

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NICOLE REICHENBERGER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0199

Case Type: PA

DECISION NO. 36947-A

Appearances:

Paul Mertz, Representative, P.O. Box 181, Redgranite, Wisconsin, appearing on behalf of Nicole Reichenberger.

Anfin Jaw, Attorney, 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.

On May 16, 2017, Examiner Raleigh Jones issued a proposed decision in this matter rejecting the medical separation of Nicole Reichenberger and ordering her placed back on medical leave and reinstated following the conclusion of her leave. Neither side sought review by the Wisconsin Employment Relations Commission. The Commission issued a final decision and order providing for the same relief on June 12, 2017. On June 23, 2017, Reichenberger filed a request for costs pursuant to § 227.485, Stats. On the same date, counsel for the Department of Corrections submitted an email asserting the request for costs was untimely. Chief Legal Counsel Peter G. Davis, to who the letter was directed, invited Reichenberger's representative to file a petition for rehearing to (in his words) provide a jurisdictional basis for resolving the matter. DOC in turn has responded with written argument addressing both the timeliness issue and the merits of the request for costs.

DECISION AND ORDER

A. Was the Request for Costs Untimely?

The award of costs, including attorney fees, in administrative proceedings under Chapter 230 are controlled by § 227.485, Stats. Fees and costs are available only when it is

determined that the state was not “substantially justified in taking its position” or that “special circumstances exist that would make the award unjust.” Such an award is only available to a party prevailing against the state and it is not automatic.

The procedure for making the request for fees requires that the prevailing party has 30 days after receiving the proposed decision from the hearing examiner to submit an application for fees and costs. § 227.485(5), Stats. Here, DOC argues that the request for costs was filed after the final decision of the Commission, not the proposed decision by the examiner. On its face, that argument seems correct. The problem is that under subsection (2)(a) of § 227.485, the term “hearing examiner” is defined as “the agency or hearing examiner.” A number of years ago, the Commission decided that under subsection (5) we would define the term “hearing examiner” to mean the Commission itself. That interpretation avoided having the parties briefing, arguing, and submitting bills of cost to the examiner given the possibility that the Commission itself might rule against the individual. There was also the possibility that the Commission might rule in favor of the appellant employee but conclude that the state’s position was substantially justified. In either case, the parties and the examiner would have gone through the lengthy ordeal of resolving fees and costs for no reason. Defining the Commission as “hearing examiner” also resolves the question of what to do in the case of an employee who loses before the examiner but prevails before the Commission.

In light of our interpretation, it is unnecessary for Appellant to submit a petition for rehearing as we conclude the underlying request for costs is in fact timely.

B. Is Reichenberger Entitled to an Award of Costs?

Reichenberger seeks an award of five different categories of items that she asserts were incurred by her representative on her behalf. As noted above, an award of costs is allowed only after a finding that the DOC’s position in the underlying dispute was not substantially justified. § 227.485(3), Stats. Here, DOC has chosen not to dispute that contention. We will avoid the question as the matter of allowable costs may be resolved on other grounds.

The procedure for awarding costs under Chapter 227 incorporates by reference § 814.245(5), Stats. Additionally, we have an administrative rule addressing the issue. Wis. Admin. Code § ERC 94.05. Furthermore, § 814.245(5) incorporates § 814.04(2) as to the items which are subject to reimbursement as costs. Of the five items submitted by Reichenberger, two are allowable costs under § 814.04(2); postage in the amount of \$1.47 and copies in the amount of \$19.80. Mileage expenses and reimbursement of salary for time at hearing are not statutory disbursements. That leaves the claim of three hours at \$250.00 per hour for an attorney that Reichenberger’s representative consulted with prior to the hearing. The attorney, Tammy J. Liska, did not enter an appearance on behalf of Reichenberger. We have no idea what the three hours covered in terms of legal advice, the nature of the work performed, and of other specifics called for under the administrative rule and the statute. Simply asserting that some lawyer provided “assistance in preparation” for the hearing falls far short of the required showing even assuming such legal work is eligible for potential reimbursement.

Finally, even the modest \$21.27 for copying and postage was submitted without any documentation that the expenditures were made. Accordingly, recovery is barred by Wis. Admin. Code § ERC 94.05(1)(d) which requires such a showing.¹

To summarize, we find that the request for costs was timely filed and that costs are denied based upon the lack of required documentation or because the underlying expenses were not reimbursable under § 814.04(2), Stats. Accordingly, we enter the following:

ORDER

That Nicole Reichenberger's request to tax costs is dismissed.

Signed at the City of Madison, Wisconsin, this 27th day of July, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

James J. Daley, Commissioner

¹ A simple affidavit for the copying and postage would have been sufficient.