

STATE OF WISCONSIN

PERSONNEL COMMISSION

GARY HERRING,
Appellant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

FINAL DECISION AND
ORDER AND RULLING
ON APPLICATION FOR
ATTORNEY'S FEES

Case No. 01-0077-PC

This is an appeal pursuant to sec. 230.44(1)(c), stats., of a demotion. In an interim decision and order entered September 25, 2002, the Commission modified the demotion to a 30 day suspension without pay. The appellant subsequently filed an application for attorney's fees pursuant to s. 227.485, Stats., which respondent opposes.

As the prevailing party, appellant contends that he is entitled to fees and costs pursuant to §§227.485, 814.245, Stats., and PC 5.05, Wis. Adm. Code. Section PC 5.05 (3), Wis. Adm. Code, provides that a motion for fees and costs raised under §227.485, Stats. shall be addressed under the standards and procedures of that statute. Sections 227.485 (3), (5) and (6), Stats., authorize the Commission to determine and award costs using the criteria in §814.245, Stats. Section 814.245 (3) provides:

If an individual is the prevailing party in an action by a state agency or in any proceeding for judicial review under §227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position.

The Commission must determine then whether respondent's position was "substantially justified." *Sheely v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *Sheely*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory pro- pounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. An important principle under this law is that losing a case does not raise a

presumption that the agency was not substantially justified, *id.* At the same time, it is not necessary for respondent's position to have been frivolous to justify an award of fees. *Behnke v. DHSS*, 146 Wis. 2d 178, 183, 430 N. W. 2d 600 (Ct. App. 1988).¹

In this case, the facts were substantially undisputed, and the record contained a verbatim transcript of the comments which were the direct cause of the discipline imposed. It is clear that respondent had a reasonable basis in truth for the facts alleged.

As for a reasonable basis in law, the law in the area of employee discipline under the civil service code is well-established and of long duration—*see, e. g., Reinke v. Personnel Board*, 53 Wis. 2d 123, 137, 191 N. W. 2d 833 (1971). There is no possible argument that the legal framework for respondent's action was improper.

The third factor that must be addressed is whether there is a reasonable connection between the facts alleged and the legal theory advanced—i. e., whether the underlying facts provided a reasonable basis for the imposition of a demotion. As the Commission observed in the September 25, 2002, interim opinion, the underlying facts here constitute significant misconduct. Part of the Commission's rationale for concluding a demotion was an excessive penalty involved mitigating circumstances, including the facts that at the time he made the improper comments, appellant was off duty, in a family gathering at home, and had been drinking. The Commission noted that it was a close question whether the discipline imposed was excessive. In the Commission's opinion, it can not be said that the ultimate conclusion respondent reached on what disciplinary action it should take was unreasonable.

ORDER

1. Respondent's application for fees under s. 227.485, Stats., is denied.
2. The Commission's interim decision and order dated September 25, 2002, is finalized as the Commission's final disposition of this matter, and appellant's demo-

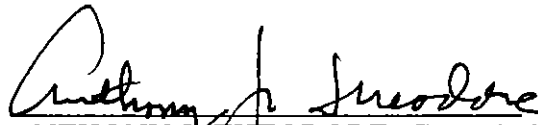

¹ Appellant also cites *Behnke* for the proposition that respondent's position is justified if it has some arguable merit. It should be noted that the Supreme Court disapproved of this standard in *Sheely*, 150 Wis. 2d at 338, n. 10.

tion is modified to a 30 calendar day suspension without pay, and this matter is re-
manded to respondent for further action consistent with this decision.

Dated: NOV 11, 2002.

STATE PERSONNEL COMMISSION

AJT:010077Adec2


ANTHONY J. THEODORE, Commissioner

KELLI S. THOMPSON, Commissioner

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL RE-
VIEW
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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