COURT OF APPEALS
DECISION
DATED AND RELEASED

FEB 24 1987

No. 86-0490

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

SAM GUTHRIE,

Petitioner-Appellant and
Cross-Respondent,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Decision No. 11457-H

Respondent and
Cross-Respondent,

LOCAL 82, COUNCIL 24,
AFSCME, AFL-CIO,

Intervenor-Respondent and
Cross-Appellant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee county: MICHAEL P. SULLIVAN, Judge. Affirmed.

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

SULLIVAN, J. Sam Guthrie appeals that part of the circuit court's judgment affirming the determination of the Wisconsin Employment Relations Commission (WERC) that Guthrie was fired for good cause by his employer, the University of

Wisconsin-Milwaukee (UWM). Local 82, Council 24, AFSCME, AFL-CIO (the union) cross-appeals that part of the judgment affirming WERC's determination that the union breached its duty of fair representation to Guthrie in not acting on his request for arbitration. We affirm the judgment in all respects.

UWM fired Guthrie, a building maintenance helper, in 1972 for unexcused absences. Guthrie asserts he had taken an approved vacation. Guthrie filed a grievance and UWM confirmed the discharge. Guthrie then filed a complaint with WERC, and hearings were held before an examiner in 1973 and 1975. The examiner issued a written decision in December 1975, holding that the union had breached its duty of fair representation and that UWM did not have just cause to fire Guthrie.

UWM and the union petitioned WERC for review of the examiner's decision and, eventually,[1] WERC issued the decision that is the subject of this appeal. That 1984 decision held that the union had breached its duty of fair representation, but that UWM did have just cause to fire Guthrie. Guthrie and the union each sought review in the circuit court, which affirmed the WERC decision in all

respects. Guthrie and the union now appeal those parts of the circuit court's judgment decided adversely to them.

Guthrie asserts that WERC, in concluding that he was fired for good cause, violated the standard set forth in Wis. Adm. Code, sec. ERB 22.09, violated his due process rights in overturning some of the examiner's credibility determinations, and issued an arbitrary decision. We disagree.

Wis. Adm. Code, sec. ERB 22.09 governs a party's petition to WERC for review of an examiner's decision. The pertinent part reads:

> (2) Petition for review; basis for and contents of. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:
>
> (a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record. [Emphasis added.]

Guthrie contends that this administrative rule prescribes a "clearly erroneous" standard by which WERC must review an examiner's findings of fact. Guthrie is mistaken. The rule

does not direct WERC to do anything; it merely prescribes the format for the petition. The agency, not the hearing officer, is the primary fact-finder. Burton v. DILHR, 43 Wis. 2d 218, 222, 168 N.W.2d 196, 197 (1969). The applicable burden of proof is the "clear and satisfactory preponderance of the evidence." Sec. 111.07(3), Stats. Thus, the agency finds facts from a clear preponderance of the evidence; it does not merely affirm the fact-findings of the examiner that are not clearly erroneous. We conclude that WERC has not violated Wis. Adm. Code, sec. ERB 22.09.

We review the fact-findings of the administrative agency, not those of its examiner. An agency's findings of fact must be supported by substantial evidence. Sec. 227.57(6), Stats. (formerly sec. 227.20(6), Stats.). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hamilton v. DILHR, 94 Wis. 2d 611, 617, 288 N.W.2d 857, 860 (1980)(citation omitted). If more than one view may be sustained by substantial evidence, the agency is to determine which view it wishes to accept, and that determination is conclusive. See Robertson Transp. Co. v. Public Serv. Comm'n, 39 Wis. 2d 653, 658, 159 N.W.2d 636, 638 (1968). In determining whether the agency's fact-findings

are supported by substantial evidence, it is not required that the evidence be subject to no other reasonable, equally plausible interpretation. Hamilton, 94 Wis. 2d at 617, 288 N.W.2d at 860. Rather, an agency's determination may be set aside only when, on examining the entire record, the evidence and inferences therefrom are such that a reasonable person, acting reasonably, could not have reached the decision. Id. at 618, 228 N.W.2d at 860.

Guthrie correctly points out, however, that due process imposes additional requirements on an administrative agency that overturns its examiner's credibility determinations.

> Where the credibility of a witness is at issue and a commission reverses its examiner and makes contrary findings, due process requires that the commission (1) glean, from the record or from personal consultation with the examiner, the examiner's personal impressions of the material witness[es] and (2) include in a memorandum opinion an explanation for its disagreement with the examiner.

Pieper Elec., Inc. v. LIRC, 118 Wis. 2d 92, 97-98, 346 N.W.2d 464, 467 (Ct. App. 1984) (footnote omitted). The commission must have, but is not bound by, the examiner's impressions of witness credibility. Rucker v. DILHR, 101 Wis. 2d 285, 293, 304 N.W.2d 169, 173-74 (Ct. App. 1981).

Guthrie contends that WERC has not met the above requirements of due process. We disagree. WERC's lengthy and detailed decision includes both a chronicle of its consultation with the examiner and a meticulous explanation of the basis for its conclusions whenever different from the examiner's. We conclude that Guthrie has received whatever process he is due.

We also reject Guthrie's assertion that WERC's decision was arbitrary. Our review of the record discloses substantial evidence to support WERC's findings that Guthrie was fired for good cause.

Guthrie reported to work on July 10, 1972, and announced that he was beginning his vacation. He was told that he was not scheduled for vacation that week and that he would have to fill out the appropriate form and get approval. He left without working. He returned the next evening and was told that his vacation could not be approved that night. He again left without working and did not return. He was notified three days later that he had been fired. There was some evidence that Guthrie had chosen a December vacation that year and that, as he was driving to work on July 10, he said he was not sure that he would be able to get his

vacation that week. We conclude that a reasonable mind might accept the evidence as adequate to support the conclusion that Guthrie was absent from work without authorization. Hence, we hold that WERC's finding that Guthrie was fired for just cause is supported by substantial evidence.

Finally, the union asserts that WERC applied the wrong legal standard in determining that the union breached its duty of fair representation. The union argues that WERC erred in retroactively applying Mahnke v. WERC, 66 Wis. 2d 524, 225 N.W.2d 617 (1975), and that the union satisfied the pre-Mahnke standard in Vaca v. Sipes, 386 U.S. 171 (1967). We conclude that the union satisfied neither the Mahnke nor the Vaca standard.

A hearing was held before the examiner in 1973 concerning the fair representation issue. The examiner did not issue a decision. Mahnke was decided in February 1975. In March 1975, a hearing was held before the examiner concerning the just cause for discharge issue. The examiner issued a decision on both issues in December 1975. Both WERC and the circuit court, citing Vaca and Mahnke, concluded that the union's conduct in not pursuing arbitration had been arbitrary and, thus, a breach of its duty of fair representation of Guthrie.

The duty of fair representation requires that a union, in administering the grievance and arbitration machinery, make decisions in good faith and in a nonarbitrary manner as to the merits of a particular grievance. Vaca, 386 U.S. at 194. Breach of a union's duty of fair representation occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Id. at 190. Our supreme court, in Mahnke, 66 Wis. 2d at 534, 225 N.W.2d at 623, explained the Vaca standard as follows:

> Vaca, supra, provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach of the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
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> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

The union contends that retroactive application of Mahnke deprived it of due process rights to fair notice and a hearing. The union argues that although retroactivity is the general rule, see Wangen v. Ford Motor Co., 97 Wis. 2d 260, 301 n.24, 294 N.W.2d 437, 458 n.24 (1980), exceptions to that rule should apply because the union reasonably relied on pre-Mahnke law and because retroactivity would unduly burden the administration of justice by requiring further fact finding. See Reimer v. Owens-Corning Fiberglass Corp., 576 F. Supp. 197, 202 (E.D. Wis. 1983). We conclude that neither exception applies.

First, any reliance by the union on pre-Mahnke law was not reasonable after Mahnke was decided, which was more than a month before the second hearing, and ten months before the examiner's decision. Moreover, Mahnke explained but did not change the law in Vaca. Mahnke merely suggests factors for the union to consider to assure that its decision not to arbitrate is not arbitrary.

As to the second exception, we disagree that the record must be reopened for evidence on whether the union considered the Mahnke factors. Moreover, this exception refers to creating "an unmanageable flood of litigation,"

Reimer, 576 F. Supp. at 202, not the possible remand of one case.

Even assuming, however, that Mahnke should not be applied to this case, the union's conduct fails to satisfy Vaca's requirement that the union's decision not to arbitrate be nonarbitrary. WERC made the following finding:

> There is no evidence on this record to show that the Union's Executive Board ever acted upon Guthrie's arbitration request or that it made a final decision on the merits. Rather, it appears that the Union simply let Guthrie's grievance drop without acting upon it and without informing Guthrie of their "decision". Indeed, there is nothing on this record which clearly indicates that the Executive Board ever discussed Guthrie's grievance.

We conclude that this finding is supported by substantial evidence.

Evidence was adduced that only the executive board could decide whether to take a grievance to arbitration. The union president spoke with the two union stewards involved with Guthrie's grievance but did not seek their recommendations. Nor were the stewards present at any board meeting to discuss whether to arbitrate. We conclude from the record that a reasonable mind could come to the same

conclusion that WERC did--that the union's decision not to arbitrate was arbitrary and, thus, constituted a breach of the union's duty of fair representation. Because WERC's decision was based on substantial evidence, we affirm it.

In summary, we affirm the circuit court's judgment affirming WERC's determination that Guthrie was fired for good cause and that the union breached its duty of fair representation.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX

[1]For details of this protracted litigation, see State v. WERC, 65 Wis. 2d 624, 223 N.W.2d 543 (1974), and Guthrie v. WERC, 111 Wis. 2d 447, 331 N.W.2d 331 (1983).