

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

KAREN CHRISTOFFERSON,
CLARA DAVISON,
JANE FISCHER,
JUDITH LEMBRICH,
MARSHA McKINNON,
SUE SCHERER,
LYNN ZASPEL,

Appellants,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
President, UNIVERSITY OF
WISCONSIN SYSTEM (Whitewater),

Respondents.

Case Nos. 90-0058, 0059, 0060,
0061, 0062, 0063,
0064-PC

* * * * *

DECISION
AND
ORDER

This matter is before the Commission for consideration of a Motion for Costs filed by appellants pursuant to §227.485(2)(f), Stats. Pursuant to this statutory provision, the Commission must award appellants their costs unless it finds that respondent was "substantially justified in taking its position." Section 227.485(2)(f), defines "substantially justified" as "having a reasonable basis in law and fact." In Escalada-Coronel v. DMRS, Case No. 86-0189-PC (4/12/87), the Commission cited with approval the following language from Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N. D. Ill. 1982):

The standard created by this statute is a new one, not in line with either the common law exceptions to the American rule restricting the award of attorneys' fees, or other statutory standards allowing fee awards in certain cases against the United States. It was intended to serve as a 'middle ground' between an automatic award of fees to a successful party and permitting fees only where the government's position was arbitrary and frivolous. . . .

* * *

... The standard falls in between the common law 'bad faith' exception and an automatic award of attorney's fees to prevailing parties. (emphasis added)

The instant case involves the reallocation of appellants' positions as a result of a survey of nursing positions. While the Commission has found on the basis of a de novo hearing that the appellants' positions are more correctly classified at the NC 3 level as opposed to the NC 2 level, this is not equivalent to a conclusion that either respondent's decision to reallocate these positions to the NC 2 level or to contest these appeals did not have a reasonable basis in fact or in law. (Manthei et al. v. DER, Case Nos. 86-0116, etc.-PC (1/13/88))

The application of the classification specifications to the duties and responsibilities of appellant's positions did not lead to an obvious result. Not only were these positions not specifically identified in the position standard for the NC series but the language of the position standard was general and required the exercise of discretion in its interpretation and application.

For example, although the direct care and patient population issues appeared clear cut vis a vis appellants' positions, the issues relating to the consultant component and to the planning/programming/ research component were not clear cut. In regard to the consultant component, although it was clear that student health nursing is a nursing specialty, it was not clear that the consultant duties performed by appellants were NC 3 level duties and it was not clear that these duties were comparable to the consultant duties performed by the student health nurses at the UW-Madison. For example, although appellants and the UW-Madison nurses both serve as preceptors to student nurses, appellants do so for student nurses at a technical school whereas the UW-Madison nurses do so for student nurses at the UW-Madison. It was not clear

that these functions are equal in view of the more rigorous and advanced nursing program provided at the college level. In addition, appellants serve as a resource for a much smaller health service and community than do the UW-Madison nurses. It was not clear that these functions are equal in view of the potential for greater variety and complexity when dealing with a larger mix of people and their health problems.

In regard to the planning/programming/ research component, it was clear that appellants have independent responsibility for performing tasks in this area but it was not clear that the tasks themselves were NC 3 level tasks or were equal to such tasks performed by the student health nurses at the UW-Madison. For example, it was not clear that a quality assurance or unit planning function performed for a smaller health service is equal to a quality assurance or unit planning function performed for a much larger health service if for no other reason than the possible complexities created in this area by volume alone. It was not clear that educational programming for a small campus is equal to such programming for a larger campus if for no other reason than the larger numbers of people who have to be reached.

Although most of these issues were resolved in appellants' favor, the results were not obvious but required, as stated in the Manthei case cited above, "weighing evidence, opinion, and argument." The Commission concludes on the foregoing basis that appellants have failed to show that the actions of respondent in this regard were not substantially justified within the meaning of §227.485, Stats.

Since the Commission concludes it is inappropriate to award fees under §227.485, Stats., it will not address the issues that have been raised concerning specific items of fees and costs.

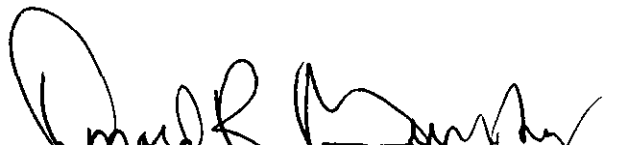
Order

Appellants' Motion for Costs is denied.

Dated: February 7, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Karen Christofferson
1010 East Florence
Whitewater, WI 53190

Clara Davison
218 South Prince Street
Whitewater, WI 53190

Jane Fischer
237 North Sanborn Avenue
Jefferson, WI 53549

Judith Lembrich
544 East Ogden Street
Jefferson, WI 53549

Marsha McKinnon
716 West Peck
Whitewater, WI 53190

Sue Scherer
226 North Franklin Street
Whitewater, WI 53190

Lynn Zaspel
1436 Lakeview Drive
Ft. Atkinson, WI 53538

Constance P. Beck
Secretary, DER
137 East Wilson Street
P.O. Box 7855
Madison, WI 53707

Kenneth Shaw
President, UW
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706