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 REQUESTS TO CLARIFY AND TO REOPEN HEARING RECORD

This is an appeal pursuant to s. 230.44(1)(c), Stats., of a discharge. This matter is before the Commission on appellant's request for clarification of the commission's February 21, 2003, ruling on petitions for rehearing, and respondent's request to reopen the hearing record to permit evidence on the issue of whether respondent was substantially justified for the purpose of ss. 227.485(3), 227.485(2)(f), Wis. Stats., with regard to its decision to discharge appellant effective April 23, 2002.

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 appellant's restoration pursuant to s. 230.43(4), Wis. Stats., and denied appellant's petition for costs pursuant to s. 227.485, Wis. Stats. On February 21, 2003, the commission ruled on the parties' petitions for rehearing. The commission denied respondent's petition, which had addressed the substantive merits of the case; granted in part the appellant's petition, which had addressed only the commission's denial of attorney's fees, and entered the following 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. (February 21, 2003, ruling, p. 6)

I APPELLANT'S REQUEST FOR CLARIFICATION

It appears to be undisputed that subsequent to the commission's February 21, 2003, ruling the appellant requested respondent to restore him to his employment with DHFS in accordance with the commission's January 6. 2003, order, and the respondent refused to do so, at least in part because the commission's February 21, 2003, order vacated the January 6, 2003, ruling. The appellant now seeks a ruling that would address the question of whether the February 21, 2003, order vacated the substantive part of the February 21, 2003, ruling relating to appellant's restoration, or whether the order just vacated that part of the ruling related to the denial of appellant's petition for attorney's fees.

Section 227.49(2), Stats., provides that

> The filing of a petition for rehearing *shall not* suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect *unless* the petition is granted *or* until the order is superseded, modified, or set aside as provided by law. (emphasis added)

Pursuant to this provision, the original order continues in effect until one of two eventualities occurs: either the petition for rehearing is granted *or* the order is superseded, modified, or set aside as provided by law. The effect of this subsection is that the granting of a petition for rehearing suspends what would otherwise have been a final order. This is in keeping with the principle that only final agency decisions are reviewable pursuant to s. 227.53, Stats. *See, e. g., Pasch v. DOR,* 58 Wis. 2d 346, 353-57, 206 N. W. 2d 157 (1973); *Friends of the Earth v. PSC,* 78 Wis. 2d 388, 405, 254 N. W. 2d 299 (1977). This operation of s. 227.49(2) is not limited by the terms of the statute to situations where the petition for rehearing is plenary in its scope, rather than (as was appellant's petition here) limited to only a specific part of the decision in question.[1] Therefore, the commission will not "clarify" the order entered February 21, 2003, as requested by the appellant.

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[1] In 73A C. J. S. *Public Administrative Law and Procedure,* s. 162, p.155, it is noted that courts have taken different approaches to this issue: "Although it has been held that the granting of a rehearing vacates the previous determination, it has also been held that the original order or decision cannot be abrogated, changed, or modified until after such rehearing and as a result thereof." (footnotes omitted) In the instant case, the provisions of s. 227.49(2), Stats., control.

II. RESPONDENT'S REQUEST TO REOPEN THE RECORD WITH RESPECT TO WHETHER THE RESPONDENT WAS SUBSTANTIALLY JUSTIFIED IN ITS SUBSTANTIVE DECISION TO DISCHARGE THE APPELLANT

In its February 21, 2003, ruling on appellant's petition for rehearing, the commission held that in its decision whether to award costs under s. 227.485, Stats., it was not limited to consideration of the part of the agency action that was actually litigated before the commission--i. e., the pre-discharge procedure followed by respondent--as opposed to the actual substantive decision to discharge appellant. Because of the way this case was litigated--complainant filed a motion for restoration on procedural due process grounds--respondent failed to make a record with regard to the substantive justification of its discharge on a just cause standard. The respondent has now requested the opportunity to reopen the record to provide evidence to attempt to demonstrate that its discharge decision was substantially justified, and the appellant objects.

In *Klemmer v. DHFS,* 97-0054-PC, 4/8/98, the commission addressed a somewhat similar situation. That case involved an appeal pursuant to s. 230.44(1)(c), stats., of a suspension. Prior to the hearing on the merits, the respondent unilaterally rescinded the suspension after the appellant voluntarily demoted and transferred to another institution. The respondent then moved to dismiss the appeal as moot. The commission concluded that the substance of the appeal had been rendered moot, but that the question of entitlement to EAJA costs was a separate issue, and should be resolved. It was decided that the record was insufficient to determine whether the appellant was a prevailing party in the sense of whether the appeal was a causal factor in achieving the results that occurred--i e., the rescission of the suspension--and with regard to the substance of the appeal:

> The record before the Commission is insufficient to determine whether respondent's position was substantially justified, within the meaning of §227.485(3), Stats. In order for an agency to demonstrate that its position had a reasonable basis in law and fact, and was therefore substantially justified, it must show that it had a reasonable basis in truth for the facts it claims justified its position, that it had a reasonable or well-accepted theory of the law that it urged as support for its position and that there was a reasonable, material connection between the facts asserted and the legal theory urged. *DER v. Wis. Pers. Comm. (Anderson),* Dane County Circuit Court, 87CV7397, 11/7/88. At this point in the proceedings the Commission does not know the nature of the dispute between the parties (as noted in ¶9 of the Findings of Fact).
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> Respondent is concerned that resolution of entitlement to attorneys fees could have a significant impact in increasing the amount of fees involved . . . .

> The Commission shares respondent's concern. It does not make sense to the Commission to conduct a full hearing to determine whether appellant is entitled to attorney's fees which would multiply significantly with hearing preparation, representation at the hearing and post-hearing briefs. . . .
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> The Commission has looked to the federal EAJA for a suggested reasonable alternative approach for determining entitlement to attorney's fees short of a full-blown hearing on the merits. Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 Ariz. State L.J. 229 (1987). The Article states (on p. 240) as shown below (emphasis added):
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> > While Congress intended to broaden the court's inquiry, for EAJA purposes, beyond mere litigation arguments when evaluating "the position of the United States," it carefully sought to define "position" in a way that would not require the court or adjudicative officer to engage in evidentiary or discovery proceedings. Congress was aware that the President was opposed to any kind of a fee and expense award scheme that would involve extensive discovery which would lengthen proceedings. Mindful of this, Congress specifically sought to clarify that courts should evaluate the "position of the United States" based on facts the parties would necessarily air during the course of litigation or agency adjudication. When a proceeding is not litigated to a final decision by a court or adjudication officer, such as instances of settlement or dismissal, congress envisioned that courts would look to the record to determine if the position of the United States was substantially justified.
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> The Article defines the term "record" by the following footnoted text:
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> > The record to which the courts would refer in such matters encompasses pleadings, affidavits and other supporting documents filed by the parties in both the case on the merits and the . . . application.

Klemmer, pp. 7-8 (footnote omitted)[2]

The commission continues to be of the opinion that when a case is resolved in a way that does not permit an adequate record to be made regarding the issue of substantial justification under the EAJA, there should be a means of supplementing the record, but that the intent of both the EAJA and the federal EAJA is to decide the issue regard-

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[2] In subsequent proceedings in *Klemmer*, the commission did hold a hearing to take additional evidence on the question of whether respondent was substantially justified in suspending the appellant, but there is an indication the parties agreed to this; there is no indication that this hearing was held over either party's objection.

ing fees without requiring a second "trial within a trial"[3] in the main case. The first proposition is buttressed by a significant distinction between the federal EAJA and the Wisconsin EAJA. The federal law explicitly provides at 5 USC 504(a)(1), *inter alia,* that "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." On its face, this is inconsistent with supplementing the record in connection with the questions of costs.[4] On the other hand, the state EAJA has no parallel provision addressing the nature of the record that should be relied on in making the decision on costs. It does require the prevailing party to submit an "itemized application for fees and other expenses, *including* an itemized statement from any attorney of expert witness . . . ." S. 227.485(5), Stats. (emphasis added) The state agency may provide a response, but the statute does not indicate what that response can include. The commission has held that the parties' submissions under this subsection can be supplemented, and replies can be filed, where necessary to ensure a fair procedure. *See Olson v. DER,* 92-0071-PC, 12/5/94; *Klemmer v. DHFS,* 97-0054-PC, 4/8/98.

Even under the seemingly more restrictive federal EAJA, courts have permitted supplementation of the record under circumstances somewhat similar to the instant case. *See* 2 Am. Jur. 2d *Administrative Law*, s. 411 (1994):

> Whether or not the position of the agency was substantially justified is determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. When a matter is brought to a close by a voluntary dismissal or settlement before the making of an administrative record, the agency may permit the parties to supplement the record by filing affidavits or other documents and the agency may consider additional material in determining whether the position of the agency was substantially justified.

The case which is cited in connection with the second sentence (*id.,* n. 11, p. 407) is *Kuhns v. Board of Governors of Federal Reserve System,* 930 F. 2d 39 (C. A. D. C., 1991). In that case, the Division of Banking Regulation and Supervision had proceeded against Kuhns before the board, but prior to the hearing, the division asked for dismissal of the proceeding on the grounds that it might interfere with a pending

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[3] This type of process can occur, for example, in civil actions regarding legal malpractice where the plaintiff must show that his or her original claim would have been successful.

[4] As discussed below, there is case law under the federal EAJA holding that notwithstanding this provision, supplementation of the record can be appropriate where cases are processed in a summary fashion that does not generate a substantive record.

criminal matter, and that the disposition of the criminal case could have the effect of rendering the administrative proceeding unnecessary. The board ruled that Kuhns was not entitled to costs under the federal EAJA, based in part on affidavits and documents submitted as part of the fee proceeding. The court discussed Kuhns' argument that because of the foregoing provision in 5 USC 504(a)(1)[5] the board should not have considered the division's supplementary material:

> Kuhns reads this sentence to mean that only the record consisting of the Division's notice, the pleadings concerning dismissal and the Board's decsion dismissing the proceeding with prejudice may be considered for the purposes of EAJA. The Board argues, however, that the sentence contemplates the making of an "administrative record" and that when a proceeding ends before that has been done, as in voluntary dismissals or settlements, section 504(a)(1) does not restrict the agency from considering other material. In support the Board points to language in the House Committee report that appears directly on point. The Report states that when no record has been developed on the merits, the parties may file other material in the fee proceeding with respect to the substantial justification issue.
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> While the matter is not free from doubt, we think the Board has the better of the argument. Restricting the inquiry to the record would make little sense when there is, in effect, no record. The government has the burden of showing substantial justification for bringing the action. To confine the inquiry to the pleadings when the matter is brought to a close by a voluntary dismissal would be to place the government at a disadvantage Congress could not have intended . . . when a case ends in a settlement it is not enough to examine the terms of the settlement agreement. The "reasons for the settlement" must also be evaluated in assessing the strength or weakness of the government's position. Yet those reasons will rarely, if ever, appear in the record. 930 F. 2d at 42-43 (citations omitted)

Similarly, in the instant case, respondent seeks to augment the existing record, which was made in the context of a motion to reinstate based on alleged errors of process, and arguably did not provide respondent an opportunity to try to show that it was substantially justified in its substantive decision to discharge Mr. [redacted].

While the commission recognizes the importance of giving respondent an opportunity to make a record in defense of its substantive discharge decision, a case like this also involves another principle--that of not creating a burdensome additional proceeding that would conflict with the legislative intent of providing a relatively streamlined, un-

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5 "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought."

complicated means of resolution of the costs issues. In *Kuhns,* the court also discussed this factor:

> There is of course the danger that the fee proceeding, if allowed to go beyond the pleadings, will turn into another major litigation. But the chances of that occurring are minimized when the agency permits the parties to supplement the record only by filing affidavits or documents relating to whether the charges were warranted. 930 F. 2d at 43

This approach, which was utilized by American Jurisprudence 2d *Administrative Law* s. 411, is also consistent with the authority the commission cited in *Klemmer v. DHFS,* 97-0054-PC, 4/7/98, p. 8: "'The record to which the courts would refer in such matters encompasses pleadings, affidavits and other supporting documents filed by the parties in both the case on the merits and the fees application.'" (citation omitted) *See also, Pine v. Richards,* NTSB, Order # EA -3724 (10/29/92):

> It would be inconsistent with the purpose of the EAJA to assume, without evaluating the case in its entirety, that because the complaints were dismissed as stale, the Administrator must have commenced the action without substantial justification. There is no provision in the EAJA for an automatic award of fees and costs in each case that is dismissed on procedural grounds.
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> . . . To prove substantial justification, there must be, among other things, "a reasonable basis in truth for the facts alleged in the pleadings. To fairly evaluate whether such a basis exists, some information attesting to this truth must be submitted to the deciding tribunal.
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> . . . The law judge should have given the Administrator an opportunity to produce some documentation for his claims, as the record lacked sufficient development for evaluating the strength of the Administrator's case. Pp. 6-8

In the instant matter, the record that has been made prior to the EAJA determination is not as spare as the record in the forgoing cases. Here, the parties had a hearing before a UC hearing examiner on the question of whether appellant had been discharged for misconduct connected with his employment, pursuant to s. 108.04(5), Stats. The parties agreed to submit the record of that proceeding, including a 216 page transcript, to be used as the record for the decision of appellant's motion to reinstate on due process grounds. At this point in this proceeding, respondent contends that record is inadequate, and requests the opportunity to make a new record on the question of whether there was substantial justification under the EAJA for its decision to terminate appellant's employment, while the appellant's position is that the UC record is sufficient for use on the substantial justification issue.

Respondent argues that it had no notice pursuant to s. 227.44(1), Stats., prior to agreeing to submit the issues raised by the appellant's motion for reinstatement on the record that had been made in the UC proceeding, that that record could figure into a decision as to whether it was substantially justified in deciding to terminate appellant's employment. In the commission's opinion there is no real APA notice issue raised here, because any agency involved in a contested case hearing knows that under s. 227.485, Stats., it is exposed to possible liability for costs. Respondent knew that if the motion to reinstate were granted, this could result in a final, adverse decision with respect to which s. 227.485 would be implicated. There was no need to have provided any additional notice vis-à-vis the EAJA.

The respondent also advances a due process argument: "The respondent also has a due process right to present evidence regarding the full merits of the just cause issue in this case before the Commission may issue a decision regarding whether the respondent's position on just cause was 'substantially justified.'" Respondent's April 7, 2003, letter brief, p. 2.

While the respondent as a state agency technically does not have the protection of the due process clause, *see, e. g.,* 16B Am Jur 2d *Constitutional Law* s. 330, as a party to a class 3 contested case proceeding under the APA, it is entitled to the same "fair play" provisions as any other party. In the commission's opinion, the case law discussed above is consistent with the principle that an administrative agency's determination as to what kind of record it should allow an agency to make in connection with an EAJA issue involves the exercise of discretion, which in turn includes attempting to strike a balance between the need to give the parties a fair opportunity to address the substantial justification test under the EAJA, while not unreasonably expanding the administrative proceeding.

In the proceeding before the UC tribunal, the respondent as the employer had the burden of proof to establish, pursuant to s. 108.04(5), Stats., that the appellant was "discharged for misconduct connected with the employee's work." *Boynton Cab. Co. v. Giese,* 237 Wis. 237, 243-45, (1941) In turn, in order to establish "misconduct connected with the employee's work, the employer must show:

> [C]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good per-

> formance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60 (1941).[6] This results in a heavier burden on the employer than obtains in an appeal of a discharge to this commission, *see Reinke v. Personnel Board,* 53 Wis. 2d 123, 137, 191 N. W. 2d 833 (1971) (employer has burden of proof to establish just cause for discharge by a preponderance of the evidence); *Safransky v. Personnel Board,* 62 Wis. 2d 464, 474, 215 N. W. 2d 379, 384 (1974):

> The court has previously defined the test for determining whether "just cause" exists for termination of a tenured [state] employee as follows:
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> > ' . . . one appropriate question is whether some deficiency has been demonstrated which can be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works.' (citation omitted)

In light of the fact that the respondent had a heavier burden of proof before the UC tribunal than he does here on his just cause appeal, it appears to the commission that a UC record of the kind involved in this case should suffice for a determination of whether the respondent's decision to discharge appellant was reasonably justified, which itself is a question on which the employer's burden of proof is less onerous than on the question of just cause--i. e., for EAJA purposes the employer does not need to show that it had just cause for the discharge, but merely that it had a reasonable basis in law and fact for the discharge. *See Larsen v. DOC,* 90-0374-PC, 8/26/92:

> That respondent did not prevail on the issue of whether the discipline actually imposed was excessive in degree does not in and of itself justify an award; *Behnke v. DHSS,* 146 Wis. 2d 178, 183, 430 N. W. 2d 600 (Ct. App. 1988); nor does it give rise to a presumption that the agency was not substantially justified, *Sheely v. DHSS,* 150 Wis. 2d 320, 338, 442 N. W. 2d 1 (1989).

In the absence of any particularized showing by the respondent as to how the use of the UC record would be unfair, the commission believes it would not strike an appropriate balance with the competing interests of the EAJA to reopen the factual record in response to the respondent's assertion that it "has a due process right to present evidence regarding the full merits of the just cause issue in this case before the Commission may issue a decision regarding whether the respondent's position on just cause was 'substan-

[6] This decision was handed down simultaneously with *Boynton Cab. v. Giese.*

tially justified.'" (Respondent's April 7, 2003, letter-brief, p. 2.) However, because respondent has not had the opportunity to argue the substantive question of whether, on the basis of the UC record, its decision to discharge appellant was substantially justified under the EAJA, the commission will provide for a briefing schedule on this issue.

ORDER

1. Appellant's request for clarification of the commission's February 21, 2003, order is denied.

2. Respondent's request to reopen the record with regard to the question of whether the respondent was substantially justified in its substantive decision to discharge the appellant is denied.

3. The following briefing schedule is established on the question of whether the respondent was substantially justified in its substantive decision to discharge the appellant:

a) Respondent: June 23, 2003
b) Appellant: July 14, 2003
c) Respondent July 24, 2003

Dated: June 3, 2003.

STATE PERSONNEL COMMISSION

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:020027Arul4

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