

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JULIO de LIMA SILVA, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0056

Case Type: PA

DECISION NO. 35747-B

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**Appearance:**

Peter M. Reinhardt, Bakke Norman, S.C., 2919 Schneider Avenue SE, P.O. Box 280, Menomonie, Wisconsin, appearing on behalf of Julio De Lima Silva.

William H. Ramsey, Department of Administration, 101 E. 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**

The ability to award attorney fees and costs to a prevailing individual is controlled by the dictates 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). In evaluating the agency’s position, it is appropriate to look at “the underlying government conduct at issue and the totality of the circumstances present before and

during litigation.” *Bracegirdle v. Department of Regulation and Licensing*, 159 Wis.2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990). The case itself must have “sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion.” *U.S. v. Thouvenot, Wade and Moerschen, Inc.*, 596 F.3d 378, 381-2 (7th Cir. 2010).<sup>1</sup>

## **I. IS A FEE AWARD WARRANTED?**

DOC bears the burden of proof that its position both before and during these proceedings met the standard. This is a disciplinary matter involving the use of physical force against an inmate. As I noted in the decision on the merits, DOC has a special obligation to insure the safety of persons placed in its custody. Balanced against that concern is the ever present risk of injury to the correctional officer staff from the very dangerous individuals they guard.

This is clearly a situation where a correctional officer found it necessary to make an instantaneous judgment in reaction to a potential threat to his physical well-being. The use of non-deadly force was authorized under the policy in place. After doing an internal investigation of the incident, DOC brought in an outside expert to independently evaluate the incident as part of a “use of force” review. Even the expert was somewhat equivocal in his analysis of the situation. That coupled with the fact that DOC took six months to determine what if any discipline to impose suggests an uncertainty as to whether De Lima Silva violated the applicable rules. Certainly DOC’s overall investigation was thorough. The problem is that the results were inconclusive. Management witnesses differed as to the facts and the application of policy to the facts.

DOC’s apparent inability to substantially justify its position is compounded by its inexplicable difference in treatment between De Lima Silva and coworker Terry Korte. One is fired and the other receives a one-day disciplinary suspension from the same warden within a month or two of the occurrences.

As discussed in the decision on the merits, the explanation for the difference in treatment was nonsensical. DOC completely undermined its case by offering this transparently false explanation for an obvious differential in treatment. But for that position this could arguably be a case where DOC made a judgment call on a relatively close case. The inexplicable differential in treatment leads to the conclusion that there was no reasonable basis in truth for the facts as alleged.

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<sup>1</sup> The statute itself is modeled after the Federal Equal Access to Justice Act and is read in conjunction with § 814.245, Stats. *Sheely* at 335.

**II. FEE AWARD.**

Counsel for De Lima Silva has requested attorney fees based upon an hourly rate of \$300.00 per hour. While the requested rate is consistent with current market rates for lawyers of Mr. Reinhardt's skill and ability, our ability to award fees is subject to the constraints of § 814.245(5), Stats. The statutory rate is \$150.00 per hour together with the cost of living adjustment increases the hourly rate to \$188.21 per hour. DOC argues that 116.7 hours of work attributable to this proceeding are the appropriate basis for a fee award and I agree. I find no special factors under § 814.245(5)(a)2, Stats. warranting a higher fee and therefore set the amount due at \$21,964.11.

The State does not dispute an award of costs for paralegal expenses but does assert that the billable rate for such time should be \$116.00 per hour rather than the \$150.00 rate reflected in the billings. I agree and will award that rate for 32.6 hours incurred in this case for an amount due of \$3,781.60.

There is no dispute over the dollar amount requested for costs and those will be awarded in the amount of \$3,494.25. The total fees and costs award is \$29,239.96 representing the three amounts as calculated above.

**CONCLUSIONS OF LAW**

1. That the position of the Department of Corrections in this matter was not substantially justified as that term is defined in § 227.485(2)f, Stats.
2. That the amount of \$29,239.96 in fees and expenses is reasonable and appropriate based upon the prevailing market rates identified herein.

**ORDER**

That the State of Wisconsin, Department of Corrections shall pay Julio De Lima Silva the sum of \$29,239.96.

Signed at the City of Madison, Wisconsin, this 28th day of July 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman