

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILLIAM POWELL, Appellant,

v.

Director, OFFICE OF STATE EMPLOYMENT RELATIONS, Respondent.

Case 718
No. 66109
PA(der)-150

Decision No. 31932

Appearances:

William Powell, appearing on his own behalf.

David Vergeront, Chief Legal Counsel, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Office of State Employment Relations.

ORDER DENYING MOTION FOR REIMBURSEMENT OF FILING FEE

This matter, which arises from a decision to reallocate Mr. Powell's position, is before the Wisconsin Employment Relations Commission (the Commission) on the Appellant's request that the Commission refund his filing fee of \$50. The final communication relating to the request was submitted on November 7, 2006.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Respondent reallocated the Appellant's position to the new classification of Facilities Maintenance Specialist, effective June 25, 2006.

2. Mr. Powell filed an appeal with the Commission on July 21, 2006, contending that his position was better described at the Facilities Maintenance Specialist – Advanced classification. He submitted a bank check in the amount of \$50 as payment of the filing fee and the Commission deposited his check.

3. The Commission convened a prehearing conference with Mr. Powell and Respondent's representative on August 18, 2006. The parties established an issue and subsequently scheduled an expedited arbitration for November 2, 2006.

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4. On October 4, Respondent's representative advised the Commission that OSER had agreed to allocate Mr. Powell's position to the Facilities Maintenance Specialist - Advanced level. As a consequence, the Commission cancelled the scheduled arbitration.

5. Mr. Powell received documentation of the reallocation on October 24 and informed the Commission that "the arbitration meet can be removed. [H]owever I would like to make [a] motion to recoup my \$50.00 [filing] fee."

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

1. The Commission lacks the authority to return the statutory filing fee to Mr. Powell.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Appellant's motion is denied and the Commission will hold the matter in abeyance for a period of 20 days.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of November, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

OSER (Powell)

**MEMORANDUM ACCOMPANYING ORDER DENYING
MOTION FOR REIMBURSEMENT OF FILING FEE**

This appeal arises from OSER's decision to reallocate Mr. Powell's position to the Facilities Maintenance Specialist classification. More than two months after the Appellant had filed his appeal and paid the \$50 filing fee, OSER reached the conclusion that Appellant's position was better described at the higher classification of Facilities Maintenance Specialist – Advanced, which was the level that Mr. Powell was seeking. Once he had received documentation of OSER's revised classification action, Mr. Powell indicated that there was no reason to proceed with the case other than to recoup the \$50 filing fee from the Commission.

The Commission is required by Sec. 230.45 (3), Stats., to establish a schedule of filing fees for certain types of appeals:

The commission shall promulgate rules establishing a schedule of filing fees to be paid by any person who files an appeal under sub. (1)(c) or (e) or s. 230.44(1)(a) or (b) with the commission on or after the effective date of the rules promulgated under this subsection. Fees paid under this subsection *shall be deposited* in the general fund as general purpose revenue—earned. (Emphasis added.)

The administrative rule (Sec. PC 3.02, Wis. Adm. Code) that applies the statute has been in effect since 1996 and sets the fee at \$50.

There is no dispute that Mr. Powell invoked the Commission's jurisdiction under Sec. 230.44(1)(b) to review the decision by the Director of the Office of State Employment Relations to reallocate his position to the newly established classification of Facilities Maintenance Specialist by filing his appeal on July 21, 2006 accompanied by a bank check for \$50. The Commission deposited the fee and convened a prehearing conference before OSER reached the conclusion that Mr. Powell's position was better described at a higher classification level. OSER subsequently reallocated his position to Facilities Maintenance Specialist – Advanced.

While 230.45(3) requires the Commission to deposit the filing fee, there is no corresponding language in either the statute or the related administrative rules to indicate that the fee is refundable. Instead, the administrative rule specifies that “. . . the commission may take no action to resolve an appeal for which the payment of a fee is required until the commission receives the fee. . . .” PC 3.02(2). In other words, the Commission had no authority to convene the August 18 prehearing conference unless Mr. Powell had already paid the fee.¹ Given the absence of any authority in either the statutes or the rules for the Commission to repay the filing fee to an appellant after a successful appeal, Mr. Powell's request for reimbursement from the Commission must be denied.

¹ The Commission deposited the fee shortly after it was received on July 21.

The Appellant contends that his request to recoup the fee is made under Sec. 227.485, Stats. That statute, commonly referred to as the Equal Access to Justice Act (EAJA), is a means for a prevailing party to obtain fees/costs *from "the state agency that is the losing party."* Sec 227.485(3). OSER, rather than the Commission, is the state agency that is a party to Mr. Powell's appeal. Consequently, Mr. Powell may not rely on the EAJA to recoup the fee from the Commission.

Under those circumstances where the state agency that is the party to an appeal has not been substantially justified in taking its position, the filing fee is a cost that may be recovered under the EAJA because the fee falls within the category of all "necessary fees . . . allowed by law." Sec. 814.04(2), Stats.² BROOKE V. UW & DER, CASE NO. 99-0034-PC (Pers. Comm. 5/15/00) In addition, fees may be awarded under the EAJA even where the case is settled without going to hearing. KLEMMER V. DHFS, CASE NO. 97-0054-PC (Pers. Comm. 4/8/98).³ In light of the fact that the Appellant is appearing *pro se* in this matter, the Commission will defer dismissing the appeal for a period of 20 days in order to give Mr. Powell an opportunity, should he wish to do so, to recast his request for reimbursement of his filing fee as a request for reimbursement *from OSER*, rather than from the Commission. He is provided the same time period to supply any additional information sought by 227.485.

Dated at Madison, Wisconsin, this 20th day of November, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

² Pursuant to 227.485(5), the criteria to be used for determining the amount of costs to be awarded to the prevailing party are specified in 814.245(5), a subsection that refers, in turn, to 814.04(2).

³ The appeal in KLEMMER arose from a suspension. After the appeal had been filed, the employing agency made a settlement offer to rescind the letter of discipline if the appellant accepted a voluntary demotion. Ms. Klemmer took the voluntary demotion and respondent withdrew the suspension but sought attorneys fees and costs. Respondent moved to dismiss the appeal as moot. The Commission found that while the suspension that was the subject of the appeal was a moot issue, Ms. Klemmer was entitled to claim costs under the EAJA. In a later ruling, the Commission found that employing agency had satisfied its burden to show that it was substantially justified in imposing the suspension. KLEMMER V. DHFS, CASE NO. 97-0054-PC (PERS. COMM. 10/9/98).