STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CLAIRE FRIED, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION and the DIRECTOR OF THE BUREAU OF MERIT RECRUITMENT AND SELECTION, DIVISION OF PERSONNEL MANAGEMENT, DEPARTMENT OF ADMINISTRATION, Respondents.

Case ID: 454.0002
Case Type: PA

DECISION NO. 37433-A

Appearances:

Michael J. Modl and Michael J. Westcott, Attorneys, Axley Brynelson, LLP, 2 East Mifflin Street, Suite 200, Madison, Wisconsin 53701, appearing on behalf of Claire Fried.

William Ramsey and Anfin Jaw, Attorneys, 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 Agriculture, Trade and Consumer Protection and the Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration.

DECISION AND ORDER

On December 4, 2017, Claire Fried filed an appeal with the Wisconsin Employment Relations Commission asserting that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) had laid her off without just cause effective at close of business on November 8, 2017. The scope of the appeal was subsequently limited to whether DATCP had improperly failed to provide Fried with displacement rights as an alternative to her layoff. The parties waived hearing and filed written argument by March 12, 2018.

On March 30, 2018, the Commission issued an Interim Decision and Order concluding that DATCP did not have just cause to lay off Fried without having extended Wis. Admin. Code § ER-MRS 22.08(3) displacement rights to her.

The parties subsequently disagreed as to whether Fried's use of displacement rights would entitle her to employment in another DATCP position. An evidentiary hearing on that issue was held in Madison, Wisconsin, on June 13, 2018, before Commission Examiner Peter G. Davis. The parties thereafter filed written argument by July 26, 2018. Fried also filed a motion to amend the

appeal by adding the Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration, as a Respondent.

On September 13, 2018, Examiner Davis issued a Proposed Interim Decision and Order granting the motion to add the Director as a Respondent and identifying certain positions as to which Fried could exercise displacement rights and thereafter be placed in a layoff pool. All parties filed objections to the Proposed Interim Decision and Order.

On November 29, 2018, Examiner Davis issued a Proposed Decision and Order regarding Fried's motion for fees and costs. All parties filed objections to that Proposed Decision and Order, and Fried filed a supplement motion for fees and costs on December 17, 2018.

Having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Claire Fried had permanent status in class as an employee of the Department of Agriculture, Trade and Consumer Protection (DATCP) when she was laid off at the close of business on November 8, 2017.

2. Prior to her layoff, DATCP did not extend to Fried the displacement rights contained in Wis. Admin. Code § ER-MRS 22.08(3).

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to § 230.44(1)(c), Stats.

2. Wisconsin Admin. Code § ER-MRS 22.08(3) had not been repealed as of November 8, 2017.

3. The State of Wisconsin Department of Agriculture, Trade and Consumer Protection did not have just cause within the meaning of § 230.34(1)(a), Stats., to lay off Claire Fried without having extended Wis. Admin. Code § ER-MRS 22.08(3) displacement rights to her.

4. Pursuant to then existent Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a., Fried has displacement rights to Department of Agriculture, Trade and Consumer Protection positions in the 81-05, 02-12, 02-13, 02-14, and 02-15 pay ranges.

5. Pursuant to then existent Wis. Admin. Code § ER-MRS 22.08(3)3, Fried's exercise of displacement rights does not guarantee her a position but rather places her in a layoff pool to determine which employee will ultimately be laid off.

6. Effective February 14, 2016, pursuant to the provisions of § 230.34(2)(a), Stats., layoffs of State employees were no longer seniority based but rather primarily based on job performance.

7. Claire Fried was the prevailing party as to the legal question of whether she had displacement rights, but the position of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection was substantially justified within the meaning of § 227.485(2)(f), Stats.

8. Claire Fried was the predominant prevailing party as to the legal question of whether there were positions within the Department of Agriculture, Trade and Consumer Protection as to which she could exercise displacement rights, and the position of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection was not substantially justified within the meaning of § 227.485(2)(f), Stats.

9. Claire Fried was not the prevailing party as to legal standards and process applicable to her exercise of displacement rights.

10. The amount of $14,601.19 in fees and costs is reasonable and appropriate.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

1. The Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration is hereby added as a Respondent.

2. The State of Wisconsin Department of Agriculture, Trade and Consumer Protection and the Director of the Bureau of Merit Recruitment and Selection, Division of Personnel Management, Department of Administration, shall allow Claire Fried to exercise displacement rights pursuant to the provisions of Wis. Admin. Code § ER-MRS 22.08(3) and § 230.34(2)(a), Stats., as those provisions existed on November 8, 2017.

3. The State of Wisconsin shall pay fees and costs of $14,601.19.

Signed at the City of Madison, Wisconsin, this 21st day of December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

A. Does Fried Have Displacement Rights?

Prior to July 1, 2016, § 230.34(2)(b), Stats., provided in pertinent part:

> (b) The director shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employee right of restoration or eligibility for reinstatement.

Consistent with § 230.34(2)(b), Stats., Wis. Admin Code § ER-MRS 22.08(3) was promulgated to provide employees facing lay off with "a displacing right."

As part of 2015 Wisconsin Act 150, § 230.34(2)(b). Stats. was amended effective July 1, 2016, as reflected below to among other matters strike the reference to "a displacing right."

> (b) The director shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion ~~and the exercise of a displacing right to a comparable or lower class~~, as well as the subsequent employee ~~right of restoration or~~ eligibility for reinstatement.

Wisconsin Admin. Code § ER-MRS 22.08(3) remained unchanged at the time of Fried's lay off but the State asserts that the amendments to § 230.34(2)(b), Stats., removed displacement rights as an alternative to layoff. Fried contends that the pre-July 1, 2016 version of § 230.34(2)(b), Stats., authorized but did not create a displacement right. Once that right was subsequently created by administrative rule, Fried argues the right continued so long as the rule remained in place. Fried also notes that DATCP initially advised Fried that she had displacement rights.

Although Fried to some extent argues otherwise, the words deleted by the statutory amendment clearly convey a legislative intent to revoke the Director's authority to promulgate rules that provide displacement rights. But what was the legislative intent as to the status of rules already promulgated? Did the Legislature intend that Wis. Admin. Code § ER-MRS 22.08(3) continue to be in effect until repealed? Apparently DATCP initially thought that to be true when it advised Fried post-July 1, 2016 that she continued to have displacement rights.

2015 Wisconsin Act 150 does not contain any language specifically addressing the status of existing administrative rules that had already been promulgated.[1] Given that silence and the

[1] While the State points to a Legislative Council memo in support of its position, Fried notes that the memo was issued after Act 150 was passed and thus cannot be viewed as persuasive legislative history. More importantly, *State ex rel. Kalal v. Circuit Court for Dane Cty*., 271 Wis.2d 633 (2004), makes clear that the Commission's analytical focus is to be on the statutory language itself (or the lack thereof).

plain meaning of "promulgate," the Commission concludes that Wis. Admin. Code § ER-MRS 22.08(3) continues to be in effect until repealed. Because Wis. Admin. Code § ER-MRS 22.08(3) was in effect when Fried was laid off, DATCP should have extended displacement rights to her. By failing to do so, DATCP lacked just cause to lay off Fried, and the State is ordered to extend displacement rights to her.

Because the parties disagree as to the impact of the exercise of those rights, subsequent proceedings were held.

B. What Do Fried's Displacement Rights Obligate Respondents to Do?

Fried's position at the time of her layoff was in the 02-09 pay range. If qualified to perform the work after customary orientation, she asserts that Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. entitles her to displace any less senior DATCP incumbent in the same or counterpart pay ranges to 02-09, as well as in the same or counterpart pay ranges (02-08 and 81-04) of positions she previously held. The State Respondents contend that: (1) the language of Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. excludes the 02-09 pay range from consideration; (2) there are no "same or counterpart pay ranges" applicable to the 02-08 and 81-04 pay ranges; and (3) even if there were, Fried's displacement rights would only place her in a layoff pool with no guarantee of employment.

As of Fried's November 8, 2017 layoff, Wis. Admin. Code § ER-MRS 22.08(3) provided the following:

> …
>
> **(3)** DISPLACEMENT. (a) If there is no position obtainable under subs. (1) and (2) at the same or higher level than any position obtainable under this subsection, an employee may exercise a right of displacement within the employing unit.
>
> 1. The employee may exercise the right of displacement in the order which will achieve the highest level position to which the employee has rights. If qualified to perform the work after customary orientation provided for newly hired workers in such position, an employee may exercise the right of displacement only to one of the following:
>
> a. A position in the same or counterpart pay range in with the employee had previously attained permanent status in class.
>
> b. A lower level within the employee's present classification series.
>
> c. A position in a lower class in which the employee had previously attained permanent status in class.
>
> d. A lower level within an approved progression series in which the employee had previously attained permanent status in class at a higher level.
>
> 2. If the employee has previously attained permanent status in class in a position whose classification had been affected by an action of the administrator, the employee shall immediately attain

rights to the classification which replaced the original classification of the position previously held by the employee.

3 Exercise of such displacement rights does not guarantee the employee a position in the class or subtitle selected. It only requires the employee to be included along with other employees in the class or subtitle when the layoff process as provided in s. ER-MRS 22.06 is applied to determine which employee is laid off as a result of displacement.

4. An employee who elects to exercise displacement rights has 5 calendar days from the date of written notification of impending layoff or receipt of such written notification, whichever is later, to exercise that option.

5. If there is more than one position in the same or counterpart pay range to which the employee is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employee shall first exercise the right of displacement.

(b) An employee who exercises displacement rights within the employing unit as a result of layoff immediately attains permanent status in class in the class into which the employee has been placed.

(c) An employee who exercises displacement rights shall have his or her pay determined under s. ER 29.03 (8) (c) or the compensation plan.

As to the dispute over whether Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. allows for displacement consideration of the 02-09 pay range and is applicable to Fried when she was laid off, the language of Wis. Admin. Code § ER-MRS 22.08(3)(a)1.b. provides a persuasive basis for concluding that it does not. In contrast to the "previously attained" language in Wis. Admin. Code §§ ER-MRS 22.08(3)(a)1.a., § ER-MRS 1.b. references the employee's "present classification series." Based on this difference, the language in Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. can most reasonably be interpreted as excluding the pay range an employee currently has when exercising the right of displacement. Therefore, Fried's displacement rights exclude consideration of pay range 02-09 positions.

Both parties agree that the pay ranges of 02-08 and 81-04 do fall within the scope of the "previously attained" language of Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. They disagree as to whether there are currently any DATCP positions with the "same or counterpart pay range" of 02-08 and/or 81-04 which provide displacement options to Fried.

Fried asserts that the "counterpart pay range" to 02-08 is 81-05, and correctly notes that there are 81-05 pay range positions at DATCP. Fried further contends that the "counterpart pay range" to 81-04 encompasses 02-12, 02-13, 02-14, and 02-15 pay range positions currently at DATCP. From Fried's perspective, all of these current DATCP positions therefore are displacement options.

The State Respondents contend that when determining whether a "same or counterpart pay range" position exists, the determinative starting point for analysis is the pay range of a position

held at the time of layoff rather than the pay range of any position or positions the employee previously held.

Thus, under the State's view, Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. asks whether the 02-09 pay range applicable to Fried's most recent DATCP position is a counterpart to the 02-08 or 81-04 pay ranges of the positions Fried previously held and, if so, whether there are any such current DATCP positions. Under the State's analytical view, that question is answered in the negative because there are no current 02-08 DATCP positions and the 81-04 pay range is not a counterpart to the 02-09 pay range.

The straightforward search advocated by Fried for current DATCP positions having the same or counterpart pay ranges of positions "previously attained" by Fried is consistent with the plain language of Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. The somewhat contorted search advocated by the State is not. Further, as the State concedes, the general goal of the displacement process is to find a position for the potentially displaced employee. Fried's proposed interpretation obviously produces a result more consistent with that goal. Therefore, the Commission concludes that current DATCP positions in the 81-05, 02-12, 02-13, 02-14, and 02-15 pay ranges fall within the meaning of Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a. as displacement options.

The parties disagree as to how the displacement process should work if displacement options are identified. Fried asserts that she has the right to "bump" any less senior DATCP employee holding a "displacement-type" position she is qualified to fill. The State Respondents contend that once a displacement position is identified, Fried then becomes part of a layoff pool and the question of whether she can "bump" is no longer resolved by seniority but rather primarily thru job performance considerations.

The State's position as to how the process should now unfold is specified in Wis. Admin. Code §§ ER-MRS 22.08(3)(a)3 and 5. While Fried is correct that the Wis. Admin. Code § ER-MRS 22.06 layoff process referenced in Wis. Admin. Code § ER-MRS 22.08(3)(a)3 identifies relative seniority as the basis for layoff decisions, the statutory layoff language in § 230.34(2)(a), Stats.[2] (effective February 14, 2016, prior to Fried's November 2017 layoff), has supplanted Wis. Admin. Code § ER-MRS 22.06 as the operative basis for layoff decisions. By law, comparative job performance has become the primary operative layoff standard. Therefore, the Commission rejects Fried's "right to bump" argument.

C. <u>Fried's Motion for Fees and/or Costs</u>.

Section 227.485, Stats., provides in pertinent part the following:

> **227.485 Costs to certain prevailing parties.**
>
> (1) The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case

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[2]Section 230.34(2)(a), Stats. provides:

> (a) An appointing authority shall determine the order of layoff of such employees primarily based on job performance, and thereafter, in accordance with the rules of the director, on disciplinary records, seniority, and ability.

law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act, 5 USC 504.

(2) In this section:
(a) "Hearing examiner" means the agency or hearing examiner conducting the hearing.

...

(f) "Substantially justified" means having a reasonable basis in law and fact.

(3) In any contested case in which an individual ... is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing 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.

(4) In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this section based on determinations made under this subsection.

(5) If the hearing examiner awards costs under sub. (3), he or she shall determine the costs under this subsection, except as modified under sub. (4). … The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245(5) and include an order for payment of costs in the final decision.

The State has the burden to establish that its position was "substantially justified," and to meet this burden the State must show (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. *Board of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). Losing a case does not raise the presumption that the agency was not substantially justified nor does advancing a novel but credible extension or interpretation of the law. *Sheely v. DHSS*, 150 Wis.2d 320, 338 (1989). In *Behnke v. DHSS*, 146 Wis.2d 178 (1988), the court of appeals adopted an "arguable merit" test for determining whether a governmental action had a reasonable basis in law and fact. It defined a position which has "arguable merit" as "one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." In *Sheely* at 340, the Supreme Court commented on the "arguable merit" test as follows:

> Although we disagree with the court of appeals' assessment of a reasonable basis in law and fact as being equivalent to "arguable merit," we do note that its definition of "arguable merit" is substantially similar to our comment here that a "novel but credible extension or interpretation of the law" is not grounds for finding a position lacks substantial justification.

Acknowledging the obligation to apply § 227.485, Stats., in a manner consistent with federal law when evaluating the State'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).

In this matter, there are multiple issues:

(1) As a matter of law, does Fried have displacement rights? On March 30, 2018, the Commission answered that question in the affirmative.

(2) As a matter of law, are there positions within the Department of Agriculture, Trade and Consumer Protection (DATCP) as to which Fried can exercise displacement rights? On September 13, 2018, that question was answered in the affirmative.

(3) As a matter of law, do Fried's displacement rights guarantee her a DATCP position? On September 13, 2018, that question was answered in the negative.

As reflected above as to issue (1), Fried is the prevailing party. However, in its March 30, 2018 decision (at footnote 2), the Commission concluded that the State's position was substantially justified within the meaning of § 227.485(2)(f), Stats. Fried asks for reconsideration of that determination. As reflected in the March 30, 2018 decision, the legal question posed was how to interpret legislative silence as to the status of not yet abolished administrative rules. While the Commission did not find the State's position to that legal issue to be persuasive, the State's legal position does fall within the "novel but credible" standard adopted by our Court in *Sheely*. On that basis, it continues to be the determination that no fees are owed as to this portion of the litigation.

As reflected above as to issue (2), Fried is again the prevailing party, although a partial segment of her argument regarding the scope of positions into which she had displacement rights was rejected. As reflected in the September 13, 2018 decision, the State's litigation position was "somewhat contorted" and at odds with "the general goal of the displacement process ... ." Ultimately, the State's position as to this issue did not have "sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion." Therefore, it is concluded that the State's position was not "substantially justified" as to this issue.

The post-March 30, 2018 fees and costs requested by Fried encompass both issues (2) and (3) above. As Fried is not a prevailing party as to issue (3), there needs to be an allocation of fees

and costs based on the relative importance of each issue as required by § 227.485(4), Stats. Because issue (2) has broader implications and thus importance for Fried, and given her predominant success as to this issue, it is concluded that an allocation of two-thirds (⅔) of the requested fee hours and costs is appropriate.

The State correctly points out that § 814.245(5)(a)2, Stats., limits the hourly fee rate to $150.00 unless the cost of living or limited availability of a qualified attorney justifies a higher fee rate. There is no "limited availability" assertion here but the Commission has historically adjusted the $150.00 rate based on cost of living increases. *See Walsh v. DOC*, Dec. No. 35041-C (WERC, 3/19). Doing so here produces a 2018 hourly rate of $200.78, as measured by the calculations of the Ninth Circuit Court of Appeals, and a fee award of 90.5 hours x ⅔ x $200.78 = $12,119.78. As to requested costs of $790.33, it is concluded there is sufficient itemization/documentation and application of the two-thirds (⅔) standard produces a cost award of $527.15.[3]

Given all of the foregoing, the State is ordered to pay $14,601.19 in fees and costs.

Signed at the City of Madison, Wisconsin, this 21st day of December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

[3] Utilizing this same formula, an additional award of $1,954.26 in fees related to preparation of the motion for fees and costs and response to the State's objections thereto is reasonable and appropriate.