STATE OF WISCONSIN
CIRCUIT COURT
COUNTY OF BROWN
BRANCH I

Jean Elliot,
Petitioner,

-vs-

Wisconsin Employment Relations Commission,
Respondent.

Case no. 93-CV-1217
Decision No. 20857-F

DECISION

FACTS

The facts leading up to Jean Elliot's petition for review against the Wisconsin Employment Relations Commission (WERC) are set forth in my May 16, 1994, decision and will not be repeated here. In that decision, I granted Elliot's leave to present additional evidence before the agency regarding her bargaining unit status. The case was remanded to the WERC examiner for that limited purpose because Elliot was not represented by conflict-free counsel during the underlying administrative proceedings. The case is before me once again, this time on a motion to vacate my earlier decision.

The present motion to vacate is brought by Julie Sowers, one of Elliot's co-workers at the Brown County Youth Home (BCYH) before Brown County shut it down in 1983. 1/ Sowers' adverse position relative to Elliot's regarding back pay entitlement from Brown County is well documented in my earlier decision. Indeed, union attorney Richard Graylow's simultaneous representation of the two women formed the basis for my decision to remand. Attorney John Brennan now represents Sowers individually and filed this motion on her behalf, arguing that Elliot became aware of and waived Attorney Graylow's conflict-of-interest at some point during the 10-year litigation.

In support of her waiver argument, Sowers attached two affidavits to her motion. The first affiant is Sowers herself, and the relevant portions of her affidavit read:

> 4. During the 10-year litigation [surrounding the BCYH's closure], Richard Graylow of the Madison office of Lawton & Cates represented the union, and through that representation, the individual 13 employees' interests. At some point during the litigation, Graylow and I discussed the subject of retaining individual attorneys. Graylow informed me that he was representing the union's interests, that whatever remedy the union achieved would directly affect each of the 13 employees, and that I had the option of retaining my own attorney if I chose to do that. I asked him if I should get another lawyer, and he replied that it was entirely up to me.
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> 5. As a consequence of some frustration over the length of time it was taking to resolve the litigation, I, together with George Pronold and Jean Elliot, two coworkers, met with Madison attorney Rich Thal to discuss the possibility of individual representation. After meeting with Thal, each of us decided to remain with Mr. Graylow.
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> . . .
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> 7. Throughout the course of the litigation, each of us was made aware repeatedly of the possibility that some of us may not get paid after the final resolution. I remember being aware of this fact since the very beginning of the litigation.
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> . . .

9. I make this affidavit in support of my motion for relief, and based upon the court's order of May 16, 1994 in which the court indicated its concern with the fact that complainant Jean Elliot was allegedly not apprised of her rights to separate legal representation and/or offered that opportunity. I was with Jean Elliot when we both took advantage of that opportunity.

The second affiant is George Pronold, one of Elliot's and Sowers' co-workers at the BCYH, and the relevant portions of his affidavit read:

2. In [the 10-year litigation surrounding the BCYH] against Brown County, Attorney Richard Graylow of the law firm of Lawton & Cates in Madison, Wisconsin, was attorney of record for the union. In some sense, he was also representing the interests of the 13 individuals, since whatever remedy was going to come of the litigation would be to the economic benefit of the individuals.

3. At some point in the litigation, Richard Graylow spoke individually, to the best of my knowledge, with all 13 named parties. He spoke to me individually, and explained that whatever the outcome of the litigation, it was possible that if the union recovered anything, it may be a matter where some of the 13 employees would receive monies while others received nothing. Graylow advised me that I had a right to retain my own attorney, if I chose to do that, but stated that the choice was entirely up to me.

4. As a consequence of that meeting with Mr. Graylow and the fact that some of us were dissatisfied with the length of time it was taking to have a resolution of this matter, I, together with Julie Sowers and Jean Elliot met with Attorney Rich Thal of Madison, Wisconsin on September 28, 1990. We met with Thal concerning possible individual legal representation in the Brown County Youth Home case. Based on our meeting with Thal, I concluded that nothing would be gained by seeking different representation. Apparently the same conclusion was drawn by Julie Sowers and by Jean Elliot, since neither of them sought separate representation even after that meeting.

Sowers believes that these affidavits demonstrate Elliot's awareness of Attorney Graylow's conflict-of-interest. Sowers asks me to conclude that in that face of that knowledge, Elliot's failure to hire her own attorney amounted to a waiver of the conflict. Elliot, now individually represented by Attorney Thomas Parins Jr., opposes Sowers' motion.

At a recent hearing on Sowers' motion, Brown County was represented by its corporate counsel, Ken Bukowski. Attorney Bukowski indicated that the money Sowers and Elliot are fighting over, approximately $24,000, is being held in escrow pending the outcome of the case.

DECISION

Sowers brings her motion to vacate under sec. 806.07(1), Stats, which reads:

(1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
(a) Mistake, inadvertence, surprise, or excusable neglect;
(b) Newly-discovered evidence which entitles a party to a new trial under sec. 805.15(3);
(c) Fraud, misrepresentation, or other misconduct of an adverse party;
(d) The judgment is void;
(e) The judgment has been satisfied, released or discharged;
(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
(g) It is no longer equitable that the judgment should have prospective application; or
(h) Any other reasons justifying relief from the operation of the judgment.

Sowers does not state upon which of the eight grounds (a-h) her argument is specifically based. Elliot believes that only ss. (1)(b), dealing with "newly-discovered evidence', is arguably applicable. I choose not to read Sowers' motion so strictly, and will consider whether any of the grounds detailed in ss. (1)(a), (b), (g), or (h) are satisfied. 2/

At the outset, it should be noted that sec. 806.07(1), Stats., can apply to a circuit court's decision to remand under ch. 227, but it depends upon the circumstances presented in each case. *State ex rel. Town of Delavan v. Walworth County Circuit Court,* 167 Wis. 2d 719 (1992). If, for example, the movant asserts "newly-discovered evidence" under sec. 806.07(1)(b), Stats., the evidence must

truly be "newly-discovered' before relief from a ch. 227 circuit court decision will be considered. Id. at 728; *citing Chicago & N.W. R.R. v. LIRC,* 98 Wis. 2d 592, 612 (1980). And, if the movant bases the motion to vacate on sec. 806.07(1)(g) or (b), Stats., no relief from the circuit court's decision is afforded when the remand resulted from the failure to fully develop the record before the agency. *Town of Delavan,* 167 Wis. 2d at 730-31; *citing Charter Manufacturing v. Milwaukee River Restoration,* 102 Wis. 2d 521 (Ct. App. 1981).

Considering first whether Sowers' proffered evidence is "newly-discovered", I am satisfied that it is not. Section 806.07(1)(b), Stats., refers directly to sec. 805.15(3), Stats., which sets forth a four-pronged test to determine whether evidence fits within the "newly - discovered" definition:

> (3) NEWLY-DISCOVERED EVIDENCE. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:
> (a) The evidence has come to the moving party's notice after trial; and
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
> (c) The evidence is material and not cumulative; and
> (d) The new evidence would probably change the result.

Sowers' affidavit concedes that she had notice of this evidence before the WERC proceedings were completed. Sowers cannot satisfy sec. 805.15(3)(a), Stats., and as such, relief from my earlier decision will not be afforded under sec. 806.07(1)(b), Stats.

Turning next to sec. 806.07(1)(g) and (h), Stats., I am satisfied that relief from my earlier decision cannot be granted under either of these provisions as well. To consider a motion to vacate when the circuit court remanded for a full development of the factual record would cause a direct conflict between sec. 806.07, Stats., and sec. 227.57, Stats., which limits the circuit court's review to the record. *Town of Delavan,* 167 Wis. 2d at 731. Here, my earlier decision to remand was based upon a conflict-of-interest which prevented a full development of the factual record before the agency. Relief from that decision cannot be granted under sec. 806.07(1)(g) or (h), Stats., without adversely impacting upon sec. 227.57, Stats.

Finally, Sowers seems to argue that my earlier decision was a "mistake" under sec. 806.07(1)(a), Stats., because Elliot knew about and waived Attorney Graylow's conflict-of-interest. Even if this is the type of "mistake" contemplated by ss. (1)(a), Sowers' affidavits have not sufficiently demonstrated its existence. Neither Sowers nor Pronold have first hand knowledge that Attorney Graylow spoke to Elliot about the inherent conflict between Elliot and Sowers. And, although Elliot, Sowers, and Pronold did meet with Attorney Thal about individual representation, Sowers and Pronold acknowledge that the reason for the meeting was to expedite the litigation, not to retain conflict-free counsel.

Even assuming Attorney Graylow advised Elliot of the conflict as he did with Sowers and Pronold, Elliot should still be allowed to present additional evidence. Supreme Court Rule 20:1.7, cited in my earlier decision, reads in part:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

This rule, phrased in mandatory language, leads me to conclude that Attorney Graylow's simultaneous representation of Elliot and Sowers was so inherently flawed to warrant remand despite Sowers' claim of waiver.

First, it would have been unreasonable for Attorney Graylow to believe his simultaneous representation of Sowers and Elliot would not be adversely affected by the conflict. His duty to Sowers was to produce evidence of her bargaining unit status, and to discredit evidence about Elliot's bargaining unit status. He owed the same duty to Elliot. Since adequately performing both duties simultaneously was impossible, as evidenced by Elliot's subsequent petition for review, Attorney Graylow should not have represented both women.

Second, Attorney Graylow's consultation with Sowers and Pronold, as set forth in their respective affidavits, falls short of the notification standard announced in SCR 20:1.7(b)(2). Multiple clients must be told in sufficient detail about the attorney's limited representation so they can make an informed choice regarding separate counsel. Judging by Sowers' and Pronold's affidavits, sufficient detail was not obtained here.

Third, neither Sowers nor Pronold consented in writing to Attorney Graylow's continued representation. The importance of such documentation is realized in this case, where a court is asked to infer a client's knowledge and waiver of her attorney's conflict-of-interest, from conversations the attorney had with two other clients.

For the foregoing reasons, Sowers' motion to vacate is denied. The case is remanded to the WERC examiner with orders to initiate proceedings consistent with this decision and the decision issued on May 16, 1994. Both Elliot and Sowers, represented by conflict-free counsel of their own choosing, should be allowed to produce evidence about their respective bargaining unit status.

Dated at Green Bay, Wisconsin, this 10th day of November, 1994.

BY THE COURT:

/s/ Richard G. Greenwood
Honorable Richard G. Greenwood (signed)
Circuit court, Branch I

Endnotes

1/ Sowers, through union attorney Richard Graylow, petitioned to intervene in this judicial review as permitted under sec. 227.53(1)(d), Stats., and as required under sec. 227.53(2), Stats. Neither Elliot nor the WERC raise any concerns about the timeliness of Sowers' petition under sec. 227.53(2), Stats., so I consider her intervention proper for purposes of this motion.

2/ Given the tenor of Sowers' argument, I do not consider any of the other grounds to be reasonably applicable.