STATE OF WISCONSIN PERSONNEL COMMISSION

ARLENE RENTMEESTER,

Appellant,

v.

Executive Director, WISCONSIN LOTTERY, [Chairperson, WISCONSIN GAMING COMMISSION],

Respondent.

Case No. 91-0243-PC

RULING ON PETITION FOR PARTIAL AWARD OF FEES AND COSTS

This matter is before the Commission on complainant's application for a partial award of fees and costs pursuant to §227.485, Stats. Both parties have filed briefs.

By way of background, on May 27, 1994, the Commission entered a substantive decision of this §230.44(1)(c), Stats., appeal of two suspensions, as well as of two other related consolidated cases -- Nos. 92-0152-PC and 92-0182-PC-ER. The latter cases involved an appeal of a noncontractual grievance and a complaint of discrimination on the basis of handicap and retaliation, respectively. The Commission decided the latter cases in favor of respondent, but decided the instant case in favor of appellant on the ground that respondent failed to provide adequate hearings prior to imposing the suspensions.

Section 227.485(3), Stats., provides as follows:

> (3) In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing 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.

The first question the Commission must address is whether the losing party was "substantially justified" in taking its position. "'Substantially justified' means having a reasonable basis in law and fact." §227.485(2)(f), Stats.

In its decision on the due process question with respect to the first suspension, the Commission noted that Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 484, 506, 105 S. Ct. 1487 (1985), clearly provides that an employe is entitled to "an explanation of the employer's evidence," and that no such explanation was provided in this case. There has never been an explanation for this omission, and it cannot be concluded that respondent was "substantially justified" in failing to provide this explanation.

With respect to the second suspension, respondent failed to provide any predisciplinary hearing at all. Again, there is no substantial justification for this omission. Respondent attempted to argue that a threat of further violence justified urgent action, but the record evidence simply failed to support the contention that this concern motivated respondent, or was a realistic concern.

The second issue presented by this motion is whether "special circumstances exist that would make the award unjust." §227.485(4). No such "special circumstances" have been advanced or are apparent.

Finally, a determination must be made as to the reasonableness of the amount of costs requested. This issue is complicated by the fact that there was a consolidated hearing involving both this and two other cases, and that the hearing as to this case (the suspensions) was plenary in nature -- i.e., involving both the questions of substantive just cause and procedural due process.

In its decision of this case, the Commission did not reach the just cause question because of its conclusion that the suspensions had to be rejected on due process grounds.[1] In its response to the motion for costs, respondent contends that its substantive decision to suspend appellant as it did was substantially justified under the circumstances, and therefore that appellant's costs should be limited to so much of the costs as can be apportioned to the procedural due process question. The Commission declines to proceed in this fashion.

The parties agreed to a consolidated hearing for all three cases. The parties also stipulated to an issue[2] for this case that did not include a separate

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[1] Once it was determined that the suspensions had to be rejected on due process grounds, the question of whether there was just cause from a substantive standpoint for the suspensions became moot.

[2] "Whether respondent's actions to suspend appellant without pay for two days on November 7 and 8, 1991, and five days on November 11-15, 1991, was for just cause." Conference report dated March 22, 1993.

issue as to the due process question, and respondent never objected to appellant raising the due process issue under the aegis of the stipulated issue for hearing. Under these circumstances, and since appellant succeeded on this appeal in overturning the suspensions on the basis of respondent's failure to adhere to the relatively clear-cut requirements of procedural due process, it would not be appropriate to prorate appellant's costs on this appeal as respondent contends.

The question remains as to the apportionment of costs to this case.[3] In her petition, appellant asserts that as of June 1994, her total law firm billings amount to $39,138.59 in costs and fees. She is requesting payment of $15,358.17, which has been determined by identifying services purportedly rendered exclusively on this appeal, and, as to services which could not be broken down among the three cases, using a one-third allocation for this case. There are 131.5 attorney hours associated in this fashion for this appeal, and in addition, there are 3.7 hours of law clerk time.

The issues raised by this appeal have been relatively straightforward. There was no factual dispute about the predisciplinary procedures involved.[4] While there was considerable dispute about the alleged misconduct that precipitated these suspensions, this boiled down to whether appellant struck Mr. Sonnenberg on two separate occasions on one date. There were only a few witnesses involved. The law involved in these areas are rather straightforward. The issues surrounding the discrimination complaint were much more complicated from both a factual and legal perspective. Under all these circumstances, the allocation of 131.5 attorney hours plus 3.7 law clerk hours is excessive.

In its response to appellant's petition, respondent contends that the maximum amount of time necessary to litigate this case would be 60 hours. Given the inherent difficulty in trying to separate time spent on consolidated cases, and that this case did involve a fair amount of pre- and post-hearing activity, as reflected in its procedural history in the file, the Commission will accept this figure as a reasonable number of attorney's hours for all activities connected with this appeal, including all allocable work on this fee petition.

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[3] Again, this appeal was heard on a consolidated basis with two other cases, with respect to which appellant did not prevail.

[4] It was undisputed there was no hearing prior to the second suspension. There was a transcript of the hearing held prior to the first suspension, and there was no dispute about the accuracy of this transcript.

The attorney's fees appellant claims are based on hourly rates ranging from $135 to $115 per hour. Section 227.485(5), Stats., requires determination of "the amount of costs using the criteria specified in §814.245(5)." Section 814.245(5), Stats., provides:

> (5) If the court awards costs under sub. (3), the costs shall include all of the following which are applicable:
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> (a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and 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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> 1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.
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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.
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> (b) Any other allowable cost specified under s. 814.04(2). (emphasis added)

Appellant has made no showing of any such factors justifying a higher fee except for increases in the cost of living. Based on a U.S. Department of Labor document provided by appellant, the Consumer Price Index for services in the North Central region has increased from a baseline of 100 in 1982-1984 to 155.4 in April 1994. As respondent points out, §814.245(5) became effective November 20, 1985. Therefore, using a baseline established in 1984 would overstate the increase in the cost of living, since the $75 fee was established as of November 1985. While it is necessarily a somewhat arbitrary approach because of the limited information before it, the Commission will reduce the 55.4% increase, which covers a 10-year period, by 1/10, which results in a cost of living increase of 49.9%. Applying this percentage increase to $75 provides an hourly rate of $112.42, as opposed to the $116.55 appellant claims.

Among the other costs appellant seeks are photocopying in the amount of $585.50. This is not included in the costs enumerated in §814.04(2), Stats., and cannot be awarded, see Ramsey v. Ellis, 163 Wis. 2d 378, 385-86, 471 N.W. 2d 289 (Ct. App. 1991). Similarly, appellant's claim for $18.09 for "office costs" cannot be allowed under §814.04(2).

ORDER

Pursuant to §227.485, Stats., appellant is awarded attorney's fees in the amount of $6745.20 (60 x $112.42) and other costs in the amount of $555.47 (claimed costs of $756.67 less $195.17 (1/3 of claimed photocopying) and $6.03 (1/3 of claimed office supplies), for a total of $7300.67. The Commission's order of May 27, 1994, is hereby finalized, and this matter is remanded for action in accordance with this decision.

Dated: September 9, 1994

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:rcr

Parties:

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1967 Hillview Drive
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John Tries
Chairperson, WGC *
P.O. Box 8979
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* Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

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.