

STATE OF WISCONSIN
CIRCUIT COURT
COUNTY OF BROWN
BRANCH 1

Jean Elliot,

Petitioner,

-vs-

Wisconsin Employment Relations Commission,

Respondent.

DECISION

Case No. 93-CV-1217

[Decision No. 20857-E]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

FACTS

Jean Elliot petitioned me to review an administrative decision by the Wisconsin Employment Relations Commission (WERC). Elliot asks me for leave to present additional evidence on her bargaining unit status while she was an employee at the Brown County Youth Home (BCYH) in DePere.

A detailed background of the eleven year-old litigation surrounding the BCYH can be found in Brown County v. WERC, 138 Wis. 2d 254 (1987). In sum, the youth home was downsized and relocated in 1983. All thirteen employees at the former site were laid off. Represented by an attorney from their Local 40, AFSCME, they sued Brown County before a WERC examiner, and were awarded reinstatement and back-pay in March, 1984. The examiner's decision was affirmed by the WERC (July, 1985), the Brown County circuit court (February, 1986), and the court of appeals (March, 1987).

Because the parties could not resolve the exact dollar figures due to each employee, compliance proceedings were held before another WERC examiner from February-April, 1989. Once again, the union's attorney represented all thirteen employees. Brown County was represented by its corporation counsel. In his opening statement, the corporation counsel argued that not all of the employees were entitled to compensation because some of them would have been laid off from the new facility anyway.

On May 28, 1993, the examiner issued a decision awarding specific dollar amounts to 11 of the 13 employees. Elliot was left out under the 1983 Collective Bargaining Agreement (CBA) lay off provision, which the examiner used because the new facility only had eleven positions.¹ Julie Sowers, who had one day seniority on Elliot, effectively bumped Elliot under the CBA lay off provision. Elliot's petition for re-hearing was denied by WERC on July 16, 1993.

In her petition before this Court, Elliot claims Sowers should not have bumped her under the provision because Elliot, not Sowers, was a "regular" part-time employee belonging to the bargaining unit. Elliot seeks leave to present additional evidence to that effect to this Court, or to the WERC examiner on remand.

DECISION

Elliot's petition to present additional evidence is based on sec. 227.56(1), Stats., which reads

¹ The parties signed the 1983 CBA on November 27, 1984.

If before the date set for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon such terms as the court may deem proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court the additional evidence together with any modified or new findings or decision.

The materiality of Sowers' bargaining unit status is undisputed by WERC. The CBA lay off provision, quoted in the examiner's decision, commands that "[n]o regular employees shall be laid off if there are part-time, temporary or seasonal employees working." Because Sowers was found to be a regular part-time employee (with one day seniority over Elliot), she was protected. If however, the examiner had found Sowers was just a part-time employee, her seniority would not have mattered. Assuming Elliot could then prove she was regular part-time, Elliot would have been the eleventh employee awarded damages.

Although WERC recognizes the materiality of Elliot's proffered evidence, they argue no good reasons exist for failing to present this evidence at the hearing. I disagree. Brown County's opening statement made its intention to use the lay off provision clear. This argument was ultimately adopted into the examiner's decision. I find this lay off methodology put all of the employees, Elliot and Sowers in particular, into an adversarial relationship with each other. It thereby created an inherent conflict of interest for the union attorney who represented them. Wis. SCR 20:1.7. The union attorney's duty to effectively represent Elliot was compromised

because he owed the same duty to Sowers. As a result, Elliot's bargaining unit status was not properly litigated. Elliot has demonstrated a good reason why the evidence was never presented.

In a recent correspondence, the union informed me that it now wishes to "assume a neutral stance" in the "fight" between Elliot and Sowers. The union now asks to disengage itself from the conflict.

I believe that as soon as the corporation counsel's statement was made, the examiner and all attorneys present, should have recognized a palpable conflict of interest. I believe that in administrative proceedings, just as in traditional judicial proceedings, there is an obligation to ensure the conflict is abated. The examiner should have stopped the proceedings immediately and asked each employee if they desired separate representation. This was not done, and Elliot's proffered evidence was never heard.

WERC argues the evidence was offered and Sowers' bargaining unit status was litigated. I disagree. In support of her request to present additional evidence, Elliot submitted the affidavits of eight employees she worked with at the BCYH. Each affiant refutes that Sowers was a regular part-time employee, but agrees that Elliot was. Elliot has also submitted an affidavit to that effect. My review of the record reveals that none of the employees were asked these specific questions during the proceedings. Elliot is also prepared to present the BCYH's business records to support her assertions.

The WERC examiner's decision recognized the lack of factual support in the record to determine Sowers' bargaining unit status when he characterized it as "unclear." Elliot should be allowed to present evidence that may clarify such a crucial issue. I believe that Elliot and

Sowers should be offered the opportunity to fully develop their respective positions on this material issue of law and fact with the assistance of independent legal counsel of their own choosing.

Elliot's petition for leave to present additional evidence is granted. The case is remanded to the WERC examiner with orders to initiate proceedings consistent with this opinion, making sure Elliot is represented by conflict-free counsel of her choice.

Dated at Green Bay, Wisconsin, this 16th day of May, 1994.

BY THE COURT:

Richard G. Greenwood /s/
Honorable Richard G. Greenwood
Circuit Court, Br. I