

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDREW DRYJA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES.

Case ID: 306.0006

Case Type: PA

DECISION NO. 37793-B

Appearances:

Alan C. Olson, Attorney, Alan C. Olson & Associates, S.C., 2880 South Moorland Road, New Berlin, Wisconsin, appearing on behalf of Andrew Dryja.

Anfin Jaw, Attorney, Department of Administration, 1 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Natural Resources.

DECISION AND ORDER ON REMAND

Pursuant to a May 6, 2021 decision by the Court of Appeals, District IV, this matter was remanded to the Wisconsin Employment Relations Commission for a determination of what discipline Andrew Dryja (Dryja) should receive for his unauthorized transport of his children in a State of Wisconsin vehicle, and for resolution of his request for costs.

Following remand, Dryja and the State of Wisconsin Department of Natural Resources (DNR) made an unsuccessful attempt to reach a settlement. Thereafter, the parties filed argument as to issues of discipline and costs, the last of which was received on September 2, 2021.

Having considered these matters, the Commission makes and issues the following:

FINDING OF FACT

1. While employed by the State of Wisconsin Department of Natural Resources (DNR), Andrew Dryja transported his children in a DNR vehicle without authorization.

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

CONCLUSIONS OF LAW

1. The State of Wisconsin Department of Natural Resources did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Andrew Dryja but did have just cause to suspend him for three days.

2. Andrew Dryja is a prevailing party within the meaning of Wis. Stat. § 227.485 (3).

3. The position of the State of Wisconsin Department of Natural Resources before the Wisconsin Employment Relations Commission as to the discharge of Andrew Dryja on July 30, 2018 was substantially justified within the meaning of Wis. Stat. § 227.485 (2)(f).

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

ORDER

1. The discharge of Andrew Dryja by the State of Wisconsin Department of Natural Resources is modified to a three-day suspension. Dryja shall be offered reinstatement and made whole.

2. Andrew Dryja's request for costs is denied.

Issued at the City of Madison, Wisconsin, this 27th day October, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER ON REMAND

This matter returns to the Commission pursuant to a May 6, 2021 decision by the Court of Appeals, District IV. In that decision, the Court rejected two of the three bases upon which the Commission concluded that the State of Wisconsin Department of Natural Resources (DNR) had just cause to discharge Andrew Dryja. The Court affirmed the Commission's determination that Dryja had engaged in misconduct by transporting his children in a DNR vehicle without authorization.

Following the Court's remand of the matter to the Commission, the parties submitted argument regarding: (1) what level of discipline meets the just cause standard as to the Dryja misconduct the Court left intact; and (2) Dryja's request for costs.

DNR contends that discharge is still the appropriate level of discipline. It argues that Dryja engaged in one of the types of serious misconduct the Legislature specifically identified as allowing disciplinary action without imposing progressive discipline-up to and including discharge. Dryja asserts that a written reprimand is the appropriate disciplinary penalty citing past instances of minimal discipline imposed by DNR for this type of misconduct.

During the evidentiary hearing before the Commission, DNR conceded that it was the cumulative impact of the three alleged types of misconduct that warranted Dryja's discharge. Given that concession, it is clear that discharge for the one remaining type of misconduct is not warranted. However, DNR is correct that the unauthorized transport of children in a DNR vehicle is "Misuse or abuse of agency property . . ." which the Legislature identified in Wis. Stat. § 230.34 (1)(a)8. as a serious act of misconduct.¹ Therefore, it is apparent that although Dryja had a clean disciplinary record at the time of discharge, there was and is no obligation to follow progressive discipline when determining the level of discipline that meets that just cause standard. Having considered the serious level of misconduct in the context of Dryja's clean disciplinary record and his length of service with DNR, the Commission concludes that there is just cause for a three-day suspension.²

Turning to Dryja's request for costs, the Commission concludes that although he is a "prevailing party" within the meaning of Wis. Stat. § 227.485 (3), DNR was "substantially justified" within the meaning Wis. Stat. § 227.485 (2)(f) regarding the position it took before the Commission as to just cause for Dryja's discharge. Therefore, his request for costs is denied.

DNR has the burden to establish its position was "substantially justified," and to meet this burden the DNR must show (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. *See Board of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). Losing a case does not raise the presumption that the agency was not substantially

¹ Dryja was not able to establish that any DNR imposition of minimal discipline for Dryja's level of misconduct occurred after the Legislature created Wis. Stat. § 230.34.

² For purposes of the make whole portion of the Commission's Order, the Commission accepts DNR's calculation of a yearly average of 14.167 hours of overtime.

justified nor does advancing a novel but credible extension or interpretation of the law. *See Sheely v. DHSS*, 150 Wis.2d 320, 338 (1989). In *Behnke v. DHSS*, 146 Wis.2d 178 (1988), the Court of Appeals adopted an “arguable merit” test for determining whether a governmental action had a reasonable basis in law and fact. It defined a position which has “arguable merit” as “one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy.” In *Sheely* at 340, the Supreme Court commented on the “arguable merit” test as follows:

Although we disagree with the court of appeals’ assessment of a reasonable basis in law and fact as being equivalent to “arguable merit,” we do note that its definition of “arguable merit” is substantially similar to our comment here that a “novel but credible extension or interpretation of the law” is not grounds for finding a position lacks substantial justification.

Here, the Commission concludes that Dryja’s admission to DNR that he engaged in the actions that formed the basis for his discharge satisfies the “reasonable basis in truth for the facts alleged” portion of DNR’s burden. As to the “reasonable basis in law for the theory propounded” portion of the DNR’s burden, the Commission is satisfied that DNR’s just cause for discharge theory was reasonable-particularly in light of Wis. Stat. § 230.34. Lastly, as to the “connection between the facts alleged and the legal theory advanced”, the DNR’s application of the admitted facts to a just cause standard meets the “connection” requirement. Therefore, Dryja’s request for costs is denied.

When reaching this determination, the Commission acknowledges that the Court of Appeals concluded that some of Dryja’s admitted actions did not constitute misconduct. However, the Commission is satisfied that DNR’s contrary view falls well within the Supreme Court’s test expressed in *Sheely*.

Issued at the City of Madison, Wisconsin, this 27th day October, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman