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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

No. 85-2201

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

JAMES A. LEAVENS,
LARRY G. GREENHILL and
RICHARD F. MAIER,

Petitioners/Plaintiffs-
Appellants,

v.

ERRATA SHEET

THE WISCONSIN EMPLOYMENT RELATIONS
COMMISSION, the CITY OF WAUWATOSA, and
DONALD BLOEDORN,

Decision Nos.
19310-C
19311-C
19312-C

Defendants-Respondents.

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PLEASE TAKE NOTICE that the attached pages 1 and 2 should be substituted in place of the current pages 1 and 2 of the opinion

in this matter which was released on July 9, 1986.

Dated this 29th day of July, 1986.

William R. Moser
Presiding Judge

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUL 09 1986

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APPEAL from a judgment and an order of the circuit court for Milwaukee county: WILLIAM J. SHAUGHNESSY, Judge. Reversed and remanded with directions.

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

MOSER, P.J. James A. Leavens (Leavens), Larry G. Greenhill (Greenhill) and Richard R. Maier (Maier) appeal a judgment and an order affirming the decision of the Wisconsin Employment Relations Commission (WERC). Because WERC had jurisdiction to hear the matter and because the discharges of Greenhill and Maier may have been without cause in violation

of the collective bargaining agreement and sec. 111.70(3)(a)5., Stats., we reverse the trial court and remand with directions. Because the appeal is moot as to Leavens, who has been reinstated, we dismiss that part of the appeal.

Leavens, Greenhill and Maier are three firefighters who were hired on January 2, 1981, by the City of Wauwatosa Fire Department (City). All three were members of the Wauwatosa Firemen's Protective Association, Local 1923 (Association), which has a collective bargaining agreement with the City. Part of the agreement provided:

> ARTICLE V - Probationary Period
>
> An employee shall be probationary and without seniority rights for his first calendar year of service. Such probationary employee may be laid off, transferred, or discharged for cause at any time during such period without any recourse to the Grievance procedure. Thereafter, rights of seniority shall be retroactive to his date of original hire. In all other respects such employee shall be eligible for union membership and entitled to all benefits as such may provide. [Emphasis added.]

On December 2, 1981, Fire Chief Donald Bloedorn (Chief Bloedorn) met with Maier and Leavens and handed each of them a letter signed by Chief Bloedorn which stated "For cause and without comment, effective 8:00 a.m. December 2, 1981, your services as a Probationary Firefighter with the

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MOSER, P.J. James A. Leavens (Leavens), Larry G. Greenhill (Greenhill) and Richard R. Maier (Maier) appeal a judgment and an order affirming the decision of the Wisconsin Employment Relations Commission (WERC). Because WERC had jurisdiction to hear the matter and because the discharges of Greenhill and Maier were without cause in violation of the

collective bargaining agreement and sec. 111.70(3)(a)5., Stats., we reverse the trial court and remand with directions. Because the appeal is moot as to Leavens, who has been reinstated, we dismiss that part of the appeal.

Leavens, Greenhill and Maier are three firefighters who were hired on January 2, 1981, by the City of Wauwatosa Fire Department (City). All three were members of the Wauwatosa Firemen's Protective Association, Local 1923 (Association), which has a collective bargaining agreement with the City. Part of the agreement provided:

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On December 2, 1981, Fire Chief Donald Bloedorn (Chief Bloedorn) met with Maier and Leavens and handed each of them a letter signed by Chief Bloedorn which stated "For cause and without comment, effective 8:00 a.m. December 2, 1981, your services as a Probationary Firefighter with the

Wauwatosa Fire Department, Wauwatosa, Wisconsin are terminated." At that time Chief Bloedorn verbally informed Maier and Leavens that the reason for their discharge was their failure "to demonstrate an acceptable level of cooperation or an acceptable attitude for continued employment with the Wauwatosa Fire Department." Greenhill was discharged on December 3, 1981, by means of the same type of letter. Chief Bloedorn orally told him the reason for his termination was excessive use of sick leave.

The three probationary firefighters then filed complaints with WERC, alleging that their discharges were without cause and hence in violation of Art. V of the collective bargaining agreement and sec. 111.70(3)(a)5., Stats. The hearing examiner concluded, as a matter of law, that Art. V did not waive the right of employees to file complaints under secs. 111.07 and 111.70(4)(a), Stats; that the term "discharged for cause" in Art. V meant that probationary employees are protected against arbitrary and capricious discharges; that Greenhill and Maier were discharged for cause, and that Leavens was discharged without cause. The examiner found that Greenhill's discharge was based on his excessive use of sick leave, that Maier was discharged for an attitude problem that eroded employee

morale, and that Leavens was discharged for boisterousness and disrespect to his superiors, although the allegations against Leavens were never substantiated by Chief Bloedorn.

On review, WERC concluded that neither the collective bargaining agreement itself nor its bargaining history supported an interpretation of the agreement to provide contract enforcement review by WERC or by any other third party. WERC thus concluded that neither Art. V nor the rest of the agreement granted WERC jurisdiction to hear the merits of the complaints. Nevertheless, WERC decided that the City did not violate sec. 111.70(3)(a)5., Stats., by discharging Leavens, Maier and Greenhill. WERC ordered that all three petitions be dismissed. In its review of WERC's decision, the trial court affirmed that "the discharge of the three petitioners herein was not subject to mediation and the hearing examiner lacked jurisdiction to hear the matter," and noted that in the interim Leavens had been reinstated with the fire department. Leavens, Greenhill and Maier appeal.

As a threshold matter, we note that the appeal as to Leavens is moot. Leavens has been reinstated to his former position with backpay and is currently employed by the City. Our decision will have no practical effect upon Leavens' part of the appeal,[1] and we dismiss the appeal as to him.

In reviewing a circuit court's order affecting an order of the administrative agency, an appellate court's scope of review is identical to the circuit court's.[2] Questions of law, including the construction, interpretation or application of a statute, are reviewable ab initio.[3] We need not defer to the agency's decision when this court is as competent as the agency to decide the legal question involved.[4] In particular, the relationship between two state statutes is within the special competence of the courts rather than WERC, and hence this court need not give great weight to WERC's decision.[5] We also view as a question of law the application of a collective bargaining agreement to certain facts.[6]

This case presents the interaction of secs. 111.70(3)(a)5. and 62.13(4), Stats., and Art. V of the Association's collective bargaining agreement with the City. Section 111.70(3)(a) states in part that "[i]t is a prohibited practice for a municipal employer ... 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to ... conditions of employment affecting municipal employes ... ." Section 62.13(4)(a) gives the chief of a city fire department the

discretion to hire and fire subordinates.[7] Article V of the collective bargaining agreement, as set forth above, specifies that a "probationary employee may be laid off, transferred, or discharged for cause at any time during [the probationary] period." (Emphasis added).

We begin our analysis with the general rule that collective bargaining agreements arrived at under the Municipal Employment Relations Act (MERA), secs. 111.70-.77, Stats., and statutes related to matters contained in such agreements, are to be harmonized whenever possible.[8] Where an irreconcilable conflict exists, the collective bargaining agreement should not be interpreted to authorize a violation of law.[9] However, because a discharge, like a promotion, is a condition of employment subject to mandatory collective bargaining under present sec. 111.70(1)(a), this court must give effect to both the collective bargaining agreement and the statutes if possible.[10]

Like a probationary police officer, a probationary firefighter has neither a constitutional nor a statutory right to a statement of reasons or to a hearing upon termination.[11] Generally, under sec. 62.13(4), Stats., the fire chief has the discretion to hire and fire subordinate

firefighters. However, sec. 111.70, Stats., permits a municipal employer to limit the scope of the fire chief's discretion by means of a collective bargaining agreement.[12]

This is what occurred here. Article V of the collective bargaining agreement between the City and the Association specifically provides that probationary firefighters must be discharged "for cause." By entering into the agreement, the City relinquished part of Chief Bloedorn's authority, but not his ultimate power to decide whom to discharge and whom to keep on.[13] A provision partially relinquishing the fire chief's discretion to discharge does not abrogate a power expressly conferred by law,[14] especially where such a provision is specifically set forth in the agreement.[15] A requirement in the agreement that the chief discharge probationary firefighters "for cause" "merely restricts the discretion [of the chief] that would otherwise exist,"[16] and does not impermissibly remove or transfer the chief's authority to a third party.[17]

We now turn to a review of WERC's decision that it had no jurisdiction to hear the probationary firefighters' complaints. A decision of an administrative agency dealing with the scope of the agency's own power or jurisdiction is

not binding on this court, but is a question of law which we independently review.[18] If an agency erroneously interprets an issue of law, "[t]he court shall set aside or modify the agency action if it finds that ... a correct interpretation [of the law] compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law."[19]

Article V of the collective bargaining agreement provides that "a probationary employee may be ... discharged for cause ... without any recourse to the Grievance procedure." The question is what remedy, if any, is available to probationary firefighters discharged without cause. The above provision could be read, by stating it in the converse, to give such firefighters access to the grievance procedure: "a probationary employee discharged without cause does have recourse to the Grievance procedure." Because the City did not intend to grant probationary employees the right to grieve terminations, we conclude that the parties did not intend to grant probationary employees access to the grievance procedure. "[T]o make a probationary termination arbitrable [would be] to wholly vitiate the significance of a probationary term."[20]

The reason for inserting the "for cause" language, as supported by the uncontroverted testimony of the City's chief negotiator, was to prevent discharges of probationary employees at the whim or caprice of the fire chief. Without a procedure for enforcing this term, the chief could discharge probationary firefighters arbitrarily and without cause, contrary to the agreement, and the City could violate the agreement with impunity. To construe the agreement as giving probationary firefighters the right to a discharge for cause but affording them no procedure for enforcing that right would defy common sense as well as emasculate the parties' intent to fetter the chief's arbitrary discretion. We reject such a construction.

We thus hold that these three probationary firefighters could properly resort to the procedures of sec. 111.07, Stats., by filing complaints under sec. 111.70(3)(a)5., to ensure that the City followed its collective bargaining agreement with regard to their discharges.[21] In so holding we note that sec. 111.70(1)(i) defines "municipal employe" as "any individual employed by a municipal employer." (Emphasis added). Probationary municipal employees thus have the same right as permanent municipal employees to ensure that their employer does not

violate the terms of a collective bargaining agreement governing their terms and conditions of employment.

Because we conclude that WERC had jurisdiction to hear Greenhill's and Maier's complaints, we reverse and remand this case and direct the trial court to reverse WERC's decision and to remand it to WERC with directions to review the hearing examiner's decision on the merits.[22]

Upon the foregoing reasons, we reverse and remand this case and direct the trial court to reverse WERC's decision and to remand to WERC for review of the examiner's decision on the merits.

By the Court: Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

APPENDIX

[1]State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis. 2d 220, 228, 340 N.W.2d 460, 464 (1983) (citation omitted).

[2]Drivers Local No. 695 v. WERC, 121 Wis. 2d 291, 295, 359 N.W.2d 174, 176 (Ct.App. 1984) (citation omitted).

[3]Id. (citation omitted).

[4]Id. (citation omitted).

[5]Glendale Professional Policemen's Ass'n v. City of Glendale, 83 Wis. 2d 90, 100-01, 264 N.W.2d 594, 600 (1978). See City of Brookfield v. WERC, 87 Wis. 2d 819, 827, 828, 275 N.W.2d 723, 727 (1979)

> WERC should not be accorded the authority to interpret the appropriate statutory construction to ch. 62, Stats. ... [T]he exclusive grant of authority to municipalities in ch. 62 is far afield from the powers and limitations in the area of labor relations as enumerated in secs. 111.70-77. ... WERC's statutory interpretations beyond the field of labor law will not be entitled to persuasive or substantial weight.

[6]Board of Educ. v. WERC, 86 Wis. 2d 201, 210, 271 N.W.2d 662, 666 (1978).

[7]See Glendale Professional Ass'n, supra note 5, at 102, 264 N.W.2d at 601.

[8]In re Arbitration Between West Salem Educ. Ass'n & Fortney, 108 Wis. 2d 167, 179, 321 N.W.2d 225, 233 (1982).

[9]Glendale Professional Ass'n, supra note 5, at 106, 264 N.W.2d at 602.

[10]See id. at 103, 264 N.W.2d at 601.

[11]Milwaukee Police Ass'n v. City of Milwaukee, 113 Wis. 2d 192, 195, 335 N.W.2d 417, 418 (Ct.App. 1983). See State ex rel. Dela Hunt v. Ward, 26 Wis. 2d 345, 350, 132 N.W.2d 523, 525 (1965) (distinction between probationary and

permanent employment is that "during a probationary period one may be separated without a hearing.")

[12] Glendale Professional Ass'n, supra note 5, at 107, 264 N.W.2d at 603.

[13] See id.

[14] See id. at 102-03, 264 N.W.2d at 601.

[15] See Milwaukee Police Ass'n, supra note 11, at 197, 335 N.W.2d at 419 (Court of Appeals held unenforceable a general provision in a collective bargaining agreement under MERA because it would transfer the police chief's discretion to an arbitrator, in violation of sec. 62.13(4), Stats.)

[16] Glendale Professional Ass'n, supra note 5, at 102-03, 264 N.W.2d at 601 (footnote omitted).

[17] See Milwaukee Police Ass'n, supra note 11, at 197, 335 N.W.2d at 419 ("a wholesale transfer of [the chief's] authority [to the arbitrator] is beyond the ambit of a labor agreement") (footnote omitted).

[18] Board of Regents v. Wisconsin Personnel Comm'n, 103 Wis. 2d 545, 551, 309 N.W.2d 366, 369 (Ct.App. 1981).

[19] Sec. 227.20(5), Stats.

[20] Milwaukee Police Ass'n, supra note 11, at 196, 335 N.W.2d at 419.

[21] We thereby deem the "for cause" provision in Art. V "express and specific" enough to require third-party contract enforcement review of probationary employee terminations under this agreement. See id. at 197, 335 N.W.2d at 419.

[22] We note that "we cannot ignore and jump over the findings of the ... Commission to reach those of the [hearing] examiner which were set aside." Anheuser Busch, Inc. v. Industrial Comm'n, 29 Wis. 2d 685, 692, 139 N.W.2d 652, 655 (1966). We thus decline to reach the merits of whether Greenhill and Maier were discharged for cause, and whether the examiner correctly construed the phrase "for cause."