

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID TESKE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION, Respondent.

Case ID: 315.0002

Case Type: PA

DECISION NO. 36360-A

Appearances:

Richard F. Rice, Fox & Fox, S.C., 124 W. Broadway, Monona, Wisconsin, appeared on behalf of Appellant David Teske.

William H. Ramsey, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, appeared on behalf of Respondent State of Wisconsin Department of Administration.

DECISION AND ORDER ON FEES AND COSTS

On August 29, 2016, the Wisconsin Employment Relations Commission issued a Decision and Order in this matter rejecting David Teske's five-day suspension. Subsequently, an application for fees and costs was filed. The state opposed the application and the matter became ripe for action on October 17, 2016.

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). 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).¹

I. IS A FEE AWARD WARRANTED?

Certainly there is no dispute that the facts as alleged are true. Teske did not dispute the core fact that he put the poster up. Where DOA misses the mark is in concluding that there is a reasonable basis for the legal theory they rely upon. DOA’s work rule is on its face vague and does not fairly alert employees as to what behavior is prohibited. Determining whether conduct with coworkers is “discourteous or disrespectful” is very much a subjective determination. DOA argues that Teske’s prior “history” of behavior-related discipline involving female coworkers should somehow color their decision and support a claimed violation of the “disrespect” standard.² In other words if Teske had a perfect work record his action would not constitute disrespect? In fact, within minutes of being informed of the fact that a female coworker was offended by the poster, Teske disposed of the poster and apologized. It was the female coworker who photographed the poster and displayed it to others who were then offended. It strikes us that Teske’s conduct in removing and responding was itself an act of respect.

A fair reading of the disciplinary letter suggests that Teske was punished not for the conduct but for disputing that it violated any rule.³ Apparently, in DOA’s view, the proper response was to acknowledge a grievous error and throw himself upon the mercy of his supervisor.

The poster itself is not on its face offensive. When advised that at least one person found it offensive, Teske promptly removed the poster. We find the legal analysis flawed and, therefore, conclude that DOA’s action was not substantially justified under § 227.485, Stats.

II. THE FEE AWARD.

An award of fees and costs is governed by § 814.245(5), Stats., and our inherent power to review the reasonableness of the request. Counsel has submitted a fee request of \$30,850.00 based upon 61.7 hours of work at \$500.00 per hour. As the state correctly asserts, the statute limits the hourly rate to \$150.00 per hour adjusted for inflation which brings the allowable rate to \$188.21 for work performed in 2015 and \$191.25 for work performed in 2016. The rate may be adjusted upward if special circumstances justify the increase. Teske does not argue

¹ 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.

² Teske’s one prior disciplinary action related to behavior with female coworkers occurred when he asked a female coworker “Who’s your daddy?”

³ “Your responses given during the investigative interview and pre-disciplinary hearing indicate a failure or refusal to acknowledge what is acceptable behavior in the workplace.” Discipline Letter dated September 3, 2015.

“special circumstances” nor do we conclude there are any to warrant an increase in the statutory fee rates.

We do however find that 61.7 hours of time spent is excessive given the discipline. We acknowledge the importance of encouraging able attorneys to participate in these matters. This is particularly true given the fact that fee awards are at best speculative even for prevailing parties. Even so, we think spending 61.7 hours on this matter seems excessive. This was not a particularly complex matter nor was there a significant amount of money at stake. On the other hand, the next step following a five-day disciplinary suspension could have been discharge for a relatively minor infraction given the dictates of the progressive disciplinary system. Accordingly, we will award the following amounts:

(1)	17.2 hours during 2015	x \$188.21	=	\$3,237.21
(2)	32.8 hours during 2016	x \$191.25	=	\$6,273.00
	For a total balance of			\$9,510.21

Accordingly, we enter the following:

ORDER

That the State of Wisconsin Department of Administration shall pay counsel for David Teske the sum of \$9,510.21.

Signed at the City of Madison, Wisconsin, this 13th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner