

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JOEL J. OLSON, EARL GUTZMER,
and ROGER W. BECK,

Appellants,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case Nos. 92-0071-PC
92-0081-PC
92-0089-PC

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RULING ON
REQUEST TO AMEND
AND TO SUBMIT FURTHER
ARGUMENT REGARDING
APPLICATION FOR
FEES AND COSTS

This matter is before the Commission to consider appellant's application for fees and costs pursuant to §227.485, Stats. This case involves consolidated appeals of respondent's decisions to reallocate appellants' positions to Maintenance Mechanic 2 (MM 2). Appellants contended their positions should have been reallocated to either MM 3 or Heating, Ventilating, Air Conditioning (HVAC) - Specialist. In its September 9, 1994, substantive decision, the Commission entered the following order:

Respondent's action of reallocating appellants' positions to MM 2 rather than MM 3 or HVAC Specialist is affirmed in part (denial of HVAC Specialist classification) and rejected in part (denial of MM 3 classification), and this matter is remanded for action in accordance with this decision.

Appellants filed their application on October 7, 1994, and respondent filed its response on October 13, 1994. Respondent asserted that appellants' fee application was fatally defective because it did not establish that appellants met the maximum income criterion in §227.485(7), Stats., and that for various other reasons the application should be denied in whole or in part. On October 24, 1994, appellants filed a proposed amendment to their application, and a request to submit a reply to respondent's brief in opposition to their application. Respondent, having anticipated this type of request, had already stated in its response to the application that it would object to such a request.

Section 227.485(5), Stats., provides for the submission of an application for costs within 30 days after service of the proposed decision, and for the

submission of a response within 15 working days of respondent's receipt of the application. The statute does not address the subject of amendments or replies. In the Commission's opinion, this statutory framework should not be interpreted as prohibiting either amendments or replies. As appellants point out, the statute does not say anything about the need to submit proof that the applicant's income is below the \$150,000 statutory maximum, but merely provides that the application shall include "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." In Showsh v. DATCP, 87-0201-PC (3/14/89), the Commission noted that: "[e]ven 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 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." A party applying for fees and costs under §227.485 may not be aware in advance of what respondent's contentions in opposition will be until he or she sees the response,¹ and he or she should have the opportunity to reply.

This conclusion is also supported by a comparison of §227.485(5), Stats., and 5 USC 504(2), the federal law upon which the former provision was modeled, see §227.485(1). The federal law specifically provides for an application for fees and costs which "shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement ... [and] shall also allege that the position of the agency was not substantially justified." Section 227.485(5), Stats., provides only for "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." The omission of the federally mandated requirements from the state law strongly

¹ While §227.485(5), Stats., requires that the prevailing party make the first submission, the losing party/agency has the burden of establishing that its position was substantially justified, see Bracegirdle v. Board of Nursing, 159 Wis. 2d 402, 425, 464 N.W. 2d 111 (Ct. App. 1990).

suggests that the legislature did not intend that this information is required in the initial application.

ORDER

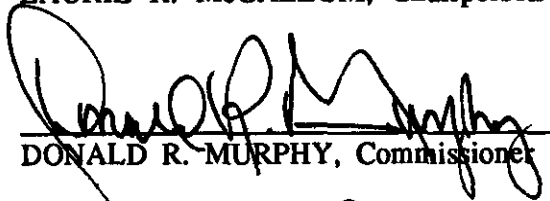
Appellants will have 10 days from service of this order to serve and file a reply to respondent's response to their fee application. Respondent will have 7 days thereafter in which to serve and file any further reply. The appellant's proposed amendment to the fee application is granted.

Dated: December 5, 1994 STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

AJT:rcr



DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner