No. 83-1358

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN, DEPARTMENT
OF EMPLOYMENT RELATIONS,

Petitioner-Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent,

DISTRICT 1199W/UNITED PROFESSIONALS
FOR QUALITY HEALTH CARE,

Intervenor-Respondent.

Decision No. 18397-B

APPEAL from a judgment and an order of the circuit court for Dane county: RICHARD W. BARDWELL, Judge. Affirmed.

Before Gartzke, P.J., Dykman, J., and Gordon Myse, Reserve Judge.

PER CURIAM. The state appeals a judgment and an order affirming a Wisconsin Employment Relations Commission order holding that Karen Hartberg's state employment was unlawfully terminated in part for her union activities under the Wisconsin Employment Labor Relations Act, sec.

111.84(1)(a) and (c). The state contends that Hartberg's employment was terminated for her inadequate job performance, a lawful ground for termination where any employer anti-union motive could not have caused her termination, and that anti-union bias should be more than a partial but should be the primary motive causing termination before a termination should be reversed by the commission under sec. 118.84(1)(a) and (c). Hartberg's union is an intervenor and has filed a brief. Because we conclude the commission's order is based on a correct interpretation of the law and is supported by substantial evidence, we affirm the order and judgment.

State employees have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Sec. 111.82, Stats. It is an unfair labor practice for an employer to interfere with, restrain, or coerce, state employees in the exercise of their rights guaranteed in sec. 111.82, Stats., or to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.

Sec. 111.84(1)(a) and (c). Although interpreting a statute governing municipal employment relations with similar language, the supreme court has held that an employee may not be fired when one of the employer's motivating factors is the employee's union activities even though many other valid reasons exist for firing the employee. Muskego-Norway Consolidated Schools v. Wisconsin Employment Relations Board, 35 Wis.2d 540, 562, 151 N.W.2d 617, 628 (1967).

The findings of the WERC must be affirmed if supported by substantial evidence. Id. The drawing of inferences from other facts in the record and the weighing of the facts are the function of the commission. Id. at 563, 15 N.W.2d at 628. The commission is the judge of the credibility of witnesses. Id. A court is not bound by an administrative agency's interpretation of a statute, a question of law, on a question of nearly first impression but accords the interpretation due weight in determining what the interpretation should be. Berns v. WERC, 99 Wis.2d 252, 261, 299 N.W.2d 248, 253 (1980).

The state asserts that the Muskego-Norway decision should not be applied to cases under the State Employment Labor Relations Act. We disagree. Although the

Muskego-Norway case involved municipal employees and sec. 111.70(2) and (3), Stats., its holding was stated broadly. There is no showing that the decision has not been consistently applied by the commission to prior cases under sec. 111.84, Stats. The state has not shown how the state civil service statutes were intended to displace the need of the Muskego-Norway rule for state employees. Moreover, the court of appeals is bound by decisions of the state supreme court, State v. Olsen, 99 Wis.2d 572, 583, 299 N.W.2d 632, 638 (Ct. App. 1980), and a change in state law based on now questioned federal law must be made by the supreme court. We conclude that the commission correctly applied Wisconsin law as it currently exists.

There was substantial evidence that Hartberg was terminated in part for anti-union reasons. She testified that after she had begun working and her work schedule had been changed without advance notice, Fred Martich told her that her contacting the union on the change would only cause her problems and that a co-worker's constant reporting to the union had created problems for the co-worker. Hartberg testified that Casey Riley, a supervisor, told Hartberg that Belle Guild, Hartberg's co-worker whom Hartberg contacted on employment problems, was a ringleader for union activities.

Hartberg testified that she was present as a potential witness at a hearing on a grievance filed by Guild and participated in meetings with union members which eventually resulted in an investigation of her office by Ivan Imm, the bureau director. Hartberg also testified that when her job classification was later eliminated and she was required to compete for an upgraded position, Robert Harrah told her that contacting the union would open up a hornet's nest from Riley's bitter feelings caused by past union involvement. Although there was evidence that Hartberg's job performance was inadequate, the commission could reasonably find from this evidence that Hartberg's termination was in part the result of anti-union motivations.

By the Court.--Judgment and order affirmed.

Publication is not recommended in the official reports.