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MARGARET E. DAVIS,

Appellant,

v.

Executive Director, EDUCATIONAL
COMMUNICATIONS BOARD,

Respondent.

Case No. 91-0214-PC

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RULING ON
APPELLANT'S APPLICATION
FOR FEES AND EXPENSES

This matter is before the Commission on appellant's application for fees and expenses pursuant to §227.485(5), Stats. This case involves an appeal pursuant to §230.44(1)(c), Stats., of a constructive demotion.

By way of background, on May 14, 1992, the Commission decided respondent's motion to dismiss, and summarized appellant's claims of constructive demotion, constructive discharge and constructive layoff, as follows:

Appellant alleges in her appeal that she was employed by the ECB since 1978 in various positions. Until October 1, 1991, she was in a 75% Administrative Assistant 3 (AA 3) position in which she had permanent status in class. She alleges that effective October 1, 1991, she was subjected to a constructive demotion, a discharge and a layoff for which there was no just cause. She asserts that her position was reduced from a 75% to a 50% time position and that her position had its "functions ... restricted and reduced to those of a ... lower classification" because of changes in level of supervision, responsibility, etc. She further alleges that another position is being created "which would perform publicist functions, including functions which were within the scope of [her] 75% Administrative Assistant 3 position."

The Commission concluded that the appeal stated a claim of constructive disciplinary demotion under the precedent established by Cohen v. DHSS, 84-0072-PC (2/5/87), as well as a constructive demotion in lieu of layoff. The Commission further concluded that the appeal failed to state claims either of constructive discharge or of any kind of layoff with respect to the reduction in her hours from 75% to 50% of full time employment, and dismissed so much of the appeal as related to those two claims. On June 12, 1992, the Commission denied both parties' motions for reconsideration.

In its final substantive decision on this appeal entered June 21, 1994, the Commission first denied respondent's motion to dismiss for untimely filing pursuant to §230.44(3), Stats.¹ The Commission determined "that management acted to reduce [appellant's] position with the intent of effectively disciplining her because of dissatisfaction with her performance," proposed decision, p. 9, and also that what occurred constituted a constructive demotion in lieu of layoff. Because appellant had resigned from her employment at ECB and took another job under circumstances which included no apparent loss of wages, no remedy was ordered.

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 that the agency was not substantially justified. Nor is advancing a 'novel but credible extension or interpretation of the law' grounds for finding a position lacking substantial justification. (citations omitted) (footnote omitted)

The losing agency has the burden of establishing that its position was substantially justified, and to that end can rely on the record before the Commission. See Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 425, 464 N.W. 2d 111 (Ct. App. 1990). In addition to examining respondent's position in this administrative proceeding, respondent's underlying action also must be considered. See Bracegirdle v. Board of Nursing, 159 Wis. 2d at 425: "In evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation." (citation omitted). The Commission will first address respondent's position in the instant administrative proceeding.

With respect to the first issue of whether there was a "reasonable basis in truth for the facts alleged," Sheely at 337, this matter is somewhat unusual in that respondent never proceeded with its case at the hearing, but rather

¹ During the hearing, respondent did not present a case following appellant's case, but moved to dismiss for untimely filing.

relied primarily on arguments that appellant did not file a timely appeal under §230.44(3), Stats., and also that the Commission lacked jurisdiction over the subject matter of this appeal. The only essentially factual contention respondent advanced was that appellant had not established at the hearing that more than 50% of her position has been changed. Even this factually-oriented argument was tied primarily to the motion to dismiss for untimely filing -- i.e., that appellant had not filed within 30 days of the changes in her position. The Commission found that the changes in question had occurred no later than May 1991 -- i.e., more than 30 days before appellant filed her appeal. However, it further concluded that §230.09(2)(c), Stats., required written notice of these changes, any written notice referred to an official effective date for the changes of October 1, 1991, and therefore the appeal, which had been filed on October 28, 1991, was timely. Under these circumstances, the Commission concludes there was a reasonable basis in truth for such facts as respondent alleged.²

The next issue is whether respondent's position on this proceeding had a reasonable basis in law. As was discussed above, respondent litigated this case primarily on two legal theories -- first, that the Commission lacked subject matter jurisdiction under §230.44(1)(c), Stats., because (assuming appellant's factual contentions), her claim of constructive demotion lacked legal viability; second, that the Commission lacked jurisdiction because the appeal was untimely filed.

The first theory necessarily relied on the argument that the Commission should overrule Cohen. This argument had a reasonable basis in law, primarily because Cohen goes a step beyond the primary reported precedent for constructive disciplinary action, Watkins v. Milwaukee Co. Civil Service Commn., 88 Wis. 2d 411, 276 N.W. 2d 775 (1979), which involved a constructive discharge via a coerced resignation.

² Respondent at oral argument before the Commission also asserted, from a substantive standpoint, that appellant failed to satisfy her degree of proof on the question of whether her position had been changed enough to satisfy the requirement set forth in Cohen v. DHSS, 84-0072-PC (2/5/87). Since respondent did not offer any evidence on this point, but rather was commenting on what could or could not be concluded from appellant's evidence, the Commission would not characterize this assertion as a "fact" alleged by respondent, but rather as a legal argument. Therefore, it will be discussed below.

In a case like Watkins, there is no ambiguity with respect to the employe's employment status as a result of the employer's adverse action -- the employe went from employed to not employed as a result of the alleged coerced resignation. In Cohen, the changes in the employe's job did not result in any tangible change with respect to his employment status -- he retained the same job classification and salary. However, he alleged that the employer acted with disciplinary motivation to reduce the classification level of his job, even if the change in classification had not yet been effectuated. The Commission held that in order to establish a constructive demotion, the employe had to show not only that the employer acted with intent to discipline, but also that the nominal classification level of the new position was incorrect, and in reality its duties and responsibilities were at a lower level.

Thus, while Cohen is a logical outgrowth of the Supreme Court's holding in Watkins, it is not unreasonable to argue that it involves an inadvisable step because it relies on a key element -- a change in the affected employe's employment status (a downward classification transaction) -- which may be predictable but which has not yet occurred. As the Commission noted in Cohen (with numerous citations), the concept of constructive disciplinary actions is well established in civil service law in Wisconsin. However, the very concept of a constructive transaction involves a process of legal inference which goes beyond reliance on readily identifiable signposts, see BLACK'S LAW DICTIONARY 283 (5th ED, 1979):

Constructive. That which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments. That which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, or made out by legal interpretation.

Reasonable minds can differ with respect to the point at which recognition of a constructive personnel transaction exceeds a reasonable and workable approach to the administration of the civil service code, and in particular at what point the application of the doctrine goes too far beyond the relatively easily identifiable signposts involved in the literal transactions. Therefore, respondent's position that the Commission lacks subject matter jurisdiction over this matter was substantially justified.

The question of the reasonableness of respondent's position on timeliness has some relationship to the constructive nature of the personnel transaction involved here. The Commission concluded that because pursuant to §230.09(2)(c), Stats., appellant was entitled to "written notice ... of changes in the duties and responsibilities to [her] position when the changes in assignment may affect the classification of the position," and the only written notice of these changes (which were a key element in her constructive demotion theory) referred to an October 1, 1991, effective date, that date had to be considered operative with respect to the period of limitations. Given a somewhat abstruse legal area to begin with, and what appears to be a case of first impression as to the application of the §230.44(3), Stats., limitation period here, respondent's contention that the period of limitations should start to run after the actual changes in appellant's position occurred was not without a reasonable basis in law.

As noted above, at oral argument before the Commission, respondent also argued that appellant failed to satisfy her level or degree of proof with respect to the amount of change in her position. Since respondent was substantially justified in taking its primary positions on this proceeding -- that it should be dismissed for lack of subject matter jurisdiction and as untimely filed -- the Commission does not believe that §227.485 requires analyzing each specific argument respondent advanced in the course of the proceeding, and it will not address further this ancillary aspect of respondent's case.³

In addition to examining respondent's position in this administrative proceeding, respondent's underlying action also must be considered. See Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 425, 464 N.W. 2d 111 (Ct. App. 1990).

The Commission has found that respondent reconstituted appellant's position to the point that it became a different position with duties and responsibilities corresponding to a lower level classification, and that in so doing it was motivated by dissatisfaction with appellant's performance. The Commission concluded that what occurred amounted to both a constructive disciplinary demotion without just cause and a constructive demotion in lieu of

³ Even if respondent had not been substantially justified in advancing this contention at oral argument, any resulting additional expense to appellant would be de minimis.

layoff without just cause. While in the Commission's opinion, what occurred was illegal under the civil service code, this conclusion necessarily relies on the concept of constructive demotion. As has been discussed above, this concept is not found in the literal language of the civil service code (Subchapter II, Chapter 230, and rules promulgated thereunder), but relies primarily on an extension of the Supreme Court's holding in Watkins v. Milwaukee County Civil Service Commission, 88 Wis. 2d 411, 276 N.W. 2d 775 (1979). Since, as also discussed above, there is a reasonable basis upon which to argue that, in the context of the instant proceeding, Watkins should not be extended in this manner, the Commission concludes that respondent's action, while illegal, was substantially justified under §227.485(3), Stats.

Because the Commission concludes respondent was substantially justified under §227.485(3), Stats., it does not address the issues respondent raised concerning various details of the fee application.

ORDER

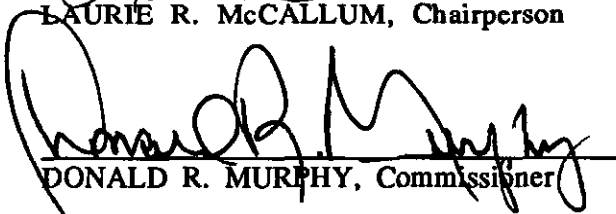
Appellant's application for fees and expenses pursuant to §227.485(5), Stats., is denied, and the Commission's interim decision and order dated June 21, 1994, is finalized as the Commission's final disposition of this matter.

Dated: December 5, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Margaret Davis
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Madison, WI 53711

Glenn Davison
Executive Director, ECB
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Madison, WI 53713-4296

**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 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.)