

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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M.S.,<sup>1</sup> Appellant,

vs.

**President, UNIVERSITY OF WISCONSIN SYSTEM, and  
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,  
Respondents.**

Case 49  
No. 69216  
PA(sel)-65

**Decision No. 33128-A**

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**Appearances:**

**Pat Wilbur** with **M. S.**, appearing on behalf of the Appellant.

**Joely Urdan**, Associate Director & Senior University Legal Counsel, University of Wisconsin-Milwaukee, P. O. Box 413, Milwaukee, Wisconsin 53201-0413, appearing on behalf of the Respondents.

**FINAL ORDER DENYING PETITION FOR FEES**

The Commission issued an Interim Order addressing the merits of the appeal on April 11, 2011. The Interim Order disagreed with the Proposed Decision and rejected the Respondents' action denying veterans preference points to the Appellant. On May 4, 2011, the Appellant filed an "application for fees and other expenses." Respondents filed a response on May 20, 2011, and the matter 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<sup>2</sup> 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.

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<sup>1</sup> The Commission has chosen to use initials, rather than the Appellant's entire name, in order to maintain the confidentiality of Appellant's service record. See Sec. VA 1.10, Wis. Adm. Code.

<sup>2</sup> In his proposed decision, the hearing examiner would have affirmed the Respondents' decision. The Commission substantially modified the proposed decision so the Commission, rather than the examiner, has taken up the Appellant's petition for fees.

This provision is part of what is commonly referred to as Wisconsin's Equal Access to 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.<sup>3</sup>

Appellant's request for fees and costs totals \$3,848.07, and he breaks down his request into the following six categories: 1) Filing fee; 2) printing and photocopy cost; 3) postage, labeling and filing supplies; 4) mileage; 5) Appellant's missed wages to attend hearing; and 6) "cost of Pat Wilbur's labor hours for researching, hearing preparation, drafting and editing required filing papers."

Respondents argue that an award of fees under Sec. 227.485, Stats., is inappropriate because Respondents were "substantially justified" in taking their position, and also argue that even if costs are warranted, they must be limited to the filing fee, copying costs and postage. Respondents do not dispute that Appellant was a "prevailing party" within the meaning of Sec. 227.485(3), Stats.

#### "Substantially justified" defense

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 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).<sup>4</sup>

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<sup>3</sup> Sec. 227.485(1), Stats.

<sup>4</sup> Recently, in *DOC (THOM)*, DEC. NO. 32746-D (WERC, 3/2011), the Commission also quoted at length from *U.S. V. HALLMARK CONST. CO.*, 200 F.3D 1076 (7TH CIR. 2000).

The circumstances that led to the Respondents' decision not to award the Appellant veterans preference points and to deem him ineligible to be a candidate for a Purchasing Agent-Objective position are set forth at length in UW & DMRS (M.S.), DEC. NO. 33128 (WERC, 4/2011). Respondents' decision arose from a highly unusual set of facts that generated an appeal placing issues of first impression before the Commission. Resolution of those issues required construction of the relevant statute. There are various related statutory provisions that are to be applied by other agencies, but no reported cases offered any insight. Respondents acted carefully based upon very limited information from the Appellant and, before making a decision, consulted with attorneys from two other state agencies based upon a reasonable belief that the attorneys would have relevant expertise. The Commission believes the record supports the conclusion that even after making their initial decision, the Respondents remained open to reconsidering it if presented with persuasive contrary evidence. The Appellant declined to supply Respondents with a full copy of his military service discharge document until a few days before the commencement of the administrative hearing. The designated hearing examiner weighed the record that was created at hearing and the parties' post-hearing briefs and made the following observation summarizing the topics at issue:

The key areas of dispute between the parties in the present case relate to the phrase "2 continuous years or more or the full period of the person's initial service obligation, whichever is less," and how that phrase interacts with the requirement that there must be service on active duty "under honorable conditions." These phrases are not defined in the statute and have technical, rather than ordinary meanings. The statute is silent, and therefore ambiguous, in terms of whether an extension of an enlistment also extends a person's initial service obligation, and whether an award of a Navy Good Conduct Medal is, by itself, proof of service under honorable conditions as set forth in the statute. The existence of ambiguity is reinforced by conflicting testimony at hearing. Appellant produced a veterans service officer who testified that the Appellant qualified under the statute, because of his Navy Good Conduct Medal. Respondents produced attorneys employed by both the Wisconsin Department of Veterans Affairs and the Wisconsin Department of Military Affairs who testified that the Appellant's entire service was less than honorable and did not qualify him as a veteran in light of the applicable language in Sec. 230.03(14)(d), Stats.

The Proposed Decision would have found that Appellant failed to sustain his burden of persuasion in the matter. The Commission's April 11, 2011 interim decision concluded otherwise, finding the Appellant was entitled to veterans preference points. It included a deeper analysis of related federal provisions.

Under all these circumstances and because, as referenced in our decision on the merits, "this case presents a close question of statutory construction," the Commission concludes that for purposes of the Equal Access to Justice Act, the Respondents' position, though not compelling, satisfied the "substantially justified" standard. Respondents have demonstrated there was a reasonable basis in truth for the facts they alleged, a reasonable basis in law for the theory they propounded, and a reasonable connection between the facts alleged and the legal theory they advanced. Appellant's request for fees and costs must be denied.

The Commission does not address the remaining arguments raised in Respondents' written submission.<sup>5</sup>

**ORDER**<sup>6</sup>

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.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

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James R. Scott, Chairman

Judith Neumann /s/

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Judith Neumann, Commissioner

Rodney G. Pasch /s/

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Rodney G. Pasch, Commissioner

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<sup>5</sup> Nevertheless, the majority of the costs sought by the Appellant are not recoverable under Sec. 227.485, Stats., and the incorporated provisions contained in Sec. 814.04(2) and 814.245(5), Stats.

<sup>6</sup> 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.