STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRIAN THOM, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent

Case 90
No. 68285
PA(adv)-152

Decision No. 32746-D

Appearances:

Bruce M. Davey, Attorney, Lawton & Cates, S.C., P. O. Box 2965, Madison, WI 53701-2965, appearing on behalf of Appellant Brian Thom.

Andrea Olmanson, Assistant Legal Counsel, P. O. Box 7925, Madison, WI 53707-7925, appearing on behalf of the Department of Corrections.

FINAL ORDER DENYING PETITION FOR FEES

After the Commission issued an Interim Order addressing the merits of the appeal and modifying the Respondent's action, the Appellant filed a petition for reimbursement of attorneys fees. The case arises from the decision to discharge the Appellant effective Augus 28, 2008. The discharge letter alleged that on at least five occasions, Appellant had unlocked a State gas pump and dispensed fuel into his personal vehicle without authorization or approval and that he had done so by using a key that he had taken without authorization or approval. According to the letter, the Appellant's conduct violated three work rules. The Commission reviewed the matter after Appellant filed an appeal under Sec. 230.44(1)(c), Stats., of a disciplinary action.

Prior to hearing, the parties filed cross motions for summary judgment, both of which were denied by the designated Hearing Examiner. DOC (THOM), DEC. NO. 32746-A (JONES, 05/2009). The Appellant, who up to that point had represented himself or was assisted by a non-attorney, retained an attorney at the end of June, 2009. The Examiner conducted a hearing in late August 2009 on the issue of whether the Respondent had just cause to discharge the Appellant. On September 11, 2009, Respondent filed a post-hearing "Motion for a

Determination of Frivolity and an Award of Sanctions," citing Sec. 227.483(1), Stats. The Examiner informed the parties that he would consider the motion in his proposed decision. After the parties submitted post-hearing briefs, including arguments on Respondent's motion, the Examiner issued his proposed decision and order under Sec. 227.46(2), Stats. Appellant's attorney withdrew from the case after the last post-hearing brief but before the Examiner issued his proposed decision. The Examiner concluded that the Department of Corrections had just cause to discharge the Appellant and the proposed decision would have denied Respondent's request for sanctions.

Both parties filed written objections to the proposed decision. Before the Commission had fully considered the objections, the Appellant asked that the hearing be reopened. The Commission denied the request. DOC (THOM), DEC. NO. 32746-C (WERC, 11/2010). Then in an interim decision and order issued on December 8, 2010, the Commission substantially modified the proposed decision, found that discharge constituted excessive discipline, modified the discharge to a 30-day suspension and probationary termination of Appellant's status as a Supervising Officer 2, and adopted the proposed decision's denial of sanctions. DOC (THOM), DEC. NO. 32746-B (WERC, 12/2010).

Appellant subsequently filed a request seeking fees in the amount of $8,962.50. Respondent filed a brief in opposition to the request, and on January 19, 2011, the fees question was ready for decision.

The Fee Request

The Appellant's request for fees is premised on Sec. 227.485, Stats., which provides, in part:

> (3) In any contested case in which an individual . . . is the prevailing party and submits a motion for costs under this section, the hearing examiner[1] 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.
>
> (4) In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this section based on determinations made under this subsection.

These provisions are part of what is commonly referred to as Wisconsin's Equal Access to

[1] In his proposed decision, the hearing examiner would have affirmed the Respondent's discharge decision in all respects. The Commission substantially modified the proposed decision so the Commission, rather than the examiner, has taken up the Appellant's petition for fees.

Justice Act (EAJA). In interpreting its provisions, the Commission is guided by federal case law interpreting the related U.S. Equal Access to Justice Act.[2]

The Appellant has broken his fee request into two components. He seeks an award of $2,250 because Respondent "[c]aused the hearing to require three days to complete instead of two days or less by calling approximately fifteen (15) witnesses and offering 120 exhibits despite maintaining that the appeal was frivolous." He also seeks $6,712.50 as reimbursement for 44.25 hours spent responding to the Respondent's post-hearing "Motion for a Determination of Frivolity and an Award of Sanctions." Even though Appellant's combined fee request is for $8,962.50, an attachment to the affidavit accompanying Appellant's petition indicates that Appellant incurred fees and costs totaling $30,673.11 for litigating his appeal. The attachment and other material in the case file shows that the Appellant was not represented by counsel when he initiated his appeal. He did not retain an attorney until two months before the commencement of the hearing, which was one month after the Examiner had denied the parties' cross motions for summary judgment. Appellant continued to be represented by counsel until after the last post-hearing brief had been filed but counsel withdrew before the Examiner issued his proposed decision.

"Prevailing party" requirement

There is no dispute that the Appellant is a prevailing party in this matter as required by Sec. 227.485(3), Stats., albeit only as to the degree of discipline imposed and as to Respondent's post-hearing motion for sanctions. At hearing, the Appellant conceded that he engaged in the conduct alleged in the letter of discipline. After considering the proposed decision and the objections thereto, the Commission concluded that the conduct warranted the imposition of some level of discipline but that the discharge action was excessive. The Commission's Order modified the discipline to a 30-day suspension, terminated Thom's probationary status as a Supervising Officer 2, and returned him to a Supervising Officer 1 position. The Order also denied the Respondent's motion for sanctions.

"Substantially justified" defense, generally

The standard for deciding whether the Respondent was "substantially justified" for purposes of Sec. 227.485(3), Stats., is set forth in SHEELY V. DEPARTMENT OF HEALTH & SOC. SERV., 150 WIS. 2D, 337-338, 442 N.W.2D 1 (1989):

> "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." Losing a case does not raise the presumption that the agency was not substantially justified. Nor is advancing a "novel but credible extension or interpretation of the law" grounds for finding a position lacking

[2] Sec. 227.485(1), Stats.

> substantial justification. We also note that when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, this court will defer to the agency's conclusions if they are reasonable; even if we would not have reached the same conclusions. (Citations omitted.)

"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." BARRY V. BOWEN, 825 F.2D 1324, 1330 (9TH CIR. 1987), cited in BRACEGIRDLE V. BOARD OF NURSING, 159 WIS. 2D 402, 425-26, 464 N.W.2D 111 (CT. APP. 1990).

A more recent case offers a fuller description of what the Commission is to consider when reviewing Appellant's fee request. In U.S. V. HALLMARK CONST. CO., 200 F.3D 1076 (7TH CIR. 2000), the trial court declined to award fees and relied largely on the fact that the government had survived a motion for summary judgment, even though the court had concluded after hearing that the government's position on the merits was arbitrary and capricious. On review, the circuit court remanded the case to the trial court on the fees issue and described the nature of the analysis that a trial court should perform:

> We recognize that the mere finding that the government's position was arbitrary and capricious does not mandate an award of attorney's fees under the EAJA. The outcome of a case is not conclusive evidence of the justification for the government's position. Similarly, the stage of the proceedings at which the case is disposed of also does not mandate a particular finding on the issue of attorney's fees. While the district court may consider objective criteria such as these when they are relevant, we caution that these objective factors are rarely conclusive. It is more important for the district court to examine "the actual merits of the Government's litigating position." This analysis will vary considerably with the circumstances of each case. However, it is rare that a single factor will be dispositive of whether the government's position was substantially justified, and the district court's analysis should contain an evaluation of the factual and legal support for the government's position throughout the entire proceeding. . . .
>
> While the resolution of the attorney's fees question "'should not result in a second major litigation,'" when considering this issue the district court must reexamine the legal and factual circumstances of the case from a different perspective than that used at any other stage of the proceeding. . . .
>
> In making a determination of substantial justification, the district court must examine the government's conduct in both the prelitigation and litigation context. For example, we have held that an EAJA award may be justified where an agency knows before trial that there is conflicting evidence on a key point it is required to prove and it "fail[s] to take adequate measures to assess that evidence." . . .

> The district court's analysis must not end here, however. A determination of substantial justification requires the district court to examine the position the government took at the litigation stage as well. . . .
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> Finally, we note that the trial court does not make separate determinations regarding each stage but "arrive[s] at one conclusion that simultaneously encompasses and accommodates the entire civil action." This global assessment comprehends that the district court will examine not simply whether the government was substantially justified in its position at the beginning or end of the proceedings, but whether the government was substantially justified in continuing to push forward at each stage.

ID., 1079-81 (Citations omitted.)

The Appellant's fee request is for only two specific segments of his cost for representation by counsel. He is not seeking reimbursement for any attorney fees incurred prior to the hearing, during the first two days of hearing, nor for drafting the bulk of the Appellant's post-hearing briefs. His request covers only 30% of the fees listed by his attorney for the approximately four months of representation.

Over-litigation theory, generally

Appellant bases his fee request exclusively on the theory that Respondent litigated the appeal excessively. According to Appellant's petition for fees:

> 2. Respondent over litigated this appeal to an extent that was not substantially justified for the apparent purpose of chilling appellant from pursuing his appeal on his own and/or making it so costly he would not be able to afford and/or obtain legal representation. In particular, respondent:
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> a) Filed a massive motion for summary judgment seeking dismissal of the appeal supported by a 102 page brief not citing any WERC case in which the Commission granted summary judgment in a discipline case and including with its motion a request for sanctions.
> b) Identified twenty-six (26) witnesses it intended to call at the hearing and approximately 120 exhibits it intended to offer into evidence.
> c) Caused the hearing to require three days to complete instead of two days or less by calling approximately fifteen (15) witnesses and offering 120 exhibits despite maintaining the appeal was frivolous thereby entitling appellant to an award of $2,250.00 attorney fees.
> d) Filed a motion for sanctions after the hearing and before even submitting its brief even though the hearing examiner had previously held that "insofar as the record shows there is no pattern of the Appellant engaging in repetitive and/or frivolous litigation."

3. Respondent's "motion for a determination of frivolity and award of sanctions" filed after the hearing and after the hearing examiner previously had denied a similar request based on a 102 page brief in support of summary judgment was not substantially justified thereby entitling appellant to an award of reasonable fees of $6,712.50 for responding to the motion.

Appellant's Petition for Attorney Fees, pp. 1-2.

Respondent raises a variety of arguments in opposing the Appellant's fee request. One assertion is that over-litigation is simply not grounds for an award of fees.

Over-litigation by the government is, at best, infrequently cited in reported cases applying either the Wisconsin or U.S. EAJA. However, we believe the analysis required of the Commission is broad enough to include indications that the government has needlessly burdened a prevailing party during the course of the litigation.

There is no doubt that a respondent government agency could act with malice and litigate a case excessively. Whatever a respondent's motivation, excessive litigation by the government can cause a prevailing party to spend excessive time and/or funds to oppose the government's action and reach a favorable result. Depending on the degree of over-litigation, the tribunal might conclude that there was no reasonable basis in law for the theory propounded or no reasonable connection between the facts alleged and the legal theory advanced. Under those circumstances, over-litigation would be a factor in determining whether the government was substantially justified, broadly speaking, for purposes of the EAJA.

Fees have been awarded where the government has continued an action, despite knowing it to be baseless. For example, in MENDENHALL V. NATIONAL TRANSP. SAFETY BD., 92 F.3D 871 (9TH CIR. 1996), the government filed an emergency order of revocation in an effort to coerce a pilot to waive EAJA fees after the pilot had already surrendered her pilot certificate. Compare MILLER ON BEHALF OF N.L.R.B. V. HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 2, 806 F.2D 1371 (9TH CIR. 1986) (The government is entitled to a reasonable time to reevaluate a position before deciding whether to abandon it in the face of adverse but previously unknown evidence. It was not reasonable to expect the government to concede in the course of one working day.) We believe that over-litigating a case, just as inappropriately continuing a case, can serve as an appropriate factor when determining whether an agency's overall position has been substantially justified.

Respondent's position in the present case

Appellant contends that the Respondent's over-litigation commenced with its motion for summary judgment filed on December 16, 2008. The motion was accompanied by a 102-page brief, affidavits from 25 individuals, and numerous exhibits attached to the various affidavits. The hearing examiner denied the motion on May 26, 2009, noting that he was unaware of any

proceeding filed under Sec. 230.44(1)(c), Stats., that had been decided on summary judgment. The absence of precedent and the fact that the Appellant was self-represented at the time were very significant hurdles to summary judgment for the Respondent to overcome. These two factors provide some support for viewing Respondent's motion for summary judgment as an unnecessary and excessive step in this litigation. However, the Respondent's motion corresponded to the Appellant's own motion for summary judgment filed earlier in December and the motion had a basis in both fact and law, relying on information developed during the investigation and subsequent discovery.

The administrative hearing in this matter was conducted on August 24, 25 and 26, 2009. Appellant contends the third day was "over litigation" by Respondent, and seeks $2,250 for 7.5 hours of attorney time on August 26 at the rate of $300/hour. The only argument that Appellant advances in support of this request is that Respondent called 15 witnesses and offered 120 exhibits at the hearing, while Appellant only called two witnesses and offered eight exhibits. Appellant did not specify which of Respondent's witnesses or exhibits were excessive, so the Commission is unable to determine whether Appellant's contention is broad enough to represent one of the three days of hearing.

This appeal arises from a discharge, so the Respondent had the burden of establishing just cause for the disciplinary action taken. REINKE V. PERSONNEL BOARD, 53 WIS. 2D 123, 191 N.W.2D 833 (1971). Appellant himself listed 14 persons on his "preliminary witness list" submitted less than two months after filing the appeal. Two months in advance of the hearing, the Respondent proposed a stipulation to avoid calling 13 witnesses. Appellant declined. Respondent followed-up with a proposal to have the same witnesses testify by telephone rather than requiring them to travel to the site of the administrative hearing. Appellant again declined. In addition to these efforts by the Respondent to reduce the duration of the hearing or its inconvenience, the Respondent has provided an extensive explanation of why it was either important or necessary to call every witness in light of the Appellant's "shifting" version of events and failure to stipulate. The Appellant, in contrast, has not identified any specific witnesses as inappropriate to the Respondent's case. The record does not support Appellant's assertion that the third day of hearing was unnecessary.

The Appellant also seeks $6,712.50 as reimbursement for 44.25 hours spent responding to the Respondent's post-hearing "Motion for a Determination of Frivolity and an Award of Sanctions." The time is divided between 13 hours by two attorneys at the rate of $300 per hour, and 31.5 hours by a law clerk at the rate of $90 per hour. Appellant filed a 25-page double-spaced post-hearing brief that included three pages related to the Respondent's Motion. Appellant's reply arguments included a single paragraph on the topic.

Many of the arguments raised in the Respondent's post-hearing motion were similar to arguments identified in the Respondent's motion for summary judgment. While the Examiner had denied the pre-hearing motion, he did so in conclusory fashion without addressing

Respondent's individual arguments.[3] We also believe it is significant that the post-hearing motion was grounded on a statutory provision that was not the basis for the previous motion: Section 227.483, Stats., permits an award of costs for a frivolous claim. Once again, there was no precedent for this Commission to impose such a sanction, yet the Respondent drew on precedent from other settings. Finally, the Appellant was appearing *pro se* at the time of the pre-hearing motion and that status strongly argued against considering the Respondent's motion. Appellant appeared with counsel at the time of the post-hearing motion, placing the later assertion into a different context.

We have reviewed the full scope of the litigation rather than just the three points referenced in the Appellant's petition and we have also considered Respondent's position at the time of imposing the discipline. We believe that Respondent's strategy would have benefitted from giving more weight to the fact that for the first ten months of litigation, the Appellant appeared without the benefit of counsel. Instead, Respondent chose to litigate formally, a strategy that may have generated additional work for both parties. Nevertheless, we believe that the Respondent's positions generally had a reasonable basis in law and fact. Appellant also identified a "personal" representative in his letter of appeal and that person actively participated in the appeal as Appellant's representative for the first two months. He withdrew once it appeared that he might be seeking compensation for his role even though he was not an attorney and once Respondent identified the problem in a motion to exclude the representative.

Even though the Appellant is a prevailing party as to one aspect of this case, the Respondent "was substantially justified in taking its position" within the meaning of Sec. 227.485, Stats. Appellant's EAJA request must be denied.

ORDER[4]

Appellant's petition for fees is denied and this matter is remanded to Respondent for action in accordance with the Commission's December 8, 2010 Interim Decision and Order and today's Order.

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[3] The operative phrase in the ruling was that "the Examiner cannot say with absolute assurance that [all three steps in the standard just cause analysis] have been established".

[4] 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 part of this Order.

Dated at Madison, Wisconsin, this 23rd day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner