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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 32

MILWAUKEE DISTRICT COUNCIL
48, AFSCME, AFL-CIO,

Decision No. 18996-C

Petitioner,

vs.

Case No. 594-402

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

DECISION ON JUDICIAL
REVIEW OF WISCONSIN
EMPLOYMENT RELATIONS
COMMISSION

Respondent.

NATURE OF THE PROCEEDINGS

This is an action for judicial review under Sec. 111.07(8) and Chapter 227, Stats., of a decision and order of the Wisconsin Employment Relations Commission (Commission) dated July 23, 1982. The Commission decided that when truck drivers and others become employed in the Bureau of Sanitation and are classified as drivers/loaders, that said employee shall be deemed included in the collective bargaining unit consisting of all Bureau of Sanitation employees. The bargaining unit presently representing the Bureau of Sanitation employees is the Public Employees Union No. 61 affiliated with the Laborers International Union of North America.

FACTS

In 1981, the city established a new position entitled "Driver/Loader". The city was uncertain as to whether the

driver/loader position should be in the bargaining unit represented by the petitioner (AFSCME), who presently represents truck drivers in the service division of the Bureau of Municipal Equipment (BME), or the units represented by Union Local No. 61, which represents employees in the Bureau of Sanitation.

The Commission decided that the drivers/loaders should be placed in a bargaining unit which includes all other employees in the Bureau of Sanitation because the driver/loader would be assigned to the Bureau of Sanitation. The Commission also found that they would be under the supervision and rules and perform duties that would be different than those of the present drivers, and that this unit has been an appropriate collective bargaining unit for other members of the Bureau of Sanitation.

ISSUE

Are the Commission's findings supported by the substantial evidence and are its conclusions reasonable?

DECISION

The petitioner has challenged the Commission's findings of fact and their conclusion or application of the law. On petition for review, this Court's examination of the Commission's fact finding is limited to a determination of whether the findings of the Commission are supported by

substantial evidence. (See Sec. 227.20(6), Stats.) Under Subsection (5), the Court is permitted to review questions of law. The Commission's application of law to this particular set of facts is a question of law. Bucyrus-Erie Co. v. ILHR Dept., 90 Wis. 2d 408, 417, 280 N.W. 2d 142 (1979). While this Court will give deference to the agency's interpretation, when, "...the only question is one of law, the court may substitute its judgment for that of the agency's." Frito Lay, Inc. v. Labor Industry Review Comm., 95 Wis. 2d 395, 400, 290 N.W. 2d 551 (Ct. App. 1980).

A review of the Commission's findings would reveal that in making its findings of fact, the Commission looked at the duties and skills of the employees in the unit, the similarity of wages, hours and working conditions, whether the employee would have common supervisors and a common workplace, the issue of fragmentation and the bargaining history. The petitioner contends that based on the above six WERC criteria, that the Commission has departed from its established policy and practices. The petitioner contends that looking at each of the criteria, it is their interpretation that an analysis would indicate that the drivers/loaders should remain as members of AFSCME. They particularly point out as an important element the "community of interest" test is that one must look at the actual duties of a job, not the department to which the position is technically assigned, as they claim the

Commission did in this case. The petitioner cites Arrowhead United Teachers v. WERC, 109 Wis. 2d 371 and the dissenting opinion of WERC chairman, Herman Torosian to indicate that the Commission has altered its "community of interest" test.

The petitioner also contends that in reviewing these criteria and the testimony presented, that the findings of fact by the Commission is not supported by substantial evidence in the record.

A determination of an appropriate collective bargaining unit presents a mixed question of fact and law. Arrowhead United Teachers, supra. A major factor in making that determination is whether a particular group of employees have a "community of interest" with respect to the above-mentioned criteria.

The Court, in reviewing the six criteria listed above and the facts as found by the Commission, will find that the determination was reasonable and supported by the substantial evidence. On judicial review under Chapter 227, Stats., administrative agency's findings of fact are conclusive if supported by substantial evidence in the record. Chicago, M., St. P. & P. RR. Co. v. ILHR Dept., 62 Wis. 2d 392, 396, 215 N.W. 2d 443 (1974). On review, a court may not make an independent determination of facts. The Court is confined to the determination of whether there was substantial evidence to sustain the findings that were in fact made.

Even though this Court, as the dissenting commissioner did, might come to another result, the Court may not second-guess the proper exercise of an agency's fact-finding function. Looking at all the criteria, examining the entire record and the evidence therein, including the inferences therefrom, it is the Court's opinion that a reasonable person, acting reasonably, could have reached the decision from the evidence and its inferences. Hamilton v. ILHR Dept., 94 Wis. 2d 611, 617, 288 N.W. 2d 857 (1980).

The petitioner also challenges the decision of the Commission in that they believe the order is contrary to law that it establishes a collective bargaining unit which is inappropriate under Sec. 111.70(4)(d)2.a., and that it denies an employee's right guaranteed in Sec. 111.70(2). Petitioner believes that the order splinters off the half dozen truck drivers from a unit of hundreds of truck drivers with the result being that the interest of the drivers will be submerged by over 300 garbage laborers. Petitioner indicates that this will cause fragmentation because 118 garbage truck drivers will remain in the AFSCME-represented unit.

The Commission found that the policy set forth in Sec. 111.70(4)(d)2 would not be effectuated by permitting District Council 48 AFSCME, AFL-CIO to represent this class of employees when they become employed in the Bureau of Sanitation as driver/loader. It would be more appropriate for them to be represented by collective bargaining unit,

Employee's Union No. 61, that presently represents other employees employed at the Bureau of Sanitation.

The Commission's interpretation and application of the Municipal Employees Relations Act is reasonable and consistent with the purpose of that act and must be sustained on review even though an alternate construction may be equally reasonable. The application of the MERA is an area of law requiring expertise, and because the Commission has expertise in this area, the Court will give deference to the determination as to what the appropriate construction should be. Employee Education Association v. WERC, 73 Wis. 2d 43, 68, 242 N.W. 2d 231.

This Court concurs in the Commission's findings and believes that it was reasonable for the Commission to establish a department-bargaining unit in view of significant similarities between drivers/loaders and other employees of the Bureau of Sanitation. It would appear that the drivers/loaders have more of a "community of interest" with employees in the Bureau of Sanitation than those employees in the Bureau of Municipal Equipment.

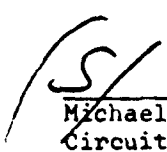
Based upon the Court's above analysis of the findings of fact and conclusions of law of the Commission, the Court affirms the decision of the Commission in all respects.

The respondent shall prepare an order consistent with this decision and submit it to the Court for signature in accordance with the Rules of the Circuit Court of the First Judicial District.

Dated this 12th day of December, 1983, at Milwaukee, Wisconsin.

BY THE COURT:

Michael D. Guolee



Michael D. Guolee
Circuit Court Judge
Branch 32