STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID BROOKE,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM, and

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 99-0034-PC

RULING ON PETITION FOR FEES AND COSTS AND FINAL DECISION

An Interim Decision and Order (IDO) was issued on February 28, 2000, with the Commission retaining jurisdiction to consider any request that Mr. Brooke might file for fees and costs under §277.485, Stats. He filed such a request. On February 24, 2000, the Commission received respondents' written arguments opposing his request.

OPINION

Costs to prevailing parties in an appeal filed with the Commission are governed by §227.485, Stats. Respondents do not dispute that Mr. Brooke was a prevailing party. Respondents contend that he is not entitled to costs because respondents' position was substantially justified, within the meaning of §227.485(3), Stats. In the alternative, respondents contend that the requested items are not allowable costs. Each argument is addressed separately below.

I. Respondents' Position Was Not Substantially Justified

A respondent is not required to pay costs under the Equal Access to Justice Act (EAJA) if its position was substantially justified. The pertinent statutory provisions are shown below:

> §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 ex-

> aminer 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.

Losing a case does not raise a presumption that the agency was not substantially justified. *Sheely v. DHSS*, 150 Wis. 2d 320, 338, 442 N.W.2d 1 (1989)

It is the government's burden to establish that it was substantially justified in taking its position. *Bracegirdle v. Board of Nursing*, 159 Wis. 2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990) The Court of Appeals in *Bracegirdle*, provided the following analytical guidance (159 Wis. 2d 425-426):

> 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 . . . 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. (Citations omitted.)

Respondents contend they have met all three criteria noted above. Respondents' argument is shown below (p. 2-3 brief dated 3/24/00):

> In determining that Appellant did not warrant reclassification to UHV Specialist, the Respondent relied on its understanding of the classification specifications for the UHV Specialist classification and its understanding of the work performed by Appellant. Respondent understood the UHV Specialist classification to require work on the most complex UHV system – the Synchrotron and the Aladdin Ring – based on its previous application of the class specifications to two other employees, both of whom worked with the Aladdin Ring and Synchrotron, and the involvement of Clay Vinje (the personnel manager at the Physical Sciences Lab) with the Department of Employee Relations in developing the classification specifications for UHV Specialist based on the work of the first employee to ever hold the UHV Specialist classification. Appellant's supervisor established that Appellant did not perform work on complex UHV systems, including the Aladdin Ring and Synchrotron, as required by the class specifica-

> tions. Based on these facts and the Respondent's understanding of the class specifications for UHV Specialist, Respondent objected to Appellant's reclassification to UHV Specialist. Respondent's position had a reasonable basis in law and fact as required by section 227.485(2)(f) and was therefore substantially justified.

Mr. Brooke argues that respondents' position was not substantially justified. The pertinent portion of his argument is shown below (from brief dated 3/8/00, using same emphasis as in the original document):

> The Respondent was not substantially justified in taking their position for the past year because their own evidence cannot support them. Their PD's are inaccurate, their own evidence (R-109)[1] supports my case, their failure to allow me to advance, work in or be trained in the Instrument Maker series, and their admitted "advancing people" through various classifications regardless of the work performed. From the Respondent's brief, "At best, Appellant may have shown that his current classification at Instrument Maker - Entry is incorrect and better described at the Instrument Maker - Journey level."[2] How can I be an I.M. (Instrument Maker) when I rarely do the work in the machine shop? This is a prime example of the gap between the facts of the case and the legal theory the Respondent argues.

The underlying government conduct at issue is respondents' denial of Mr. Brooke's request to have his position reclassified. This was a decision delegated by the Department of Employment Relations (DER) to the University of Wisconsin (UW), pursuant to §230.04(1m), Stats. Classification of a position in the civil service is governed (in relevant part) by §230.09(2)(a), Stats., which states as noted below:

> After consultation with the appointing authorities, the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other facts recognized in the job evaluation process. The secretary may reclassify or reallocate positions on the same basis.

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[1] Exhibit R-109 shows respondent's accounting of the amount of time the appellant performed vacuum work in 1998. Respondent disputed at hearing, however, that the vacuum work performed by the appellant warranted classification at the higher pay range.

[2] This is a reference to a statement made on page 4 of respondent's post-hearing brief.

The record shows that the UW denied the request summarily. (See Exh. A-18) On January 21, 1999, Mr. Brooke wrote a memo to the UW personnel office stating as shown below:

> Here is a copy of the actual time I have spent working here at PSL. This is for 1998. 1997 would be basically the same. PSL has been working on vacuum parts and chambers for 30+ years and still is. I want a job audit in order to get a reclass to the job I am doing. [Phone number provided for questions.]

On March 9, 1999, the UW personnel office informed Mr. Brooke in an e-mail message, that his reclassification request would not be processed. The text of the e-mail message is shown below:

> I met with Pat Griffith of CPO (Classified Personnel Office) this morning. Since it is management who decides the duties and responsibilities of a position; only a reclassification request that had been approved and signed by your supervisor and PSL management would be reviewed. A supervisor is the only one who can update a PD.
>
> Therefore any position description that you would submit to the Graduate School or to CPO without supervisory/management approval would be rejected. The Instrument Maker title series is a position delegated to UW-Madison so review by DER would not be an option. Hopefully some mutual resolution can be found. [Contact names and phone numbers provided for questions.]

It is the content of the e-mail message that formed the basis for the present appeal.

The approach taken here by the UW was unsupportable. The UW refused to process Mr. Brooke's reclassification request for the stated reason that he did not submit an updated position description (PD) which had been approved and signed by his supervisor. Yet the entire crux of Mr. Brooke's request was to have the duties he actually performed formally recognized for determination of the correct classification of his position, as required in §230.09(2)(a), Stats. The UW's response failed to provide a rationale of why duties actually performed by Mr. Brooke as assigned to him by his supervisor should not be recognized formally for purposes of determining the correct classification of his position. Accordingly, the circumstances show that respondents' position before litigation was not substantially justified

because it lacked a basis in truth for the facts alleged and a reasonable basis in law for the theory propounded.

Respondents' main legal theory at hearing was based on Mr. Vinje's recollection of contacts he had with DER when the classification specifications were developed. Specifically, Mr. Vinje recalled that it was work on the Synchrotron and Aladdin Ring at the SRC that were intended as requirements for the higher classification. Ultimately, however, his recollection was not established as reliable because it was unsupported by respondents' own exhibits as detailed in the IDO, pp. 11-15. The inconsistency between his recollections and respondents' own hearing exhibits should have been evident to respondents prior to hearing. These circumstances show that respondents' position during litigation was not substantially justified because it lacked a basis in truth for the facts alleged.

Respondents assert that their position was supported by the previous application of the classification specification to two other employees who perform work on the Aladdin Ring and Synchrotron. There is, however, no reasonable basis in fact to conclude that the classification of these other positions support respondents' position. The classification specifications were developed to encompass only Mr. Siverling's position. He worked at the Physical Sciences Laboratory (PSL) and not at the Synchrotron Radiation Center (SRC) where the Synchrotron and Aladdin Ring were housed. He worked on those devices but mainly as back up for employees stationed at the SRC. Furthermore, DER rejected the UW's request to write the classification specification to encompass positions at the SRC as well as at the PSL. The other position referred to by respondent is the position held by Mr. Thikim at the SRC. The Commission concludes that reliance on the reclassification of Mr. Thikim's position also does not provide a reasonable basis in fact for respondent's legal theory for the reasons already discussed on pp. 15-16 of the IDO.

The Commission concludes from the foregoing discussion that respondents' position was not substantially justified, within the meaning of §227.485, Stats. We now turn to the Mr. Brooke's claimed costs.

II. Allowable Costs

As noted previously, the EAJA applicable to administrative proceedings (such as Mr. Brooke's case) is found at §227.485(5), Stats. A statute similar to the EAJA but applicable to court actions is found at §814.245(5), Stats. Mr. Brooke's entitlement to fees and costs is governed by §227.485(5), Stats., which, by reference, provides that costs shall be determined using the criteria specified in §814.245(5), Stats. Section 814.245(5), Stats., is shown below in relevant part:

> If the court awards costs . . . the costs shall include all of the following which are applicable:
>
> (a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . .
>
> 1. Attorney or agent fees may not be awarded in excess of $75 per hours unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.
>
> (b) Any other allowable cost specified under §814.04(2).

The text of §814.04(2), Stats., is shown below (emphasis added):

> Disbursements. **All the necessary disbursements and fees allowed by law**; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified copies of papers and records in any public office; postage, telegraphing, telephoning and express; depositions including copies; plats and photographs, not exceeding $50 for each item; an expert witness fee not exceeding $100 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

Mr. Brooke has requested fees and costs as enumerated below. Respondents challenge each item.

Commission filing fee	$ 50.00
Copying/postage costs	$ 30.00
Hearing Tapes	$ 31.65
Legal fees	$400.00
Total	$511.65

Mr. Brooke seeks reimbursement for the filing fee required for his appeal, pursuant to §230.45(3), Stats. Whether the filing fee is reimbursable under the EAJA is a question of first impression for the Commission. Respondents object on the basis that it is not an enumerated item under §814.04(2), Stats. It is true that the term "filing fee" does not appear in the statute. However, the filing fee is included under the introductory phrase "All the necessary disbursements and fees allowed by law." The inclusion of suit costs as a recoverable expense allowed by law is a long-standing principle in Wisconsin. See *Emerick v. Krause*, 52 Wis 358, 9 NW 16 (1881). This principle forms the basis of the Bill of Costs Form #47.1 found in *Wisconsin Litigation Forms Manual*, CLE Books, State Bar of WI (1999), which specifically cites §814.04, Stats., as the section being interpreted for a definition of "disbursements." The first item on the form under the term "disbursements" is "filing and jury fees."

Mr. Brooke seeks reimbursement for copying expenses, postage and costs associated with obtaining copies of the hearing tapes. Respondents object to all these requests. The Commission previously has held that copying expenses and costs associated with duplication of hearing tapes are not reimbursable under the EAJA, *Smith v. DMRS*, 90-0032-PC, 10/27/95 and, accordingly, denies those claimed expenses. Respondents concede that postage is recoverable under the EAJA but objects here because the postage was not itemized separately from copy expenses. The Commission agrees that the claimed postage costs should be denied because there is no way to determine from Mr. Brooke's submission the amount spent on postage.

Mr. Brooke seeks reimbursement for attorney fees. Respondents object on the grounds that Mr. Brooke represented himself throughout these proceedings. Mr. Brooke's argument is shown below in relevant part:

> The legal fees I am asking for are for the best legal advice I could afford and that was available. I called about 15 labor attorneys [and] approximately 5 responded and only 1 offered to help me. I could not afford a full time attorney for this case. The hearing day cost would have been $1,0000+ . . . Just because my attorney did not directly represent me does not make her indirect representation and advice any less important. [My attorney's] advice was instrumental in my ability to fight this case every step of the way.

Section 227.485(1), Stats., specifically states that interpretation of Wisconsin's EAJA be guided by case law under the federal EAJA, 5 USC 504. The federal EAJA is the same as Wisconsin's EAJA in including language that the prevailing party submit an itemized statement from an attorney "representing or appearing on behalf of" the prevailing party.[3] (Compare §227.485(5), Stats., to 5 USC §504(a)(2).) The federal and state laws also are similar in limiting awards to "reasonable attorney fees." (Compare §§227.485)(5) & 814.245(5), Stats., to 5 USC §504(b)(1)(A).)

The Commission has held that a *pro se* litigant is not entitled to an award for fees under the EAJA as reimbursement for his/her own time and efforts expended in presenting his/her case, *Heikkinen v. DOT*, 90-0006-PC, 4/16/90. The Commission's ruling in *Heikkinen*, is supported by the courts. (See, 32 Am Jur 2d *Federal Courts* §329 (1995) "Generally a *pro se* litigant cannot recover attorneys' fees under the Equal Access to Justice Act (EAJA) since such a litigant has not 'incurred' legal fees.")

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[3] Respondents suggest in footnote #1 of its arguments (p. 3 of arguments filed by cover letter dated 3/24/00), that §814.04(1)(c), Stats., should guide the Commission's interpretation of Mr. Brooke's entitlement to attorney fees. The referenced statute provides that: "No attorney fees may be taxed on behalf of any party unless the party appears by an attorney other than himself or herself." This argument is without merit because §814.04(1), Stats., specifically provides that it does not apply to awards under §814.245(5), Stats.

It is a question of first impression for the Commission whether attorney fees are recoverable under the EAJA when an employee appears *pro se* but has incurred attorney fees in preparing his case. The parties did not cite to any cases that addressed the question.

In *Kooritzky v. Herman*, 178 F.3d 1315 (D.C. Cir. 1999), the court looked for guidance to cases decided under other fee-shifting statutes including *Kay v. Ehrler*, 499 U.S. 432 (1991) [concerning attorney fees under the Civil Rights Attorney's Fees Awards Act, 42 USC 1988] and *Burka v. United States Dep't of Health and Human Servs.*, 142 F.3d 1286 (D.Cir. 1998) [concerning attorney fees under the Freedom of Information Act, 5 U.S.C. §552(1)(4)(E)]. The *Kooritzky* court specifically rejected an argument that the *Kay* and *Burka* cases should be limited to the statutes discussed therein. The *Kooritzky* court stated (142 F.3d at 1317): "Upon review, we conclude that the fee-shifting provision of the EAJA does not differ in any material way from the statutes construed by the Supreme Court in *Kay* and by this court in *Burka*."

The question addressed by the Supreme Court in *Kay*, was whether a *pro se* litigant was entitled to attorney fees for his own time preparing and presenting his case when the litigant was a licensed attorney. The Court answered this question in the negative after discussing the purposes of the fee-shifting statute, as noted below (*Kay*, 499 U.S. at 436-7, citations omitted):

> We do not think either the text of the statute or its legislative history provides a clear answer. On the one hand, petitioner is an "attorney," and has obviously handled his professional responsibilities in this case in a competent manner. On the other hand, the word "attorney" assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under 1988. Although this section was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.
>
> In the end, we agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

The *Burka* court rejected Mr. Burka's claim for attorney fees for the time he spent, as a *pro se* attorney-litigant preparing and defending his case, citing *Kay* as controlling authority. The court went on to consider Mr. Burka's request for attorney fees for the work performed by his attorney colleagues who never entered an appearance in the case and who worked under Mr. Burka's direction and control. The court's discussion of the latter claim is shown below (*Burka*, 142 F.3d at 1291-92):

> Burka cites three cases in support of his argument that he is eligible to recover for the professional services rendered by his colleagues at his law firm, *Ray*, 87 F.3d 1250; *Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991); and *Aronson v. United States Dep't of Housing & Urban Dev.*, 866 F.2d 1 (1st Cir. 1989). In all three cases, the court awarded attorney's fees to a *pro se* attorney-litigant for the work of co-counsel. Yet, as the district court noted below, all three cases involved attorneys who were not affiliated with the litigant's law practice. As a result, these outside counsel, unlike the colleagues employed by Burka, enjoyed a genuine attorney-client relationship with the litigants, were situated to offer "independent" legal advice and assistance, and were presumably paid for their services by the attorney-litigants involved. This was not true here.

Turning to the *Kooritzky* case, the court rejected Mr. Kooritzky's claim for attorney fees for the time he spent, as a *pro se* attorney-litigant preparing and defending his case. The court went on to consider Mr. Kooritzky's request for attorney fees for the work performed by other attorneys. The court's discussion of this latter issue is noted below in relevant part (*Kooritzky*, 178 F.2d at 1323-4, citations omitted

> DOL argues that Kooritzky should not have been permitted to recover attorney fees for the work of his colleagues. The Department relies primarily on our ruling in *Burka* that a *pro se* attorney-litigant must demonstrate that he and his co-counsel have a "genuine attorney-client relationship" and that his co-counsel are exercising "independent" judgment before he may be awarded attorney fees for their work under the EAJA. DOL argues that the rationale of *Burka* applies in this case even though Kooritzky's co-counsel are not employees of his law firm, as were the attorneys in *Burka*. Kooritzky responds that he need only demonstrate that a valid attorney-client relationship existed between him and his co-counsel. While admitting that he never had a written agreement with any of his co-counsel, Kooritzky asserts that no such agreement is necessary for there to be a valid attorney-client relationship . . .

> Applying the test we outlined in *Burka*, we conclude that Kooritzky has not shown that his co-counsel evidenced the independence necessary for recovery of fees under the EAJA. We further conclude that Kooritzky and his co-counsel did not enjoy a genuine attorney-client relationship for purposes of the fee-shifting provisions of the Act. As the district court noted, the relationship between Kooritzky and his "co-counsel" was "unusual." As in *Burka*, none of Kooritzky's co-counsel entered an appearance on his behalf during the merits phase of the case . . . There was no formal agreement between Kooritzky and his colleagues concerning fees for legal services rendered. None of Kooritzky's alleged co-counsel ever billed him for legal services rendered. Moreover, his co-counsel did not even keep accurate records of the time they allegedly spent on Kooritzky's case. After reviewing the evidence, the magistrate judge observed that "'[n]obody expected to get paid.'" . . .

The Commission concludes Mr. Brooke has shown that a valid attorney-client relationship existed with his attorney. He consulted with his attorney to obtain legal advice, the time claimed was reasonable for this purpose, and the attorney expected to be paid and was paid for services rendered. The fact that the attorney did not enter an appearance or handle the hearing herself is not determinative. The fee-payment provision of the EAJA is intended to ensure effective prosecution of meritorious claims. This policy is furthered whether a litigant is able to risk just consultation fees to effectively present his case, or whether a litigant is able to risk a significantly greater amount of money associated with having an attorney present at hearing. Mr. Brooke chose to risk the lesser sum and respondents benefit from that decision by exposure to liability for a lesser amount of attorney fees.

Mr. Brooke's attorney prepared an itemized statement indicating that he paid $400.00 for consultations related to this case which took place on four separate dates. The total time claimed is 3.2 hours at the hourly rate of $125. No argument was advanced for requesting hourly fees in excess of the $75 rate noted in §814.245(5) 2., Stats., and, accordingly, Mr. Brooke has not shown entitlement to the higher rate. See *Shew v. DHSS*, 92-0506-PC, 3/29/94, in which the Commission held that fees in excess of the $75 rate would not be awarded where the appellant offered no justification for an excess award.

CONCLUSIONS OF LAW

1. It is respondents' burden to show that its position was substantially justified, within the meaning of §227.485(2)(f) and (3), Stats. Respondents failed to meet this burden.

2. It is appellant's burden to show entitlement to costs for photocopying, postage and obtaining copies of the hearing tapes. The appellant failed to meet this burden.

3. It is appellant's burden to show entitlement to costs for the filing fee required under §230.45(3), Stats. The appellant met this burden.

4. It is appellant's burden to show entitlement to attorney fees and for the hourly rate claimed. The appellant met his burden with respect to his entitlement to attorney fees but not with respect to an hourly rate greater than $75.00.

ORDER

The respondents shall pay Mr. Brooke within 30 calendar days from the date shown in the signature block below the total amount of $290.00. This award includes reimbursement for the $50.00 filing fee and for $240.00 in attorney fees (3.2 hours at $75 per hour). The Commission's February 28, 2000, interim order is finalized as the Commission's final disposition of this matter.

Dated: May 15, 2000.

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.)