

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

GREG M. DOYLE, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, *

Respondent. *

Case No. 86-0192-PC *

* * * * *

DECISION
AND ORDER
ON
MOTION
FOR
REHEARING

This matter is before the Commission on appellant's motion for rehearing filed February 20, 1989. By way of background, this case is an appeal pursuant to §230.44(1)(a), Stats., of an examination. On November 3, 1988, the Commission entered and served an "INTERIM DECISION AND ORDER" in effect granting summary judgment to appellant on the basis of the fact that respondent had admitted as a matter of law, pursuant to §804.11, Stats., the invalidity of the subject examination. The Commission's order included the following: "a decision finally disposing of the instant case will not be issued until appellant has an opportunity to file a motion for costs [pursuant to §227.485(3), Stats.] and the Personnel Commission issues a decision on such motion if one is filed." In a letter to appellant's counsel dated November 3, 1988, and accompanying the foregoing interim decision and order, the Commission advised: "...the prevailing party has 30 days after service of the decision to submit an itemized application for fees and other expenses...." On January 10, 1989, appellant filed a "NOTICE OF MOTION AND MOTION TO TAX ATTORNEYS FEES," which respondent opposed. On February 9, 1989, the Commission entered a decision and order

denying the aforesaid motion for attorney's fees on the ground that it had not been filed within 30 days after service of the November 8, 1988, interim decision as required by §227.485(5), Stats.

In his motion for rehearing, appellant argues that the Commission's denial of the motion for attorney's fees was erroneous in two respects. First, he asserts that he had filed a request for fees as part of his "Motion for Judgment" filed April 6, 1988, and therefore there was a timely request for attorney's fees before the Commission. While in its November 3, 1988, decision the Commission referred to appellant's motion for judgment including a request for attorney's fees,¹ the only reference by appellant to attorney's fees was contained in appellant's brief in support of the motion for judgment, filed May 27, 1988, which included the following:

The following Order is appropos:

IT IS ORDERED that Appellant's "MOTION FOR JUDGMENT" be and the same hereby is granted together with such other relief as may be appropriate, including but not limited to costs, disbursements and attorneys' fees.

There is absolutely no reference in the "MOTION FOR JUDGMENT" filed on April 6, 1988, to attorney's fees or costs. Therefore, even assuming for the sake of argument that if appellant had filed a "premature" motion for costs there would have been substantial compliance with §227.485(5), Stats., a bare reference in a brief that the final order should include an award of fees and costs cannot be equated with an application for fees under §227.485(5), Stats., which refers to:

¹ The Commission noted that this request was premature but could be renewed after a decision on the merits.

"...an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed...."

If appellant's position were carried to its logical extreme, it would mean a request for fees and costs in the "remedy requested" section of an initial appeal would excuse noncompliance with the filing requirements set forth in §227.485(5), Stats.


Appellant's second asserted ground for error concerns the Commission's conclusion that the 30-day filing requirement under §227.485(5), Stats., is mandatory rather than directory. Appellant cites several Wisconsin cases interpreting time requirements in other statutes in support of his contention. What appellant completely ignores is the provision in §227.485(1), Stats., that interpretations of §227.485 are to be guided by "federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act [EAJA], 5 USC 504." The applicable federal case law consistently has interpreted the 30-day time limit under the EAJA as jurisdictional and mandatory in nature. See, e.g., Monark Boat Co. v. National Labor Relations Board, 708 F. 2d 1322, 1326-1327 (8th Cir. 1983); Action on Smoking and Health v. Civil Aeronautics Board, 724 F. 2d 211, 225 (D.C. Cir. 1984); Columbia Manufacturing Corp. v. NLRB, 715 F. 2d 1409, 1410 (9th Cir. 1983). Given the foregoing provision in §227.485(1), Stats., and the absence of any Wisconsin authority specifically interpreting §227.485(5), Stats., that is contrary to the federal authority on this point under the EAJA, the Commission is constrained to follow the foregoing federal caselaw.

In conclusion, there being no error of fact or law in the Commission's February 8, 1989, decision and order, or other basis for rehearing, the motion for rehearing must be denied.

ORDER

Appellant's motion for rehearing filed February 20, 1989, is denied.

Dated: March 17, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

AJT:rcr
DPM/2


GERALD HODDINOTT, Commissioner

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