

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELIZABETH KOHL, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION, and
Director, OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 608
No. 62902
PA(der)-68

Decision No. 30996-B

(formerly Case No. 02-0013-PC)

Appearances:

Lester Pines and **Nicholas E. Fairweather**, Cullen Weston Pines & Bach, LLP, Attorneys at Law, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of the Appellant.

David J. Ghilardi, Assistant General Counsel, Department of Agriculture, Trade and Consumer Protection, P.O. Box 8911, Madison, Wisconsin 53707-8911, appearing on behalf of the Respondent DATCP.

David J. Vergeront, Chief Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent OSER.

RULING ON MOTION FOR COSTS AND FINAL ORDER

This matter is before the Commission on Ms. Kohl's request for costs under Sec. 227.485, Stats. The Commission issued an Interim Decision and Order on July 23, 2004, rejecting the Respondents' decision to allocate Appellant's position to the Administrative Manager classification rather than the Program and Planning Analyst – Advanced Management classification. Appellant filed a motion for fees and costs on August 23, 2004, but withdrew and later renewed the motion. The final submission from the parties was received on March 13, 2006.

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The Commission makes and issues the following

ORDER¹

Appellant's motion for costs pursuant to Sec. 227.485, Stats., in the amount of \$24,892.00 is granted in part and denied in part. Respondents shall pay Appellant's costs in the amount of \$14,187.99.

The Commission's Order Granting Motion for Summary Judgment, issued in this matter on January 5, 2006, is adopted as the Final Order in this matter.

Within 20 days of the date of this Order, Respondents shall notify the Commission and Appellant in writing as to the action it has taken to comply with the Commission's Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of April, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith M. Neumann did not participate.

Parties:

Ms. Karen Timberlake, Director
OSER
101 E. Wilson Street, 4th Floor
P.O. Box 7855
Madison, WI 53707-7855

Mr. Rod Nilsestuen
Secretary, DATCP
P.O. Box 8911
Madison, WI 53708-8911

Ms. Elizabeth Kohl
c/o Attorney Lester Pines
122 W. Washington Ave.
Madison, WI 53703

¹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

DATCP & OSER (Kohl)

MEMORANDUM ACCOMPANYING RULING ON MOTION AND FINAL ORDER

This matter is before the Commission on Ms. Kohl's Motion for Costs. Wisconsin's Equal Access to Justice Act (EAJA) provides the Commission with the authority to award costs under certain circumstances. Pursuant to Sec. 227.485(3), Stats.:

In any contested case in which an individual . . . is the prevailing party and submits a motion for costs under this section, the [Commission] shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that 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.

There is no dispute that Ms. Kohl is a prevailing party in this matter. Materials submitted in her supplemental submission filed on March 13, 2006 also satisfy the eligibility requirement set forth in Sec. 227.495(7), Stats. The remaining question is whether Respondents were substantially justified in taking their position or if special circumstances exist so that the request for costs should be denied.

The standard for deciding the initial part of this question is set forth in *BRACEGIRDLE V. BOARD OF NURSING*, 159 Wis. 2d 402, 425-26, 464 N.W.2d 111 (Ct. App. 1990):

In evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation. . . . 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. (Citations omitted.)

Even though DER² contends it is the Appellant's burden to "make a case apart from the fact that Respondents were the losing party, as to why Respondents' position was substantially unjustified," the *BRACEGIRDLE* decision indicates that the burden is on the Respondents to show their position was substantially justified. *Accord*, *DER v. WIS. PERS. COMM. (ANDERSON)*, DANE COUNTY CIRCUIT COURT, 87CV7397, 11/7/88; *ESCALADA-CORONEL v. DMRS*, CASE NO. 86-0189-PC (PERS. COMM. 4/2/87).

² The Commission refers to DER in this ruling because the effective date of 2003 Wis. Act 33 which renamed the agency as the Office of State Employment Relations and placed it within the Department of Administration, was subsequent to the evidentiary hearing in this matter.

The relevant chronology for analyzing the EAJA request for costs is relatively straightforward.³ DATCP employed Appellant as a Career Executive and prior to 2002 she had been serving as the Deputy Administrator of the Food Safety Division. In order for a position to be included in the Career Executive program it typically must be in a classification assigned to pay range 81-01 or 81-02. Of those two pay ranges, 81-01 is higher and at all relevant times, she was paid at 81-01. Appellant's class has been assigned to this higher range.

No later than January 2002, the Secretary of DATCP decided to reorganize the agency by merging certain responsibilities of the Food Safety Division with the Division of Animal Health. The Secretary met with the Appellant, proposed reassigning her to a new position and identified her new duties in a draft position description as an Administrative Manager - a class (assigned to pay range 81-01) that is within the Career Executive program. The Administrative Manager classification specification specifically excludes "[p]ositions which do not meet the statutory definition of supervisor and management as defined in Wis. Stats., 111.81(19) and (13)." Appellant promptly raised a concern whether, given the anticipated duties, the position would be properly identified at the Administrative Manager level. While DATCP always intended for the position to be assigned to a Career Executive classification, however, the position had no supervisory responsibilities, nor did DATCP ever intend that it have such responsibilities.

DATCP lacked the authority to make a final decision setting the classification for the position and referred the question to DER. The person at DATCP who was handling the matter contacted Leean White, the Director of the Bureau of Classification at DER,⁴ and told her that DATCP needed a quick decision. Ms. White later described the circumstances as follows:

When asked to classify the position, I was in the management caucus room of the AFSCME Council 24 offices, participating in bargaining the 2001-2003 collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employees Union. I did not have classification specifications readily available. I did however have the Alphabetical Listing of Classifications. I used that list of classifications to quickly review all titles assigned to PR81-01 and concluded that there were only two classifications assigned to this pay range that had the potential to provide the "best fit" for the set of duties described because the vast majority of classifications assigned to PR81-01 are specific to certain agencies and functional areas, and also require the incumbent to be functioning as a supervisor/manager.

³ The facts are more completely described in the Commission's July 23, 2004 Interim Decision.

⁴ Ms. White has been involved in thousands of classification decisions but her experience and expertise do not preclude an award of costs. The EAJA requires the Commission to review the justification for the position taken rather than the relative experience of the decision-maker.

The two classes I identified in PR81-01 as potentially serving as the “best fit” for the position under review were the Policy Initiatives Advisor and Administrative Manager. . . .

I was also aware that the Administrative Manager classification was much more widely used throughout state government and that while the specification indicates positions must be supervisory, at least some of the positions classified as Administrative Manager do not supervise. This has been the case since the classification was implemented in 1997, even though the specification clearly states the positions classified by this title must be supervisory and managerial in nature.

DER formally approved classifying the position as an Administrative Manager. After Ms. Kohl filed this appeal, Ms. White took the opportunity to reexamine her original decision and perform additional research. She considered a variety of alternative classifications that Kohl had identified in the interim, including the Program and Planning Analyst – Advanced Management class (hereafter referred to as Advanced Management) which is assigned to the lower pay range of 81-03. Ms. White reaffirmed her conclusion that the Administrative Manager class was the best fit for Appellant’s position, even though it was not a perfect fit. Ms. White’s supporting memorandum shows that she also considered how Appellant’s position compared to numerous position descriptions throughout State service, including four Administrative Manager positions and six Advanced Management positions.

The preceding paragraph mirrors the classification rationale that was presented by Respondents at hearing. They did not dispute that the Appellant had no supervisory responsibilities. Respondents contended that her position, nevertheless, could be properly allocated to the Administrative Manager title because there were other positions classified at the same level even though they, too, lacked any supervisory responsibility. The Commission rejected the contention, citing “a long and consistent series of decisions that the agency exercising the authority to conduct quasi-judicial reviews of classification decisions can not simply disregard or rewrite the classification specifications promulgated by DER.” After finding that the Appellant’s position fit within the general language of the Advanced Management classification, the Commission proceeded to evaluate the position in terms of the complex “Factor Evaluation System” that was part of the class specification and concluded that the position fell within the point range assigned to the Advanced Management class.⁵

⁵ The Interim Decision contains the following description of the requisite evaluation: “Both the PPA and PPA – Advanced Management classifications incorporate a very complex Factor Evaluation System (FES) that is based on assigning various characteristics of a position into one of a series of definitions that are, in turn assigned a particular number of points. After all the characteristics have been considered, the points are totaled.” The Advanced Management class and each of the various levels within the PPA series are assigned different point bands.

The fulcrum for the Commission's decision rejecting Respondents' decision was the unambiguous language in the Administrative Manager specification that excluded all non-supervisory positions.⁶

DER has the authority to "establish, modify or abolish classifications as the needs of the service require" and the agency exercised this authority in 1997 when the Administrative Manager specification was established.⁷ The record in the present case includes DER bulletins that announce numerous changes to individual classifications in the State's classification plan. However, the agency never modified the Administrative Manager classification once it was adopted in 1997, and the language that excluded non-supervisory positions has continued to be operative. DER employees admitted they had been aware for some time that the specification needed modification, but they were too busy with other demands to accomplish the change.

Most of those persons occupying positions assigned to the Administrative Manager classification had no reason to object to the incongruity between the language and the application of the specification. Ms. Kohl's circumstances were unusual; she believed her new collection of duties was over-classified.⁸ She hired an attorney and paid a filing fee in order to exercise her statutory right to appeal the classification action. She prevailed in the initial issue raised by her appeal because the underlying decision ignored the clear language of the specification. In order to affirm Respondents' action, the Commission would have had to reject longstanding precedent that it lacks the authority to rewrite the specifications promulgated by DER.⁹ Under these circumstances, Respondents were not substantially justified in their position either before or during the litigation that resulted in the Commission's Interim Decision dated July 23, 2004.¹⁰

⁶ Respondents suggest that because they closely followed the classification review process that is described in the Commission's decision in *METNIK V. DOC & OSER*, DEC. NO. 31135 (WERC, 3/05), their position in this matter was substantially justified. However, it is inaccurate to say that Respondents followed the *METNIK* methodology because the Appellant's position was not plausibly described by the Administrative Manager specification.

⁷ Sec. 230.09(2)(a), Stats.

⁸ Respondents acknowledge that their decision arose from a desire to continue to classify Ms. Kohl's position at a level assigned to PR 81-01 and point out that her pay was not reduced by classifying it as an Administrative Manager. Respondents' motivation is not a sufficient basis for rejecting Appellant's request for costs. She filed her appeal because she believed the change in her duties placed her into a lower classification than previously, resulting in a constructive demotion, reviewable under Sec. 230.44(1)(c), Stats.

⁹ An appellant before an administrative agency such as the Commission can anticipate that the respondent agency will follow its precedents unless it provides a rational and reasonable basis for departing from them. However, if the agency takes a position contrary to a Commission precedent, while it presumably would be subject to rejection by the Commission, it would not be subject to the imposition of costs pursuant to §227.485, Stats., as long as it had a reasonable basis in law for its position. *PEARSON V. UW*, CASE NO. 84-0219-PC (PERS. COMM. 2/12/97). Respondents have not advanced a theory sufficient to meet this standard.

¹⁰ Because Respondents' position on the classification question remained constant before and during the hearing, no distinction needs to be drawn between the reasonableness of their position in pre-litigation and during litigation.

Respondents have identified a variety of factors to support the argument that their position was substantially justified, as well as a few that appear to relate to the “special circumstances” exception that is also found in Sec. 227.485, Stats. Respondents point out that classification of positions in state service is not an exact science; it requires a conclusion as to which class is the “best fit” for a specific position, a conclusion that is based on the duties actually assigned to the job, the language of the specifications that are being considered and comparisons of the subject position to other positions already identified within the classified service. There is little dispute that some classification appeals turn on a credibility determination and others involve “non-specific” specifications that provide little guidance to the reviewer. A request for costs under those circumstances is typically rejected.¹¹ The present case must be distinguished because it is focused on a clear exclusion set forth in the specifications for the class selected by Respondents and there was no dispute that Appellant’s position was encompassed by the exclusion.

Several of the arguments relating to the question of whether Respondents were substantially justified arise from the contention that the Advanced Management classification that was identified by the Commission as a better fit is less than an optimal fit for the position.¹² “Best fit” is a relative term that depends on the universe of available classifications. The Appellant’s position description reflects one goal (25%) that involves providing program planning and analysis *as well as* two goals (40% and 15%) that relate directly to management responsibilities.¹³ There is little doubt that the Advanced Management specifications could have been written in a way that would have described Ms. Kohl’s position even better, but that

¹¹ Where the determining factual issue in the case was whether appellants had the requisite supervisory duties, respondent was substantially justified where the documentary evidence lent strong support to respondent's case but the testimony of a witness lent strong support to the appellants' case. VON RUDEN ET AL. V. DER, CASE NOS. 91-0149-PC, ETC. (PERS. COMM. 11/17/95). The appellants were not entitled to fees and costs where the application of the classification specifications to the duties and responsibilities of appellants' positions did not lead to an obvious result, the positions were not specifically identified in the position standard and the language of the position standard was general and required the exercise of discretion in its interpretation and application. CHRISTOFFERSON ET AL. V. DER & UW, CASE No. 90-0058-PC, ETC. (PERS. COMM. 2/7/91)

¹² The record includes evidence explaining why Ms. White believed the PPA Advanced Management class was inappropriate for Ms. Kohl’s position. However, that evidence indicates that Ms. White’s analysis was premised on a whole job comparison rather than going through the FES analysis that is referenced in the definition statement. Individual comparator positions assigned to the PPA Advanced-Management class could fall anywhere within a range of 410 to 720 FES points. Without knowing how the other positions fit within the FES point structure, merely saying that one position is substantially stronger than another does not mean they do not co-exist at different ends of the point spectrum.

¹³ The statutory definition of management which was adopted as part of the Advanced Management class refers to being engaged “*predominately* in executive and managerial functions.” If the majority of work time for an Advanced Management position is spent on management duties, it need not follow that the position must also spend the majority of time performing program and planning analysis in order to fit within the limits of the classification.

observation has little weight when the alternative classification advanced by Respondents expressly excluded Appellant's non-supervisory position. Respondents also suggest that the

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Commission was ill-advised to go through the FES analysis when “[n]one of the parties . . . supplied evidence calculated to assist the Commission in its effort to apply the FES structure to Kohl’s position.” The absence of such evidence may have made analysis more difficult but it did not serve as a basis for the Commission to reject the PPA and Advanced Management classifications out of hand. The Commission had to answer the question of whether any one of the alternatives encompassed by the hearing issue was a better fit for Ms. Kohl’s duties than the Administrative Manager class, and the Advanced Management class is grounded upon an FES analysis.¹⁴

Finally, Respondents appear to argue that special circumstances exist such that they should not pay costs in this matter because: 1) Appellant attempted to minimize her duties, engaging in obstructive conduct; and 2) if Respondents had *not* classified the position at the Administrative Manager level, Ms. Kohl might have appealed the decision and argued that it was incorrect because of other positions at that level without supervisory duties.¹⁵ The first point fails to take into account that Appellant’s “minimizing” testimony did not relate to the question of whether she was a supervisor and the second point fails to acknowledge the Commission precedent holding that an appellant is not entitled to rely on other misclassified positions as long as DER identifies the positions as misclassified and initiates corrective efforts.¹⁶

Although the Respondents have failed to show their position was substantially justified or that circumstances would make an award of costs unjust, several of the Respondents’ objections to the amount of the request are well founded. Appellant’s request for both fees and disbursements in this matter is \$24,892.00. This amount includes some attorneys fees calculated at the rate of \$225 per hour, which is in excess of the \$150 rate provided by Sec. 227.485(5) and 814.245(5)(a)2., Stats.¹⁷ It includes costs associated with obtaining copies of the electronic tape recording of the hearing and preparing a transcript. Neither of those

¹⁴ The absence of any evidence that Respondents had ever conducted an FES analysis of the position as required by the PPA and Advanced Manager classifications undermines their claim that their classification decision was substantially justified.

¹⁵ According to Respondents, she would have had a “solid argument” and it would be unfair to award fees if Respondents were “damned if it does and damned if it doesn’t.”

¹⁶ MORTENSEN V. DER, CASE NO. 94-0276-PC (PERS. COMM. 12/7/95) (where a position is clearly misclassified on the basis of the criteria set forth in the class specification, and respondent has acted to remedy the mistake, appellant can not rely on the initial, mistaken classification to support her case).

¹⁷ The Appellant has not provided any supporting materials to suggest that a higher fee, permitted by 814.245(5)(a)2., Stats., would be appropriate.

costs is reimbursable under the EAJA.¹⁸ HIGGINS V. WIS. RACING BOARD, CASE NO. 92-0020-PC (PERS. COMM. 3/31/94) (cost of preparing a hearing transcript); BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00); (duplication of hearing tapes).¹⁹

Respondents' objections to other costs are without support. The \$50 fee for filing the appeal with the Commission is recoverable. BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00). Respondents also object to reimbursement for Westlaw research costs. However, Sec. 814.245(5)(a), Stats., provides for the recovery of "the reasonable cost of any study, analysis . . . or project which is found by the court to be necessary for the preparation of the case." The Commission has no reason to believe that research conducted by Appellant's counsel was unnecessary.

Respondents further claim that the procedural history of this case after the Commission's July 2004 Interim Order is such that the Appellant should not recover fees or costs arising after September 2004 because the expenses arose from issues and cases for which the Appellant was not a prevailing party.²⁰ In order to understand Respondents' arguments, it is necessary to further summarize the case history.

The appeal arose from the action taken to reassign Appellant to a new collection of duties in February 2002. She filed her appeal in March. During a pre-hearing conference, the parties agreed to bifurcate the proceeding so the initial hearing would be limited to the issue of

Whether the position to which appellant was reassigned [on February 24, 2002] was properly classified as an Administrative Manager? If not, what is the proper classification?

¹⁸ Certain allowable costs are specified in Sec. 814.25(5)(a), Stats., and paragraph (b) includes "any other allowable costs specified under Sec. 814.04(2), Stats., which provides:

(2) Disbursements. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding \$100 for each item; an expert witness fee not exceeding \$300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

¹⁹ The conclusion reached in RENTMEESTER V. WIS. LOTTERY, CASE NO. 91-0243-PC (PERS. COMM. 9/9/94) that photocopying costs are not recoverable has been superseded by legislative changes to Sec. 814.04(2), Stats.

²⁰ The September 2004 date was offered by DER. DATCP did not clearly identify one date but articulated an argument consistent with ending any reimbursement at approximately the same time as DER.

The parties agreed that depending on the resolution of the initial topic, it might be necessary to schedule a second hearing on the remaining issues. The Commission issued its Interim Decision and Order on July 23, 2004. On August 23, 2004, Appellant filed a motion for fees and costs but later agreed “to withdraw her pending application . . . upon receiving assurance from the Commission that she be allowed to renew the application upon the final resolution of this case.” The Commission issued a letter dated September 15 confirming that Appellant would be provided an opportunity to renew her application. Respondents initially made no change to Appellant’s classification level and continued to pay her at the 81-01 rate. Then in October 2004, DER modified an existing classification (Policy Initiatives Advisor – Executive) assigned to pay range 81-01 and reallocated Ms. Kohl’s position to the new class. Ms. Kohl filed an appeal (Kohl II) of this October action but later withdrew the matter. The parties subsequently agreed to the following statement of the remaining issues in Appellant’s initial appeal:

- a. What is the proper remedy?
- b. Whether OSER’s reallocation of the Appellant’s position on October 3, 2004, and the Appellant’s current duties and assignments, provide a proper remedy?

In January 2005, Respondents filed what amounted to a motion for summary judgment on the remedy issues, contending that no additional remedy was available to Appellant. On July 15, 2005, before the Commission had ruled on the summary judgment motion, DATCP once again reassigned Ms. Kohl, this time to the position of Deputy Administrator of the Division of Food Safety, at her original classification of Administrative Manager. Appellant filed another appeal (Kohl III) with the Commission in August 2005. However, the Appellant stipulated that Kohl III related to her reassignment in 2002 and the reallocation of her position in 2004, rather than to her July 2005 reassignment. DATCP also moved to dismiss Kohl III. In a decision issued on January 5, 2006, the Commission granted DATCP’s motion for summary judgment as to the instant appeal on the issue of remedy and retained jurisdiction in this matter solely for the purpose of addressing Appellant’s request for fees and costs. The same decision dismissed Kohl III as untimely filed.

Appellant prevailed in only one of the three appeals she filed with the Commission and in that appeal, Respondents were ultimately successful in a motion for summary interim judgment. Appellant should be compensated for her costs associated with the favorable ruling but Respondents’ responsibility for reimbursement should not extend to the costs associated with her fruitless efforts. The Commission believes that the most appropriate way to differentiate Appellant’s reimbursable costs and her un-reimbursable costs is to establish a date that reflects the transition in her status as a successful litigant.

After the Commission’s July 24th Interim Order, Appellant promptly prepared her request for costs but later agreed to withdraw the request as long as it could be resubmitted. Her success in her three appeals essentially ended on September 16, 2004, the point at which she

received notice that she could resubmit her request later in the proceedings. Her later appeals were withdrawn or dismissed on timeliness grounds and she did not prevail in terms of the remaining issues on the merits of her initial appeal. Therefore, she should be reimbursed for the time she spent preparing her original request but not for the subsequent costs associated with her subsequent appeals and with Respondents' successful summary judgment motion. The Commission's Order grants Appellant's request for those reimbursable costs arising on or before September 16, 2004, but denies the remaining time period covered by her request.²¹

Dated at Madison, Wisconsin, this 12th day of April, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

²¹ Summary of allowed costs:

\$12,712.50	Fees (not including Attorney Pines) from March 1, 2002 through September 16, 2004
\$960.00	Attorney Pines' fees from March 4, 2002 through August 2, 2004 at rate of \$150 per hour (6.4 hours)
\$515.49	Reimbursable disbursements from March 6, 2002 through September 16, 2004
\$14,187.99	TOTAL