STATE OF WISCONSIN : CIRCUIT COURT DANE COUNTY

BRANCH 32

LARRY G. GREENHILL
and RICHARD F. MAIER,

Plaintiffs,

v. Case No. 759-164

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION, CITY OF WAUWATOSA,
and DONALD BLOEDORN, Decision Nos. 19311-D
and 19312-D

Respondents.

DECISION ON JUDICIAL REVIEW OF
THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

This case involves the review of a Wisconsin Employment Relations Commission (WERC) decision, dated October 21, 1987, in which both petitioners' cases were dismissed. The Commission found that respondents' actions in discharging the petitioners were not in violation of the party's collective bargaining agreement and, therefore, not in violation of Sections 111.70(3)(a)5 or 111.70(3)(b)4, Wis. Stats.

Jurisdictional issues were previously decided on July 9, 1986 by the Wisconsin Court of Appeals, which reversed and remanded the Circuit Court's decision,

the Circuit Court holding that the Hearing Examiner lacked jurisdiction to hear the merits of the case.

Petitioners Greenhill and Maier were employed as probationary firefighters with the City of Wauwatosa, subsequent to the City's agreement with Milwaukee County to provide fire protection. Both petitioners were employed on January 2, 1981 under a collective bargaining agreement with the City of Wauwatosa and the Wauwatosa Protective Association. The collective bargaining agreement held in pertinent part that:

> 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.

On December 2, 1981, Chief Bloedorn, one of the respondents in this matter, presented Maier with a letter stating, "[f]or 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." The examiner found that the basis for Maier's termination was his general attitude with regard to his work.

Subsequently, on December 3, 1981, Greenhill was given the same type of termination letter. The Commission found that the reason for Greenhill's discharge was his excessive use of sick leave.

The appeal involves mixed questions of law and fact. The review encompasses the Commission's construction of the term "for cause" in the collective bargaining agreement as well as the Commission's application of that term to the particular set of facts involved. Arrowhead United Teacher's Organization v. WERC, 116 Wis. 2d 580, 587, 342 N.W. 2d 709, 713 (1984). This Court must separate the factual determinations from the legal conclusions and apply the appropriate standard of review to each part. Dept. of Revenue v. Exxon Corp., 90 Wis. 2d 700, 713, 281 N.W. 2d 94, 101 (1979) aff-d, 447 U.S. 207 (1980).

This Court must determine whether the WERC's interpretation of the term "for cause" in the above provision of the collective bargainin agreement and its conclusion that it only protected probationary employees from arbitrary and capricious discharges was reasonable.

The standard of review of a Commission's decision construing and applying the terms of a

collective bargaining agreement is that a reviewing court "...will not independently redetermine every legal conclusion of the board. If the board's construction of the agreement is reasonable, this court will sustain the board's view even though an alternative view may be equally reasonable." Board of Ed., Brown Deer Schools v. WERC, 86 Wis. 2d 201, 210, 271 N.W. 2d 662 (1978). Furthermore, "[u]pon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Section 227.57(10), Wis. Stats.

The Commission determined that the term "discharged for cause" in the collective bargaining agreement means that a probationary employee is protected against arbitrary and capricious discharges. Petitioners contend that the Commission's interpretation of the term "for cause" as arbitrary and capricious is contrary to the clause's accepted interpretation of "just cause."

The examiner, as affirmed by the Commission, rejected the petitioner's first contention, stating that the "for cause" provision appearing in Article V of the collective bargaining agreement is expressly

applied to the "Probationary Period." The examiner reasoned that the word "probationary" had an established meaning in the context of collective bargaining agreements and that meaning is that the probationary period is a time of testing so that an employer can judge the employee's suitability and fitness for the position, citing to San Jose Mercury News, 48 LA 145 (Burns, 1966). He reasoned that because the collective bargaining agreement applies-in Article V to probationary firefighters, an employer need not show "just cause" for discharge; however, the discharge cannot be arbitrary or capricious.

Further, the examiner felt that to interpret the "for cause" provision as requiring "just cause" would make the use of the probationary period provided for in the agreement meaningless, because probationary firefighters would have the same rights as tenured firefighters. Thus, the examiner concluded that a plain reading of the contract substantiates that the "for cause" provision does not mean "just cause."

In addition, the examiner considered the testimony of Bruce Patterson, chief negotiator for the City of Wauwatosa, and found his viewpoint with respect to the negotiating history of the collective

bargaining agreement compatible with the above interpretation of "for cause." Mr. Patterson testified that the "for cause" provision was added to the agreement to "...protect the employees against an outbreak of arbitrary, capricious dismissals because someone wouldn't do something just at the whim of the chief." (Tr. 329)

Based upon a review of the record of the Commission's rationale, it is this Court's conclusion that a rational basis existed for its conclusion. It distinguished between probationary and non-probationary employees and probed into the meaning and purpose of the former, indicating in accordance with State ex rel. Dela Hunt v. Ward, 26 Wis. 2d 345, 349 (1965), that the purpose of a probationary period is to give an employer a chance to test an employee's ability for a given job. It reasoned that if the "just cause" standard were applied to a probationary employee on the fire department, there would be limited discretion in determining whether a probationary firefighter could be discharged. The Court finds that a rational basis exists for this conclusion, particularly in that a more stringent standard could possibly foster

inefficiency in a profession that relies substantially on efficiency and teamwork to insure the lives and property of the public. The Court finds that the strong policy behind a probationary period for firefighters provided a reasonable basis for the Commission to conclude that the term "for cause" does not mean "just cause."

Petitioner Maier next contends that the evidence in the record is insufficient to support findings of fact made by the examiner regarding his attitude "problem." (Findings of Fact #5, #8, #10, and #11). The Court's scope of review as to the findings of fact made by the Commission is very narrow. Findings of fact of the agency will not be set aside if supported by substantial evidence. Guthrie v. Wis. Employment Relations Comm., 107 Wis. 2d 306, 315 (Ct. App. 1982) aff. 111 Wis. 2d 447 (1983).

As to issues of credibility, it has been consistently held that the triers of fact are the sole judges of the credibility of witnesses. Insofar as the agency is the factfinder, the credibility and the weight of the evidence are the sole province of the agency. Kohler Co. v. Industrial Comm., 272 Wis. 310 (1956).

Upon reviewing the record, Chief Bloedorn

testified that he overheard Maier complaining bitterly when he applied for the job with the fire department. Maier was grumbling to another applicant about his fate in having to start at the bottom of the ladder within the department even though he had previously spent several years in its employ. (Tr. 121) During these comments by Maier, the Chief interjected that he wasn't forced to apply; Maier responded that he had to feed his family. (Tr. 121)

Francis Lussier, a training officer for the department, testified that Maier had shown his displeasure with his job by complaining about having to go through the fire training procedures. (Tr. 429) He testified that he had to watch Maier closely because otherwise, Maier would hang back from the rest of the group and not participate in the training maneuvers. (Tr. 430) He further stated that Maier was somewhat of a problem during training sessions because he lacked enthusiasm in becoming a Wauwatosa firefighter. (Tr. 434) Lussier said that Maier had to be forced into participation by verbally commanding him to pick up the equipment and use it. (Id.)

The record indicates that Maier again demonstrated a negative attitude to Chief Bloedorn

after Maier sought further medical treatment following a fire. Bloedorn testified that Maier had sought treatment from his own physician without proper authorization. (Tr. 136) The Chief stated he was concerned that the reason for Maier's independent treatment efforts was possibly knowledge of an exposure [to hydrogen chloride] problem that was not detected by County General Hospital where they all had gone for a check and, if so, the department should be informed of it. He stated that Maier simply had not gone through the proper channels.

During a telephone conversation with Maier with respect to the above action on Maier's part, Bloedorn further testified that Maier told him he did not trust Bloedorn, and that 99 percent of the firefighters did not trust him or hated him. (Tr. 133) There was evidence that the Chief was so disgruntled about Maier's attitude towards him on the telephone that he asked Assistant Chief Donald Pekel to talk to Maier and get to the heart of the problem, if any. (Tr. 241)

The record also reveals that Maier refused to sign a non-contributory life insurance policy. (Tr. 451) As a result, David Moore, Employee Relations Director, testified that Maier put other city

employees in jeopardy of having their insurance cancelled because a failure to get 100 percent of the employees to sign the forms would be considered a violation of the insurance contract. (Tr. 452)

Maier also contends that the testimony of the union president, Vukovitch, is at odds with that of Chief Bloedorn regarding the latter's version of Maier's constant complaints to Vukovitch. If Vukovitch's testimony actually does not harmonize with the Chief's version, this fact would not mandate reversal. The Commission was confronted with the witnesses personally and consequently, was in a better position to judge their credibility. It evidently attributed more credibility to Chief Bloedorn. It may possibly have felt that Vukovitch's status as union president may well have caused him to minimize Maier's conduct. With the Commission being in the best position to evaluate the witnesses and their testimony, this Court is not at liberty to judge them anew. It does note, however, that Training Officer Lussier substantiates Chief Bloedorn's version of what took place. Lussier testified that Vukovitch stated at a meeting he was present and that he (Vukovitch) was being "bothered or constantly called" by Maier. (Tr. 428)

In light of the above, the Court concludes there is substantial and credible evidence to support the findings of fact made by the Commission with regard to Maier's attitude, and accordingly affirms those findings.

The final issue before this court is whether the Commission erred in concluding that Bloedorn's decision to discharge Maier and Greenhill was "for cause." As stated earlier, the Court agrees with the Commission's interpretation of the term as used in the collective bargaining agreement at issue. Thus, as long as the discharges were not arbitrary and/or capricious, they must be upheld.

Petitioners first contend that the definition of arbitrary and capricious as used by the Commission is not applicable here because the case on which the Commission relied did not deal with the review of an employee's discharge. The Commission utilized the definition of arbitrary and capricious set forth by our Supreme Court in Pleasant Prairie v. Johnson, 34 Wis. 2d 8, 12, 148 N.W. 2d 27 (1967).

> An arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful and irrational choice of conduct. Olson v. Rothwell (1965), 28 Wis. 2d

233, 239, 137 N.W. 2d 86.

Pleasant Prairie involved a review of a planning function director's decision in which the director determined that a proposed incorporation did not meet the requirements and standards for incorporation of a village as set forth in Sec. 66.014(8)(b), Wis. Stats.

This Court rejects petitioners' position by virtue of the case of Jabs v. State Board of Personnel, 34 Wis. 2d 245, 148 N.W. 2d 853 (1966). In the above case, the Wisconsin Supreme Court applied the arbitrary and capricious standard used in Pleasant Prairie to review the dismissal of a University of Wisconsin employee who had been dismissed for excessive absences due to illness.

The arbitary and capricious standard used by the examiner in this case was appropriate.

Utilizing the Pleasant Prairie criteria, the Commission found in the case of Greenhill that the reason for discharge was his excessive use of sick leave, and thus, the discharge of Greenhill was not arbitrary and capricious.

Greenhill began his employment on January 2, 1981. It was established that he used all his alloted sick leave time as of November 5, 1981. A

union steward talked to Greenhill at this time and emphasized the importance of accumulating sick leave time in order not to be removed from the payroll. There is evidence in the record that despite this admonition, about five work days later, Greenhill did not report to work again "due to illness."

There is substantial evidence in the record to indicate that Greenhill had excessive absences. There is evidence to show that some of his absences had nothing whatsoever to do with his own health but that of others. Under the circumstances, the question is whether, as a matter of law, these facts give rise to "cause" for discharge. Keeping in mind the Pleasant Prairie criteria, the Court concurs with the Commission's conclusion that there existed a rational basis for Chief Bloedorn's decision to discharge Greenhill. Indeed, dependability and regular attendance being important factors in the firefighting profession, this Court cannot conclude that a discharge for excessiave absenteeism is either an unreasonable or irrational course of action.

In the case of Maier, the Commission found that the basis for discharge was his general attitude with regard to his work and, consequently, that he was discharged "for cause." There were numerous

instances of flagrant disrespect or scorn for his Chief or for his job that were enumerated by the Commission in its findings of fact. As stated, the Court in its review of the record has found substantial and credible evidence to support these findings.

The Court also finds that Maier's behavior and attitude constituted cause for discharge. The Commission found that his dissatisfaction with his job, which he expressed to his cohorts, and corresponding attitude and lack of cooperation affected the morale of fellow firefighters, and that this was the reason the Chief terminated his employment. The Court concludes that the Chief's decision was not without a rational basis; it was not an arbitrary or capricious determination on his part.

The Court is not persuaded by petitioners' assertion that the reasons for discharge must substantially relate to actual job performance. The acts of both Greenhill and Maier have a direct, as well as indirect, effect on job performance.

Based upon the above, the Court affirms the decision of the Commission in all respects.

The respondents 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 15th day of July, 1988, at Milwaukee, Wisconsin.

BY THE COURT:

Michael D. Guolee

Michael D. Guolee
Circuit Court Judge
Branch 32