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RAYMOND R. BRIGGS,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 NATURAL RESOURCES, and Secretary,  
 DEPARTMENT OF EMPLOYMENT  
 RELATIONS,  
 Respondents.

Case No. 95-0196-PC

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RULING ON  
MOTION FOR COSTS  
AND ORDER

The Commission issued an interim decision and order dated July 5, 1996, which rejected respondents' decision to deny appellant's request for reclassification of his position from Forestry Technician 4 (FT4) to Forestry Technician 5 (FT5), and remanded the matter to respondents for action in accordance with the decision. The Commission retained jurisdiction to consider any motion for costs under s. 227.485, Stats. This matter is now before the Commission on appellant's timely motion for costs and for final disposition of the appeal. The parties filed briefs with the final brief received by the Commission on August 21, 1996.

DECISION

A. Legal Standard for Determining if an Award for Costs is Appropriate.

Appellant's motion for fees and costs is stated in the alternative as shown below:

Appellant . . . respectfully moves the Personnel Commission for an Order directing the respondents to pay the appellant's actual and reasonable attorney fees and costs incurred in this proceeding, pursuant to Section PC 5.04 and PC 5.05, Wisconsin Administrative Code, and Section 227.485, Stats.

In the alternative, if the Commission determines that fees are more appropriately awarded under the Equal Access to Justice Act (EAJA), Section 227.485, Stats., complainant (sic) moves for an award of attorney fees at the rate specified therein, plus such increases in such rate as are authorized by law, in addition to his actual and reasonable costs. This alternative motion is made solely for the purpose of preserving complainant's (sic) rights in

the matter relative to compensation for legal fees, and does not constitute an acknowledgement that the Commission in any way lacks authority to award reasonable attorney fees as sought.

The Commission's authority to award costs for classification cases (arising under s. 230.45 (1)(a) and 230.44(1)(b), Stats., is pursuant to the EAJA. The Commission is unaware of any alternative authority, nor is such alternative authority cited by appellant.

The pertinent portions of the EAJA statutes are shown below:

227.485(3): In any contested case in which an individual . . . 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.

227.485(2)(f), Stats.: "Substantially justified" means having a reasonable basis in law and fact.

227.485(5), Stats.: If the hearing examiner awards costs . . . he or she shall determine the costs under this subsection . . . The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245 (5) and include an order for payment of costs in the final decision.

The Wisconsin Supreme Court has provided guidance on interpreting the EAJA. The Court in Sheely v. DHSS, 150 Wis. 2d 320, 337-38, 442 N.W. 2d 1 (1989) stated 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 rise to 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 Wisconsin Court of Appeals provided the following additional guidance:

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.)

Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 425, 464 N.W.2d 402 (Ct. App., 1990)

In accord, McCready v. DHSS, 85-0216-PC, p. 2-3, (9/10/87): "[T]he Commission, in deciding whether to award costs under s. 227.485, Stats., looks at both the justification for the underlying action and the justification for the agency's position in the subsequent appeal", and Escalada-Coronel v. DMRS, 86-0189-PC, p. 3, (4/2/87): "The first issue is whether the 'position' of the state agency referred to in s. 227.485(3), stats., is the position of the agency on the underlying transaction that triggered the administrative proceeding, its position in the administrative proceeding, or both."

B. Were Respondents Substantially Justified in Denying Appellant's  
Reclassification Request?

Respondents spoke with Mr. Sloan (Mr. Briggs' supervisor) as part of their analysis of Mr. Briggs' reclassification request. Respondents understood Mr. Sloan to say that about half of the time Mr. Briggs' position spent on forest management work was at the FT5 level. It was this information which lead respondents to state the following on page 3 of the denial memo dated August 23, 1995 (Exh. A-2):

[I]n further evaluation and discussions, it was determined that approximately half of Mr. Briggs' forest management time was spent performing forest management work which is identifiable as complex. Taking half of Mr. Briggs' forest management time (identified within the position description as 70% of the total time) we have determined that approximately 35% of this position's time can be identified at the Forestry Technician 5 level.

Based on the foregoing, the Commission concludes that the position of the respondents on the underlying transaction that triggered the administrative proceeding was substantially justified.

The next question is whether respondents' position in the administrative proceeding was substantially justified. On September 6, 1995, Mr. Sloan wrote to respondents to attempt to clarify the misunderstanding which lead respondents to conclude that only 35% of Mr. Briggs' position was spent on Forestry Technician 5 level tasks. Mr. Sloan's explanation memo (Exh. A-10) includes the following excerpt:

I conducted a detailed analysis of all the available forest management work products that were completed by Mr. Briggs for a period of years immediately preceding his reclass request. . . . I identified each of the various forest management tasks involved with each work product. I then evaluated the complexity level of each individual task according to the criteria developed for each classification level. This task analysis was reviewed in deal [with respondents as part of respondents' initial evaluation of the reclassification request].

The material evaluated included 78 examples of the eight forest management tasks. 28 (36%) of the examples were classified at the technician 3 or 4 complexity level. 50 (64%) were classified at the technician 5 level.

70% of Mr. Briggs' position description is devoted to forest management. Even if one assumed that the completion of a particular type of task at ANY level of complexity takes an equal amount of time, Mr. Briggs would appear to be spending approximately 45% of his total time on Level 5 Technician work [70% forest management work X 64% tasks at level 5].

Obviously, however, more complex work takes more time. By definition, the criteria for performing a given task at a higher level is more complex. The evaluation of additional, generally more subjective factors, involving the collection and analysis of considerably more data is required. At the level 3 and 4 level, for example, designating trees for harvest is largely a mechanical exercise in identifying specific species, spacing, rows, or areas of trees to be cut. At level 5, each individual tree must be evaluated and selected for harvest based on site/species potential, quality, risk, vigor, stand diameter structure, wildlife and aesthetic values, etc. Likewise, at levels 3 and 4, vegetative inventory work (Recon data collection), involves collection of only segments of data and updating existing records -- often done in the office, based on other existing information such as timber sale records, etc. At level 5, extensive photo interpretation, field work,

mapping, and development of management recommendations are required to create an entirely new database.

I was unable to specifically quantify the additional time requirements inherent in higher complexity tasks, since we generally do not keep records on that level of detail. I can tell you, however, based on 25 years of experience, that the difference is usually on the order of "minutes" v.s. "hours" or "hours" v.s. "days".

Since 64% of the forest management tasks Mr. Briggs performs are at level 5, it would seem only logical that they account for a disproportionate amount of his time. Given the fact that even WITHOUT this additional consideration, Mr. Briggs spends 45% of his total time on level 5 forest management tasks, I'm convinced he meets the "majority of time" standard in the Forestry Technician 5 Classification standard.

After literally spending years on the "Forestry Organization Committee" trying to quantify forest management task "complexity", I sympathize with the difficulty you face in making these classification decisions. I did my best to give you as much unbiased, objective input as I could. If I failed to accurately convey the results of my analysis, I apologize. I hope this information helps clarify my findings. I stand ready to attempt to further quantify "time requirements" at various complexity levels if you would find it useful.

The Commission acknowledged Mr. Sloan's clarification memo but the information contained therein was not fully adopted by the examiner in the proposed decision and order (PDO) and was scrutinized further by the full Commission in the interim decision and order (IDO). In other words, recognition of Mr. Sloan's memo did not dispose of the factual or legal issues as explained in the following paragraphs.

The analysis of the PDO demonstrates that the hearing examiner disagreed with Mr. Sloan's approach in quantifying FT5 level tasks as compared to lower-level tasks, as shown by the following excerpt from pp. 19-20 of the PDO):

The Commission's decision adopts Mr. Sloan's opinion of the difficulty of the specific tasks based upon his expertise in forest management (except for the few cases where his reasoning was contrary to the unofficial guidelines). However, the method used by Mr. Sloan to tally the tasks was viewed by the Commission as flawed and, accordingly, was not followed.

The conceptual flaw with Mr. Sloan's approach was to count one project for more than one task. For example, some stewardship plans were counted three times: once under "Forest Management Planning", once under "Cruising" and a third time under "Private Forestry Assistance". In other words, he counted the cruising and the silvicultural aspects of developing a stewardship plan separately from the plan development itself. The approach taken by the Commission treated each project as justifying a count under only one category -- the most appropriate category in terms of the overall purpose of the assignment. This approach is supported by the guidelines which specifically recognize such tasks as cruising and silviculture as part of the stewardship plan itself.

A comparison of the examiner's PDO to the Commission's IDO illustrates an additional difficulty which the Commission had in attempting to utilize Mr. Sloan's analysis. Footnotes "c" and "d" on page 18 of the IDO describe the problems:

c PDO ¶49 was deleted because the arithmetic contained therein was faulty. Specifically, there was no expert testimony indicating that it takes, for example, four times as long to complete a 4,000 acre assignment at the FT5 level, as it does to complete a 1,000 acre assignment at the FT5 level. In other words, the number of acres provides some basis for comparison but does not provide a perfect basis for converting from acreage to time percentages absent the noted expert testimony.

d The wording of [the discussion] section was changed to delete reference to the faulty mathematics relied upon in the PDO, and to reflect the rationale of the full Commission. The Commission was unpersuaded that consideration of the sole factor of number of tasks at the FT5 level as compared to total number of tasks bore a direct correlation to time spent on such tasks. In other words, one task at the FT5 level does not necessarily correlate to twice the time spent on a different task at the FT4 level. The Commission's concern over the lack of direct correlation also existed between the factor of FT5 level acreage as compared to total acreage. (Emphasis shown appears in the original.)

As illustrated by the preceding paragraphs, significant areas of dispute existed throughout these administrative proceedings which were unresolved by Mr. Sloan's clarification memo and by the hearing record. Based on the foregoing, the Commission concludes that respondents' position

in the administrative proceeding was substantially justified as having a reasonable basis in law and fact.


ORDER

Appellant's request for costs is denied and the Commission's Interim Decision and Order of July 5, 1996, is final.


Dated October 22, 1996.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

JMR

  
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