repeatedly held that the question of credibility of witnesses is one that lies peculiarly within the province of the trial court.[3] The credibility of the Berlinskis was crucial to the forces trying to set aside the deed. The trial court found the Berlinskis' testimony to be "clearly motivated by self-interest" and "permeated with bias and prejudice." This was the trial court's prerogative to so find and its finding binds this court.

By the Court.—Judgment affirmed.[4]

6986-c

KENOSHA TEACHERS UNION LOCAL 557 and another, Appellants, v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

No. 254. Argued May 6, 1968.—Decided June 4, 1968.
(Also reported in 158 N. W. 2d 914.)

1. **Labor—Employment Peace Act—Unfair labor practices—Discharge allegedly motivated by union activities—Burden of proof on employee making such claim.**
An employee who charges that one of the motivating factors which impelled his discharge was his union activities has the burden of proving the same by the clear and satisfactory preponderance of the evidence. p. 203.

2. **Schools and school districts—Teachers—(Municipal Employee Management Relations Act)—Alleged prohibited practice in failing to renew teacher's contract—Motivating factor—When an issue of fact.**
On a complaint before the Wisconsin Employment Relations Commission in a proceeding brought by a junior high school teacher, charging his principal and the board of education with a prohibited practice in refusing to renew his contract (thereby precluding him from gaining tenure), allegedly motivated by his union activities—the trial court did not err in concluding that a question of fact was presented for decision by the board and not one of law, where the teacher relied on a single incident involving a discussion of unionism and teaching professionalism, but the principal, although aware of the incident, denied any knowledge concerning the teacher's participation in union activities, asserting his evaluation was predicated on the teacher's professional performance and attitude. p. 203.

[3] *Estate of Dobrecevich* (1962), 17 Wis. 2d 1, 115 N. W. 2d 597; *Estate of Rich* (1965), 26 Wis. 2d 86, 131 N. W. 2d 909.

[4] No double costs are taxed because of failure to supply an appendix. The respondent did not supply a supplemental appendix of her own because she understandably believed appellants were raising only questions of law.

3. **Administrative law and procedure—Judicial review of administrative decisions—"Substantial evidence" rule.**
The term "substantial evidence" as used in the Administrative Procedure Act, sec. 227.20 (1) (d), Stats., connotes such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. p. 204.

4. **Administrative law and procedure—Judicial review of administrative decisions—Test of reasonableness—How applied.**
Implicit in the statutory term "substantial evidence" is the test of reasonableness, and use of the statutory words "in view of the entire record as submitted" following the statutory term, implies that that test is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's findings. pp. 204, 205.

5. **Labor—Employment Peace Act—WERC findings—Judicial review.**
The WERC is the judge of the credibility of the witnesses and the reviewing court is not to substitute its judgment for the judgment of the board. p. 206.

6. **Schools and school districts—Teachers—Failure to renew contract—Review of WERC determination—Evidence—Sufficiency to support agency's findings.**
The teacher's claim that the conclusions of the WERC were erroneous in failing to find discrimination and hence not supported by substantial evidence was dispelled by the record which disclosed (a) that the teacher in fact was not an organizer, officer, agent, or union steward; (b) the principal's detailed evaluation and adverse recommendation, as found by the board, was based upon professional performance and attitude and not motivated by the teacher's union activities; (c) the assistant principal, after an independent evaluation, made a similar adverse recommendation; (d) both

evaluators took into consideration the tenure status of the teacher; and (e) the contracts of two other teachers were not renewed for the same general reasons. pp. 205, 206.

APPEAL from a judgment of the circuit court for Dane county: EDWIN M. WILKIE, Circuit Judge. *Affirmed.*

This is an appeal by Colin R. Spaight and the Kenosha Teachers Union Local 557 (KTU), herein referred to as appellants, from a judgment of the circuit court for Dane county affirming the decision of the Wisconsin Employment Relations Commission (WERC), herein referred to as the respondent.

Colin R. Spaight was employed as a teacher at Lance Junior High School, and during his second year of teaching, the Kenosha Board of Education, upon recommendation of John Hosmanek, the principal of the school, informed Spaight that his teaching contract would not be renewed for the following year. In the Kenosha school system, teachers acquire tenure upon commencing their third year of teaching.

The recommendation of Hosmanek and his reasons therefor, upon which the Board of Education based its decision not to renew the contract, are as follows:

Recommendation: "Although I feel that this teacher has the potential for improvement, such factors as his age, relative lack of discretion, and other personality factors, lead me to state that I cannot recommend him for renewal of his contract for the coming year."

Supporting reasons: "Mr. Spaight is in his second year of teaching in Kenosha. Although he had many of the difficulties commonly found in an initial teaching experience, he gave some indications that he was learning much from experience.

"I regret to say that he has not shown substantial progress. He continues to give indications of having a personality not particularly appropriate to the teaching profession. Therefore, after considerable thought I have concluded that, in my opinion, Mr. Spaight does not possess the potential for becoming a better than average teacher at this school.

"While he gives the appearance of being conscientious, there are many indications that his philosophy of teaching and his conception of what a teacher is are not in harmony with what is expected at this school and school system. Some examples of the kinds of incidents which have led to this conclusion are these:

"(1) During the first year, it was necessary to remind him to dress appropriately for teaching. On several occasions he came with a sweater over a T-shirt. This year, he has appeared in a dark blue knit shirt with a large emblem sewed to it displaying the word, 'Jaguar.'

"(2) Despite my frequent visitations to his class, discussions relative to class-control, a handbook which carefully describes what is desirable and necessary, and various announcements designed to supplement this information, he maintains an overly-permissive and a highly informal, disorganized type of class situation.

"(3) Toward the end of the school year he hired a number of ninth grade students to help him wreck a building at Great Lakes upon which he was the successful bidder.

"(4) He does not hesitate to discuss highly controversial aspects of topics such as religion, birth control, politics, etc., in places such as the faculty dining room and professional library.

"(5) He gives evidence of a philosophy of grading inconsistent with the stated guidelines for evaluating and grading student progress. These are contained in a bulletin issued regularly and have been discussed thoroughly at faculty meetings. During the first quarter he issued 35 'F' and 39 'D' grades. He is a frequent tester and relies almost solely on a lecture or lecture-discussion presentation during which students speak out freely, interrupting him or other students.

"(6) Because of the classroom atmosphere, several relatively serious incidents have occurred during the past year. Among these have been the lifting of skirts and placing of hands on girls by boys, an incident in which a colored girl student was openly called a 'black bastard,' by another student, several incidents of physical force by

the teacher to compel students to obey his requests, etc.

"(7) On one occasion, early in November, he became highly emotional one morning when he found a flyer pertaining to the KEA-KTU controversy in his mailbox with something written across it. He complained to me vigorously and publicly, stating, 'If I find out who is doing this, I'll deck him if he's a man, and I'll slap the person if it's a woman.'

"(8) He has been highly vocal in his criticism of the Kenosha Public Schools, commenting extensively on matters of which he has no direct knowledge, such as, a situation involving a substitute teacher in a Spanish class at one of the high schools which he said resulted in students getting no grades.

"(9) During the latter part of last year, he applied for a transfer to the senior high school without even extending the professional courtesy of notifying his principal beforehand."

In essence, the complaint alleges that the recommendation of Hosmanek for nonrenewal of Spaight's contract was motivated by Hosmanek's desire to discourage membership in the KTU. It is the position of the appellants that such action was contrary to the provisions of sec. 111.70 (2), Stats., and in violation of sec. 111.70 (3) (a) 1 and 2.[1]

[1] "111.70 **Municipal employment.**

". . .

"(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities.

"(3) PROHIBITED PRACTICES. (a) Municipal employers, their officers and agents are prohibited from:

"1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2).

After extensive proceedings, the WERC found that the determination of the Kenosha Board of Education not to renew the contract of Spaight was not motivated by his union activities. The commission's order also dismissed the complaint of the KTU.[2]

For the appellants there was a brief by *Goldberg, Previant & Uelmen* of Milwaukee, and oral argument by *Richard M. Goldberg*.

For the respondent the cause was argued by *William H. Wilker,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

CONNOR T. HANSEN, J. This appeal presents two issues:

(1) Whether the trial court erred in not determining as a matter of law that one motivating factor in the nonrenewal of Spaight's contract was his involvement in union activities.

(2) Whether there is substantial evidence, in view of the record as a whole, to support the determination of the WERC that nonrenewal of Spaight's contract was not motivated by his union activities.

(1) We have carefully reviewed the entire record in this proceeding and conclude that in this particular case the question of whether union activity was a motivating factor in the nonrenewal of the teaching contract was a question of fact and not one of law.

Appellants contend that the fourth reason enumerated by Hosmanek in support of his recommendation relates to a brief, but heated discussion which occurred between

"2. Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment."

[2] Other portions of the WERC findings and conclusions were not appealed to the circuit court. Included in such findings was the determination that the Kenosha Board of Education did not discriminate against the KTU in favor of the Kenosha Education Association (KEA).

the librarian and Spaight in the professional library. It is uncontroverted that the topic of discussion was unionism and teaching professionalism. It is also undisputed that the librarian reported the incident to Hosmanek who later mentioned this to Spaight as an example of the latter's unprofessional attitude. However, the undisputed occurrence of the incident does not, in and of itself, constitute a motivating factor as a matter of law. The incident must be viewed within the scope of the relationship between Hosmanek and Spaight. Spaight was not exceptionally active in the union. He was neither an organizer, nor an officer, agent or steward. Hosmanek testified that at the time he began evaluating Spaight he had no knowledge of Spaight's participation in either the KTU or the Kenosha Education Association (KEA). He also testified that when he composed the teacher evaluation during Spaight's second year, the only indication Hosmanek had of Spaight's relation to the KTU was the librarian's complaint relating to the library incident.

Therefore the question of whether the library incident constituted a motivating factor, was a question of fact and properly within the scope of the WERC's review. We deem it significant that the WERC made the following specific finding:

". . . the refusal of the School Board to renew Spaight's teaching contract *was not motivated* for the purpose of discouraging activity or membership in any employe organization, including the KTU, and that the action by the School Board in this regard was based on Spaight's performance and behavior in relationship to his teaching position." (Emphasis added.)

The findings of the WERC in this case were rendered over a year before the decision of this court in *Muskego-Norway Consolidated Schools Joint School Dist. No. 9 v. Wisconsin Employment Relations Board* (1967), 35 Wis. 2d 540, 151 N. W. 2d 617. However, both the trial court and the WERC were cognizant of the motivating

factor criteria as explained by this court in *Muskego-Norway, supra,* page 562:

"Although these cases (several federal cases) all involve a construction of unfair labor practices under the Wagner Act, the case of *St. Joseph's Hospital v. Wisconsin Employment Relations Board* [3] adopts their legal conclusion that an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him."

The appellants possessed the burden of proof before the WERC. The appellants must establish that the union activity of Spaight was a motivating factor in the nonrenewal of his contract by the clear and satisfactory preponderance of the evidence. *See* sec. 111.07 (3), Stats.; [4] *Century Building Co. v. Wisconsin Employment Relations Board* (1940), 235 Wis. 376, 382, 291 N. W. 305.

The trial court correctly concluded that in this case a question of fact was presented for determination by the WERC and not a question of law.

(2) Appellants contend that the findings and conclusions of the WERC are erroneous and not supported by substantial evidence in view of the record as a whole. Appellants specifically contest the finding that the nonrenewal of Spaight's contract was not motivated by union activities but was based upon his performance and behavior in relation to his teaching position.

In *Muskego-Norway Consolidated Schools Joint School Dist. No. 9 v. Wisconsin Employment Relations Board,*

[3] (1953), 264 Wis. 396, 59 N. W. 2d 448.

[4] "111.07 **Prevention of unfair labor practices.**

". . .

"(3) A full and complete record shall be kept of all proceedings had before the board, and all testimony and proceedings shall be taken down by the reporter appointed by the board. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

supra, this court reiterated the standard of judicial review of the findings of the WERC. It is well established that under sec. 227.20 (1) (d), Stats.,[5] judicial review of WERC findings determines whether or not the questioned finding is supported by "substantial evidence in view of the entire record."

In *Copland v. Department of Taxation* (1962), 16 Wis. 2d 543, 554, 114 N. W. 2d 858, this court explained what is meant by substantial evidence by quoting from an article entitled *"Substantial Evidence" in Administrative Law,* 89 Univ. of Pa. L. Rev. (1941), 1026, 1038:

"'[T]he term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, *could not* have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.'"

Moreover, in *Copland,* this court noted that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and then determined:

"We deem that the test of reasonableness is implicit in the statutory words 'substantial evidence.' However,

[5] "227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

". . .

"(d) Unsupported by substantial evidence in view of the entire record as submitted; . . ."

in applying this test the crucial question is whether a reviewing court is only to consider the evidence which tends to support the agency's findings, or whether it is also to consider the evidence which controverts, explains, or impeaches the former. Use of the statutory words 'in view of the entire record as submitted' strongly suggests that the test of reasonableness is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's findings."

Appellant's contention is based upon the allegedly adverse attitudes of Principal Hosmanek and upon an analysis of the reasons supporting Hosmanek's written recommendation of nonrenewal.

Concerning Principal Hosmanek's attitudes, the WERC filed an explanatory memorandum along with its findings, which memorandum detailed the complaints against him and concluded:

"We have carefully reviewed the testimony and other evidence surrounding the decision of Hosmanek to recommend the non-renewal of the teaching contract of Colin Spaight for the 1965–66 school year. We are satisfied that Hosmanek's recommendation and the determination by the School Board in the non-renewal of Spaight's teaching contract was not motivated by his concerted activity on behalf of either of the organizations, or the lack thereof, and therefore, we have concluded that such action did not constitute unlawful discrimination against Spaight nor was it intended to unlawfully interfere, restrain or coerce any of the teachers in the employ of the School Board."

As previously stated, in the evaluation of Spaight by Hosmanek when making his ultimate recommendation to the Board of Education, the tenure status of Spaight was a matter for consideration. Hosmanek was not the sole source of this evaluation. Charles Danke, assistant principal, testified that it was his duty to help evaluate teachers who had not gained tenure status. He recommended to Principal Hosmanek that the contract of Spaight not be renewed. All of the observations of

Danke upon which his recommendation is based relate solely and only to the teaching ability of Spaight. These observations are also supported by the teacher evaluation summary of him. It is also significant that the contracts of two other teachers were not renewed for the same general reasons and one of these teachers was very active in the Kenosha Education Association which was an association allegedly given preferential treatment as to KTU.

The WERC is the judge of the credibility of the witnesses and the reviewing court is not to substitute its judgment for the judgment of the board. *St. Francis Hospital v. Wisconsin Employment Relations Board* (1959), 8 Wis. 2d 308, 318, 98 N. W. 2d 909; *St. Joseph's Hospital v. Wisconsin Employment Relations Board, supra,* 401, 402.

It is, therefore, our determination that the findings of the WERC are supported by substantial evidence when considering the entire record.

By the Court.—Judgment affirmed.

WILKIE, J., took no part.

ESTATE OF GEHL: GEHL and another, Administrators, W. W. A., Appellants, V. REINGRUBER and others, Respondents.

No. 268. Argued May 6, 1968.—Decided June 4, 1968.
(Also reported in 159 N. W. 2d 72.)

1. **Wills—Construction—Surrounding circumstances—When resort to extrinsic evidence permissible.**
Under rules as to construction of a will, unless there is ambiguity in the text of the will read in the light of surrounding circumstances, extrinsic evidence is inadmissible for the purpose of determining intent; accordingly, when the surrounding circumstances have been considered and an ambiguity appears or remains, then only may there be a resort to extrinsic evidence. p. 210.

2. **Wills—Construction—Intention of a testator—Meaning of words to be ascertained subjectively.**
Unlike a contract, a will is a unilateral transaction consisting of words whose meaning is to be ascertained subjectively; hence the question is not what the usual usage of a word may be or the dictionary usage, but the testator's individual meaning. p. 211.

3. **Wills—Construction—Intention of testator—Language to be interpreted in light of surrounding circumstances.**
Although a will speaks as of the time of death, the language is to be interpreted in light of the circumstances surrounding the testator at the time the will is written; if, from those circumstances, the testator's meaning is clear, no further inquiry is necessary; if, after that inquiry, equivocation or uncertainty still appears, an ambiguity is said to exist, and the rules of construction relevant to the resolution of these ambiguities become applicable. p. 213.

4. **Wills—Construction—Resort to extrinsic evidence impermissible where meaning is ascertainable from surrounding circumstances.**
In a construction proceeding involving the will of a testatrix survived by one natural child and six stepchildren, who bequeathed the residue of the estate to her "beloved children—in even and equal shares," no resort to extrinsic evidence to determine whether or not the testatrix intended that her stepchildren (whom she did not adopt) should share in the residue with her natural child was permissible if from examination of the surrounding circumstances the meaning of her words could be ascertained. p. 213.

5. **Wills—Construction—Intention of testatrix—Subjective view of language—"Children" as including stepchildren.**
Subjectively viewing the language of the will without resort to extrinsic evidence, it was manifest that the testatrix, who married a widower with six children, only one child being born to the marriage, intended all to share equally in the residue of the estate, the surrounding circumstances disclosing that she raised the children from infancy, treating them in the same manner as her natural child—the entire record being indicative of a family situation, of a mutual exchange of parent-child love, with the testatrix exercising all the disciplinary prerogatives of a parent, and further indicating that the parental relationship continued after the children became adults. pp. 213–215.