

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

DANIEL L. MURRAY,

Petitioner,

vs.

Case No. 95CV0988

WISCONSIN PERSONNEL COMMISSION,

Respondent.

**DECISION AND ORDER AFFIRMING WISCONSIN PERSONNEL COMMISSION
RULING ON ATTORNEYS FEES AND COSTS**

Petitioner, Daniel L. Murray (Murray), seeks review under § 227.52, Stats. of a decision by the Wisconsin Personnel Commission (Commission), denying Murray's request for attorney fees and costs as a prevailing party pursuant to the Wisconsin Equal Access to Justice Act, § 227.485, Stats. Having reviewed the record herein, I affirm WPC's decision denying Murray costs and fees, because the Commission correctly determined that DER's position was substantially justified.

FACTUAL BACKGROUND

Petitioner Murray had been employed as Chief of the Building Inspections Section of the Bureau of Buildings and Structures for many years. This position was located within the Safety and Buildings Division of DILHR. On June 17, 1990, the Department of Employment Relations reallocated Murray's position. Murray appealed the reallocation of his position to the Wisconsin Personnel Commission pursuant to § 230.44(1)(b), Stats. At a contested hearing Murray sought to establish that the DER had wrongly reallocated his

position. The Commission found in favor of DER and dismissed Murray's appeal. Murray then filed a petition for circuit court review pursuant to § 227.52, Stats. The stipulated underlying issue was whether DER correctly decided to reallocate Murray's position to Civil Engineer Supervisor 4 (which was primarily supervisory) rather than Architect/Engineer 1 (which was predominately executive and managerial). On April 29, 1994, Dane County Circuit Court Judge Michael Nowakowski [J. Nowakowski] reversed the Commission decision on the grounds that the Commission's sole reliance upon the definition of executive and managerial functions as found in § 111.81, Stats., to determine where management responsibilities begin, without consideration of the DER classification specifications for those positions, was a clear error of law. J. Nowakowski also determined that the factual findings made by the Commission did not support the Commission's ultimate conclusion that Murray's position was not predominately managerial or executive. In his Order, J. Nowakowski reversed and set aside the Commission's dismissal of Murray's reallocation appeal and remanded the appeal back to the Commission to make such additional findings consistent with the order and to grant Murray's appeal before the Commission so as to reallocate his position to A/E Manager 1. (Oral Decision dated 4/29/94, Dane County Circuit Court Case No. 93-CV-2661; Findings and Order dated 5/12/94, Petitioner's Reply Brief, Exh. C).

Both DER and the Commission filed an appeal with the Court of Appeals. The appellate proceeding was resolved by a settlement agreement prior to a decision. The settlement left the circuit court decision reversing the Personnel Commission intact and compelled the reallocation of Murray's position to the A/E Mgr. 1 level.

On October 24, 1994, the Personnel Commission filed an Interim Order remanding the matter to DER for reallocation of Murray's position to A/E Mgr. 1 and notifying Murray of his right to file an application for fees and expenses pursuant to § 227.485, Stats..

On November 14, 1994, Murray filed his motion for costs and fees under § 227.485, Stats. before the Personnel Commission. The Commission issued a ruling denying Murray's request for costs and fees concluding that DER's position in the litigation was substantially justified. Murray now seeks judicial review of the Commission's Ruling on Murray's Request for Attorney's Fees and Costs.

STANDARD OF REVIEW

Generally, the standard of review of an administrative decision depends on whether the issues presented involve questions of law or fact. A court must separate the factual findings from the conclusions of law and apply the appropriate standard of review to each. Badger State Agri-Credit v. Lubahn, 122 Wis. 2d 718, 723 (Ct. App. 1985). However here, the court is called upon to review the Commission's denial of costs and fees to Murray which the Commission determined under the standards enunciated in §227.485(3), Stats. That section provides:

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.

Petitioner is the prevailing party below as evidenced by J. Nowakowski's decision and

order and by the Commission's Interim Order requiring DER to reallocate Murray's position to the A/E Manager 1 level consistent with the circuit court's Order. The remaining issue under § 227.485(3), Stats. is whether the Commission erred in determining that DER was "substantially justified" in taking its position in the underlying litigation. "Substantially justified" is defined as having a reasonable basis in law and fact. §227.485(2)(f), Stats. The application of a statute to a particular set of facts is a question of law. Eau Claire County v. WERC, 122 Wis. 2d 363, 365 (Ct. App. 1984).

The proper standard of review for "substantial justification" is stated in Behnke v. DHSS, 146 Wis. 2d 178 (Ct. App. 1988):

We now address our standard of review for the "reasonable basis in law and fact" test set out in sec. 227.485(2)(f), Stats. In Esparza v. DILHR, 132 Wis. 2d 402, 393 N.W. 2d 98 (Ct. App. 1986), we concluded that the traditional fact/law analysis to an agency determination was inappropriate when reviewing a value judgment of the agency. Id. at 406, 393 N.W. 2d at 100 . . . Instead, we concluded that where the expertise of the agency is significant to the determination, the agency's decision should be given weight, although it is not controlling. . . Behnke at p. 184.

Therefore, while the court is not bound by the agency's interpretation of law, I am to give due deference to the Commission's statutory interpretation and conclusions of law.

DECISION

In order to satisfy the government's burden of substantial justification under § 227.485(3), Stats., 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. Sheely v. DHSS, 150 Wis. 2d 320, 337-338 (1988)(citations omitted).

In its Ruling on Request For Attorney Fees and Costs, the Commission states the

reasons why DER was "substantially justified" in reallocating Murray's position to CE Sup. 4 rather than A/E Mgr. 1 in the initial action. Generally, the Commission concluded that the factual evidentiary record provided a reasonable basis for DER's position and that at no time did DER advance the error of law relied upon by the Commission.

Judge Nowakowski, in his decision on the merits, confirmed that the clear legal standards to be applied in determining classification allocations in civil service are the DER classification specifications. These are an outgrowth of the Administrative Rules that DER created and were ultimately made a part of the Wisconsin Code of Administrative Rules. On the other hand, §111.81(13) and (19), Stats. which define "management" and "supervisor" do not govern determinations of classification allocation. These definitions relate to a different body of law and are to be used as a tool by administrative agencies. In its brief before the Commission on the underlying merits, DER set forth two major positions. First, it argued that Murray's position was correctly classified as CE Sup. 4 because the classification specifications for that position most accurately describe the duties performed by Murray. DER's second argument was that Murray's position did not fit the criteria for A/E Mgr. 1 because it was not "predominately executive or managerial." In support of its contention that Murray's position was correctly classified as CE Sup. 4, DER compared the DER classification specifications of that position to Murray's job description. After setting forth this argument with some degree of specificity, DER then argued that **in addition to meeting the specifications for the CE Sup. 4 position**, Murray's position also met the definition of "supervisor" under §111.81(19), Stats. (Respondent's Post Hearing Brief, pp. 9-12). In support of its contention that Murray's position did not fit the criteria for the A/E Mgr. 1

position, DER first set out the criteria for that position from the DER classification specifications. Those specifications refer to § 111.81, Stats. in determining managerial and executive functions. As noted by the Commission in its Ruling Denying Costs and Fees, DER, in its posthearing brief, does not rely upon §111.81(13) as the basis for determining where management responsibilities begin. In fact, as stated by the Commission, DER's brief recognizes that §111.81(13), Stats. does not cut off management at the bureau level because the statute also includes employees performing functions and responsibilities similar to bureau directors. Furthermore, DER also identified the specifications for A/E Mgr. 1 positions which includes section chiefs in a major complex agency A/E services program. See Respondent's Post Hearing Brief, pp. 13-14. Thus, DER's position clearly does not fall prey to the same error of law which J. Nowakowski attributes to the Commission. Consequently, having given due deference to the Commission, this court agrees that in setting forth its position in this matter, DER applied the proper legal standards and accorded those standards their proper authority. In light of the foregoing evidence, this court finds that DER demonstrated a reasonable basis in law for the theories propounded.

DER must also demonstrate a reasonable basis in truth for the facts alleged. To support its arguments, DER relied upon Murray's Position Description dated 5/10/91; deposition testimony of Murray, various DER personnel specialists, Mr. Buchholz-the Deputy Division Administrator for the Division of Safety and Buildings, Mr. Pankratz-Administrator of Classification and Compensation for DER, and various position descriptions it considered comparable to the positions at issue here. DER contended that Murray's position was not predominantly managerial based on, among other things, the lack of

specificity in Murray's position description indicating his precise executive and managerial responsibilities, the fact that the position description for Murray's immediate supervisor, Mr. Eagon, indicated that Eagon has the management responsibility for the bureau-including Murray's section, and the testimony of one of DER's personnel specialists that there is a difference between managing a program for a unit such as appellant's, where policies have been in place for some time, and performing "executive and managerial" responsibilities as contemplated by the specifications. Other evidence supporting DER's position included Mr. Pankratz's testimony concerning the criteria he used to determine whether a position met the definition of "predominantly managerial." DER also compared Murray's position to other positions with what it considered comparable functions and responsibilities. Those positions included 2 individuals performing very similar responsibilities as Murray but who were classified at the C/E Sup. 5 level and not at the A/E series level. However, the C/E Sup. 5 level was not an option for reallocation here because the parties stipulated to consideration of either CE Sup. 4 or A/E Mgr. 1. Furthermore, DER offered as comparison the management position of "Schlough" who, in contrast to Murray, did not have a supervisor with technical expertise in the engineering field like Murray did, presumably making his position more appropriate for the A/E Mgr. series.

Taking this evidentiary record as a whole, it cannot be said that there is no reasonable factual basis for DER's position, even though J. Nowakowski did not find this evidence factually persuasive and rather relied on evidence in the record contrary to DER's position. As the Commission stated, this does not render the factual evidence submitted by DER to be unreasonable, just unpersuasive on judicial review.

Murray points to no specific factual evidence in the record nor to any legal theories propounded that he claims are unreasonable. Rather, Murray maintains that J. Nowakowski's determination that there was no reasonable basis in the record to sustain the Commission's finding negates any possibility of "reasonableness" regarding DER's position in the underlying litigation. [" . . . [R]espondents (sic) herein continue to ignore . . . the fact that J. Nowakowski's Findings and Order constitute the final word on the question of reasonableness of DER's position in the reallocation appeal." (Petitioner's Reply Brief, p. 7)]. This argument totally misinterprets the procedural status of this matter.

The issue before J. Nowakowski was whether the Commission's determination regarding Murray's reallocation was unreasonable. The court did not address the question of whether DER's position in that litigation was substantially justified. J. Nowakowski's decision does not address the issue of whether DER's position was unreasonable. Losing a case does not raise the presumption that the agency was not substantially justified. Sheely v. DHSS, 150 Wis. 2d 320, 338 (1989). Furthermore, there can be no issue of collateral estoppel as there is no identity of issue. West Bend Mut. Ins. Co. v. Berger, 531 N.W. 2d 636 (Ct. App. 1995).

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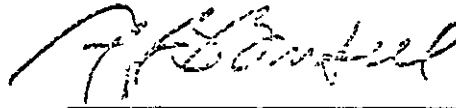
CONCLUSION AND ORDER

For the reasons stated above, and based on the record herein, I hereby affirm the Commission Ruling On Request For Attorney's Fees and Costs.

THE FOREGOING ORDER IS THE FINAL ORDER OR JUDGMENT FOR PURPOSES OF APPEAL. NO SUBSEQUENT DOCUMENT IS CONTEMPLATED BY THE COURT.

Dated: December 15, 1995.

BY THE COURT:



Angela B. Bartell
Circuit Judge

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