STATE OF WISCONSIN PERSONNEL COMMISSION

CHERYL KLEMMER,
Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 97-0054-PC

RULING ON RESPONDENT'S MOTION TO DISMISS

This matter is before the Commission to resolve respondent's motion to dismiss the above-noted case on the basis of mootness. Both parties filed written arguments with the final argument received by the Commission on February 26, 1998. The facts recited below appear undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. The Commission received this appeal on June 2, 1997, challenging a suspension imposed by respondent on May 5, 1997.

2. A prehearing conference was held on June 30, 1997, at which time the parties agreed to hold the case in abeyance for 60 days for the purpose of continuing settlement negotiations. (See Conference Report dated 7/1/97.)

3. Respondent, by letters dated July 31, and November 18, 1997, offered to rescind the suspension if appellant would accept a demotion. The offers were rejected by appellant.

4. A second prehearing conference was held on October 21, 1997, at which time the parties agreed to hearing on January 12-13, 1998, at Winnebago Mental Health Institute and to the following statement of the hearing issue:

> Whether there was just cause for the discipline imposed on appellant by respondent in May of 1997.

5. Respondent, by letter dated January 5, 1998, sent the Commission a letter indicating that appellant submitted a written request for a voluntary demotion stating the intent to transfer from Winnebago Mental Health Institute (WMHI) to the Wisconsin Resource Center (WRC). Both are institutions under respondent's authority. WMHI accepted the request to demote to a different institution by letter dated January 2, 1998.

6. Respondent unilaterally rescinded the suspension due to appellant's decision to accept a lower-classified position in a different institution. Appellant was sent notice of this decision by letter dated January 2, 1998.

7. Respondent filed a motion on January 5, 1998, that the hearing scheduled for January 12-13, 1998, be canceled and the case dismissed. A telephone conference was held on January 6, 1998, to consider respondent's request. The content of the conference was memorialized by Commission letter dated January 6, 1998. Basically, respondent argued the case was moot because the discipline was rescinded and such action was the only relief possible in the appeal. Appellant, on the other hand, argued the case was not moot because if appellant prevailed at hearing, she would be entitled to attorney fees. The parties agreed to postpone the hearing (to scheduled dates in May) pending resolution of the present motion.

8. Respondent's reasons for imposing a suspension were described in a letter to Ms. Klemmer dated May 5, 1997 (and repeated in a revised letter dated May 23, 1997). A copy of both letters was attached to Ms. Klemmer's appeal letter. The pertinent portion of the letter text is shown below.

> 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."
>
> Although, according to our progressive disciplinary schedule, your conduct in these instances would merit a 3 day suspension without pay, this letter of reprimand is being issued instead of a 3 day suspension in order to maintain the FLSA exempt status of your position.[1]
>
> Further violation of DHFS Work Rules may result in a full work-week suspension without pay, or other discipline, up to and including termination of your State employment.

9. Ms. Klemmer contended in her appeal letter that the suspension was imposed without just cause, within the meaning of §230.44(1)(c), Stats. (See, appeal let-

---

[1] Respondent noted in a letter dated 1/27/98, that the 3-day suspension without pay was not imposed because to withhold pay "for less than five work days would risk the classification of Ms. Klemmer as a professional, exempted from certain provisions of the (federal) Fair Labor Standards Act." This explanation was not contested by Ms. Klemmer.

ter dated 5/30/97.) The information in the Commission file does not reveal the specific factual or legal disputes which exist between the parties in connection with the imposed suspension.

OPINION

The Issues Raised On Appeal Are Moot

The Commission has considered the issue of mootness in the context of appeals filed under the civil service code (e.g., *Friedrichs v. DOC*, 96-0023-PC, 11/22/96; *Maday v. DOC & DER*, 92-0838-PC, 6/23/93) and in the context of complaints filed under the Fair Employment Act (e.g., *Nolen v. DILHR*, 95-0163-PC-ER, 12/17/97). The Commission consistently has held that the test for mootness for a civil service appeal is whether a decision on the merits would have any practical legal effect on the controversy raised in the appeal. A slightly broader view was taken for complaints filed under the Fair Employment Act (FEA) based on the statute's remedial focus.

The employer in *Nolen* moved for dismissal of an allegation related to the denial of overtime pay which respondent paid to the employe after the discrimination complaint was filed and prior to hearing. The employer claimed the issue had become moot and should be dismissed. The Commission denied the motion stating as follows (p. 3):

> In *Watkins v. DILHR*, 69 Wis. 2d 782, 12 FEP Cases 816 (1975), the Wisconsin Supreme Court ruled, in a case where it was concluded that the complainant had been discriminated against by her state agency employer on the basis of her race when she denied a requested transfer to a different position in 1969 and in 1970, that the controversy was not moot even though the complainant had been transferred to the position she sought in 1971, after she had filed the underlying complaint of discrimination. The basis for the Court's ruling was that, since the complainant remained an employee of DILHR, an order could be entered which would have the practical, legal effect of requiring that the complainant be considered for all future transfers on the basis of her qualifications and ability, and without regard to her race; that the complainant was entitled, having suffered frustration in her employment over an extended period of time, to know whether or not this was due to race discrimination; and that it would foster, not eliminate, discrimination if employers in such situations could escape liability by simply waiting until enforcement proceedings were begun and then remedying the subject adverse action. . . .

The Commission noted in *Nolen* that if the employee prevailed in the case, the Commission could issue an order for respondent to cease and desist from retaliating against complainant in regard to future requests for overtime and such order would have a

practical, legal effect due to the continuing employment relationship. The Commission, accordingly, rejected the employer's contention that the matter was moot.

The appeal in *Maday* involved a question of the effective date of a reclassification. After the appeal was filed and prior to hearing the employer agreed to use the earlier effective date sought by the appellant and then claimed the case should be dismissed as moot. The employe, citing *Watkins*, asserted he had a right to know whether the civil service act had been violated. The Commission disagreed noting that although the employment relationship continued, it was unlikely the issue would arise again and the policies underpinning the civil service and discrimination laws were different. Specifically, the Commission noted as shown below (pp. 3-4, *Maday*):

> In the instant case, appellant apparently will be granted the effective date he is seeking . . . there is no reason to think he will ever encounter this issue again. Therefore, a Commission ruling, . . . could not affect appellant's working conditions in any way, now or in the future. In *Watkins*, the Court noted that DILHR could issue orders that would affect complainant's treatment in the future. The Commission also observes that *Watkins* involved a race discrimination charge under the Fair Employment Act (FEA). The *Watkins* decision rests to some extent on policy factors concerning the FEA that are not equivalent here, a case involving a personnel transaction that turns on a more or less technical question of an employe's status for reclassification purposes while on §230.36 leave.

Ms. Klemmer distinguished her case from the circumstances in *Maday* based on the observation that an abuse of discretion was more likely to occur in her continuing employment than the effect date issue posed in the *Maday* case. The Commission already has rejected this argument in *Friedrichs*, ruling that an appeal was moot when the contested action was a suspension which the employer withdrew prior to hearing. The rationale is noted below (from p. 2):

> An issue in an appeal such as this is moot when the decision of the issue cannot have any practical legal effect or where there is no longer any actual controversy. When it is concluded that the only issue in the appeal is moot, the appropriate action is an order dismissing the appeal. Here, it is undisputed that the remedy sought by the appellant and the only remedy available to him in an appeal of a disciplinary suspension, i.e., the rejection of the suspension, has been carried out by the respondent and any decision by the Commission could not have any practical legal effect. There can no longer be any actual controversy here because the subject matter of the appeal, i.e., the suspension imposed in October of 1995, no longer exists. *See, Maday v. DOC & DER*, 92-0838-PC, 6/23/93.

The controversy raised in Ms. Klemmer's appeal relates to a disciplinary suspension which has been rescinded by the employer. The Commission, if Ms. Klemmer prevailed at hearing could reject the suspension but, unlike a discrimination case, could not issue a cease and desist order. Based upon this and the case law recited above, the Commission finds Ms. Klemmer's appeal is moot.

Appellant contends the controversy is not moot because if she prevailed at hearing she would be entitled not only to an order rejecting the suspension, but also to an award of attorney fees and costs. Case law indicates that the question of fees and costs is not part of the analysis of mootness. (*Economy Preferred Ins. Co. v. Solner*, __ Wis.2d __, __ N.W.2d __ (Ct. App. 1996) [arising under the declaratory judgment act]; State ex rel. *Young v. Shaw*, 165 Wis.2d 276, 477 N.W.2d 340 (Ct. App. 10/24/91) [arising under the Open Records Law]; Hartman v. Winnebago County, 208 Wis.2d 552, __ N.W.2d __ (Ct. App. 1997) [arising under §42 USC 1988]; and *Racine Ed. Ass'n. v. Racine Bd. Of Ed.*, 129 Wis.2d 319, 385 N.W.2d 510 (Ct. App. 1986 [arising under the Open Records Law].

Attorney Fees and Costs

Ms. Klemmer's potential entitlement to fees and costs would be pursuant to the Wisconsin EAJA, §227.485, Stats., the text of which is shown below in pertinent part (emphasis added):

> (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.

Ms. Klemmer could be considered a prevailing party even though the case became moot prior to hearing if a causal connection exists between filing the appeal and attainment of the relief sought (withdrawal of the suspension). There is no Wisconsin case law to this effect under the Wisconsin EAJA. However, the Wisconsin EAJA expressly states (§227.485(1), Stats.) the Legislature's intent that interpretation of the state law be guided by interpretation of the federal EAJA, 5 USC 504. The clearest guidance found regarding the federal law is in the following article: Louise L. Hill,

Equal Access to Justice Act – Paving the Way for Legislative Change, 36 Case Western Reserve L. Rev. 50 (1985-6).[2] Hereafter, this article is referred to as the "Treatise."

The Treatise at page 240, described attempts by Congress to amend the federal EAJA to clarify Congressional intent as noted below (at p. 58):

> In order to be eligible for a fee award under the EAJA, the party seeking the award must have prevailed against the United States in a civil litigation or in an agency adversary adjudication. In reviewing fee award requests, courts have had difficulty in determining what constitutes a "prevailing party." The Act's legislative history makes clear that Congress intended the interpretation of "prevailing party" to be consistent with the interpretation of that term developed in case law under other fee-shifting statutes. In fact, the legislative history specifically recites certain case law on this issue, stating that a prevailing party
>
> > should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case; if the plaintiff has sought a voluntary dismissal of a groundless complaint; or even if he does not ultimately prevail on all issues.

The approach noted in the Treatise is the same as used by Wisconsin courts in dealing with a different fee-shifting statute (the open records law). In *Young, Id.*, the court found it appropriate to consider an award of attorney fees even though the defendant voluntarily turned over the records sought prior to trial thereby leaving the trial issue moot. Regarding the question of attorneys fees, the court indicated (165 Wis.2d at 292):

> Young is entitled to recover his reasonable attorney's fees, compensatory damages and other actual costs under sec. 19.37(2), Stats., if he prevailed "in whole or in substantial part" in his mandamus action . . . A judgment or an order favorable in whole or in part in a mandamus action is not a necessary condition precedent to a finding that a party prevailed against an agency . . . "This is because the purpose of the statute is to encourage voluntary compliance; if the government can force a party into litigation and then deprive that party of the right to recover expenses by later disclosure, it would render the purpose nugatory."

The Treatise went on to note (p. 61) that in order to be considered a "prevailing party" in circumstances where the case ends without a full hearing on the merits, the

---

2 This Treatise discussed Congressional intent behind the federal EAJA promulgated in 1980. The law as enacted initially had a three-year sunset provision. Congress passed legislation in October of 1984, making the legislation permanent and including modifications. The President vetoed the legislation. The legislation was revived on a permanent basis in July of 1985, with clarification. The discussion in this ruling regarding Congressional intent behind the initial legislation also appears applicable to the 1985 legislation.

plaintiff must show "that the litigation effort was a causal factor in achieving (the plaintiff's) objectives or improving (the plaintiff's) situation." This causal nexus requirement is consistent with the approach taken by Wisconsin courts under other fee-shifting statutes. *See, Hartman v. Winnebago County, Id.*

The record before the Commission is insufficient to determine whether Ms. Klemmer is a prevailing party, within the meaning of §227.485(3), Stats. For example, respondent's initial submission for the present motion indicated that prior to the appeal being filed the offer was made to rescind the suspension if Ms. Klemmer would take a demotion. (See, respondent's letter dated 1/27/98, p. 2.) In correspondence dated February 26, 1998 (p. 2), respondent noted the offer may not have been made until after the appeal was filed. It would appear that if the offer had been made prior to filing the appeal then Ms. Klemmer could not be considered as a prevailing party as there would be no causal connection between filing the appeal and the later rescission of the suspension when she voluntarily demoted. Even if the offer had been made after the appeal was filed, the question for resolution would be whether respondent ultimately rescinded the suspension because of the pending appeal.

The record before the Commission is insufficient to determine whether respondent's position was substantially justified, within the meaning of §227.485(3), Stats. In order for an agency to demonstrate that its position had a reasonable basis in law and fact, and was therefore substantially justified, it must show that it had a reasonable basis in truth for the facts it claims justified its position, that it had a reasonable or well accepted theory of the law that it urged as support for its position and that there was a reasonable, material connection between the facts asserted and the legal theory urged. *DER v. Wis. Pers. Comm. (Anderson)*, Dane County Circuit Court, 87CV7397, 11/7/88. At this point in the proceedings the Commission does not know the nature of the dispute between the parties (as noted in ¶9 of the Findings of Fact).

Respondent is concerned that resolution of entitlement to attorneys fees could have a significant impact in increasing the amount of fees involved. Respondent noted (p. 2, letter dated 2/26/98):

> It would be a waste of time and resources, by the Commission and by the parties, to conduct a full administrative trial of this case when the discipline no longer exists. Think of it; a state circuit court would never conduct a trial if the merits of the underlying issue in dispute no longer existed. This would be true even if the parties had undergone extensive pre-trial preparations, which the Appellant has not demonstrated here.

The Commission shares respondent's concern. It does not make sense to the Commission to conduct a full hearing to determine whether appellant is entitled to attorney's fees which would multiply significantly with hearing preparation, representation at the hearing and post-hearing briefs. In other words, the economies of litigation do not support the proposition that in order to determine if a party is entitled (for example) to $4,000 in attorneys fees that you need to spend another $8,000 to resolve the issue thereby increasing the total attorney's fees award to $12,000.

The Commission has looked to the federal EAJA for a suggested reasonable alternative approach for determining entitlement to attorneys fees short of a full-blown hearing on the merits. Again, the best guidance is found in a learned treatise. An alternative approach was noted in a second treatise written by Ms. Hill (hereafter, referred to as the "Article"). Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 Ariz. State L.J. 229 (1987).[3] The Article states (on p. 240) as shown below (emphasis added):

> While Congress intended to broaden the court's inquiry, for EAJA purposes, beyond mere litigation arguments when evaluating "the position of the United States," it carefully sought to define "position" in a way that would not require the court or adjudicative officer to engage in evidentiary or discovery proceedings. Congress was aware that the President was opposed to any kind of a fee and expense award scheme that would involve extensive discovery which would lengthen proceedings. Mindful of this, Congress specifically sought to clarify that courts should evaluate the "position of the United States" based on facts the parties would necessarily air during the course of litigation or agency adjudication. When a proceeding is not litigated to a final decision by a court or adjudication officer, such as instances of settlement or dismissal, congress envisioned that courts would look to the *record* to determine if the position of the United States was substantially justified.

The Article defined the term "record" by the following footnoted text:

> The record to which the courts would refer in such matters encompasses pleadings, affidavits and other supporting documents filed by the parties in both the case on the merits and the fact application.

The problem in this appeal is the record is insufficient to conduct the analysis on whether Ms. Klemmer is a prevailing party and whether respondent's position was substantially justified. An in-person status conference will be scheduled at which time the examiner and parties will discuss whether an economical method exist for further

proceedings. Each party will be expected to have a draft prepared of the party's statement of the case; including a section detailing the facts which the party reasonably believes could be established at hearing, as well as a short outline of an analysis of the law based upon the drafted facts. This will enable the hearing examiner and the parties to identify the disputed areas and attempt to develop an economical procedure to address the disputes for purposes of resolving the question of Ms. Klemmer's entitlement to attorney fees and costs under the EAJA.

The hearing currently scheduled for May 12-13, 1998, at the Winnebago Mental Health Institute is canceled to provide the Commission and the parties an opportunity to develop a more economical method of determining appellant's entitlement to attorney's fees and costs. The parties should notify their witnesses that the hearing has been canceled.

ORDER

The disciplinary issue raised in this appeal is moot but appellant's entitlement to attorneys fees and costs remains an unresolved issue. Accordingly, respondent's motion for dismissal is denied. The parties are required to prepare for a conference as noted in this ruling. The hearing scheduled for May 12-13, 1998, is canceled.

Dated: April 8, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
970054Arul1.doc

Parties:

Cheryl Klemmer
1830 Leonard Point Rd.
Oshkosh, WI 54904

Joe Leann
Secretary, DHFS
1 W. Wilson St., Rm. 650
P. O. Box 7850
Madison, WI 53707-7850

---

3 This Article discussed Congressional intent behind the federal EAJA as re-promulgated in July 1995.