STATE OF WISCONSIN CIRCUIT COURT BRANCH I BROWN COUNTY

GEORGE SHOWSH, D.V.M.,

Petitioner-Appellant,

-vs-

WISCONSIN PERSONNEL COMMISSION,

Respondent.

DECISION

Case No. 90 CV 1001

FACTS

George Showsh seeks judicial review of the Wisconsin Personnel Commission's decision denying his motion for partial attorney fees and costs.

Showsh, a Veterinarian Supervisor 2 for the Department of Agriculture, Trade, and Consumer Protection (DATCP), was suspended by the DATCP for ten days without pay for the following three incidents of alleged work rule violations: (1) falsifying his time sheet at the Smokey Hollow Meat Plant on March 30, 1988; (2) falsifying his time sheet at the Dalebraux Meat Plant on April 13, 1988; (3) making two threatening statements regarding Dan Stillings, a meat inspector supervised by Showsh.

Showsh appealed the suspension to the Wisconsin Personnel Commission. The commission ruled that the DATCP did not have just cause to discipline Showsh for the second and third incidents and modified the suspension to five days. Showsh then applied to the commission for attorney fees and costs relating to the two issues decided in his favor. Under § 227.485(3), Stats., when an individual is the prevailing party and moves for costs, the hearing

examiner is to award the costs incurred in connection with the case, unless the 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. Subsection (4) provides for partial awards when more than one issue was involved. The commission denied Showsh's motion concluding that the DATCP was substantially justified in imposing discipline for all three of the incidents.

ISSUE

Whether the commission erred by concluding that the DATCP was substantially justified in imposing discipline?

STANDARD OF REVIEW

This is a review of the commission's conclusion that the DATCP's position was substantially justified as that term is used in § 227.485. The parties disagree as to the appropriate standard of review to be applied by this court. Section 227.485(1) provides that the legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law interpreting substantially similar provisions under the federal Equal Access to Justice Act (EAJA).

Our supreme court in Sheely v. DHSS, 150 Wis.2d 320, 442 N.W.2d 1 (1989), used an "abuse of discretion" standard when reviewing the circuit court's conclusion that the Department of Health and Social Services' determination that the petitioner was

without a disability was not substantially justified.[1] The court, in adopting this standard of review, relied on a U.S. Supreme Court case holding that under the federal EAJA, an appellate court must review a trial court's determination on whether a government agency's position was substantially justified as a question of an abuse of discretion. Id. at 337 (citing Pierce v. Underwood, 487 U.S. 552, 101 L.Ed.2d 490 (1988)). However, in the present case, it was the administrative agency rather than the circuit court which determined that attorney fees should not be awarded because the DATCP's decision to discipline was substantially justified. This difference does not change the standard of review, though. In Pierce, the Court noted that the language of the EAJA provides that attorney fees shall be awarded "unless the court finds that the position of the United States was substantially justified." Id. at 559, 101 L.Ed.2d at 500 (emphasis added by the Court). The Court went on to state that "[t]his formation, as opposed to simply `unless the position of the United States was substantially justified,' emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." Id.

Section 227.485(3) similarly states that the hearing examiner shall award costs "unless the hearing examiner finds" that the state agency was substantially justified. This also seems to indicate that the determination is for the hearing examiner (and

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[1] In Sheely, the court was applying sec. 814.245(3), Stats., which, along with sec. 227.485, comprises Wisconsin's Equal Access to Justice Act. See Sheely, 150 Wis.2d at 328.

thus the commission) to make and that this court owes some deference to it upon appeal. This court will sustain the commission's exercise of its discretion if the record reflects the commission's reasoned application of the appropriate legal standard to the relevant facts in the case. Kwaterski v. LIRC, 158 Wis.2d 112, 120, 462 N.W.2d 534 (Ct. App. 1990).

In reviewing the commission's decision, this court must keep in mind that under § 227.485(2)(f), "substantially justified" means having a reasonable basis in law and fact. To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. Sheely, 150 Wis.2d at 337-38. Losing the case does not raise the presumption that the agency was not substantially justified. Id.

DECISION

According to the DATCP's work rule #4, an employee is subject to discipline for falsifying records or giving false information to the DATCP. The DATCP imposed discipline against Showsh for violation of this rule claiming that he signed in at the Dalebraux Meat Plant at 8:30 a.m., even though he did not arrive there until 9:30 a.m. The commission's decision determining that there was not just cause to impose discipline concerning this allegation states in part:

> In imposing discipline for this incident, respondent [DATCP] relied solely upon statements by Mr. Stillings

> that he did not see appellant [Showsh] in the Dalebraux meat plant on that date until 9:30 a.m. and that it was unlikely that appellant could have been present in the meat plant for an hour without Mr. Stillings being aware of his presence. In view of the fact that Mr. Koslo [DATCP's investigator] spent 500 hours on his investigation of appellant, including his investigation of this incident, and interviewed 30 individuals, it is surprising that evidence substantiating Mr. Stillings' representations in this regard wasn't solicited. It is also surprising, in view of respondent's knowledge that appellant and Mr. Stillings had a strained relationship and that appellant tried to avoid contact with Mr. Stillings, that respondent would rely solely on information presented by Mr. Stillings in reaching a conclusion to impose discipline for this incident. At the hearing, Mr. Stillings testified that it was possible that appellant could have been at the Dalebraux meat plant for an hour without Mr. Stillings being aware of his presence. Respondent did not successfully rebut this evidence or appellant's testimony that it would not be unusual for appellant or any other inspector to spend an hour in another part of the meat plant before going to the kill floor. In addition, in view of the fact that appellant was not required to be at the Dalebraux meat plant at a particular time or for a particular period of time, it is not possible for the Commission to conclude that appellant had any motive to misrepresent his time of arrival there.

The commission's decision denying attorney fees concerning this incident states:

> [I]n regard to the Dalebraux incident, the Commission disagreed with respondent's conclusion that appellant actually misrepresented his time of arrival at the plant. However, at the time the decision to discipline was made, the information available to respondent in this regard was Mr. Stilling's representation that he had been at the Dalebraux plant that morning and that appellant had misrepresented his time of arrival. Again, commission determined that this presents a reasonable basis for respondent's actions in regard to the Dalebraux incident. (Emphasis added.)

Showsh argues that because Stillings' statement, that it would have been impossible for Showsh to be at the plant without Stillings seeing him, was the sole basis on which the DATCP based

this charge, the DATCP should not have proceeded to hearing on this charge once Stillings recanted his statement under oath in his deposition.

It seems that the parties disagree as to the point at which DATCP must have been substantially justified in order to avoid an award of costs to Showsh. The commission seems to think that the DATCP must have been substantially justified at the time of the decision to discipline Showsh while Showsh contends that the pertinent time was at the hearing. The language of § 227.485(3) does not expressly limit recovery to parties prevailing only after a hearing is held on the contested matter, rather it applies to all prevailing parties. It provides that in order to avoid paying out costs, the state agency must have been substantially justified in taking its position. Neither § 227.485(3) nor Wisconsin case law construing it provides that the government agency must be substantially justified in its position throughout the period up until the matter is decided.

I conclude that the commission did not abuse its discretion in determining that the DATCP was substantially justified in taking its position at the time that it imposed the discipline. It found that Stillings had made the representation that he did not see Showsh until 9:30 on the date in question and that he also represented that it was unlikely that Showsh could have been present in the meat plant for an hour without him being aware of his presence. I agree that this presents a reasonable basis for the DATCP's discipline in regard to the Dalebraux incident. The

commission examined the relevant facts, applied the proper rules and reached a reasonable conclusion.

According to the DATCP's work rule #10, an employee is subject to discipline for threatening, intimidating, inflicting injury, use of abusive language or otherwise discourteous actions toward fellow employes or the general public. The DATCP had disciplined Showsh for allegedly telling Stillings in 1985 that he wished Stillings was dead, and for telling Meat Inspector Rose Runge in 1988 that he should get a gun and shoot Stillings. The commission's decision concerning this allegation states in part:

> In regard to the "For me, you are dead." statement, appellant does not dispute that he uttered it to Mr. Stillings. In regard to the "I should get a gun and shoot Dan Stillings." statement, appellant does dispute that he uttered it to Ms. Runge. However, Ms. Runge made an entry to this effect in her personal journal not long after appellant allegedly made the statement to her and this statement, as interpreted by Mr. Stillings and others at DATCP, is consistent with appellant's personal feelings about Mr. Stillings at that time. The Commission concludes that respondent has shown that appellant uttered these statements as alleged by respondent.
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> In regard to the two statements made by appellant, the Commission concludes that neither rises to the level of "threatening, intimidating, inflicting injury" within the meaning of DATCP Work Rule #10. Neither statement was interpreted by Mr. Stillings or Ms. Nelson as a threat of physical or other retaliation by appellant. Although the statements were certainly "discourteous" and, in certain contexts, could be considered "abusive", the Commission does not conclude on this record that there is just cause for the imposition of discipline on the basis of these statements.

The commission's decision denying attorney fees concerning this incident states:

> In regard to the two allegedly threatening statements made by appellant, the Commission found that the

> statements had been made by appellant and had certainly been "discourteous" within the meaning of the applicable work rule and inappropriate in a work setting. The Commission concludes on this basis that respondent had a reasonable basis for its action in regard to the statement. Although the Commission, based on the context in which the statements were uttered and the manner in which they were interpreted, disagreed with respondent's conclusion that such statements were actually threatening and that there was just cause for imposing discipline for such statements, this is not necessarily incompatible with the conclusion that respondent had a reasonable basis in law and fact for its decision to impose discipline in this regard.

As to the first statement, Showsh argues that four years is too long a period of time to wait before investigating an incident and imposing discipline, and that disciplining employees for stale charges constitutes unreasonable government action. He further argues that the commission's conclusion that the DATCP was substantially justified in disciplining him for this incident encourages government agencies to act in an arbitrary manner and undermines not only the goals of § 227.485 but also undermines the goals of corrective discipline. As to the second statement, Showsh contends that while it may have been inappropriate, it was never realistically considered a threat by anyone and thus it was arbitrary and unreasonable for a state agency to suspend an employee for this off-the-cuff statement.

I conclude that the commission did not abuse its discretion by determining that the DATCP was substantially justified regarding in its position regarding these statements. The commission found that the DATCP had shown that the statements were actually made. The commission acknowledged that although the DATCP did not show just cause for discipline, the statements were "discourteous," thus

fitting within the prohibitions of work rule 10. The commission examined the relevant facts, applied the proper rules and reached a reasonable conclusion. Although a reviewing court might agree with Showsh that an employee should not be disciplined for discourteous statements made four years before, I conclude that this does not render the commission's decision an abuse of discretion. A court shall not substitute its judgment for that of the agency on an issue of discretion. See sec. 227.57, Stats.

ORDER

Based on the above, the Wisconsin Personnel Commission's ruling on the petition for costs is affirmed.

Dated at Green Bay, Wisconsin, this 25 day of July, 1990.

BY THE COURT:

Richard G. Greenwood
Circuit Judge, Br. I