

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANTHONY WALKER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0574

Case Type: PA

DECISION NO. 39922-A

Appearances:

Robert M. Mihelich, Attorney, 2665 S. Moorland Road, Suite 200, New Berlin, Wisconsin appearing on behalf of Anthony Walker.

David G. Makovec, Attorney, Department of Administration, 101 E. 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 FEES AND COSTS

On June 26, 2023, the Wisconsin Employment Relations Commission issued a Decision and Order in this matter rejecting the discharge of Anthony Walker by the State of Wisconsin Department of Corrections. On July 26, 2023, Walker filed a Motion for Attorney's Fees and Costs. The Department of Corrections filed a response on August 11, 2023. On August 22, 2023, the Commission requested the legal basis for Walker's fees and costs, and Walker filed a reply brief on August 30, 2023.

FINDINGS OF FACT

1. Anthony Walker (Walker) was employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer at the Racine Correctional Institution (RCI).
2. The DOC discharged Walker for allegedly receiving information about a sexual relationship between an inmate and a senior RCI employee and for not acting on the information in any way.

3. In a June 26, 2023, decision, the Commission overturned the discharge based on Warden Wells's admission that there was disparate treatment in how Walker was disciplined, as well as Wells's acknowledgment that Sgt. Wilson, a material witness identified by Walker, was never interviewed but should have been.
4. The Commission determined that Walker committed misconduct, but the DOC never argued that that particular type of misconduct was grounds for Walker's discipline.

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

CONCLUSIONS OF LAW

1. Anthony Walker is a prevailing party within the meaning of Wis. Stat. 227.485(3).
2. The position of the State of Wisconsin Department of Corrections did not have a reasonable basis in fact and therefore was not substantially justified within the meaning of Wis. Stat. §227.485(2)(f).
3. The amount of \$25,249.12 in fees is appropriate within the meaning of Wis. Stat. 814.245(5)(a) 2.

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

ORDER

Anthony Walker is awarded 104 hours of attorney fees at a rate of \$242.78 per hour, for a total award of \$25,249.12. The State of Wisconsin shall pay \$25,249.12 to Anthony Walker.

Issued at Madison, Wisconsin, this 14th day of November 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER ON FEES AND COSTS**I. WAS THE POSITION OF THE DEPARTMENT OF CORRECTIONS SUBSTANTIALLY JUSTIFIED?**

The ability to award attorney fees and costs in Chapter 230 discipline cases is limited by the provisions of Wis. Stat. § 227.485. A qualified prevailing party is entitled to fees and costs unless the Commission 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.” Here, Walker is the “prevailing party” within the meaning of Wis. Stat. § 227.485 (3) and has requested attorney fees and costs.

When an appellant requests attorney fees, the State bears the burden of establishing that its position was “substantially justified.” *Board of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). To meet this burden, the State 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. *Id.* 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. *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.” *Id.* 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.

Sheely v. DHSS, 150 Wis.2d at 340.

Here, the Commission concludes the State of Wisconsin Department of Corrections was not substantially justified in its position. The State failed to bear its burden of establishing that its position was substantially justified, because it failed to show a reasonable basis in truth for the facts alleged. The State’s position does not have arguable merit, because it is grounded in a factual inaccuracy, not an area of legitimate debate or a difference of opinion.

In its June 2023 decision, the Commission found that Walker committed misconduct by failing to meet his obligations under the Prison Rape Enforcement Act (PREA), specifically by failing to disclose the reason his supervisor needed to speak with the informant. *Walker v. DOC*, Dec. No. 39922 (WERC, 6/23). However, the Commission reinstated Walker because it found that – per the testimony of RCI’s warden – Walker was subject to disparate treatment by RCI, and therefore there was no just cause for his discharge. *Id.*

Crucially, in finding that Walker committed misconduct, the Commission found that, after hearing information about a PREA violation from an inmate informant, “Walker proceeded to inform Lieutenant McBride that she needed to speak to Hull but did not specify what the conduct or subject matter/purpose was, only that it was important.” *Id.* at 2. However, the State took the position that Walker “never in any way” communicated to his superiors regarding the PREA violation allegations he was made aware of. The State’s argument was refuted by the testimony of Correctional Sergeant Latasha Wilson, who witnessed Walker telling a supervisor to speak with the inmate informant.

In *Bracegirdle v. State Dep’t of Regul. and Licensing*, 159 Wis. 2d 402, 464 N.W.2d 111 (Ct. App. 1990), the Court of Appeals held that a nurse was entitled to attorneys’ fees where the nursing board’s position in charging her with abusing a patient was not substantially justified since there was a total lack of factual support for the board’s position. Here, the State’s theory of Walker’s failure to report – that he never in any way communicated to his superiors – had a total lack of factual support.

The Commission has previously held that the State has a reasonable basis in fact, and is therefore substantially justified, when the appellant admits to having engaged in the underlying actions that formed the basis of their discipline. *Dryja v. DNR*, Dec. No. 37793-B (WERC, 10/21); *de Lima Silva v. DOC*, Dec. No. 39305-A (WERC, 06/22). In *Dryja*, the Commission held that the State was substantially justified since the appellant admitted to using state vehicles for personal use. Similarly, in *de Lima Silva*, the Commission held that the State was substantially justified since the appellant admitted to raising his voice to his supervisor. Here, however, Walker did not admit that he committed the conduct that the State charged him with (that he never said anything after hearing the allegations from an inmate informant). Instead, Walker argued that he told a supervisor to speak with the inmate informant. The Commission ultimately found that Walker committed misconduct by failing to meet his PREA obligations by failing to disclose the reason or nature of the reason the supervisor needed to speak with the inmate. However, the State never made this argument, even in the alternative. Therefore, the position the State took does not have a reasonable basis in fact, and the State’s position was not substantially justified.

Further, by failing to interview a key witness, the State failed to thoroughly investigate the incident that led to Walker’s discharge. The Commission has previously held that failure to investigate properly may lead to a conclusion that the State’s position was not substantially justified. In *Hanneman v. DOC*, Dec. No. 36991-A (WERC, 09/17), the DOC was considering suspending the appellant when the appellant allegedly committed another act of misconduct. Rather than initiate another investigation for this new allegation, the DOC recommended that the appellant be discharged rather than suspended. *Id.* The Commission found that because the DOC failed to properly investigate the allegations that prompted the discharge decision, it was not substantially justified and awarded attorneys’ fees. *Hanneman v. DOC*, Dec. No. 36991-B (WERC, 01/18). Here, by the Warden’s own admission, the State failed to interview a key witness, Sergeant Wilson, who would have supported Walker’s account. Thus, the State’s failure to conduct a thorough and diligent investigation supports the Commission’s conclusion that the State’s position was not substantially justified.

Given the foregoing, the State's theory for Walker's misconduct did not have a reasonable basis in fact, and therefore was not substantially justified.

II. FEE AWARD.

Walker requests that attorney fees for 113.2 hours at a rate of \$375 per hour be granted, specifically justifying the hourly rate based upon Attorney Mihelich's advanced skill in the field of labor and employment law. Additionally, Walker requests reimbursement of transcript fees.

In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court interpreted the "special factor" language narrowly in what circumstances allow for a determination of special factors in determination of an upwards adjustment in the hourly rate awarded.¹ The Commission does not find a special factor in the form of limited availability of qualified attorneys to be a consideration and finds no special factor or specialization that would justify such a departure.

However, the Commission has previously, and continues, to recognize an increase in the cost of living as a determinative factor in the awarding of fees. *Fried v. State of Wisconsin et. al.*, Dec. No. 37433-A (WERC, 12/18). Wisconsin Stat. § 814.245(5)(a)(2), states that "Attorney or agent fees may not be awarded in excess of \$150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justify a higher fee." The State's fee award structure is based upon the Federal Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A). Pursuant to *Thangaraja v. Gonzales*, 428 F.3d 870, 876-877 (9th Cir. 2005), and Ninth Circuit Rule 39-1.6, the most recent applicable maximum hourly rate under EAJA, adjusted for increases in cost of living, is \$242.78 per hour. The Commission adopts this as the hourly rate of reimbursement for purposes of this award.

The State, citing Wis. Stat. § 814.245(7), argues that Walker's hours should be reduced for the time allotted to the first day of hearing where Walker made the motion for the initial hearing examiner to recuse herself from the proceeding. Given that it was Walker's motion for recusal we agree and decrease the award with a reduction of 7.1 hours.

Additionally, when the hearing was rescheduled, Walker failed to appear in a timely manner, being under the impression that the hearing would be conducted remotely despite the notice of hearing clearly stating the location of the hearing being at WERC. As such, Walker caused delay for all involved in waiting for his arrival from New Berlin to Madison. Under the

¹[T]he "special factor" formulation suggests Congress thought that [attorney fee cap] was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the [attorney fee] cap, reimbursement above that limit is allowed." *Pierce v. Underwood* at 572.

same authority as cited prior, the Commission further decreases the award of fees by an additional 2.1 hours for the delay caused by Walker.

Finally, the Commission denies Walker's request for reimbursement of transcript fees. Transcript fees are not reimbursable pursuant to Wis. Stat. § 814.04(2).

It is hereby ordered that Walker is awarded 104 hours of attorney fees at a rate of \$242.78 per hour, for a total award of \$25,249.12.

Issued at Madison, Wisconsin, this 14th day of November 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman