STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 25

HAROLD MAHNKE,

Petitioner,

-vs-

STATE OF WISCONSIN - EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 461-832

OPINION

Decision No. 11017-E

On August 9, 1971, Harold Mahnke was discharged from his employment with the Louis Allis Company. Mahnke petitioned the Wisconsin Employment Relations Commission (WERC), alleging two basic charges. The first issue raised alleges that the Louis Allis Company committed unfair labor practice in discharging him. The second issue raised alleged that his union, Local 1131, International Union of Electrical, Radio and Machine Workers, did not fairly represent him in the negotiations which preceded his discharge.

The Wisconsin Supreme Court on February 4, 1975, ordered the Commission to take proceedings so as "to make a determination from all the relevant evidence before it as to whether the union failed in its duty of fair representation to Harold Mahnke, its employee member. If the finding is that the Union did not fail in its duty of fair representation, the employee will be foreclosed from further prosecution of his claim. The burden to establish the breach of a duty of fair representation is upon the employee, Harold Mahnke." Mahnke v. WERC, 66 Wis. 2d 524 (1975).

Pursuant to this order, the Commission held hearings on May 6, June 24 and 25 and December 10, 1975, and issued a Findings of fact, Conclusions of Law, and Order on October 13, 1976. In this document the examiner found that Harold Mahnke had not met his burden of proof in establishing any of the charges of his Petition. The Commission approved of this finding and, consequently, on January 18, 1978 dismissed the Complaint. This Court agrees with those findings.

On February 15, 1978, under Sec. 111.08 and Ch. 227, Wis. Stats., Mahnke commenced this proceeding to review the order of the Commission.

On judicial review under Ch. 227, Stats., and administrative agency's findings of fact are conclusive if supported by substantial evidence in view of the entire record. Chicago, M., St. P. & P. RR. Co. vs. ILHR Dept., 62 Wis. 2d 392, 396, 215 N.W. 2d 443 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Stacy vs. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595, 603, 159 N.W. 2d 630 (1968).

> Substantial evidence is not equated with preponderence of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such case, it is for the agency to determine which view of the evidence it wishes to accept.

Robertson Transport Co. vs. Public Serv. Comm., 39 Wis 2d 653, 658, 159 N.W. 2d 636 (1968).

The weight and credibility of the evidence are matters for the agency to determine. Sanitary Transfer & Landfill, Inc. vs. Adult Ed. Dist. 13 vs. ILHR Dept. 76 Wis. 2d 230, 240, 251 N.W. 2d 41 (1977).

Review is limited to whether the evidence was such that the agency might reasonably make the determination it did. State ex rel. Beierly vs. Civil Service Comm.41 Wis. 2d 213, 217-218, 163 N.W. 2d 606 (1969). Chapter 227, Stats., does not contemplate that the reviewing court shall make an independent determination of the facts. Hixon vs. Public Service Comm., 32 Wis. 2d 608, 629, 146 N.W. 2d 577 (1966). However, due weight must be accorded the experience, specialized knowledge and discretionary authority of the agency. Sec. 227.20(10), Stats.; Muskego-Norway C.J.S.J.D. No. 9 vs. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W. 2d 617 (1967).

This Court finds that there is substantial evidence to support the Commission's findings. This Court agrees with the findings of the Commission that the Complainant, Harold Mahnke, was frequently late or absent from work and that some, but not all, of these absences were due to genuine medical problems. The Complainant received approximately eleven notices from his employer during the course of his employment concerning his absences and his poor work performance. In August of 1970 the employer seriously considered discharging the Complainant but was persuaded by the Union to issue a warning and a five-day disciplinary layoff instead. The last warning, issued approximately four months before Mahnke's discharge, was sternly worded and indicated that Mahnke could be fired if his performance did not immediately improve. This warning had only a short-term effect on Complainant's behavior. Within three months his frequent absences recurred and, as a result, he was discharged on August 9, 1971.

Prior to the Complainant's discharge, his Union took steps to prevent that discharge. Due at least in part to the intervention of the Union, Complainant was disciplined rather than discharged in August of 1970. In the week before the Complainant was discharged in 1971 and in the months following that discharge, the Union took all steps short of formal arbitration in an attempt to secure for the Complainant his job.

The Union decided against taking the Complainant's case to arbitration. This decision was not based solely on financial considerations but, on the contrary, was based primarily on the merits of the Complainant's case. The Union agreed with the employer that, even if all of the Complainant's absences were due to genuine medical problems, it is still the right of the employer, under the contract, to discharge the Complainant. In view of this fact and with due consideration of the records of Mahnke's many absences and of his prior suspension, the Union decided that it had little chance of winning in arbitration, and, therefore, chose not to pursue arbitration. In making this decision, the Union did not act arbitrarily, nor did it base its decision on discriminatory motives or other bad faith considerations.

Under well-established case law, the remedies specified in a collective bargaining agreement are exclusive and the Union has the exclusive right to pursue those remedies. The complainant union member can pursue a remedy only if the Union decides in an arbitrary or discriminatory manner not to pursue the Complainant's claim. The Union in this case did not make its decision in an improper manner. The Complainant is, therefore, foreclosed from pursuing his claim against the Louis Allis Company, even if he volunteers to pay for such arbitration out of his own rather than the Union's funds.

Therefore, the court upholds the Wisconsin Employment Relations Commission's decision. Counsel for the Respondent is to draft an order consistent with this opinion.

Dated at Milwaukee, Wisconsin this 27th day of July, 1979.

BY THE COURT:

/s/ Ralph G. Gorenstein
Ralph G. Gorenstein, Circuit Judge