

STATE OF WISCONSIN

PERSONNEL COMMISSION

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BRENDA LYONS,

 Appellant,

v.

Chairperson, WISCONSIN
GAMING COMMISSION,

 Respondent.

Case No. 93-0206-PC

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INTERIM DECISION AND ORDER
ON APPELLANT'S MOTION
FOR COSTS

An Interim Decision and Order was issued in the above-noted case on December 5, 1994, which found that the Wisconsin Gaming Commission (WGC) failed to inform Ms. Lyons of her demotion opportunities under ER-Pers 22.08(2) Wis. Admin. Code, and accordingly, failed to show that her layoff was not the result of arbitrary and capricious action. The Commission retained jurisdiction to consider any motion for costs under the Equal Access to Justice Act (s. 227.485(5), Stats.).

Appellant filed a motion for costs on January 5, 1995. Without objection from appellant, respondent was granted an extension to file objections which were ultimately received by the Commission on January 25, 1995. The motion for costs is now before the Commission for resolution.

DECISION

The Equal Access to Justice Act (EAJA) is contained in s. 227.485, Stats., which provides as shown below:

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. (Emphasis added.)

Section 227.485(2)(f), Stats., defines "substantially justified" as "having a reasonable basis in law and fact." In Sheely v. DHSS, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989), the court adopted the analysis set forth in Phil Smidt & Son, Inc. v. NLRB, 810 F.2d 638, 642 (7th Cir., 1987):

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.

The Court went on, in Sheely, to give the following examples:

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)

Appellant Submitted No Arguments

Appellant offered no argument regarding whether WGC's position was substantially justified under the EAJA. Appellant's sole submission to the Commission was an itemization of costs.

The Commission's analysis of the two pivotal issues presented in Ms. Lyons' case under the EAJA, are contained in the following paragraphs.

The AA3 Positions in Green Bay

One hearing issue was whether Ms. Lyons was entitled to be informed of two AA3 positions in Green Bay as a "vacancy" to which she could have demotion rights under ER-Pers 22.08(2), Wis. Admin. Code. (See Interim Decision and Order, pars. 33-39 of the Findings of Fact) WGC wished to redeploy those positions for other uses at WGC and, accordingly, informed all employees affected by the closing of the Fox Valley track that the positions were unavailable as alternatives to layoff.

The Commission previously addressed a similar scenario in Givens v. DILHR, 87-0039-PC (3/10/88). (See Interim Decision and Order, Discussion section, p. 19-22.) WGC argued that Givens was inapplicable to Ms. Lyons situation because in Givens evidence existed that the hiring authority manipulated access to a position as an alternative to the employee's layoff, whereas no evidence of WGC manipulation was present in Ms. Lyons' case. While the Commission ultimately disagreed with WGC's argument, the Commission concludes that a reasonable basis in law existed for WGC's legal argument.

The Storekeeper Position in Green Bay

WGC did not offer the storekeeper position in Green Bay to Ms. Lyons as a demotion opportunity in lieu of layoff because it would have involved a wage reduction of 7 pay ranges, which WGC felt would not have met the "reasonable offer" criteria in ER-Pers 22.09(2), WAC. Further, while it is true that WGC offered the storekeeper position to Mr. McDaniels with a difference of 6 pay ranges, the Commission found no impermissible intent on WGC's part in failing to make the offer to Ms. Lyons. (See Interim Decision and Order, pars. 40-47 of the Findings of Fact.) The Commission disagreed with WGC's conclusion that a reduction of pay would have occurred and, accordingly, found that it would have been a reasonable offer for Ms. Lyons. (See Interim Decision and Order, Discussion section, p. 28-29.)

Resolution of this question involved an apparent first-impression question of interpreting the inter-relationship between ER-Pers 22.08(2)(a), WAC and ER 29.03(8), WAC. The Commission believes a reasonable basis in law existed in support of WGC's actions, even though the Commission ultimately disagreed with WGC's arguments.

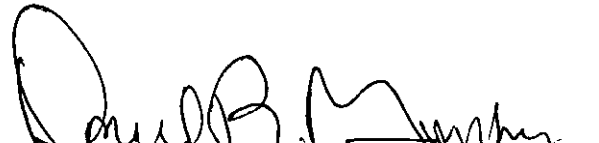
ORDER


The appellant's motion for costs is denied. The Commission retains jurisdiction for resolution of pending sanction motions. The parties will be

contacted in the near future to schedule a telephone conference to discuss the procedure for resolving the remaining issues.

Dated February 20, 1995.


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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