

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JOHN T. WALSH, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 255  
No. 72886  
PA(adv)-393

DECISION NO. 35041-C

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**Appearances:**

Michael J. Kuborn, Attorney, Curtis Law Office, 491 South Washburn Street, Suite 100, P.O. Box 2845, Oshkosh, Wisconsin, appearing on behalf of John T. Walsh.

William H. Ramsey, Deputy Legal Counsel, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER ON FEES AND COSTS**

On November 16, 2016, the Commission issued a decision and order concluding that the Wisconsin Department of Corrections failed to establish just cause for the § 230.37(2), Stats., forced unpaid leave of absence of John T. Walsh. On December 14, 2016, counsel for Walsh filed a written request for fees and costs and, on January 9, 2017, the Department of Corrections filed its objections, at which time the matter became ripe for Commission consideration. We incorporate this decision and order on fees and costs into our final decision and order issued on November 16, 2016.

**I. WAS THE POSITION OF THE DEPARTMENT OF CORRECTIONS SUBSTANTIALLY JUSTIFIED?**

This matter is before us on a request for attorney fees and costs submitted by Appellant John T. Walsh. Walsh is entitled to his fees and costs under § 227.485(3), Stats., unless we conclude that the Wisconsin Department of Corrections was “substantially justified” in taking

the position it did in this matter. The burden is on DOC to show that there was (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. *Bd. of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). DOC asserts substantial justification by essentially making the same arguments it made on the merits. DOC argues that it was entitled to rely on the psychologist's opinion and that Walsh neither followed his recommendations nor contested them.

As we noted in our decision on the merits, state employers have a particularly heavy burden placed upon them to do everything possible to retain employees with medical or physical infirmities. The language in § 230.37(2), Stats., requires the state employer to explore all sorts of alternatives short of dismissal, which may be utilized only as a "last resort." It is clear that DOC made no effort to explore any alternative employment for Walsh.

That action was consistent with the explanation from Cathy Jess, the Administrator of Adult Institutions, that DOC did not accommodate individuals who were determined to be unable to perform the "job that they were hired to do."<sup>1</sup> It is also significant that this was not a major disabling condition. Walsh was diagnosed with having adult attention deficit disorder. Certainly there was some vacant position he could have filled at DOC. That of course is speculative because DOC never fulfilled their statutory obligation to explore other alternatives. DOC falls back on the psychologist's one sentence response to a question about Walsh's ability to perform other administrative work. At best the psychologist's conclusions are inconsistent. He characterizes Walsh as "an intelligent man who does not have any problems thinking and problem solving in a structured monitored process." In response to a question about whether Walsh is capable of working full time and on call, the psychologist responded "yes, but it would depend on the type of work that he was doing." Later, the psychologist indicates that Walsh can do many types of work "however he would require remediation as outlined." DOC seizes upon that comment to justify its complete refusal to follow the dictates of § 230.37(2).

DOC also argues that Walsh should have either followed the opinion or contested it. The record reflects that Walsh took immediate steps to dispute the opinion. He was placed on unpaid leave based upon the psychologist's report on October 28, 2013. Walsh was not provided with the report, and the letter suspending him indicates he was determined to be unfit to perform the essential functions of the nursing supervisor positions at DOC because of his "attention deficit disorder." The letter says nothing about other alternatives. Within weeks Walsh obtained legal counsel who contacted DOC seeking copies of the psychologist's report. Shortly thereafter Walsh was examined by another psychologist who determined that he had no attention deficit disorder.

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<sup>1</sup> DOC attempts to minimize Jess' comments because she was not an "HR expert." Jess was the number three person in the leadership hierarchy of an agency with over 10,000 employees. Clearly, she "spoke" with authority to state DOC's position.

The opinion issued on December 20, 2013 was provided to DOC. DOC chose not to accept it or to send Walsh for a third opinion. Rather DOC took their time and eventually sent Walsh back to the original psychologist on May 1, 2014. He subsequently changed his diagnosis and Walsh was returned to his position.

DOC also relies on the fact that the original psychologist's report did not comment on demotions or transfers. We find that argument wanting. The psychologist was never asked the question nor did DOC attempt any follow up.

Ultimately, this case and our conclusion that a fee award is warranted turns on the fact that DOC did not follow the dictates of § 230.37(2). Rather than treating the dismissal of Walsh as the last resort, DOC chose to utilize it as the first resort ignoring all other options. DOC's position was not substantially justified. The legal basis for their theory is unreasonable and not supported by the facts which are basically undisputed.

## **II. FEE AWARD.**

Counsel for Walsh has requested payment for 70.4 hours of work at a rate of \$200.00 per hour. Additionally, he is requesting \$828.31 in costs. While DOC has disputed the entitlement to any award, it has not challenged the requested amounts.

Under § 814.245(5), Stats., we are limited to awarding attorney fees at the rate of \$150.00 per hour adjusted for inflation. In previous cases, DOC has asserted (and we have accepted) that \$188.21 is the appropriate rate adjusted for inflation as of 2015. Here, some of the work was performed in each of the years from 2014 through 2016. For purposes of simplicity, we utilize \$188.21 as the rate for all work performed. Accordingly, the attorney fee award will be \$13,249.98 (70.4 hours times \$188.21).

Reimbursable costs are permitted under § 814.04(2), Stats. Counsel for Walsh has requested \$790.60 for the costs of the audio record and a transcript of same, neither of which is an allowable cost. The request for reimbursement of postage in the amount of \$37.71 is allowed.

## **CONCLUSIONS OF LAW**

1. The position of the Department of Corrections was not substantially justified within the meaning of § 227.485(2)(f), Stats.

2. The amount of \$13,287.69 in fees and costs is reasonable and appropriate and is awarded to John T. Walsh.

**ORDER**

That the State of Wisconsin shall pay John T. Walsh the sum of \$13,287.69.

Signed at the City of Madison, Wisconsin, this 14th day of March 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner