814.245(5), Stats., had been to allow upward adjustment of the $75 reasonable fee merely because of the presence of a contingency fee, it seems apparent this would have been reflected more explicitly rather than to have included this factor under the general language of "special factor."

Respondent also objects to costs claimed for copying, hearing tapes, facsimile transmission and postage as outside the costs permitted by §814.04(2), Stats. While this subsection does not cover the cost of copying and hearing tapes, and these items will be excluded, it specifically covers "postage, telegraphing, telephoning and express." Therefore, postage is explicitly allowed, and FAX transmissions fall within the scope of the term "telegraph, telephoning and express."

Finally, the Commission declines to consider prorating costs with respect to the merits (i.e., the "just cause" issue). As noted above, inasmuch as the appellant never received an adequate predisciplinary hearing, the disciplinary action taken must be voided. The proposed decision addressed the

merits because a plenary hearing had been held.[3] If an adequate predisciplinary hearing had been held, it is possible that no appeal would have ensued.

ORDER

The §227.485 petition is granted in the amount of $14,607.38, representing the total amount requested ($21,949.62) less copying and tape costs ($276.12) and less the difference between a rate of $110 per hour versus $75 per hour ($35 x 194 hours or $6790). The Commission's February 6, 1992, interim order is finalized as the Commission's final disposition of this matter.

Dated: May 14, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:
Rod Arneson
UW-Madison ADP
2118 Computer Sci-Statistics Bldg
Madison WI 53706

Katharine Lyall
President, UW
1730 Van Hise Hall
1220 Linden Dr
Madison WI 53706

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served per-

[3] The hearing examiner obviously did not know when he prepared the proposed decision whether the full Commission would adopt his conclusion that the predisciplinary hearing had been inadequate.

sonally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation