

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

ROBERT VON RUDEN, WILLIAM F.  
 LEISSO, EDWARD M. BIDDICK,  
 RICHARD C. WENDT, JAMES VOBORSKY,\*  
 DONALD R. BEATY, ALLEN C. BEYER,  
 GEORGE E. ROCK, & JOHN E. BERGGREN,  
 Appellants,

v.

Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
 Respondent.

Case Nos. 91-0149, 0155, 0156,  
 0164, 0166, 0167, 0172,  
 0175, 0178-PC

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RULING ON  
 PETITION FOR  
 COSTS AND  
 FINAL ORDER

This matter is before the Commission on appellants' petition for costs pursuant to §227.485, Wis. Stats. By way of background, these consolidated cases involve the question of whether appellants' positions should have been reallocated to Civil Engineer - Transportation Supervisor 4 (Supervisor 4) rather than Civil Engineer - Transportation Supervisor 3 (Supervisor 3). On September 1, 1995, the Commission issued its interim decision and order addressing the substantive merits of these cases.

The Commission found in favor of respondent with respect to four of these cases -- 91-0164-PC, 91-0172-PC, 91-0175-PC, and 91-0178-PC. The appellants in these cases are not "prevailing parties" and thus do not satisfy the initial criterion for an award of costs pursuant to §227.485(3), Wis. Stats. Therefore, the petition for costs will be denied as to these appellants on that basis.

The Commission found in favor of the remaining appellants--Nos. 91-0149-PC, 91-0155-PC, 91-0156-PC, 91-0166-PC, and 91-0167-PC. Therefore these appellants are entitled to an award of costs unless the Commission finds that respondent "was substantially justified in taking its position or that special circumstances exist that would make the award unjust." §227.485(3). Section 227.485(2)(f) provides: "'Substantially justified' means having a reasonable basis in law and fact."

In Davis v. ECB, 91-0214-PC (12/5/94), the Commission outlined the law in this area as follows:

In Sheely v. DHSS 150 Wis. 2d 320, 337-38, 442 N.W. 2d 1 (1989), the Supreme Court summarized the principal considerations involved in analyzing an application for fees and costs under §227.485, Stats., as follows:

"'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." Losing a case does not raise the presumption (citations omitted) (footnote omitted).

The resolution of these cases turned on an issue of fact; respondent's position on the law was not and is not in question.

The determining factual issue in this case was whether these appellants satisfied the Supervisor 4 allocation of supervision of one to ten senior or advanced civil engineers. Respondent had reallocated their positions to the Supervisor 3 level because it had concluded they did not. At the de novo hearing, respondent relied primarily on documentary evidence to support its position -- primarily the appellants' position descriptions and supervisory analysis forms, and the absence of any indication appellants either had signed time sheets or had completed performance evaluations for the subordinate engineers in question during a period near the time the engineering survey occurred. In reaching its finding that appellants did have the requisite supervisory duties, the Commission relied heavily on the testimony of Richard Walsh, the District 5 Chief of Administrative and Management Services. He testified that the engineers in the "pool" positions from time to time were assigned to the appellants' supervision, and that appellants' supervisory activities with respect to the pool engineers were indistinguishable from the supervisory activities of the Supervisor 4's in the other sections. In a nutshell, the documentary evidence (or absence thereof in some instances) lent strong support to respondent's case, while Mr. Walsh's testimony lent strong support to appellants' case. Mr. Walsh also testified, however, that in District 5, very little attention was devoted to the accurate maintenance of the type of personnel records in question. There also was other evidence supporting appellants' contention, such as 1993 affidavits solicited by DOT management for use in an FLSA case which gave a more expansive picture of

appellant's supervisory duties. Based on the record before it, the Commission is compelled to conclude that while respondent DER lost these cases, it had a good deal of evidence to support its position, and did have "a reasonable basis in truth for the facts alleged." Sheely v. DHSS, 150 Wis. 2d 320, 337, 442 N.W. 2d (1989).

Inasmuch as the Commission concludes that respondent's position on this matter was substantially justified, and that therefore these appellants are not entitled to an award of costs on this basis, it will not address the other issues raised by respondent concerning certain logistical aspects of appellants' petition.

ORDER

Appellants' petition for costs pursuant to §227.485, stats., is denied and the Commission's interim decision and order dated August 31, 1995, is finalized in all respects.

Dated: November 17, 1995 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALEUM, Chairperson

AJT:bjn

  
JUDY M. ROGERS, Commissioner

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**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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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 personally, 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95