

FEB 16 1979

Wisconsin Employment
Relations Commission
Suite 200, 111 Madison St.
Madison, WI 53703

STATE OF WISCONSIN

CIRCUIT COURT
Br. 2

DANE COUNTY

DONALD ZIMMER and
WAUNAKEE TEACHERS' ASSOCIATION,

PETITIONERS,)

vs.)

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION; WAUNAKEE PUBLIC SCHOOLS,
JOINT DISTRICT No. 4; BOARD OF
EDUCATION, WAUNAKEE PUBLIC SCHOOLS,
JOINT DISTRICT No. 4,)

RESPONDENTS.)

MEMORANDUM

DECISION

Case No. 162-049

Decision No. 14749-B

This is a proceeding under sec. 111.07(8) and ch. 227, Stats., to review a decision and order of the Wisconsin Employment Relations Commission, (Commission), dated February 7, 1978, which dismissed the petitioners' prohibited practices complaint against Waunakee Public Schools under the Municipal Employment Relations Act, (MERA).

The "Findings of Fact" made by the commission in this case fill eight pages and will not be reiterated in this opinion. The essence of the petitioners' complaint, however, is that Donald Zimmer's teaching contract with the Waunakee Public Schools was "nonrenewed" because he had filed a grievance on February 4, 1976 under the terms of a collective bargaining agreement. The employers have maintained that the reason for nonrenewing Zimmer's teaching contract was his deficient performance of duties. On February 23, 1977, a commission hearing examiner filed a Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum. The examiner concluded that the employers' actions constituted a prohibited practice under MERA. The employers thereafter petitioned the commission for review of the examiner's decision. The commission issued an order which modified the examiner's findings of fact in two respects and which reversed the examiner's conclusion of law that a prohibited practice had been committed. An extensive memorandum accompanied the commission's order reversing the hearing examiner. It is this decision and order which is before the court on the petition for judicial review.

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While the petitioner's brief is somewhat confusing in this respect, the court deems the single issue in this case to be whether the commission's findings of fact are supported by substantial evidence in the record. That question is clearly a basis for review of an administrative decision, sec. 227.20(6), Stats. The other issues attempted to be raised are either insubstantial or outside the scope of review.

The petitioners' arguments that there are grounds for review because "the examiner's decision was based on substantial evidence" (Brief, p. 3) or because "the examiner's findings and conclusions were based on a preponderance of the evidence" (Brief, p. 11) are immaterial. Those arguments appear to be based on the legal assumption disclosed on page 7 of the petitioners' brief:

"The Examiner, however, was supported by the evidence and, therefore, the Commission erred in reversing the Examiner's order."

In the first place, it is the commission's decision and not the hearing examiner's which is before the court on the petition for judicial review. Furthermore, it is clearly within the powers of the commission to reverse a decision of its hearing examiners. Sec. 111.07(5), Stats. Whether the hearing examiner's decision was supported by the preponderance of the evidence was a question for the commission to decide; with respect to factual issues, this court's role in an action for judicial review is to ascertain whether the commission's decision is supported by substantial evidence in the record, giving deference to the commission's expertise and its prerogative to judge the credibility and weight of the evidence before it. Sec. 227.20, Stats.

Another issue attempted to be raised is the prejudice of the commission. The petitioners have submitted, with their brief, an affidavit of Donald Zimmer which, it is argued, proves the commission's bias in this case. The court is of the opinion that this evidence is not properly before it, sec. 227.20(1), Stats., and, in any case, that it is not compelling proof of prejudice. The Zimmer affidavit does not raise any additional issues in this case.

In Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540, 562 (1967), the court reaffirmed the rule 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 burden of proving that union or other protected activities were a reason for the firing rests upon the complainant, who has to

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prove his or her case by "a clear and satisfactory preponderance of the evidence." Sec. 111.07(3), Stats. Additionally, there is a presumption of good faith and regularity for the acts of public officials. State ex rel Wasilewski v. Bd. School Directors, 14 Wis 2d 243 (1961). In determining that the complainant had not met the burden of proof in this case, the commission made numerous findings of fact, some of which are challenged here by the petitioners. The court will proceed to determine whether these findings are supported by substantial evidence in the record.

The petitioners criticize (Brief, p. 9) the commission's observation (Decision, p. 10) that Zimmer's work performance failed to change despite previous warnings in the form of evaluation reports and that the reasons for nonrenewal given to the school board by the school administrator were essentially those called to Zimmer's attention in the performance evaluations. That observation was made in the commission's discussion of the significance of the January 30, 1976, notice to hold at step level. The commission felt that the history of poor evaluations supported the employer's contention that the notice of hold at step level was but a gesture preliminary to notice of nonrenewal, that it was made in part to allow Zimmer a chance to resign without suffering the stigma of nonrenewal. Zimmer's rating did improve in some respects in the successive evaluation reports, though the extent of improvement is obscured somewhat by the fact that the persons evaluating his performance varied and by the fact that some evaluations contained express reservations as to the extent of improvement indicated. All the evaluations show communications with the administration to be a serious problem. Despite the fact that the evaluations varied more than is suggested in the commission's decision, the court believes that the facts in the record nevertheless support the inference made by the commission in its treatment of the evaluations: the school administration had put Zimmer on notice that his job was in jeopardy and that his work continued to be deficient up to the time he filed his grievance.

The petitioners also criticize (Brief, p. 15) the commission's treatment of evidence relating to the school principal's suggestion to Zimmer, sometime in January 1976, that Zimmer obtain a bus driver's license for use the following school year. The hearing examiner regarded that evidence as probative of Zimmer's belief that the notice of hold at step level did not constitute a warning of nonrenewal (Decision, p. 16). The commission, on the other hand, did not believe that this evidence was probative of any issue material to the case (Decision, p. 9); instead, the commission viewed the instruction to obtain the driver's license as a mere contingency plan. The petitioners argue that the evidence is

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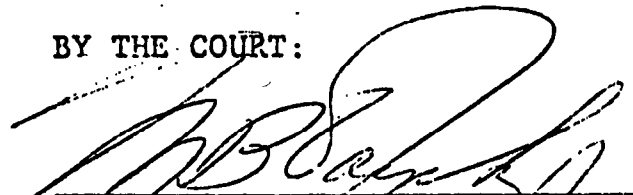
relevant in that it impeaches testimony tending to prove a non-retaliatory motive for nonrenewal. But, as noted in the commission's decision and elaborated in its brief, because the school board made the final decision as to nonrenewal, there need not be anything "incongruous" in the principal's suggestion that Zimmer obtain the license even if the administrator had already agreed with the principal's recommendation that Zimmer not be renewed for the following year. Although it might be possible to draw other inferences from this evidence, the court must defer to the inferences drawn by an agency in the fact finding process where the inference is not inherently unreasonable. The court finds no error in the commission's treatment of the evidence on this subject.

The petitioners, pointing to evidence that the principal told Zimmer on February 23, 1976 that he was considering recommending Zimmer's nonrenewal to the administrator, argue that the administrator could not have decided to recommend nonrenewal prior to the time that Zimmer filed his grievance. The court believes that the conclusion urged by the petitioners is but one inference which could be made from the evidence. The principal's action in this respect is consistent with the employer's expressed intention to encourage Zimmer to resign prior to a decision by the school board to non-renew his contract. The evidence does not render the commission's findings unreasonable in any way.

The court concludes that there is substantial evidence in the record to support the commission's findings of fact. Accordingly the commission's decision and order are hereby affirmed.

Dated this 7 day of February, 1979.

BY THE COURT:



Michael B. Torphy, Jr., Judge
Circuit Court, Br. 2.