

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Milwaukee),**
Respondent.

INTERIM RULING ON
APPLICATION FOR
FEES AND COSTS AND
REQUEST TO
CONDUCT DISCOVERY

Case No. 96-0016-PC

This matter, arising from an appeal pursuant to §230.44 (1)(a), Stats., of a suspension without pay and discharge, and the Commission's interim decision and order rejecting respondent's disciplinary actions against appellant, is before the Commission on a petition by appellant for costs, §227.485, Stats., and a request by respondent for leave to conduct discovery on the issue of remedy.

The appellant, a police sergeant, began employment with respondent at the University of Wisconsin-Milwaukee Police Department (UWMPD) in October of 1974. On December 20, 1995, appellant received a written notice of suspension for ten days without pay, effective January 22, 1996. Later, on February 11, 1996, appellant was discharged. Appellant appealed both actions to this Commission.

In its interim order, dated February 12, 1998, based on a hearing on the merits, the Commission rejected the ten day suspension because "appellant was denied due process prior to his suspension" and concluded the discharge was excessive.

As the prevailing party, appellant argues 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 propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

In regard to the ten-day suspension, the Commission's decision that just cause had not been demonstrated hinged on its conclusion that the pre-disciplinary process followed by respondent was not sufficient to satisfy due process requirements. The sufficiency of this pre-disciplinary process is thus the proper focus of our inquiry here. In *Arneson v. UW*, 90-0184-PC, 5/14/92, the Commission stated as follows:

In *Showsh v. Wisconsin Personnel Commission*, No. 90-1985 (Ct. App., 1991) (unpublished), the Court of Appeals upheld a Circuit Court decision reversing the Commission's decision that the predisciplinary proceeding followed there had been adequate. The Circuit Court had pointed out that, at a minimum under *Loudermill*, the employe is entitled to notice of the charges against him or her and is entitled to an opportunity to respond prior to the disciplinary action. *Showsh v. Wisconsin Personnel Commission*, Brown Co. Circuit Court No. 89CV445 (6/39/90). The Court of Appeals held:

Before a person may be deprived of a protected property interest, he must be given notice of the charges against him and a meaningful opportunity to respond. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Court observed that a key reason why adequate notice is important is that it gives the employe an opportunity not only to respond to the substance of the alleged misconduct, but also to try to persuade the employer to impose a lesser penalty.

Under the facts present here, appellant was given notice of the specific allegation against him, i.e., the Million Man March joke he had repeated; was given an opportunity to answer the allegation during his meeting with Mr. Sroka; was made aware as a part of his meeting with Mr. Sroka that the purpose of the meeting was to discuss this particular allegation and what consequence should follow; was provided notice, although not until the end of his meeting with Mr. Sroka, of the fact that a ten-day suspension was being contemplated; and was provided an opportunity, through his meeting with Chief Clark, to persuade the employer to impose a lesser penalty. The Commission concludes that this pre-disciplinary process possessed enough of the attributes of a sufficient due process proceeding to support a conclusion that respondent had a reasonable basis in law and fact for contending that the just cause standard had been met in this regard. As a result, the application for fees and costs must fail as it relates to the ten-day suspension.

In regard to the discharge, it was reasonable for respondent to have relied upon representations made by appellant's co-workers to the effect that he was continuing to engage in the type of behavior cited as the basis for his previous discipline. In addition, since discharge was the next step in the progressive discipline process, it was reasonable for respondent to have decided to discharge appellant based on these representations by co-workers. Although, at hearing, certain of these representations were not corroborated, respondent had no reason to doubt the reliability of these representations at the time that discharge was imposed, i.e., not only did they come from several apparently independent sources but they were also consistent with a pattern of behavior that appellant had exhibited over a period of time. As a result, the application for fees and costs is denied as it relates to the subject discharge.

Finally, respondent has requested leave to conduct discovery relating to the issue of remedy. Appellant has objected based on the contention that the hearing already conducted in this matter was a plenary hearing, i.e., the issues of liability and remedy have not been bifurcated, and no further proceedings should be permitted. However, the record here shows that the hearing examiner indicated during the course

of the hearing that the remedy phase of these proceedings would be conducted separately from the liability phase, if necessary, and, as a result, leave to conduct discovery is hereby granted.

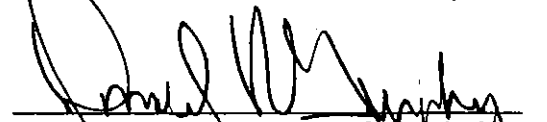
ORDER

The application for fees and costs relating to the liability phase of these proceedings is denied. Leave to conduct discovery relating to the issue of remedy is hereby granted.

Dated: June 23, 1998.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

LRM
960016Adec4.2