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WILLIAM R. HIGGINS,
 Appellant,

v.

Executive Director, WISCONSIN
 RACING BOARD [Chairperson,
 WISCONSIN GAMING COMMISSION],
 Respondent.

Case No. 92-0020-PC

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DECISION AND
 ORDER ON
 MOTION FOR FEES
 AND COSTS

Previously appellant was before the Commission on a claim of unlawful termination of employment. After hearing, the Commission issued an Interim Decision and Order, dated January 11, 1994, rejecting respondent's decision terminating appellant and remanding the matter to respondent for action in accordance with the decision. The Commission retained jurisdiction to consider any motion for costs as allowed by §227.485, Wis. Stats. This matter is now before the Commission on appellant's timely petition for costs pursuant to §227.485 and for final disposition of this appeal. Briefs on appellant's motion were filed by the parties.

DECISION

On February 4, 1994, appellant filed a Petition for Attorney's Fees, Costs and Disbursements pursuant to §227.485, Wis. Stats. Section 227.485(3) provides:

In any contested case in which an individual, a small nonprofit corporation or a small business 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.

Section 227.485(2)(f), Stats., defines "substantially justified" as "having a reasonable basis in law and fact."

In Escalada-Coronel v. DMRS, Case No. 86-0186-PC (April 2, 1987), this Commission said that the state agency had the burden of affirmatively proving that it was "substantially justified" in its position or that "special circumstances exist(ed) that would make the award unjust," using a standard of proof which falls between arbitrary and frivolous action and automatic award to the prevailing party. The Commission also said that it would analyze the state agency's action at both the prelitigation and litigation stage.

As indicated in its decision on the merits dated January 11, 1994, the Commission believes respondent terminated appellant primarily for allegedly violating Racing Board rules to correct a wrong order of finish in a race and to order a payout to the correct winners. In the decision, the Commission clearly disagreed with respondent's interpretation of Racing rule Race 8.14, claimed to have been violated by appellant. The Commission said that Race 8.14 addresses the mechanical incorrect posting of payout figures, not a steward's officially posted incorrect call of the order of finish of a race, and that, "the plain language of the rule does not provide for a presiding steward to unilaterally order payouts to the actual winner after posting 'official' winners of a race." Further, the Commission indicated that respondent never advised appellant of its interpretation of Race 8.14, never told appellant the call was wrong until he was suspended from employment and never gave appellant the opportunity to correct the "wrong" call under its interpretation of the board rules.

While the interpretation of Race 8.14 may be debated, it is doubtful that it could be interpreted as respondent contends. But given that, respondent never explains why it never advised appellant of its position regarding the correct order of finish of the race and provide him a chance to follow its rules as it interpreted them. This failure by respondent is critical to the Commission's conclusion that respondent was not "substantially justified" in its position taken in this proceeding.

Other than contending that appellant is not entitled to any award of attorney's fees, respondent made no objection to appellant's motion for costs. Appellant requested attorney fees and costs for work performed by the law firm of Swartz, Tofte, Nielsen and Demark, S.C. as follows:

Total Attorney Time on Case: 10.60 hrs. @ \$100.00 per hour	\$1,060.00
Total Staff Time on Case: 3.40 hrs.	0.00
Total Cost of Miscellaneous Expenses	<u>5.47</u>
TOTAL	\$1,065.47

Appellant's request for attorney fees and costs for the law firm of Hanson, Gasiorkiewicz & Weber, S.C. is as follows:

Total Attorney Time on Case: 76.00 hrs. @ \$100.00 per hour	\$7,600.00
Total Costs Advanced:	<u>1,032.61</u>
TOTAL ATTORNEYS FEES & COSTS:	\$8,632.61

Section 227.485, Wis. Stats., states that costs to the prevailing party in a contested case shall be determined by the hearing examiner "using the criteria specified in §814.245." Section 814.245(5), Wis. Stats., authorizes:

(a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:

1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.

2. Attorney or agent fees may not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.

(b) Any other allowable cost specified under s.814.04(2).

Addressing the requested attorney fees, appellant states that Attorney Mark F. Nielsen and Attorney Robert K. Weber number among the few attorneys in the Racine community experienced in litigating employment cases or practicing before the Commission and that the rate of \$100 per hour was determined to be reasonable in the Racine community by the Labor and Industry Review Commission in Racine Ed. Assoc. v. Racine Unified School District, ERD Case No. 8650279 (1988).

The Commission believes appellant has submitted insufficient information to justify fees greater than the \$75 per hour fee specified in §814.245(5), Stats. The information available to the Commission does not reveal that either Attorney Nielsen or Attorney Weber had extensive, if any, experience before the Commission prior to being retained for this case; or that there was a dearth of attorneys in the Racine area or the nearby Milwaukee

area with some general expertise in practicing employment law. Finally, the cited LIRC decision dealt with the award of fees under the Fair Employment Act, not the Equal Access to Justice Act (§227.485, Stats.).

Other allowable costs under §§227.485 and 814.245, Stats., are specified in §814.04(2). It provides:

(2) **DISBURSEMENTS.** All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified copies of papers and records in any public office; postage, telegraphing, telephoning and express depositions including copies; plats and photographs, not exceeding \$50 for each item; an expert witness fee not exceeding \$100 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

The Commission believes that the costs requested by appellant are properly included within the scope of this section of the statutes except for: Kleen Kopy Kwikly (copy of hearing transcript), \$23.38; Cora White Enterprises (hearing transcript), \$404.63; copy of personnel file from Racing Board, \$18.75; and Centurion Investigations, \$115.00.

ORDER

Appellant is awarded fees and costs as follows:

Schartz, Tofte, Nielsen & Demark, S.C.

Mark F. Nielsen	Fees:	\$795.00
	Costs:	<u>5.47</u>
	Total	\$800.47

Hanson, Gasiorkiewicz & Weber, S.C.

Robert K. Weber	Fees:	\$5,700.00
	Costs:	<u>494.23</u>
	Total	\$6,194.23

The Commission's January 11, 1994, interim decision and order is finalized.

Dated: March 31, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

William Higgins
5210 65th Street
Kenosha, WI 53142

John Tries
Chairperson, WGC*
P.O. Box 8979
Madison, WI 53708

* Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Racing Board with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)