STATE OF WISCONSIN | CIRCUIT COURT Branch 2 | EAU CLAIRE COUNTY

EAU CLAIRE AREA
SCHOOL DISTRICT,

Petitioner,

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,
and EAU CLAIRE SCHOOLS
CLASSIFIED STAFF FEDERATION,
LOCAL 4018, AFT-WI, AFL-CIO,

Respondents.

MEMORANDUM DECISION AND ORDER

Case No. 09CV854

Decision No. 17124-DC1

Eau Claire Schools Classified Staff Federation, Local 4018 (Local 4018) is the exclusive collective bargaining representative of all regular full-time and part-time clerical, data processing personnel, educational assistants, and bilingual educational assistants of the Eau Claire Area School District (District), excluding confidential and supervisory personnel and other specific positions. On June 26, 2008, Local 4018 petitioned the Wisconsin Employment Relations Commission (Commission) pursuant to the Municipal Employment Relations Act (MERA) for a declaration that the Integration and Software Specialist position, held by Sarah Paul, is a "municipal employee" and included in the bargaining unit represented by Local 4018. The District took the position that Paul was excluded from the bargaining unit because she was a "supervisor" within the meaning of MERA.

After hearings and briefing, the Commission determined that the Integration and Software Specialist position is properly included in the bargaining unit because Paul is not in an exempt supervisory position. This is a judicial review of that WERC decision under Wis. Stat. §227.57. For the reasons expressed below, this Court denies the Petition and affirms the decision of the Commission.

THE LAW

In the present case, a municipal employee may be included in the union's bargaining unit, while a "supervisor" may not. A "municipal employee" is "any individual employed by a municipal employer other than an independent contractor, **supervisor**, or confidential, managerial or executive employee." Wis. Stat. §111.70(1)(i) (emphasis added)

A "supervisor" is . . . any individual who has authority in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline of their employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment." Wis. Stat. §111.70(1)(o)1

Thus, the statute defines the term "supervisor" to include two groups. First, "any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, pay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances." This first group would appear to include those who have "independent authority" to take the enumerated employment actions. The second group includes any individual who has authority "effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." This second group would seem then to include individuals who do not have "independent authority" to take the enumerated employment actions, but who can "effectively recommend" that the enumerated employment actions be taken.

In *City Firefighters Union v. City of Madison,* 48 Wis.2d 262, 179 N.W.2d 800 (1970), our Supreme Court approved the following seven-part test for deciding whether an employee is a "supervisor" within the meaning of the MERA. The Commission is to consider: (1) whether the

employee has the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees; (2) whether the employee has the authority to direct and assign the workforce; (3) the number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees; (4) the level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees; (5) whether the supervisor is primarily supervising an activity or is primarily supervising employees; (6) whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and (7) the amount of independent judgment and discretion exercised in the supervision of employees.

Not all of the factors must apply to be a "supervisor" under Wis. Stat. §111.70(1)(o)1, nor is one factor determinative. Rather, the Commission must determine whether the significance of the factors present and the degree to which they are present combine sufficiently to support a finding of supervisory status and exclusion from the bargaining unit. *Rice Lake Housing Auth.*, Dec. No.30066 (WERC Feb. 27, 2001), *Crear v. Labor and Industry Rev. Comm.*, 114 Wis. 2d 537, 339 N.W. 2d 350 (1983).

FACTS

Robert Scidmore is the District's Director of Technology. He oversees the work of about fifteen employees in the Technology Department, including the Integration and Software Specialist, Sarah Paul, and Technology Clerk, Julie Steuck. Paul oversees the work of Steuck when she is working as a clerk in the Technology Department (75% of her time). Paul assigns and is familiar with the work Steuck is doing on a regular basis. As a practical matter, Scidmore often defers to Paul relative to her decisions concerning the work of Steuck. Scidmore does, however, reserve the right to overrule decisions Paul may make relative to her direction of Steuck. None of the parties could identify a time when Scidmore actually exercised his right to

intervene in a decision made by Paul with respect to Steuck. Significantly, Scidmore could not think of a time he disagreed with Paul and needed to exercise his authority.

The District commenced this action on September 30, 2009 seeking relief from the Commission's decision dated September 10, 2009. The Commission determined that Paul had neither "independent authority" nor the authority to "effectively recommend" the hire, transfer, suspension, pay off, recall, promotion, discharge, assignment, reward or discipline of Steuck. Part of the District's complaint is with the facts the Commission found in rejecting the existence of both criteria. The District points out specific decisions and actions Paul takes relative to Steuck. It also acknowledges that Scidmore has retained his authority to make the final decision on issues, but argues there is no requirement that Paul's decisions be the "final word" on the subject. The District says that, at a minimum, Paul "effectively recommends" those actions identified in Wis. Stat. §111.70(1)(o)1.

The District takes issue with Findings 6 and 7 of the Commission and says there is substantial evidence in the record to refute those findings (which may be the case, but is not the standard to be applied.) Those findings read as follows:

> 6. Paul does not have the independent authority or the authority to effectively recommend the hire, transfer, suspension, lay off, recall, promotion, written reprimand, or discharge of Steuck or to adjust her grievances.
>
> 7. Director Scidmore has more supervisory authority over Steuck than does Paul.

The District also believes there is inconsistency in the Commission's Memorandum language and the Findings of Fact. It suggests it is difficult to reconcile Findings 6 and 7 with the following language in the Memorandum:

> "Thus, although it is a close question because Paul independently assigns, directs and evaluates Steuck's work **and plays a significant role in any hiring and transfer decisions**, we reject the District's position that she is a supervisor within the meaning of section 111.70(1)(o)1, Stats. Thus, we have ordered for inclusion in the bargaining unit." (Petitioner's emphasis)

Respondents, Local 4018 and WERC, urge that the Petition should be denied and the Commission's decision affirmed. They argue that the Integration and Software Specialist position does not have sufficient supervisory authority under MERA and is properly included in the collective bargaining unit of District employees represented by Local 4018. They emphasize that Scidmore has the "final say" over supervisory decisions with respect to Steuck. Perhaps, more importantly, they argue that there is no basis upon which this Court may overturn the Commission's decision.

STANDARD OF REVIEW

Judicial review of an administrative agency decision is governed by Wis. Stat. §227.57. The reviewing court does not retry the case and is confined to the record that has been filed. The Court's duty is to examine the record to determine whether the rights of the petitioner have been invaded by an error of the agency. Unless the reviewing court finds a ground for setting aside, modifying, remanding, or ordering other agency action, it must affirm the agency's action. Wis. Stat. §227.57(2).

The Court may not substitute its judgment for that of the agency as to the weight of the evidence as to any disputed fact. Wis. Stat. §227.57(6). On review, consideration must be given to the expertise of the agency. Due weight must be accorded the experience, technical competence, and specialized knowledge of the agency as well as the discretionary authority conferred upon it. Wis. Stat. §227.57(10).

A different standard of review for agency decisions is applied for questions of law and questions of fact. As to questions of law, there are three distinct levels of deference applied to an administrative agency's interpretation of a statute. They are "great weight", "due weight" and "de novo review". "Great weight" deference is appropriate when the agency has been charged by the legislature with the duty of administering the statute; the interpretation of the agency is one of long standing; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. Labor and Industry Review Com'n*, 196 Wis.

2d 650, 539 N.W.2d 98 (1995). (For reasons discussed below, the Commission's decision in the present case is given "great weight".)

Once it is determined that the "great weight" level of deference is the appropriate standard of review to be applied by the Court reviewing the administrative agency's interpretation of a statute, the agency's interpretation must then be merely reasonable for it to be sustained. *Harnischfeger, supra.*

The burden of proof to show that an agency's interpretation of a statute is unreasonable is on the party seeking to overturn the agency action and, thus, it is not on the agency to justify its interpretation. An agency's interpretation is unreasonable if it directly contravenes the words of the statute, it is clearly contrary to the legislative intent or it is without rational basis. *Harnischfeger, supra*

With regard to questions of fact, the Court is required to set aside or modify the agency order if the agency's action depends on any finding of fact that is not supported by substantial evidence in the record. Wis. Stats. § 227.57(6). The substantial evidence standard is satisfied when reasonable minds could arrive at the same conclusion as the agency when taking into account all the evidence in the record. *Wisconsin Professional Police Ass'n v. Public Service Com'n of Wisconsin*, 205 Wis. 2d 60, 555 N.W.2d 179 (Ct. App. 1996). The substantial evidence standard does not permit the Court to overturn an agency's finding even if the finding is against the great weight and clear preponderance of the evidence. *Omernick v. Department of Natural Resources*, 94 Wis. 2d 309, 287 N.W.2d 841 (Ct. App. 1979), decision aff'd, 100 Wis. 2d 234, 301 N.W.2d 437 (1981).

The Court will not substitute its judgment for that of the agency. It is the function of the agency to determine the credibility of evidence, and the inferences to be drawn from the facts. It is also for the agency to determine the weight of the evidence. The reviewing court will not usurp this function by weighing the evidence. *Omernick, supra.* This is so even where the Court might have decided the question differently had it been before the Court for initial determination. *In re*

International Ass'n of Machinists, Lodge No. 1406, A.F.L., 249 Wis. 112, 23 N.W.2d 489, 174 A.L.R. 1267 (1946).

DISCUSSION

First, the parties dispute the level of deference to be afforded the Commission's decision. The Respondents are of the opinion that the Commission should be afforded "great weight" deference. Petitioner suggests that one of the lesser levels of deference should be given to the Commission because the Commission's interpretations are not "longstanding" nor "uniform or consistent".

The District suggests the Commission "is moving away from long-standing interpretations of MERA". The District points to several recent decisions of the Commission in support of its position. It says those cases "show the Commission's bias against public employers when interpreting the MERA on "municipal employee" status cases and represent a turning away from its previous applications of the statute".

In response, WERC points out that four of the five decisions of the Commission cited by the District have been affirmed and the fifth is currently pending judicial review. It also advises that all of these reviewing courts have given "great weight" deference to the Commission's decisions. The Commission suggests that any disparity in its decisions is the result of factual differences in the cases presented to it.

The Commission's decision is entitled to "great weight" deference. The courts have given WERC decisions "great weight" in the past. See *St. Croix Falls School Dist. v. Wisconsin Employment Relations Com'n* (App. 1994) 522 N.W.2d 507, 186 Wis.2d 671; *Mineral Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, 25, 251 Wis.2d 325, 641 N.W.2d 701.

As to the four criteria, Wisconsin Stat. § 111.70 gives WERC the authority to determine which municipal employees may be part of collective bargaining units; the test used by the Commission in the present case has been in place for at least the last forty years; it employed its expertise or specialized knowledge in forming the interpretation; and the Commission's interpretation will provide uniformity and consistency in the application of the statute.

It appears to this Court that disparities between decisions cited by the District are factually driven. Beyond that, there is certainly not sufficient evidence in the record for this Court to make a finding that the Commission is trending away from one interpretation toward another in such a way to show a bias against public employers.

With the Commission's decision being given "great weight" deference, its decision need only be reasonable to be sustained. The Commission went through its analysis of all the above seven factors in its Memorandum supporting its decision. There were instances where the testimony of Paul and Scidmore differed with respect to Paul's authority to do certain things. The Commission made its own determination of credibility in those instances and generally concluded that the testimony of Scidmore was entitled to greater weight, since he is Paul's supervisor. It concluded that Scidmore essentially retained all of his authority over Steuck in spite of the fact that he would defer to Paul on many issues. This Court will not re-evaluate the credibility of the witnesses nor the weight of the evidence.

The Commission made the following statement in the memorandum supporting its decision.

> "in this regard we are strongly influenced by the small number of employees (one) whose work Paul directs, the absence of significant disciplinary authority, and the physical proximity of Scidmore to Steuck's worksite during the 75% of her time that she is serving as the Information Technology Clerk. **Thus, although it is a close question because Paul independently assigns, directs and evaluates Steuck's work and plays**

> **a significant role in any hiring and transfer decisions,** we reject the District's position that she is the supervisor within the meaning of section 111.70 (1)(o)1 Stats. Thus, we have ordered her inclusion in the bargaining unit."(emphasis added)

The District points to the bold language above and says it conflicts with Findings 6 and 7. This Court views the language as an acknowledgment by the Commission that *some* of the statutory criteria exist in this case. It does not stop there, however, as it must decide whether these factors are of sufficient significance and degree to support a finding of supervisory status. It obviously concluded they were not.

The District has the burden of proof to show that the Commission's interpretation of the statutes at issue is unreasonable. An agency's interpretation is unreasonable if it directly contravenes the words of the statute, it is clearly contrary to the legislative intent or it is without rational basis.

The District zero's in on "effectively recommends". The statutes do not define the term "effectively recommends". The WERC argues that it must fall somewhere between a "mere" recommendation and a "required" action. In any event, it cannot be said the interpretation given to it by the Commission in the present case directly contravenes the words of the statute.

The district points out that Scidmore has never exercised his right to have the last word, but has deferred to the decisions made by Paul. Given the fact that he could not recall a time when he disagreed with Paul's decision, this should not be surprising, nor diminish right to have the final say.

Similarly, it cannot be said the Commission's interpretation is contrary to legislative intent, or is without rational basis. The Commission analyzed the facts of this case following a

hearing and briefing and, using the proper test, concluded that the Integration and Software Specialist position was not "supervisory" under MERA.

Although the District's construction of the evidence and inferences therefrom is reasonable, so is that of the Commission. When more than one inference reasonably can be drawn, the finding of the agency is conclusive. *VTAE Dist. 13 v ILHR,* 76 Wis.2d 230, 251 N.W.2d 41(1977)

The Commission's decision is not dependent on findings of fact that are not supported by substantial evidence in the record. Each of the eleven Findings of Fact was supported by evidence that would allow reasonable minds to arrive at the same conclusion as the Commission when taking into account all the evidence in the record. The Court will not substitute its judgment for that of the agency.

CONCLUSION

When, as in this case, great weight deference is appropriate and the Commission's interpretation is not unreasonable, the Court must refrain from substituting its interpretation of the statute for the long-standing interpretation of the agency charged with its administration. The District has failed to meet its difficult burden of proof to show the Commission's statutory interpretation is unreasonable. There is "substantial evidence" supporting the decision of the Commission. The Court finds there is no ground to set aside or modify the agency decision and, accordingly, the Petition is denied and the decision affirmed.

Dated this 31 day of March, 2010.

BY THE COURT:

Michael A. Schumacher
Circuit Court Judge, Branch 2