

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PATRICIA JACKSON-WARD, Appellant,

vs.

WISCONSIN DEPARTMENT OF REVENUE, Respondent.

Case 6
No. 66942
PA(adv)-120

Decision No. 32471-A

Appearances:

Victor Arellano, Attorney, Lawton & Cates, P.O. Box 2965, Ten East Doty Street, Suite 400, Madison, Wisconsin 53701-2965, appearing on behalf of the Appellant.

Mark Zimmer, Attorney, Department of Revenue, Office of the General Counsel, 2135 Rimrock Road, P.O. Box 8907, Madison, Wisconsin 53708-8907, appearing on behalf of the Respondent.

ORDER DENYING MOTION FOR HEARING ON COSTS AND FINAL ORDER

The underlying appeal involved two disciplinary actions imposed on Appellant – a written reprimand and a written reprimand in lieu of a one-day suspension – as well as her career executive reassignment. In a ruling issued July 15, 2008, the Commission concluded that it lacked authority to review the written reprimand, but had authority to review the reprimand in lieu of a one-day suspension. We further concluded that the appeal of her career executive reassignment was untimely.

The Appellant has filed a request for a hearing on attorney's fees. The parties submitted written arguments and then, on May 18, 2009, reached a stipulation that caused the matter to be ready for decision. Having reviewed the record and considered the parties' positions, the Commission makes and issues the following

Dec. No. 32471-A

ORDER

The Appellant's request for a hearing on attorney's fees/costs is denied. The appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of June, 2009.

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

Wisconsin Department of Revenue (Jackson-Ward)

MEMORANDUM ACCOMPANYING
ORDER DENYING HEARING ON COSTS AND FINAL ORDER

A. Background

On July 15, 2008, in response to a motion to dismiss, the Commission issued a ruling which dismissed two claims articulated in the letter of appeal, filed on April 27, 2007, or in subsequent submissions. Specifically, we concluded: 1) that we lacked authority to review a March 30, 2007 letter of discipline accurately denominated as a “written reprimand”; and 2) that the appeal of the Appellant’s career executive reassignment was untimely. We additionally found that the third claim, arising from a “written reprimand in lieu of a one-day suspension” that was also dated March 30, 2007, fell within the scope of the Commission’s jurisdiction and rejected the Respondent’s argument that the matter had become moot. All three claims related to Appellant’s employment with the Department of Revenue (DOR). No hearing has been held on the merits of the appeal arising from the reprimand in lieu of a one-day suspension, and the Commission has never reached a conclusion as to whether there was just cause for that disciplinary action.

Appellant left the employment of DOR on May 5, 2007, about one week after she filed her appeal, and was hired to fill a position within the Department of Transportation (DOT). Consistent with normal State of Wisconsin procedure, her personnel file accompanied her as she moved from DOR to her new employing agency, DOT. In June, 2008, Jackson-Ward requested that the May 2007 written reprimand in lieu of a one-day suspension be removed from her personnel file. DOT’s Director of Human Resources granted the request in October 2008. Appellant does not dispute any of the following statements made by DOT’s Human Resources Director in an affidavit:

5. There had been no misconduct by Patricia Jackson-Ward during that year [after the March 30, 2007 reprimand in lieu of a suspension was issued], so she was entitled to removal of the written reprimand from her personnel file. The written reprimand in lieu of suspension was removed from Patricia Jackson-Ward’s personnel file in early October, 2008.

6. At no time did anyone from the Wisconsin Department of Revenue request or suggest that the written reprimand in lieu of suspension be removed from Patricia Jackson-Ward’s personnel file.

7. The written reprimand in lieu of suspension was removed from Patricia Jackson-Ward’s personnel file by my decision in the normal course of business and at her request. The [appeal filed with the Commission] had no effect on the removal of that reprimand from her personnel file.

Appellant has now requested a hearing on costs associated with her appeal, and the parties have stipulated that no other material issue remains before the Commission in this matter. The Appellant's request reads as follows:

Please take notice that the complainant [sic] has spen[t] a considerable amount of money having to obtain the removal of the reprimand from her personnel file. She should not be responsible for paying her attorney's fees and costs in defending same. Therefore, the complainant [sic] requests a hearing on the issue of compensation for her attorney's fees and costs.

Appellant has otherwise submitted nothing in the way of support for her request.

B. Analysis

The parties have stipulated that the sole basis for Appellant's request for a hearing on costs is Sec. 227.485, Stats., which includes the following:

(3) In any contested case in which an individual . . . is the *prevailing party* and submits a motion for costs under this section, the hearing examiner [or agency conducting the hearing] 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.]

The only argument made by Respondent in opposition to the Appellant's request is that she should not be considered a "prevailing party" for purposes of the above statute.

Even though subsection (2) of Sec. 227.485, Stats., includes definitions of some of the statutory terms used in the section, "prevailing party" is not one of them. However, the legislature also specified that examiners, agencies and courts interpreting the statute "be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act, 5 USC 504." Sec. 227.485(1), Stats.

The Commission is directed in its interpretation of "prevailing party" by the ruling in *KLEMMER V. DHFS*, Case No. 97-0054-PC (Pers. Comm., 4/8/98), which held that fees and costs may be awarded even where a case has been settled without going to hearing. The ruling relied on a law review article interpreting the federal Equal Access to Justice Act in 1985-86:

[I]n order to be considered a "prevailing party" in circumstances where the case ends without a full hearing on the merits, the plaintiff must show "that the litigation effort was a causal factor in achieving (the plaintiff's) objectives or improving (the plaintiff's) situation." [Louise L. Hill, *Equal Access to Justice Act - Paving the Way for Legislative Change*, 36 Case Western Reserve L. Rev. 50, 61 (1985-6)] This causal nexus requirement is consistent with the approach taken by Wisconsin courts under other fee-shifting statutes. [Citation omitted.]

In KLEMMER the question was whether there was a causal connection between filing the appeal and the employing agency's action, taken after Ms. Klemmer had voluntarily demoted and transferred to a different facility operated by the same employing agency, to rescind the suspension that was the subject of the appeal.

In the present matter, the causal factor question is determined by the uncontroverted affidavit of DOT's human resources director stating that DOT removed the reprimand in lieu of suspension "in the normal course of business and at [Appellant's] request" and because there had been no misconduct by the Appellant during the 12-month period after the reprimand had been imposed. Appellant also did not dispute the provision of the affidavit stating that the appeal filed with the Commission "had no effect on the removal of that reprimand from her personnel file." The Commission must, therefore, determine there was no causal connection between the appeal and the removal of the letter. Consequently, the Appellant was *not* a prevailing party for purposes of Sec. 227.485, Stats., so her request for a hearing on costs must be denied.

In light of the parties' stipulation that nothing else remains at issue in this matter, the appeal is properly dismissed.

Dated at Madison, Wisconsin, this 3rd day of June, 2009.

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