

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

K.R. , Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION , Respondent.

Case ID: 315.0029

Case Type: PA

DECISION NO. 40881-A

Appearances:

Ben Hitchcock Cross, Attorney, Cross Law Firm, S.C., 845 N. 11th Street, Milwaukee appearing on behalf of K.R.

David 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 Administration .

DECISION AND ORDER ON FEES AND COSTS

On May 5, 2025, the Wisconsin Employment Relations Commission issued a Decision and Order in this matter rejecting the discharge of K.R. by the State of Wisconsin Department of Administration (DOA). On May 22, 2025, K.R. filed a motion for fees and costs. On June 12, 2025, DOA filed objections to the motion.

Having considered the matter, the Commission is persuaded that the motion for fees and costs should be denied. Although K.R. is a prevailing party within the meaning of Wis. Stats. § 227.485(3), the position of the State of Wisconsin Department of Administration that the appeal should have been dismissed as untimely filed was substantially justified within the meaning of Wis. Stat. § 227.485(2)(f).

NOW, THEREFORE, it is

ORDERED

The motion for fees and costs is denied.

Issued at Madison, Wisconsin, this 20th day of November 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER
ON FEES AND COSTS

As the “prevailing party” K.R. is entitled to fees and costs unless DOA can establish that its position was “substantially justified.” To meet this burden. DOA 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. *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. *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, it is undisputed that K. R. did not file his appeal within 14 calendar days as required by Wis. Stat. § 230.445(3) (c) 1. which provides:

An employee or an appointing authority may appeal a decision issued by the administrator under par. (b) by filing an appeal with the commission. The employee or appointing authority may not file an appeal with the commission under this paragraph later than 14 days after receiving the administrator’s decision.

However, primarily due to personal circumstances limited to K.R., the Commission found the appeal to be timely.

As there was no factual dispute and solid statutory support for the DOA position that K.R.’s appeal should have been dismissed, it is apparent that there was a reasonable connection between the facts and the DOA legal theory. Thus, the Commission concludes the DOA position was substantially justified and the motion for fees and costs should be denied.

Issued at the City of Madison, Wisconsin, this 20th day of November 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Chairman