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GEORGE SHOWSH, *

Appellant, *

v. *

Secretary, DEPARTMENT *

OF AGRICULTURE, TRADE AND *

CONSUMER PROTECTION, *

Respondent. *

Case No. 87-0201-PC *

* * * * *

RULING
ON
PETITION
FOR
REHEARING

On November 28, 1988, the Commission issued an interim decision and order in the above matter which adopted, with certain amendments, the proposed decision and order issued by the examiner and reduced the appellant's five-day suspension to a two-day suspension. In a decision and order issued on January 26, 1989, the Commission denied the appellant's motion for costs filed under \$227.485, Stats.¹ On February 14, 1989, the appellant filed a petition for rehearing. Both parties subsequently filed additional arguments relative to the petition. The appellant's petition for rehearing alleges material errors in both the November 28th interim decision and in the January 26th decision and order.

Interim Decision and Order Issued November 28, 1988

The appellant's initial contention is that the Commission was required to give deference to the conclusions reached by the hearing examiner

¹ The effect of the January 26th decision was that of a final decision and order. One effect of the January 26th decision was also to make the November 28th decision final relative to the determinations of due process and just cause for the suspension imposed against the appellant.

relative to the existence or non-existence of a predisciplinary hearing.

The decision as to whether a predisciplinary hearing was held or not rest [sic] on the evaluation of the testimony presented. Since all of the evidence presented on this issue was verbal this is a issue of creditability [sic].

The members of the Personnel Commission who rendered the final Order and Decision did not have the opportunity to observe the demeanor of the witnesses, and pass first hand on their creditability. Therefore they should defer to the hearing examiner in this matter. The hearing examiner did not find the testimony creditable that a predisciplinary hearing occurred. The members of the Commission who did not observe and hear this testimony should be bared [sic] from over turning the hearing examiner on the issue of creditability. Petition, page 2.

The predisciplinary meeting being referred to by the appellant was described by the hearing examiner in finding of fact 21 in his proposed decision and order dated August 23, 1988:

21. Sometime in October 1987, Mr. Dennison [appellant's supervisor] met with appellant. He told appellant that there was a possibility that disciplinary action would ensue, although he did not state specifically that appellant was the target of the possible discipline. Mr. Dennison told appellant that it was a meeting to gather as much information as possible, and asked him what he had to say about his involvement in the incidents or "situations around the June 29th and July missed inspections." He did not advise appellant he had a right to be represented at said meeting.

In his proposed decision, the examiner went on to conclude that this October 1987 meeting did not constitute a constitutionally adequate predisciplinary hearing. In turn the examiner would have rejected the five-day suspension.

After the proposed decision was issued and the parties were provided an opportunity to file objections thereto, the Commission adopted the proposed findings of fact, except that findings 9 and 10 were amended to more accurately reflect the record, but then went on to reach a different conclusion as to the adequacy of the predisciplinary hearing:

However, while the Commission concludes that the five day suspension was subject to the protection of the due process clause and required some kind of pre-deprivation procedure under Cleveland Bd. of

Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), it also concludes the proposed decision errs in its determination that the predisciplinary hearing here provided was inadequate. Given the limited nature of the property interest deprivation involved, and the availability of a postdisciplinary trial-type hearing, it is not necessary that the predisciplinary hearing be at all extensive. Appellant was given an opportunity to meet with and explain to his supervisor what he knew about the matters in controversy, after having been advised that disciplinary action might result. While it is possible that this meeting might have been inadequate under Loudermill for a pretermination hearing, it at least ensured that management did not act without knowing appellant's version of the underlying facts. Given the limited nature of the property interest deprivation, and the availability of a full hearing after appellant appealed the suspension, there was no denial of appellant's right to procedural due process in what occurred.

The Commission substituted its conclusions of law for those set forth in the proposed decision.

Had the Commission modified the examiner's findings of fact as to what occurred during the October 1987 meeting between the appellant and his supervisor, the appellant's argument about deference to the examiner would be relevant.² However, here the Commission adopted the examiner's finding and reached a different legal conclusion as to whether what occurred met the due process requirements established by Loudermill (supra). As a result, the appellant's contention that the examiner's observation as to witness credibility is inapplicable.

The appellant also argues that the Commission erred in concluding that the October, 1987 meeting between the appellant and his supervisor was a constitutionally adequate predisciplinary hearing. Before issuing its November 28th interim decision, the Commission considered similar arguments

² In Pieper Elec., Inc. v. LIRC, 118 Wis. 2d 92 (Ct. of App., 1984) the court of appeals held that "[w]here the credibility of a witness is at issue and a commission reverses its examiner and makes contrary findings [of fact]," the commission must determine the examiner's impression of the material witnesses and must explain its disagreement with the examiner.

set out in the proposed decision and order. The Commission perceives no basis for altering its conclusion that due process was provided the appellant here.

Decision and Order on Motion for Costs Issued January 26, 1989

In its November 28th ruling, the Commission specifically indicated that its decision was being issued as an interim decision so the prevailing party would have an opportunity to submit an application for fees and costs pursuant to §227.485, Stats. On December 22nd, the appellant filed an application for attorney's fees and costs that was accompanied by an affidavit by appellant's counsel and an itemization of hours. On January 12, 1989, the respondent filed objections to appellant's application. Included in its objections were arguments that the respondent was substantially justified in taking its position and that the appellant had failed to assert that his annual income met the limitations imposed in §227.485(7), Stats.

In its January 26, 1989 decision and order, the Commission denied the appellant's motion for costs because the Commission concluded that the respondent agency's position was "substantially justified" under §227.485(3), Stats. The Commission went on to note that there was an additional reason for denying the motion:

Pursuant to §227.485(7), Stats., an individual is not eligible to recover costs "if the person's reported federal adjusted gross income was \$150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case...." Since appellant provided neither an assertion, an affidavit, nor any evidence to this effect with his motion, and did not reply to respondent's objection on this ground, the Commission must conclude that appellant is not eligible under this subsection.

Appellant now contends that it was the respondent who had the burden of establishing that the appellant earned \$150,000 or more, rather than the

appellant who had the burden of establishing that he earned less than \$150,000.³ The respondent correctly notes that it has no way of determining how much income the appellant derives from sources other than through his employment with the respondent. Even if the appellant did not have a responsibility, at the time he filed his motion for fees and costs, to file an affidavit setting forth his federal adjusted gross income, he clearly had such a responsibility once the respondent raised appellant's income as an issue. The appellant was the party seeking the fees and costs and was also the only party in position to provide the information to establish eligibility under the law.

The appellant contends that because neither the Equal Access to Justice Act (§227.485, Stats.) nor the letter from the Commission setting forth the schedule for filing the motion for costs specifically established a period for the appellant to respond to respondent's January 12th objections, his failure to file a response should not "be held against" him:

If the Personnel Commission had unresolved issues after the filing of papers from both parties, it has within its power the right to call for a motions hearing and have the parties argue to those issues.
Petition, page 4.

The appellant's argument assumes that the Commission could perceive a factual dispute between the parties. However, the appellant's motion for fees and costs made no mention of the \$150,000 requirement and the appellant failed to indicate any disagreement with the respondent's statement that the appellant had failed to provide any proof of eligibility

³ Appellant's contention relates only to the secondary basis on which the Commission denied his motion for costs. None of the appellant's arguments relate to the primary basis, the conclusion that the respondent's action was "substantially justified."

under the requirement. There was no indication of any "unresolved issues" and the fact that §227.485(5), Stats., does not specifically provide for a reply by the party filing a motion for costs does not preclude such an opportunity upon request. Here, there was no such request nor any indication of disagreement with the respondent's objections.

ORDER

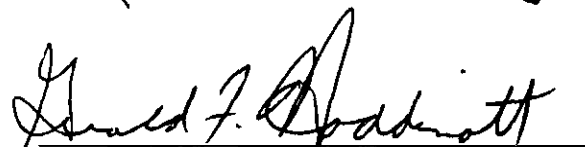
Appellant's petition for rehearing is denied.

Dated: March 14, 1989 STATE PERSONNEL COMMISSION

KMS:rcr
DPM/2


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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