

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JEANETTE BRAND, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0563

Case Type: PA

DECISION NO. 39897-A

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**Appearances:**

Jakob Feltham, Attorney, Hawks Quindel, 409 E. Main St., Madison, Wisconsin, appearing on behalf of Jeanette Brand.

David Makovec, Attorney, 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 Corrections.

**DECISION AND ORDER ON MOTION FOR FEES AND COSTS**

On April 7, 2023, the Wisconsin Employment Relations Commission issued a Final Decision and Order which concluded that the Department of Corrections did not have just cause to discharge Brand and ordered her reinstated to her former position and made whole with interest.

On April 25, 2023, Attorney Feltham filed a petition for attorneys' fees and costs totaling \$7,525.00. On April 27, 2023, Attorney Makovec advised the Commission he did not object. On June 7, 2023, Examiner Scott issued a Proposed Decision denying the motion for fees and costs. No objections were filed by the parties by the deadline given of June 12, 2023.

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

**CONCLUSIONS OF LAW**

1. Jeanette Brand is the prevailing party within the meaning of Wis. Stat. § 227.485(3).

2. The position of the State of Wisconsin Department of Corrections before the Wisconsin Employment Relations Commission as to the discharge of Jeanette Brand was substantially justified within the meaning of Wis. Stat. § 227.485(2)(f).

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

**ORDER**

Jeanette Brand's motion for fees and costs is denied.

Issued at Madison, Wisconsin, this 26<sup>th</sup> day of June 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

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

The Commission concludes that although Brand is a “prevailing party” within the meaning of Wis. Stat. § 227.485 (3), DOC was “substantially justified” within the meaning Wis. Stat. § 227.485 (2)(f) regarding the position it took before the Commission as to just cause for Brand’s discharge. Therefore, her request for costs and fees is denied.

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*, 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.

*Id.* at 340.

Here, the Commission concludes that Brand’s admission that she misrepresented that she was injured by an inmate satisfies the “reasonable basis in truth for the facts alleged” portion of DOC’s burden.

As to the “reasonable basis in law for the theory propounded” portion of the DOC’s burden, the Commission is satisfied that DOC’s just cause for a skip in progression or a serious misconduct theory was reasonable. The DOC found that Brand’s conduct violated multiple work rules, and ultimately determined the conduct rose to the level of serious misconduct. The DOC attempted to issue discipline consistent with discipline previously imposed for instances of falsification of agency records and making false statements.

Lastly, as to the “connection between the facts alleged and the legal theory advanced”, the DOC’s application of the admitted facts to a just cause standard meets the “connection” requirement.

Given all of the foregoing, Jeanette Brand's motion for fees and costs is denied.

Issued at Madison, Wisconsin, this 26<sup>th</sup> day of June 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman