STATE OF WISCONSIN | PERSONNEL COMMISSION

CHERYL KLEMMER
Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 97-0054-PC

FINAL DECISION AND ORDER

PROCEDURAL SUMMARY

Ms. Klemmer (hereafter, appellant) filed an appeal regarding a letter of discipline imposed in respondent's letter dated May 5, 1997.[1] The Commission's jurisdiction over the matter is pursuant to §230.44(1)(c), Stats., which provides the Commission may hear a disciplinary appeal if appellant alleges that the suspension was not based on just cause.

An initial hearing date was scheduled for January 12-13, 1998, but was cancelled when respondent filed a motion to dismiss (by letter dated January 5, 1998) contending the case was moot due to appellant accepting a voluntary demotion and respondent's related action of withdrawing the suspension. The hearing was cancelled to allow the parties to file briefs on respondent's motion.

The Commission issued a ruling on April 8, 1998, which found the subject of the appeal (the disciplinary letter) to be a moot issue, and further found that appellant's entitlement to attorney fees and costs remained an unresolved question. During a subsequent conference, the parties agreed that after the appeal was filed, respondent made a settlement offer whereby the disciplinary letter would be rescinded if appellant would accept a voluntary demotion. Under the rationale of the Commission's ruling (dated

[1] The proposed decision and order contained inconsistent terms for the disciplinary letter. Changes were made in the final decision to correct the inconsistency. Typographical errors also were corrected.

4/8/98), this meant appellant was a "prevailing party", within the meaning of §227.485(3), Stats.

A status conference was held on July 14, 1998, at which time a hearing was scheduled for August 27-28, 1998. Also at the conference, the issue for hearing was defined as follows (see conference report dated 7/14/98):

> As discussed today, the hearing issue will center on appellant's entitlement to attorney fees and costs under §227.485, Stats. The hearing issue is whether respondent was substantially justified in taking its position (about the discipline in May of 1997) or whether special circumstances exist that would make the award unjust. (See §227.485(3), Stats.)

Appellant's attorney provided formal notice (by letter dated 8/25/98) that appellant did not wish to attend the hearing due to economic concerns and did not intend to defend against respondent's case, but did not wish to withdraw her claim. The hearing examiner provided formal notice to the parties (by letter dated August 26, 1998) that she would take testimony by telephone rather than travel to the hearing site in Winnebago, Wisconsin. The same letter included a ruling granting respondent's attorney's request to hold the hearing only on August 28, 1998, due to his spouse's recent surgery.

The hearing was held on August 28, 1998, with respondent making an oral closing argument. The case is now before the Commission to determine if appellant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Appellant, at the time relevant to this case, was employed at Winnebago Mental Health Institute (WMHI) as a Nursing Supervisor 1. She functioned as Head Nurse for a specific unit, which cared for patients the majority of whom had committed crimes and suffered from a major mental illness or substance abuse problem. Appellant's duties as Head Nurse are described in Exh. R-1. Of particular relevance here, appellant was expected to perform the following duties: a) serve as a role model for

subordinate staff; b) supervise the seclusion of patients according to the law, WMHI policy and nursing procedures; c) teach, review and monitor principles of infection control; and d) actively participate in institute committees.

2. Appellant's work was evaluated by Kathleen Bellaire, who was the Director of Nursing. Ms. Bellaire had been working with appellant for a long time to correct appellant's performance problems. Appellant understood what was expected yet willfully failed to correct problematic behaviors. Ms. Bellaire, therefore, provided formal notice to appellant by letter dated April 3, 1997 (Exh. R-4) that continued unsatisfactory performance could lead to discipline. Examples of past problematic behaviors were summarized in the letter with one being the failure to involve appropriate staff members in decision making.

3. Respondent's Exh. R-11 is a Performance Planning and Development Report (PPDR) signed by appellant on April 22, 1997. Specific expectations for improvement were noted in the document. One problem reported to Ms. Bellaire was that appellant was away from the assigned unit too often and, accordingly, was difficult to contact. The resolution to this problem was noted on the final page of the PPDR where appellant was informed to be present on the unit except to attend nurse manager meetings, nurse manager training, forensic continuity of care meetings, security committee meetings and "PIN" meetings. Despite this instruction, appellant, on April 24, 1997 (just 2 days after she signed the PPDR), missed a security committee meeting and, instead, was away from the unit to perform tornado captain activities. The appellant volunteered for the tornado captain duties even though she had the option to and should have delegated the function to one of her subordinates.

4. On April 21, 1997, appellant placed a patient in seclusion without following the directives of Ms. Bellaire. Specifically, appellant telephoned Ms. Bellaire when appellant felt a need existed to place a patient in seclusion. Ms. Bellaire told appellant to contact Joann O'Connor, WMHI Director, for consultation. Appellant attempted to contact Director O'Connor but was told by the Director's secretary that she was at a meeting. Appellant did not tell the secretary of the importance of reaching Di-

rector O'Connor. Nor did appellant report back to Ms. Bellaire for further instruction. Instead, the appellant consulted with the unit physician and obtained an order for secluding the patient and then left for the day.

5. Respondent conducted an investigation of the incidents described in the two prior paragraphs. As to the incident on April 24, 1997, respondent found appellant was insubordinate in being away from her unit for an unauthorized reason (volunteer tornado captain activities) thereby missing an assigned meeting of the security committee. As to the incident on April 21, 1997, respondent found appellant embellished information to the unit physician representing that the patient was a greater risk to others than was true. Respondent further concluded that if appellant would not have embellished the information to the physician that a seclusion order would not have been appropriate and would not have been issued. Seclusion is a patient rights issue governed by law and respondent's own policies. Failure to comply with the same could raise an accreditation (licensing) issue for WMHI. Respondent also discovered that appellant had not been truthful in certain aspects of her version of events.

6. On May 5, 1997, respondent gave appellant a disciplinary letter the text of which is shown below in relevant part:

> This is a letter of reprimand, issued as a result of your violation of DHFS Work Rule #1 on April 21, 1997, to follow the verbal instructions of your supervisor to contact Joann O'Connor, WMHI Director, prior to instituting seclusion procedures with a patient on infection control precautions . . . and when on April 24, 1997, to follow the verbal and written instructions of your supervisor when you volunteered to act as tornado captain rather than attend the Security Committee meeting. This Work Rule applies to all DHFS staff and specifically prohibits, "Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions."[2]

7. Insubordination by a supervisor, like appellant, has the potential to undermine the efficient performance of her job duties. Appellant's acts of insubordination illustrated that she was not setting a good example for her subordinate staff and that she

was not using good judgment - including on professional matters such as the seclusion issue. Furthermore, the potential accreditation impact existed in connection to appellant's handling of the seclusion incident.

8. One supervisor at WHMI was suspended for 5 days for violating work rule #1, when the employee took a patient to his home. (Exh. R-31) A Head Nurse at WMHI was suspended for 3 days for violation of 3 work rules (including insubordination) for making sexually inappropriate remarks about a patient in the presence of a female co-worker who found the remarks offensive. (Exh. R-29) The same Head Nurse was demoted about a year and three months later for violating two work rules (including insubordination). (Exh. R-30)

CONCLUSIONS OF LAW

1. Respondent has the burden of proof to show respondent was substantially justified in imposing the disputed discipline.

2. Respondent met its burden of proof.

3. Appellant is not entitled to an award of attorney fees and costs.

OPINION

Evidentiary Note Regarding Appellant's Failure to Appear at Hearing

Commission rules provide that if a party who does not have the burden of proof fails to appear at hearing he/she is "deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made." §PC 5.03(8), Wis. Adm. Code. This code provision applies in this case because appellant did not have the burden of proof and failed to appear at hearing. The findings of fact recited in this decision were made based on this code provision and on the fact that witness testimony at hearing was credible because there were no indicators of credibility issues, such as inconsistent testimony.

[2] The second paragraph of the letter was deleted in the final decision as unnecessary.

Respondent's Position Was Substantially Justified

The Equal Access to Justice Act (EAJA) provides as shown below in relevant part:

> §227.485(3), Stats.: 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 which would make the award unjust. (Empahsis added.)

The term "substantially justified" is defined under the EAJA as shown below:

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

Further guidance on the term "substantially justified" is found in *Sheely v. DHSS*, 150 Wis.2d 320, 337-38, 442 N.W.2d 1 (S.Ct. 1989), as shown below (citations omitted):

> "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.

The record established that appellant committed the acts which formed the basis of the discipline, and that appellant's conduct constituted "just cause" (within the meaning of §230.44(1)(c), Stats.) to impose discipline. Just cause was established by the connection between appellant's conduct and the negative impact on the workplace as noted in paragraph 7 of the Findings of Fact. The record further established that the discipline imposed was not excessive and was consistent with serious work rule violations by other supervisors, as noted in paragraph 8 of the Findings of Fact. The factors recited in this paragraph are pertinent to the merits of a disciplinary case filed under

230.44(1)(c), Stats. (See *Safransky v. Personnel Board*, 62 Wis.2d 464, 215 N.W.2d 379 (1974).)

The Commission concludes based on the foregoing discussion that respondent had a reasonable basis in truth for the facts alleged and for the legal theory advanced. The Commission further concludes respondent established that a reasonable connection exists between the facts alleged and the legal theory advanced by respondent. Accordingly, appellant is not entitled to an award of fees and costs under the EAJA.

ORDER

Appellant's request for attorney fees and costs is denied and this case is dismissed.

Dated: October 9, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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.)

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