STATE OF WISCONSIN PERSONNEL COMMISSION

JOEL J. OLSON, EARL GUTZMER, and ROGER W. BECK,

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case Nos. 92-0071-PC
92-0081-PC
92-0089-PC

RULING
ON
APPLICATION FOR
FEES AND COSTS

This matter is before the Commission on appellant's application for attorney's fees and costs pursuant to §227.485, Stats. These cases involve consolidated appeals of the reallocation of appellants' positions to Maintenance Mechanic 2 (MM 2). They contended the reallocations should have been to Maintenance Mechanic 3 (MM 3) or, alternatively, to Heating, Ventilating, Air Conditioning (HVAC) - Specialist. In its substantive decision of this matter, the Commission determined that respondent erred in not reallocating appellants' positions to MM 3, but that it did not err in denying the HVAC - Specialist classification.

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:
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> > "'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).

In the instant case, there were two parts to the issue -- DER's reallocation of these positions to the MM 2 level effectively denied both the MM 3 and the HVAC - Specialist classifications. Appellants did not prevail with respect to the HVAC - Specialist classification. The Commission agreed with respondent's contention that appellants' positions did not meet the criteria in the class specification for HVAC - Specialist. Respondent's position on this issue was substantially justified. That the Commission concluded on the basis of the record before it that a different position -- the HVAC - Specialist position at UW-Whitewater -- was incorrectly classified at that level does not make respondent's decision with respect to appellant's position "not substantially justified."

With respect to the MM 3 classification, the Commission concluded, on the basis of the de novo hearing record, that respondent's decision to reallocate appellants' positions to MM 2 rather than MM 3 was incorrect. Pursuant to Bracegirdle, the Commission must look at the totality of DER's course of conduct with respect to this transaction. As a practical matter, DER's conduct can be broken down into two periods -- the survey process and reallocation itself, and the period after the reallocation, which includes the appeals.

With respect to the survey and the ensuing reallocations, the record reflects that DER followed its standard practice in terms of analyzing positions for reallocation. Specifically, it relied on appellants' official PD's (position descriptions) as well as UW-Whitewater's recommendation on class level. These PD's had been signed by the employes, their immediate supervisors, and the personnel manager, and had been prepared recently in conjunction with the survey. It certainly was not unreasonable for DER to have followed its standard practice and to have relied on these PD's and the recommendations of local management in deciding how to reallocate these positions. Since

appellants' PD's were consistent with the MM 2 level, DER's conduct to this point was substantially justified.

After these appeals were filed, DER looked further into this matter and sent a personnel specialist to UW-Whitewater. He consulted with several members of management, the campus personnel manager, and the appellants. It became apparent that appellants and their supervisors disagreed about the proper characterization of appellants' work, and whether it corresponded to the criteria found in the MM 3 (as well as the HVAC - Specialist) specification. The DER personnel specialist considered what he was told by management. He also spoke to the appellants, and spent time looking at their assigned buildings while they described their work. DER concluded, based on its audit of appellants' jobs, that their jobs were not inconsistent with their official PD's, and on the basis of all the information available, reallocation to MM 3 would not have been appropriate. While in light of all the evidence that came out over several days of a de novo hearing, the Commission concluded that MM 3 was appropriate, this does not mean that DER did not have a substantially justified basis for its position at that time. In resolving the dispute about the level of appellants' work, DER relied to a substantial extent on input from management. This was not unreasonable, because it is management's right to assign duties and responsibilities, and should be in a good position to know about its employes' work. This is particularly the case given that an important distinction between the MM2 and MM3 levels is the level of independence exercised in resolving complex problems. Also, appellants at that time were relying on unofficial PD's that management refused to approve, which obviously were modeled on a higher level position description, and which DER correctly concluded were inaccurate. This factor contributed to the reasonableness of DER's decision to place more weight on information from management and less weight on information appellants were providing.[1]

With respect to the hearing process itself, the Commission in its decision commented that "[a]ppellants have made a strong showing that their positions should have been reallocated to the MM 3 rather than the MM 2 level," proposed decision, p. 3, and concluded that respondent had erred in not reallocating appellants' positions to MM 3. Of course, "[l]osing a case does not

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[1] While management's "official" PD's also turned out to be partially inaccurate, these inaccuracies were less obviously apparent than those on appellants' versions.

raise the presumption that the agency was not substantially justified." Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2c, (1989).

In its case at hearing, respondent relied heavily on appellants' "official" PD's. While in its decision the Commission discounted the weight to be assigned these PD's, this involved an analysis of the language of both the PD's and the class specifications, as well as other record evidence. The Commission did not suggest, and does not conclude, that these PD's were not credible evidence in support of its case.

Respondent also relied on the testimony of appellants' supervisors concerning how appellants' positions functioned in the context of the roles of both other positions on campus and private contractors. The Commission attached more weight to the testimony of appellants and some of their coworkers. In support of its fee application, appellants characterize some of the testimony of these supervisors, particularly that of Mr. Lauer, the Executive Director of Facilities Planning and Management, to whom appellants' direct supervisor reported, as uninformed and speculative. The Commission cannot agree. Mr. Fuerstenberg's testimony appeared to reflect more his understanding of how the HVAC operation was supposed to function, rather than how it actually functioned. As a higher level supervisor, he had little direct observation of appellants' work. The Commission tended to place more weight on the testimony of appellant and certain coworkers, who actually performed the work in question. However, matters such as appellants' level of independence and the degree of complexity of their work certainly were susceptible to impact by the staffing and other changes about which Mr. Lauer testified; the question was the degree to which this actually had affected appellants' jobs. Appellants contend in effect that there was no evidence to support respondent's position that the availability of these resources detracted from the level of complexity of appellants' positions. However, the Commission found that the contract that was entered into prior to the implementation of the survey called for the contractor to do spring startups and fall shutdowns of the air conditioning equipment, in addition to repair and other work. The record also reflected that appellants were supposed to make repairs when they could do so within the parameters of their expertise, and if they could not, to call in outside help. While occasionally this occurred, it was an infrequent occurrence. The Commission concluded that on balance these facts did not take appellants' positions below the MM 3 level. Thus, while respondent's

contention concerning the role of outside specialists was not given a great deal of weight by the Commission, it cannot agree with appellants' characterization of this contention as totally unjustified.

Also, Mr. Lauer's testimony was corroborated generally by Mr. Fuerstenberg. He had been appellants' direct supervisor, had performed similar work before that, and he was in a good position to be familiar with appellants' work. He testified that there was little difference between his and Lauer's characterizations of appellants' jobs.

The key position comparisons in this proceeding strongly supported appellants' cases for the MM3 classification. Here again, respondent relied heavily on the "official" PD's and management's opinions regarding the nature and level of the work performed. This evidence of course reflects management's views of the level of work performed, and respondent's reliance on it was not unreasonable, particularly given the nature of the dispute, discussed above, between appellants and management concerning the degree of independence and complexity associated with appellants' activities. While the Commission gave more weight to the testimony of the employes who were actually doing the work, there is enough support for respondent's position to conclude that it was substantially justified.

Respondent also relied on the argument that even if appellants met the MM3 criteria of independently trouble-shooting and resolving complex problems, they do not do this for a majority of the time. The Commission rejected this argument. Based on its reading of the Maintenance Mechanic class specification, the Commission concluded that the language in this classification did not require that the employe be involved in this particular criterion (independently troubleshooting complex problems) a majority of his or her time, but rather that, when faced with more complex problems, the employe at the MM3 functions independently. However, it is axiomatic that position classification is based on the majority of a position's duties and responsibilities, see e.g., Tiser v. DNR & DER, 83-0217-PC (10/10/84), and respondent had at least a reasonable basis for relying on this precept here.

In conclusion, and without attempting to address every disputed issue in this matter, the Commission believes that while respondent did not have a strong case with respect to the MM3 level, it was not so weak that it can be said to have been without substantial justification.

ORDER

Appellants' fee application is denied, the Commission's interim decision is finalized, and this matter is remanded for action in accordance with the Commission's decision.

Dated: March 9, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Joel Olson
R2, W643 Woodfield Lane
Whitewater, WI 53190

Earl Gutzmer
Route 4, Box 16
Whitewater, WI 53190

Roger Beck
211 South 3rd Street West
Fort Atkinson, WI 53538-2013

Jon Litscher
Secretary, DER
P.O. Box 7855
Madison, WI 53707

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