

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NANCY FULK, CHARLES JAGEMANN,
WILLIAM WALBRUN, LOUIS FUSCO,
MARK BRIGGS, KENNETH MILLER,
JUDITH HEINE and ALLAN CREVIER,

Appellants,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case Nos. 95-0004-PC, 95-0005-PC
95-0007-PC, 95-0008-PC
95-0009-PC, 95-0010-PC
95-0011-PC, 95-0012-PC

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RULING ON APPELLANTS'
MOTION FOR FEES & COSTS

Appellants' appeals were upheld by the Commission by Interim Decision and Order, dated April 4, 1996. The Commission retained jurisdiction to consider any motion for costs as allowed by s. 227.485, Stats. This matter is now before the Commission on appellants' timely motion for costs and for final disposition of these appeals. The parties filed written arguments, with the last argument filed on May 21, 1996.

DISCUSSION

Appellants' petition for costs is governed by s. 227.485, Stats., the pertinent portion of which is shown below:

(3) 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. (Emphasis added.)

Section 227.485(2)(f), Stats., defines "substantially justified" as "having a reasonable basis in law and fact". In Sheely v. DHSS, 150 Wis.2d 320, 337, 442

N.W.2d 1 (1989), the court adopted the analysis set forth in Phil Smidt & Son, Inc. v. NLRB, 810 F.2d 638, 642 (7th Cir., 1987):

To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

DER demonstrated a reasonable basis in truth for the facts alleged. There were few disputed facts for hearing despite the many relevant facts as recited in the Proposed Decision and Order (PDO), pars. 1-26. Some exceptions exist regarding DER's understanding of the duties of the Parole Board (as noted in par. 19)¹ and DER's understanding of the 1988 changes to appellants' positions (as noted in par. 26)². Such misunderstandings occurred despite the efforts of DER's classification expert who (prior to issuing her denial of appellants' reallocation request) consulted with appellants and members of the Parole Board to gain an understanding of their job duties. The Commission had the benefit of 4 days of hearing to gain an understanding of these matters, an opportunity which DER's classification expert did not have.

DER demonstrated a reasonable basis in law for their legal theories. DER's main legal theories had a reasonable basis in law, such as DER's distinction between "release" and "parole" decisions based upon s. 301.01(2), Stats. It was only with the benefit of hearing evidence (previously unknown to DER) which persuaded the Commission that professionals in the field of

¹ Par. 19 of the PDO, is shown below in pertinent part:

Prior to the hearing in this matter, Leean White thought that members of the Parole Board and Parole Commission only performed parole reviews for adults. . .

² Par. 26 of the PDO, is shown below:

DER did not fully understand the 1988 change which resulted in appellants' positions acting as chair of the program review process. (Citation omitted.) Initially, appellants' positions served as coordinator of the program review process which required the appellants to be more involved with the provision of direct services to JOs. The 1988 change from coordinator to meeting chair further removed appellants' positions from duties which could be characterized as provision of direct social services. This coordinative function was assumed by existing SSS positions.



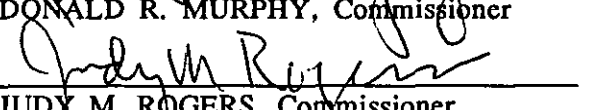
criminal law equated the two terms, despite the noted statutory provision. Furthermore, this case involved application of outdated position standards where the legal principles are not clear cut or well-defined by precedent.

DER demonstrated a reasonable connection between the facts alleged and the legal theory advanced. DER's position would have been much stronger (and perhaps successful) if the hearing evidence had supported DER's understanding of the facts prior to hearing.

ORDER

The appellants' motion for costs is denied. The Commission's April 4, 1996, interim order is finalized as the Commission's final disposition of this matter.

Dated May 28, 1996.


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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. 2/3/95