

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ISAAC HAATS, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 217
No. 72138
PA(adv)-328

DECISION NO. 34191-A

Appearances:

Troy Bauch, Field Representative, Wisconsin State Employees Union, AFSCME Council 24, 1190 Ruffedt Road, Cornell, Wisconsin appearing on behalf of the Complainant, Isaac Haats.

Paegge Heckel, Labor Relations Specialist-Chief, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin, appearing on behalf of Respondent, Secretary, Wisconsin Department of Corrections.

**ORDER DENYING APPELLANT'S MOTION TO COMPEL PRODUCTION OF
APPELLANT AND WITNESSES BY THE STATE DURING DUTY HOURS
AND PAYMENT TO APPELLANT AND WITNESSES IN ACCORDANCE
WITH WISCONSIN ADMINISTRATIVE CODE CHAPTER PC 1.13**

On June 17, 2012, Appellant filed a personnel appeal complaint with the Wisconsin Employment Relations Commission alleging that the Respondent had violated § 230.44(1)(c), Stats., by imposing a 3-day suspension without just cause. On July 11, 2013, Lauri A. Millot was appointed by the Commission to act as Examiner in this case.

Hearing commenced on December 10 and 11, 2012, but the matter was not heard in its entirety. Additional dates for hearing were scheduled for February 19 through 21, 2013, but in a prehearing conference convened on February 14, 2013, the Respondent indicated that it would be changing its position relative to employee witness attendance at hearing to which Appellant objected for various reasons. The hearing was canceled pending submission of Appellant's motion.

Appellant filed a Motion to Compel Production of Appellant and Witnesses Employed by the State during Duty Hours and Payment to Appellant and Witnesses in Accordance with Wisconsin Administrative Code Chapter PC 1.13 on February 21, 2013, and Respondent filed a reply to Appellant's motion.

Having considered the arguments of the parties and the record as a whole, the Examiner makes and issues the following:

ORDER

Appellant's Motion to Compel Production of Appellant and Witnesses Employed by the State during Duty Hours and Payment to Appellant and Witnesses in Accordance with Wisconsin Administrative Code ch. PC 1.13 is denied without prejudice.

Dated at Rhinelander, Wisconsin, this 6th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



Lauri A. Millot, Examiner

**MEMORANDUM ACCOMPANYING ORDER DENYING APPELLANT'S MOTION
TO COMPEL PRODUCTION OF APPELLANT AND WITNESSES BY THE STATE
DURING DUTY HOURS AND PAYMENT TO APPELLANT AND WITNESSES IN
ACCORDANCE WITH WISCONSIN ADMINISTRATIVE CODE CHAPTER PC 1.13**

Appellant's motion asks the Examiner to order Respondent to designate for payroll purposes the Appellant and Appellant's witness as "in pay status" during the times in which they are in attendance at hearing; to adjust the work schedules of Appellant and Appellant's witnesses to coincide with the dates and times of the hearing; and finally, to compensate the Appellant and Appellant's witnesses for their travel consistent with § 20.916, Stats. Appellant maintains that Wis. Admin. Code ch. PC 1.13 is controlling.

I start with Appellant's request for identification as "in pay status" for himself and his witnesses during their attendance at Appellant's personnel appeal hearing. Appellant is a state civil service employee and a party to the pending personnel appeal. Wis. Admin. Code ch. PC 1.13 provides that his attendance at the hearing shall occur "without loss of state salary." The Respondent does not dispute that when the Appellant or his state employee witnesses appear at hearing during their scheduled work hours they do so without loss of his state salary. The question is whether they are entitled to "in pay status" when they are at hearing during their non-scheduled work hours.

Wis. Admin. Code ch. PC 1.13 (Jan. 2011) provides:

PAY STATUS OF STATE EMPLOYEE PARTIES. State civil service employees who, as parties, are interviewed as part of commission investigations or appear at prehearing conferences, conciliation sessions, oral arguments or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel in accordance with the uniform travel schedule amounts established under s. 20.916(8), Stats.

PAY STATUS OF STATE EMPLOYEE WITNESSES. State civil service employees who are interviewed as part of commission investigations or attend hearings, whether held in person or via telephone, as witnesses shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats., unless the hearing examiner or commission determines that their testimony was or would have been irrelevant, immaterial, or unduly repetitious.

...

Thus, Wis. Admin. Code ch. PC 1.13 provides two forms of compensation for appellants and state employee witnesses that attend personnel appeal hearings. First, the appellant and witnesses are eligible for their state salary. Second, the appellant and witnesses are also entitled to expenses consistent with § 20.916, Stats.

Section 20.916, Stats., provides in relevant part:

(1) EMPLOYEES TO BE REIMBURSED. State officers and employees shall be reimbursed for actual, reasonable, and necessary traveling expenses incurred in the discharge of their duties in accordance with sub. (9). The officers and employees of any state agency shall, when for reasons of economy or efficiency are stationed at any other place than an official location of such state agency, receive their actual, reasonable, and necessary traveling and other expenses when called to such official location for temporary service.

...

(8) UNIFORM TRAVEL SCHEDULE AMOUNTS, ALLOWANCES. (a) The director of the office of state employment relations shall recommend to the joint committee on employment relations uniform travel schedule amounts for travel by state officers and employees whose compensation is established under s. 20.923 or 230.12. Such amounts shall include maximum permitted amounts for meal and lodging costs, other allowable travel expenses under sub. (9) (d), and portage tips, except as authorized under s. 16.53 (12) (c). In lieu of the maximum permitted amounts for expenses under sub. (9)(b), (c), and (d), the director may recommend to the committee a per diem amount and method of reimbursement for any or all expenses under sub. (9)(b), (c), and (d).

(b) The approval process for the uniform travel schedule amounts under this subsection shall be the same as that provided under s. 230.12(3)(b). The approved amounts for the uniform travel schedule shall be incorporated into the compensation plan under s. 230.12(1).

Prior State Personnel Board decisions provide authoritative guidance.¹ In 1978, the State Personnel Board addressed an appellant's request for travel expenses when appearing at a Personnel Board hearing and whether she was entitled to be in regular pay status for the time spent traveling to attend the State Personnel Board hearing. *Toigo v. U.W.*, Case Nos. 76-251, 77-

¹The State Personnel Board became the Personnel Commission pursuant to Chapter 196, Laws of 1977.

59 (Wis. Pers. Bd. 5/18/1978). The Personnel Board, following *Sheda v. Carballo*, Case No. 76-091, 76-114 (Wis. Pers. Bd. 6/13/1977) opined:

With regard to the appellant's expenses, we are guided by an opinion of the attorney general. See 36 OAG, 90, 91-92 (1947). In that opinion, the attorney general was responding to a question from the personnel director concerning the pay status of certain employes (sic) who attended a personnel board appeal hearing. The opinion stated:

... we are of the opinion that this matter is controlled by our prior opinion, XXX OAG 24, at pp. 217-218:

... the administration of justice being a course of mutual benefit to everyone in the state, each is under obligation to aid in furthering it as a matter of public duty, including the state itself as an employer, and ... the state should not, therefore, penalize its own employes by withholding their compensation when they are compelled to be absent from their duties to testify in court matters relating to such duties.

The employes in question in the present case were present before an administrative tribunal of the state and engaged in a successful defense of their rights as civil service employes of the state. We are of the opinion that in so defending their civil service rights they were engaged in matters relating to their employment and hence are employed within the meaning of sec. 16.27 and are entitled to be certified on the payroll as being so employed. [Section 16.27 is now 16.37]

Prehearing conferences are provided for both by the personnel board rules, section P.B.05 W.A.C., and the state's administrative procedure act, Section 227.04(4), stats., and are an integral part of the appeal hearing process. We conclude that the appellant's attendance at the prehearing conference falls within the reasoning set forth in the cited opinion.

With respect to appellant's attendant expenses, Section 20.916(1), Stats., provides:

State officers and employes (sic) shall be reimbursed for actual, reasonable and necessary traveling expenses incurred in the discharge of their duties in accordance with Section 15.535.

As was indicated in the foregoing attorney general's opinion, employees involved in personnel board appeals are "engaged in matters relating to their employment and hence are employed ...". In this sense their traveling expenses may be said to be incurred in the discharge of their duties" and hence, we conclude, appellant's expenses are reimbursable.

Almost 15 years later in 1992, the Personnel Commission was presented with a motion similar to that which the Appellant has filed entitled, "Motion to Compel Payment of Salary for Witness Appearing before Personnel Commission". *Asche v DOC*, Case No. 90-0159-PC (Pers. Comm. 1/27/1993). The appellant in *Asche* called two state employee witnesses, each employed by a different state agency, to provide testimony at her personnel appeal hearing. Although neither witness was scheduled to work on the day and time in which they testified, one received two hours compensatory time for the time she spent appearing as a witness at hearing and the second did not receive any form of compensation. In interpreting Wis. Admin. Code ch. PC 1.13, the Personnel Commission concluded that the witness did not lose any state salary as a result of his attendance at hearing and that, while the cited provision does "require that a state employee not be deprived of salary he or she would have been entitled to receive for the period of time he or she was appearing as a witness," it does not "require an employing agency to pay salary to an employee solely on the basis of that employee's appearance as a witness at a commission hearing." The Personnel Commission continued noting that "the cited provision does not prevent a state agency from awarding salary to one of its employees for his or her appearance at a commission hearing during a period of time he or she is not on work status." *See also Holubowicz v. DOC*, Case Nos. 90-0048-PC-ER, 90-0079-PC-ER (Pers. Comm. 8/22/1990)(concluding appellant was not entitled to compensation for attendance at deposition and specifically did not address appellant's FLSA and collective bargaining rights claims).

In each of the decisions interpreting Wis. Admin. Code ch. PC 1.13, the State Personnel Board/Personnel Commission was addressing a specific request for payment following the completion of the personnel appeal hearing and after the state agency made a determination as to whether the state employee witness could be compensated. Appellant is asking for a determination before the agency has acted. Appellant's motion is premature.

Appellant next requests that the Examiner order the modification of the work schedule for Appellant and Appellant's state employee witnesses to coincide with the hours of the hearing. There is no authority in Wis. Admin. Code ch. PC 1.13 or § 230.44, Stats., that would allow a hearing examiner to order the modification of an employee work schedule or to direct the scheduling of work for a state employee.

Section 230.44(4)(b), Stats., specifically denies state employees witness fees for attendance at personnel appeal hearings. Section 20.916(8), Stats., provides state employees reimbursement for travel expenses when encumbered in the discharge of their duties. As previously addressed, as to Appellant's request for travel expenses, lacking a specific request submitted and thereafter denied by Respondent, it is premature for the Examiner to address this issue.

Dated at Rhinelander, Wisconsin, this 6th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot. Examiner