
NORTHWEST UNITED EDUCATORS,

Petitioner,

MEMORANDUM DECISION

vs

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 15534-B

Respondent.

FACTS

The salient facts and dates in this case are as follows: John Andersen, a music teacher employed by the New Auburn School District, New Auburn, Wisconsin, was hired in January of 1976 as a half-time music instructor. In the spring of 1976, Mr Anderson was offered a fulltime teaching contract for the 1976-77 school year. On or about January 26, 1977, the District Administrator, Douglas Walker, determined that he was going to urge the School Board to non-renew Mr Andersen. In point of fact, by letter dated February 11, 1977, and received by Mr Andersen on February 14, 1977, the course of non-renewal was adopted by Walker. The district, by School Board action, formally non-renewed Mr Andersen on March 14, 1977.

Northwest United Educators, on behalf of John Andersen, filed a prohibited practices complaint with the Wisconsin Employment Relations Commission alleging that the New Auburn School District had violated Section 111.70(3)(a) (1) & (3) of the Municipal Employment Relations Act in non-renewing Andersen, in part because of his union activities.

The Commission appointed Examiner Greco to conduct a hearing on said complaint, which he did on August 16, 1977. Mr Greco entered his Findings of Fact, Conclusions of Law and Order on February 9, 1978, concluding that the school district did commit a prohibited practice in non-renewing Andersen's contract and stated in his decision that the non-renewal was in part motivated by an anti-union animus. The district appealed the commissioner's decision to the entire Commission and upon review the Commission revised the examiner's Findings of Fact and reversed his Conclusions of Law and Order.

ISSUE

Was the Commission's finding that anti-union animus was not a factor in the school district's decision to non-renew Andersen's contract supported by substantial evidence?

RATIONALE

It is this Court's function to review the Commission's findings in light of the entire record and to determine whether the Commission's Findings of Fact are supported by substantial evidence on that entire record. This Court has done that.

The most recent appellate guidance which the Circuit Court has in applying substantial evidence test is the case of Omernick v Dept of Natural Resources, 101 Wis2d, 234, wherein Justice Callow stated:

"The substantial evidence test:

""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.'" (Citation omitted.) Copland v. Department of Taxation, 16 Wis. 2d 543, 554, 114 N.W. 2d 858 (1962). (Emphasis in original.)"

Holtz & Krause, Inc. v. DNR, 85 Wis.2d 198, 204, 270 N.W.2d 409 (1978). Moreover, the reviewing court will neither weigh the evidence nor pass upon the credibility of the witnesses, City of Superior v. ILHR Department, 84 Wis.2d 663, 666, 267 N.W.2d 637 (1978), nor will it, under this standard, upset an agency's finding even if it may be against the great weight and clear preponderance of the evidence. Chicago & North Western Railroad v. Labor & Industry Review Comm., 98 Wis.2d 592, 608, 297 N.W.2d 819, 826 (1980); Holtz & Krause, supra; DeGayner & Co. v. DNR, 70 Wis.2d 936, 939, 236 N.W.2d 217 (1975).

It is well settled 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," Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 W.2d, 540. The Commission, upon reviewing the entire record, found no violation on the part of the district of John Andersen's protected concerted activities. In analyzing the Commission's decision, this Court must affirm it if it finds from the reading of this entire record that the evidence and its inferences are such that a reasonable man acting reasonably might have reached the Commission's decision and as indicated, supra, the Court cannot under the substantial evidence test upset the Commission's findings even if it may be against the great weight and clear preponderance of the evidence.

Three essential instances of Walker's alleged misconduct have been imputed to the district. First, in a September 1976 conversation between Walker and Andersen wherein Walker allegedly threatened Andersen with non-renewal if he refused to assume extra-curricular duties. The petitioner took the position that Mr Andersen had every right under the Municipal Employment Relations Act to raise and contest the issue of his acceptance of co-curricular and extra-curricular assignments. The Commission in its analysis (See Findings 4) found that contractual obligations, or Walker's perception of them, were responsible for Walker's assertions that Andersen should perform extra-curricular functions. The Commission found that Andersen was compensated for performing additional functions and, moreover, Walker was not motivated by a union animus but a preoccupation with insuring that the school district receive a complete music program, including vocal, instrumental, co-curricular, not to mention extra-curricular activities, for the 7th through 12th grades and that a special program for the 5th and 6th grade band would be available to the district in the ensuing year as it had been available in the preceding years. A review of the entire record indicates that these programs were made available by Andersen's predecessors and that they had become a vital part of the district's instructional and extra-curricular offering and that Walker's concern for securing them were legitimate and did not involve anti-union animus. While it is true that Walker's formal evaluation of Andersen in November of 1976 included a claim that Andersen, "initially this year exhibited a very hostile and negative attitude toward administration and administrative policy", it cannot be gain said that a reasonable man viewing the entire record could not (emphasis supplied) arrive at the conclusion that the Commission did, namely that non-union, non-protected activity rationale could have provoked Walker's motivation. It should probably be pointed out that mere personality conflict could have provided Walker's impetus; regrettable if so, but not illegal.

The second essential point of the union's argument focuses on a meeting in January of 1977 at which time Andersen claimed that he was withdrawing a grievance filed a short time before and that Walker, upon being informed of that fact, looked surprised and stated to him, "Well, if your teaching improves within a week or two, I won't non-renew you". It is very difficult for this Court to see how, if that statement were believed, a reasonable man, acting reasonably, could not conclude that the subsequent Andersen non-renewal was motivated by anti-union animus toward a protected concerted activity. In short, Andersen said that the statement was made; Walker unequivocally denied that it was made. Examiner Greco indicated he believed Mr Andersen; the Commission believed Walker. Obviously, it is well settled that a hearing examiner's findings are to be accorded great deference. Reviewing courts or Commissions must give particular deference to the trier of fact, hearing examiner's, or trial Judge's determinations of credibility of the witnesses. The Wisconsin

Supreme Court, however, in Carley Ford, Lincoln, Mercury v. Bosquette, 72 W12d, 569, 575 (1976), not only permits the Commission to reverse Findings involving credibility of witnesses, but specifically points out the procedure by which it is done. The Commission, in footnote #4, page 18, of its Memorandum, certified that pursuant to the above-named requirement and in view of the fact that the Commission's Findings of Fact involved determinations contrary to those of the examiner, which also involved credibility resolutions, the Commission before issuing its final decision, met with the examiner, consulted with him and discussed with him the personal impressions of the witnesses in respect to their credibility. Further, the reasons for departing from the examiner's findings were explained in the Memorandum. In short, the Supreme Court leaves the ultimate decision regarding credibility of witnesses to the Commission provided it complies with the Supreme Court Rule; in this case the Commission did comport with the Supreme Court Rule and did reverse. This Court upon reviewing the entire record in this case, cannot conclude that a reasonable man, acting reasonably, could not (emphasis supplied) arrive at the same finding the Commission did.

A review of the entire record indicates that Walker's testimony regarding the January 26 meeting with Andersen is further supported by the memorandum he wrote to the file immediately following the meeting in which he summarized the reasons he gave Andersen for non-renewal (Exhibit 42). The Commission also gave weight to the fact that Andersen made no attempt to confront Walker or any other authority for this alleged statement after it was allegedly made. The Commission pointed out that Andersen's version of the events was extracted during cross examination leading to the obvious conclusion that not even Andersen's representative at the August hearing had been informed of same, allowing the Commission to further conclude Andersen did not have a mental impression that the remark had been made.

The final significant point which the union raises to indicate anti-union animus was the notation found on Exhibit 27, "Should be done with him". Exhibit 27 was, of course, the March 14, 1977, letter to Andersen advising him that the Board, after the non-renewal conference, determined not to offer him a contract for the 1977-78 school year. Walker's explanation for the notation was that he entered it to indicate that the file was closed. During the course of his testimony, he indicated that he did not make the notation on other files because no other files were closed. The fact of this notation became a source of special irritation to the hearing examiner. This Court has no difficulty in concluding from a fair and comprehensive reading of the entire transcript that Mr Greco became more than a little unnerved. The Court particularly noted Mr Greco's obviously flip "like why" (Trans p 115) response, his persistence in asking repetitious questions (Trans p 116), and his exasperation with Walker's inability to find other similar notations: "If there were other times, he would have told us about it". The upshot of all this was that Mr Greco was not persuaded by Walker's explanation as to why same or similar notations were not made on other files; the Commission disagreed.

The petitioner referred to the Commission's findings regarding this notation as "facile", putting special emphasis on the nature of the statement as opposed to its mere existence. Petitioner argues that it indicates emotion and intemperate emotion at that, which should lead to a clear inference of animus. This Court, upon reviewing the entire record, cannot find that a reasonable man, acting reasonably, could not have found the Commission's finding reasonable. In point of fact, it is clearly supported in the record. No other teacher occupied the same precise position regarding finality of non-renewal determination on March 14, 1977, that John Andersen did.

The Court believes that it should also note the language contained in the case included in petitioner's excellent Reply Brief, namely Eastern Engineering v NLRB U.S. 3rd Court of Appeals:

"The general counsel's burden was to prove not only that Eastern knew of the charges but that Shephard motivated the discharge (citations omitted), 106 LRRM 2103;"

"We recognize that direct evidence of this causal relationship will rarely be available and therefore the Board will ordinarily rely on inferences drawn from circumstantial evidence. Although the Board is permitted to draw permissible inferences from narrative or historical facts, the evidence must do more than create a

suspicion of the inferred facts. We have recently emphasized that "(a) legitimate or permissible inference must be deduced as a logical consequence of facts presented in evidence There must be a logical and rational connection between the basic facts presented in evidence and the ultimate fact to be inferred."

The Court believes that language to be particularly useful here. The Commission in reviewing Examiner Greco's decision obviously found that inferences were drawn from inferences, a procedure which the Commission did not approve. The Commission in reviewing its decision separated and focused upon each salient objection to the district's conduct which was urged upon the examiner by the union. The Commission reviewed that record, paying deference to the findings that the examiner made. The Commission altered those findings only after complying with the procedural requirements outlined by appellate authority. The Commission gave a rationale predicated in logical format and logical terms stating essential fact and drew logical inferences therefrom. Whether this Court agrees with each of the separate determinations is irrelevant. What the Court must do and has done is assess them in light of the entire record and has determined that a reasonable man, acting reasonably, could have concluded in each and every respect as did the Commission. Accordingly, the Commission's Findings and Judgment are affirmed.

Dated at Barron, Wisconsin, this 13th day of May 1981.

BY THE COURT:

James C Eaton /s/

JAMES C EATON
CIRCUIT COURT JUDGE
BARRON COUNTY, WISCONSIN