STATE OF WISCONSIN PERSONNEL COMMISSION

J[redacted]. K[redacted],
Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 02-0027-PC

RULING ON PETITIONS FOR REHEARING

This is an appeal pursuant to s. 230.44(1)(c), Stats., of a discharge. This matter is before the Commission on the parties' petitions for rehearing filed January 27, 2003. By way of background, the Commission entered a "RULING ON S. 227.485 MOTION FOR COSTS AND FINAL ORDER" on January 6, 2003, in which it granted appellant's motion for reinstatement, rejected appellant's discharge on due process grounds, remanded the matter to respondent for the restoration of appellant pursuant to s. 230.43(4), Wis. Stats., and denied appellant's petition for costs pursuant to s. 227.485, Wis. Stats.

I RESPONDENT'S PETITION FOR REHEARING

Pursuant to §227.49(3), Stats., a petition for rehearing will only be granted on the basis of:

(a) Some material error of law;
(b) Some material error of fact;
(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Respondent contends that the Commission's ruling involved a material error of fact at Finding of Fact 14, where the Commission found that respondent never advised complainant "of Ms. Schuster's activities, observations, or findings." Respondent contends this finding is inconsistent with Findings 4 and 5, which delineate the information provided in the April 18, 2002, notification letter and the discussion that occurred at the April 19, 2002, meeting, which "constitute a summary of Ms. Schuster's activities, observations and findings." This issue boils down to a dispute over how to character-

ize the essentially undisputed facts regarding the contents of the letter and the information provided at the April 19, 2002, meeting. The Commission concluded that the letter provided the "tentative conclusions respondent reached as a result of its investigation, but it does not explain the specific pieces of evidence that respondent relied on." (October 24, 2002, ruling, p. 10) The information provided at the April 19th meeting was also conclusory: "The purpose of that meeting was to identify that when we had tried to boot up the computer, that we could not do it, and that the files had been deleted off of the computer, that they were rendered impossible to boot directly." (Finding of Fact 7). The Commission recognized that these conclusions implied certain things--i. e., that "the person conducting the investigation for the respondent found the computers in an inoperable condition, that she found evidence that some system and other files were missing, and that she found non-work related jpg files on the hard drive." (October 24, 2002, Ruling, p. 10) Respondent has provided no basis for the Commission to conclude that it erred when it found that "respondent never advised appellant . . . of Ms. Schuster's activities, observation, or findings." (Finding of Fact 14).

The respondent also criticizes the Commission's observation that the "work-around" document appellant provided at the April 19th meeting is consistent with the conclusion that respondent did not discharge its obligation under *Cleveland Bd. of Educ. v. Loudermill,* 470 U. S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). to provide an explanation of its evidence. The respondent argues that appellant's provision of the work-around should be viewed as part of his pattern of deception. Even if this contention were accepted, the disutility of the work-around is still consistent with the conclusion that appellant did not have an adequate explanation of the evidence respondent relied on to have "a meaningful opportunity to contest the factual basis for the proposed action, and/or to try to show that for other reasons the proposed actions should not be taken." (October 24, 2002, ruling, p. 11)

Respondent also contends that Finding of Fact 17 (that respondent had earlier reached the conclusion that appellant would not be discharged in connection with his improper internet usage alone) was erroneous. Appellant's immediate supervisor, Cheryl Thompson, testified at the UC hearing that she would not have recommended termination without the charge of the destruction of system files. T. 103. She also testified that she did not know what the ultimate decision of the department would have been without this additional act of misconduct. T. 104. However, as appellant's immediate supervisor, it is reasonable to infer that her advice would have been followed.

Respondent also argues that the Commission's conclusion that respondent did not provide a sufficient explanation of its evidence was an error of law. Respondent cites language from *Loudermill* and other cases stressing the limited nature of the pre-termination hearing that is required where the employee is provided with an extensive post-termination hearing. Each of these cases has to be considered in the context of the specific facts involved. For example, in *Leftwich v. Bevilacqua,* 635 F. Supp. 238 (W. D. Va. 1986), the employee was charged with sex harassment. In the instant case we have a charge of deliberately destroying computer system files. This allegation takes us into a relatively technical area. Inasmuch as the respondent has the burden of proof regarding compliance with the due process requirements laid out in *Loudermill,* it has the obligation to establish that it provided enough of an explanation of its evidence to have a meaningful opportunity to respond to the charges against him. *See, e. g., Patkus v. Sangamon-Cass Consortium,* 769 F. 2d 1251, 1265 ((7th Cir. 1985). Respondent makes a number of assertions about the adequacy of its showing, e. g.:

> The pretermination notice explained to the employee that the files were missing. Short of displaying the inoperable computer to the appellant, there was no other significant information to present. The efforts Ms. Schuster took to reboot the computer do not constitute information that is crucial to Mr. [redacted]'s ability to present his side of the case. Her testimony at the UC hearing merely describes the methods and process she used to explain why the computers weren't working. She concluded that the computers didn't work because system files were missing. This information was shared with Mr. K[redacted] via the pretermination notice . . . There was nothing else to present to Mr. K[redacted]. (Respondent's petition for rehearing, p. 7)

These conclusions certainly are plausible, but they are not anchored to evidence in the record consistent with respondent's burden of proof.

II APPELLANT'S PETITION FOR REHEARING

Appellant argues the Commission committed a material error of law in declining to consider the question of whether there was substantial justification for the substantive conclusion the respondent reached in this case--i. e., to discharge appellant for cause. Part of the Commission's reasoning for reaching this conclusion was that the issue of just cause was not litigated before the Commission due to the way this case was litigated--that is, appellant filed a motion for reinstatement based on due process grounds, and the Commission granted this motion. Following additional consideration of this matter, the Commission concludes that it reached an erroneous conclusion when

it decided it was inappropriate to consider whether respondent's decision to terminate appellant's employment was substantially justified.

Section 227.485, Stats., does not by its terms restrict the scope of potential recovery of costs to issues that are actually addressed by the adjudicative agency. Section 227.485(3) provides that in any contested case the prevailing individual may submit a motion for costs. The law does not restrict the payment of costs to situations where the substantive position the losing agency took was actually the subject of the contested case decision. The Supreme Court has characterized the purpose of the law as follows:

> The purposes of the Act are threefold: (1) to encourage private litigants to pursue their administrative and civil actions against the government and not be deterred by the prospect of having to absorb the cost of their own attorneys' fees; (2) to compensate parties for the cost of defending against unreasonable government action; and (3) to deter the . . . government from prosecuting or defending cases in which its position is not substantially justified. *Sheeley v. DHSS,* 150 Wis. 2d 320, 336, 442 N. W. 2d 1 (1989)

These purposes are not served by a construction of the law which would limit an individual's ability to recover costs in a case where the substantive merits of an agency's action are never litigated due to an idiosyncrasy of litigation. In the instant case, respondent's action can be divided into two parts, the discharge decision itself and the process that was used in effectuating the discharge. However, it was the discharge itself which provides the basis for appeal pursuant to s. 230.44(1)(c), Stats., and which precipitated appellant's appeal and caused him to incur litigation costs. If, as a result of respondent's improper handling of the procedural aspects of the discharge (albeit the respondent's procedural process was at least substantially justified), the Commission never has to deal with the substantive just cause question[1], the respondent is insulated from liability for costs, and the appellant is unable to recover his costs with regard to the discharge decision, which may or may not have been substantially justified. Assuming, *arguendo,* the discharge decision was not substantially justified, the agency's exposure to liability for costs would be less in a case, such as this, where it had not provided adequate due process than in a case where the disciplinary process

[1] The Commission notes that it is not unusual to have disciplinary appeals resolved on due process grounds without reaching the merits of the disciplinary action. *See, e. g., McReady & Paul v. DHSS,* 85-0216-PC, 5/28/87.

passes muster and the Commission is required to rule on the merits. This would result in the employing agency having less exposure to liability for costs in a case where it makes two improper decisions (procedural and substantive) than in a case where it only makes one improper decision (substantive). This would not be consistent with the purpose of this legislation.

In the Commission's January 6, 2003, ruling, the Commission also relied on the point that s. 227.485(5), Stats., provides for only two submissions on costs--one by the individual and one response by the agency--and also on the basis of lack of notice to the respondent, who would not have known the appellant's motion called into question the justification for its substantive decision on discharge. However, if the Commission were wrong on its conclusion that a non-litigated issue could not be before the Commission on a s. 227.485(5), Stats., motion for costs, it follows that the respondent should have been aware that its entire handling of appellant's discharge was called into question by the motion, and responded accordingly, and the Commission should have addressed all aspects of the subject matter of the appeal without prompting by the appellant. In any event, the notice issue has essentially been mooted by the way this case has played out, now that the justification of the discharge issue has been called into question by appellant's petition for rehearing. The Commission will schedule a conference call to provide the parties an opportunity to provide their opinions regarding further proceedings.

ORDER

Respondent's petition for rehearing filed January 27, 2003, is denied. The appellant's petition for rehearing filed January 27, 2003, is denied in part and granted in part consistent with the foregoing discussion. The Commission's ruling entered January 6, 2003, is vacated and this matter is reopened for further consideration of the issue of whether costs should be awarded to the appellant pursuant to s. 227.485, Stats., with regard to its substantive decision to terminate appellant's employment. A conference call will be held to discuss further proceedings.

Dated: 2/21, 2003.

STATE PERSONNEL COMMISSION

Anthony J. Theodore

ANTHONY J. THEODORE, Commissioner
(Commissioner Theodore is the sole sitting Commissioner; the other two Commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. *See* 68 Op. Atty. Gen. 623 (1979))

AJT:020027Arul3

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