

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEPHEN W. GROHMANN, Appellant,

vs.

Executive Director, OFFICE OF JUSTICE ASSISTANCE, Respondent.

Case 1
No. 62930
PA(adv)-18

(Previously Case No. 02-0053-PC)

Decision No. 31021-A

Appearances:

Stephen W. Grohmann, 1750 Skidmore Road, Stoughton, Wisconsin 53589, appearing on his own behalf.

Mark J. Saunders, Deputy Legal Counsel, Department of Administration, P.O. Box 7864, Madison, Wisconsin 53707-7864, appearing on behalf of the Office of Justice Assistance.

RULING ON MOTION FOR COSTS AND FINAL ORDER

The Commission issued an Interim Decision and Order in this matter on March 11, 2005, rejecting the decision of the Office of Justice Assistance to both suspend Stephen Grohmann for 10 days and demote him from his position as Research Analyst – Advanced Supervisor. The Commission concluded that Respondent had failed to sustain its burden in terms of the allegations set forth in the letter of discipline.

Mr. Grohmann has filed a request for costs pursuant to Sec. 227.485, Stats. The final argument relating to the request was received on April 8, 2005.

Dec. No. 31021-A

ORDER

Appellant's request for fees/costs is denied. The Interim Order issued on March 11, 2005 is adopted as the Final Order in this matter.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Parties:

Stephen W. Grohmann
1750 Skidmore Road
Stoughton, WI 53589

David Steingraber
Exec. Dir., OJA
131 West Wilson Street, Suite 310
Madison, WI 53702

Office of Justice Assistance (Grohmann)

MEMORANDUM ACCOMPANYING RULING ON MOTION AND FINAL ORDER

The Commission addresses Mr. Grohmann's request for costs pursuant to that portion of Wisconsin's Equal Access to Justice Act (EAJA) found in Sec. 227.485, Stats. The criteria for applying the EAJA are set forth in Sec. 814.245, Stats., which provides in part:

(3) . . . [I]f an individual . . . is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 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 or that special circumstances exist that would make the award unjust.

There is no dispute that Mr. Grohmann is a prevailing party. Although he appeared *pro se* during the hearing, he seeks reimbursement for amounts paid to the law firm he consulted between August 27, 2002 and August 17, 2004. The scope of this consultation covered the entire period between the time that Grohmann filed his letter of appeal and the time the hearing examiner issued a proposed decision on August 5, 2004.

As noted in *BRENON V. UW*, CASE NO. 96-0016-PC (PERS. COMM. 6/23/98), AFFIRMED, *BOARD OF REGENTS V. STATE PERSONNEL COMM.*, 2002 WI 79, 254 Wis. 2d 148, 646 N.W.2d 759:

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.

As part of our analysis of Appellant's request the Commission will consider the Respondent's position in the administrative proceeding as well as its underlying disciplinary action. *DAVIS V. ECB*, CASE NO. 91-0214-PC (PERS. COMM. 12/5/94).¹ This concept was more recently explained in *STERN V. DHFS*, 212 WIS. 2D 393 (CT.APP. 1997):

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. *BRACEGIRDLE V. DEPARTMENT OF REGULATION & LICENSING*, 159 WIS. 2D 402, 425, 464 N.W.2D 111, 119 (CT. APP. 1990).

By mid-2002, Respondent had received complaints from a number of its employees that they were troubled by aspects of Appellant's office conduct. Respondent obtained advice from the Department of Administration (DOA)² and initiated a formal investigation that was carried out by a member of DOA's human resources staff. The investigator conducted numerous interviews of Grohmann's co-workers, obtained various documents and then interviewed Grohmann. Before the investigation had been completed and because of additional allegations, Respondent placed Grohmann on paid leave and expanded the scope of the inquiry. Respondent interviewed Grohmann a second time before imposing any discipline. The investigator obtained information from approximately 20 employees and generated her report approximately 3 months after she began her investigation.

OJA made the decision to discipline after assessing the credibility of the many sources of information that were tapped by the investigator and after considering the reasonableness of the perceptions that were expressed. Respondent considered the allegations in light of the circumstances of the workplace as well as Grohmann's work responsibilities and his disciplinary history. Given the apparently extensive investigation and the employer's legal responsibility to eliminate a hostile work environment, Respondent had a reasonable basis in truth for the allegations in the letter of discipline.

¹ On page 3 of its brief in opposition to Grohmann's motion for fees, Respondent cites *SHOWSH V. PC, BROWN CO. CIR. CT.*, 90 CV 1001 (7/25/91) for the proposition that "neither Sec. 227.485(3), Stats., nor Wisconsin case law requires that a government agency be substantially justified in its position throughout the entire period until the matter is decided." The court's decision in *SHOWSH* does not accurately describe the prevailing law and Respondent appeared to recognize as much in later portions of the brief.

² The Office of Justice Assistance is attached to the DOA for administrative purposes.

As to the Respondent's legal theory, just cause certainly may exist for disciplining a supervisor who makes comments and engages in physical actions that are discourteous and serve to harass other employees, especially if the supervisor has been directed not to engage in such conduct.

The remaining question is whether the facts reasonably supported the legal conclusion that Grohmann should be suspended for 10 days and demoted from his supervisory position. While the Commission's decision reflects its strong conviction that the employees' perceptions of Grohmann's behavior were largely unfounded and that Baumbach's testimony regarding prior adequate warnings largely lacked credibility, it is apparent from the Examiner's proposed decision (upholding the discipline) and the dissenting opinion (agreeing in many respects with the Examiner but suggesting a 30-day suspension rather than a demotion) that reasonable minds can differ regarding both the evidence itself and its nexus with the just cause legal standard. In this situation, we cannot conclude that the Respondent failed to establish that its disciplinary decision was reasonable.

Accordingly, applying the SHEELY standard, Respondent was substantially justified in taking its position in this matter. Grohmann's motion for costs is denied.

Dated at Madison, Wisconsin, this 16th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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