

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ANDREW J. TOMASZEWSKI, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0001

Case Type: PA

DECISION NO. 35077-C

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**Appearances:**

James C. Koppelman, Attorney, Schmitt & Koppelman, S.C., 1029 E. Main Street, P.O. Box 176, Merrill, Wisconsin, appearing on behalf of Andrew J. Tomaszewski.

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

**DECISION AND ORDER ON FEES AND COSTS**

On June 15, 2016, the Wisconsin Employment Relations Commission issued a Decision and Order concluding that the State of Wisconsin, Department of Corrections did not have just cause to discharge Andrew J. Tomaszewski but did have just cause to impose a five-day suspension. On July 15, 2016, Tomaszewski filed a motion for attorneys' fees and costs pursuant to § 227.485, Stats., and the State filed a statement in opposition to the motion on August 5, 2016.

Having considered the motion, we conclude that the State was substantially justified in taking its position in this litigation.

NOW, THEREFORE, it is

**ORDERED**

The motion for attorneys' fees and costs is denied.

Signed at the City of Madison, Wisconsin, this 22nd day of August 2016.

**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

**MEMORANDUM ACCOMPANYING DECISION AND ORDER ON FEES AND COSTS**

Our ability to award attorney fees and costs in Chapter 230 discipline cases is limited by the provisions of § 227.485, Stats. A qualified prevailing party is entitled to costs unless the 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.”

To establish that its position was substantially justified, the State 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.

*Sheely v. Wisconsin Department of Health & Social Services*, 150 Wis.2d 320, 337, 442 N.W.2d 1 (1989).

Here, DOC more than met (1) by proving to the Commission’s satisfaction that Tomaszewski engaged in the physical conduct that triggered discipline. DOC also more than met (2) and (3) by persuading us that the conduct warranted discipline. Therefore, we have denied the motion for fees and costs.<sup>1</sup> We hereby incorporate this ruling into our June 15, 2016 Decision and Order.

Signed at the City of Madison, Wisconsin, this 22nd day of August 2016.

**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

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<sup>1</sup> On July 5, 2016, we received a written request directly from Tomaszewski asking that we reconsider the part of our June 15, 2016 Decision and Order that provided no back pay for the period of time Tomaszewski’s attorney was not complying with discovery requests. We see no basis for modifying that action.