

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JULIO de LIMA SILVA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0496

Case Type: PA

DECISION NO. 39305-A

Appearances:

Peter M. Reinhardt, Attorney, Bakke Norman, S.C. 2919 Schneider Avenue SE, P.O. Box 280, Menomonie, Wisconsin, appearing on behalf of Julio de Lima Silva.

Nicole Rute, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER ON ATTORNEY'S FEES AND COSTS

On February 3, 2022, Chairman Daley issued a Final Decision and Order modifying the three-day suspension to a one-day suspension in the above matter.¹ On February 25, 2022, Appellant filed a request for attorney's fees and costs. On March 18, 2022, the Respondent filed a reply and objections to the request for fees and costs. On April 5, 2022, Appellant filed a reply to the Respondent's response.

Having considered the matter, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The State of Wisconsin Department of Corrections did have just cause within the meaning of Wis. Stat. § 230.34 (1)(a) to suspend Julio de Lima Silva for one-day but did not have just cause for a three-day suspension.
2. Julio de Lima Silva is the prevailing party within the meaning of Wis. Stat. § 227.485(3).

¹ See *de Lima Silva v. DOC*, Dec. No. 39305 (WERC, 02/2022).

3. The position of the State of Wisconsin Department of Corrections before the Wisconsin Employment Relations Commission as to the three-day suspension of Julio de Lima Silva on October 7, 2021, was substantially justified within the meaning of Wis. Stat. § 227.485 (2)(f).

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

ORDER

Julio de Lima Silva's motion for fees and costs is denied.

Issued at Madison, Wisconsin, this 21st day of June, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER
ON ATTORNEY'S FEES AND COSTS

The Commission concludes that although de Lima Silva is a “prevailing party” within the meaning of Wis. Stat. § 227.485 (3), DOC 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 de Lima Silva’s three-day suspension. Therefore, his request for costs is denied.

DOC has the burden to establish its position was “substantially justified,” and to meet this burden the DOC 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 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*, 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.

Id. at 340.

Here, the Commission concludes that de Lima Silva’s admission that he raised his voice to his supervisor, as well as the hearing record that supported the extent to which staff and inmates could hear de Lima Silva’s voice, satisfies the “reasonable basis in truth for the facts alleged” portion of DOC’s burden. Furthermore, the level of the volume of his voice created an intimidating atmosphere, not only for those directly involved, but extended beyond causing general disruption to the facility.

As to the “reasonable basis in law for the theory propounded” portion of the DOC’s burden, the Commission is satisfied that DOC’s just cause for a skip in progression or a serious misconduct theory was reasonable—particularly in light of Wis. Stat. § 230.34 and DOC’s Executive Directive #2. The DOC found de Lima Silva’s conduct to be in violation of multiple work rules, and ultimately determined the conduct rose to the level of serious misconduct. While the Commission concluded in its decision that de Lima Silva’s actions did not meet the threshold for the allegation of harassment to be sustained, the DOC attempted to issue discipline consistent with discipline previously imposed for instances where there was a single incident of threatening or aggressive behavior rising to the level of serious misconduct.

Lastly, as to the “connection between the facts alleged and the legal theory advanced”, the DOC’s application of the admitted facts to a just cause standard meets the “connection” requirement. Therefore, de Lima Silva’s request for costs is denied.

When reaching this determination, the Commission acknowledges its conclusion that DOC did not meet its burden to establish the actions of de Lima Silva met the threshold for harassment, and therefore did not constitute serious misconduct. However, the Commission is satisfied that DOC’s contrary view falls well within the Supreme Court’s test expressed in *Sheely*.

Issued at Madison, Wisconsin, this 21st day of June, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman