

STATE OF WISCONSIN

PERSONNEL COMMISSION

HAROLD E. SONNLEITNER,
Appellant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,
[Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES],¹**
Respondent.

**RULING ON MOTION
FOR ATTORNEY'S
FEES AND
FINAL ORDER**

Case Nos. 94-1055-PC
96-0010-PC

NATURE OF THE CASES

Previously, appellant was before the Commission on two disciplinary action appeals under §230.44(1)(c), Stats. After a hearing on these matters, the Commission issued an Interim Decision and Order on February 18, 2000, which sustained respondent's decision to suspend appellant for three days without pay (Case No. 94-1055-PC), but rejected respondent's decision to demote appellant (Case No. 96-0010-PC) and remanded the matter for action consistent with the decision. Jurisdiction was retained by the Commission to consider any motions for fees and costs. This matter is now before the Commission on appellant's petition for costs pursuant to §227.485, Stats. Both parties have filed briefs.

Section 227.485(3) provides, *inter alia*, that the prevailing party shall be awarded costs unless "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." Section 227.485(2)(f) provides that "[s]ubstantially justified" means

¹ Pursuant to §9127(19), 1995 Wisconsin Act 27, the name of the Department of Health and Social Services was changed to the Department of Health and Family Services. Both 94-1055-PC and 96-0010-PC were filed prior to this name change, while 96-0080-PC-ER was filed after the change. For the sake

having a reasonable basis in law and fact.” In *Sheely v. DHSS*, 150 Wis. 2d 320, 337-38, 442 N.W. 2d 1 (1989), the court held:

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.” Losing a case does not raise the presumption that the agency was not substantially justified. Nor is advancing a “novel but credible extension or interpretation of the law” grounds for finding a position lacking substantial justification.” (citations and footnote omitted).

Appellant acknowledges that respondent was successful in Case No. 94-1055-PC, but argues that because the cases (94-1055-PC, 96-0010-PC) were interrelated and overlapped and because he prevailed on five of the seven issues presented to the Commission, he should be awarded 5/7 of the amount of his fees and costs. In the alternative, appellant asserts that he should obtain 3/5 of the amount “because the Commission discussed ‘other allegations; Violation of Work Rule 7, Other Misconduct’ together, but each of the four charges separately.” Appellant makes no allegation that respondent was not substantially justified in its position in these matters.

In opposition, respondent makes two arguments, but first questions whether appellant timely filed his motion for fees and costs within the 30-day time limit. Then respondent argues that, if the motion was not timely filed, the Commission lacks jurisdiction to grant the motion. Respondent cites *Sheely v. DHSS*, 150 Wis. 2d 320 at 329-330 (1989) in support. Next respondent argues that it was “substantially justified in taking its position” (§227.485(3), Stats.) because appellant did not prevail in Case No. 94-1055-PC and is not entitled to any fees and expenses; and, with regard to Case No. 96-0010-PC, the Commission found that respondent had “just cause for the imposition of discipline.”

Addressing respondent's first contention, the record shows that appellant failed to comply with the 30-day filing period. ("§227.485(5) The prevailing party shall submit, within 30 days after service of the proposed decision, to the hearing examiner and the state agency . . . an itemized application for fees and other expenses.") Based on the record, the decision by the Commission, with notice of the 30-day limitation, was issued on February 18, 2000, and the motion for attorney fees was not filed until March 21, 2000, more than 30 days later.

The Commission believes that it lacks jurisdiction to consider appellant's motion for attorney fees because of its untimely filing. Section 227.485(1), Stats., provides:

The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access of justice act, 5 USC 504.

In *Sheely v. DHSS, supra*, the court held that the thirty-day time limit under the Federal Equal Access and Justice Act (EAJA) is a jurisdictional question, albeit in a discussion with respect to §814.245, Stats. However, in *Sheely v. DHSS*, 145 Wis. 2d 328, 333, the court recognized that §814.245 and §227.485 are related. For the reasons expressed, the Commission believes it lacks jurisdiction to consider appellant's motion for fees.

However, assuming *arguendo* that it does have jurisdiction, the Commission addresses the question of whether respondent was substantially justified in its position in these matters. Based on the test for reversing the "substantially justified" question as provided in *Sheely v. DHSS, id.*, the Commission concludes that respondent's action was reasonably based in facts and law. In Case No. 94-1055-PC, respondent's disciplinary action taken against the appellant was affirmed by the Commission. In Case No. 96-0010-PC, though it was remanded, the Commission concluded that respondent had established just cause for disciplinary action. Clearly the decision on the merits and the record reflect the conclusion reached here on this question.

ORDER

This motion is denied for lack of jurisdiction and the interim decision and order issued February 18, 2000, is the final decision of the Commission.

Dated: April 19, 2000.

STATE PERSONNEL COMMISSION

DRM:rcr:940155Adec2


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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