STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 RICHLAND COUNTY

RICHLAND SCHOOL DISTRICT,

Petitioner,

v.

Case No. 2009-CV-0113

Administrative Agency Review: 30607

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and AFSCME, COUNCIL 40, AFL-CIO,

Respondents.

Dec. No. 24683-C

ORDER

Richland School District having commenced this proceeding on June 9, 2009, under Wis. Stat. §§ 227.52-227.57, for judicial review of a decision of the Wisconsin Employment Relations Commission under the Municipal Employment Relations Act (MERA), *see* Wis. Stat. §§ 111.70-111.77; and

The District having appeared by Kathy L. Nusslock and Erin E. Kastberg, Davis & Kuelthau, s.c., the Commission having appeared by Assistant Attorney General David C. Rice, and AFSCME, COUNCIL 40, AFL-CIO, having appeared by Bruce F. Ehlke, Ehlke, Gartzke, Bero-Lehmann & Lounsbury, S.C., and

The court having reviewed the record and having considered the arguments of the parties; and

The court having entered a Memorandum Decision on October 1, 2010,

Now Therefore IT IS ORDERED that judgment be entered affirming the Commission's decision.

Dated at Richland Center, Wisconsin, this 19th day of October, 2010.

BY THE COURT:

/s/

Honorable Edward E. Leineweber
Circuit Court Judge

STATE OF WISCONISN CIRCUIT COURT RICHLAND COUNTY

RICHLAND SCHOOL DISTRICT,

Petitioner,

Case No. 09CV113

WISCONSIN EMPLOYMENT
RELATIONS COMMITTEE,

Respondent,

And
AFSCME, COUNCIL 40
AFL-CIO,

Interested Party.

Dec. No. 24683-C

Prior to the 1987 election when AFSCME became the collective bargaining representative for all full-time and regular part-time employees of the Richland School District (District) - with some exceptions, the parties negotiated the scope of the potential bargaining unit. The parties agreed that the five clerical employees who worked in the District's Central Office would not be eligible to vote in the election for union representation and would be excluded from the bargaining unit.

In 2008 AFCSME filed a Petition to Clarify Bargaining Unit with the Wisconsin Employment Relations Commission (WERC) seeking to include three of the five Central Office staff positions in the union. AFSCME dropped its request with respect to one position, but persisted in two others: The District Receptionist/Secretary - Maintenance and Transportation and Secretary - Special Education/Pupil Services.

In the Findings of Facts, Conclusions of Law and Order Clarifying Bargaining Unit and accompanying Memorandum dated May 11, 2009, WERC ordered that the two positions in question be included in the bargaining unit.

under an exception to a "deal is a deal" doctrine.

STANDARD OF REVIEW

Siger v. Wisconsin Personnel Comm., 181 Wis. 2d 845, 855 (Ct. App. 1994), citing *Jicha*, holds:

> If an agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the statute, the agency decision is entitled to "great weight."
>
> The second level of review provides that if the issue is "very nearly" one of first impression, it is entitled to "due weight" or "great bearing."
>
> The lowest level of review, *de novo,* is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

CASE AT BAR

AFSCME asks the court to give great weight to the WERC decision while the District argues for *de novo* review. The burden of proof in overturning the Commission's determination as unreasonable is on the moving party. *Mineral Point Unified School District v. WERC*, 251 Wis. 2d 325 (Ct. App. 2002).

The District asserts, without persuading, that *de novo* standard is appropriate because this case is one of first impression. Ample case law exists, much of it addressed in the District's brief, wherein the "deal is a deal" doctrine and its exceptions are fleshed out. The District does not sufficiently distinguish this Petition for Clarification from the others in those cases. While legal disputes are always somewhat distinguishable on their unique facts, the court does not view the legal questions here to be sufficiently novel as to fairly describe this case as one of first impression, or even nearly so.

In its reply brief, the District also argues that there is "a separate basis for *de novo* review; i.e., " . . the agency is not experienced in reconsidering its practices or inclined to reevaluate agency precedent in need of critical review." Since the District cites to no authority for that proposition, the court does not consider it further and will not adopt it.

Since neither de *novo* nor "due weight" review is the appropriate standard here, the court is required to give "great weight" WERC's decision, if it is reasonable and supported by substantial evidence in the record. "Substantial evidence" is that quantum of relevant evidence as a "reasonable mind might accept as adequate to support a conclusion" *Gateway City Transfer Co. v. Public Service Com.*, 253 Wis. 397 (1948).

WERC correctly identifies the dispositive issue to be whether or not the application of "deal is a deal" doctrine is appropriate here. There are competing accounts in the record as to whether the agreement made by AFSCME and the District was (1) that the positions were, in fact, confidential under the statute, or (2) that the positions were simply termed "confidential" as shorthand used in negotiations that were really aimed at reaching agreement on the contours of the bargaining unit. This factual determination is a crucial one in that it determines whether or not the "deal" here is to be enforced or whether the "deal is a deal" exception regarding confidential employees applies.

In its Findings of Fact, the Commission determined that at the time the parties negotiated the scope of the bargaining unit, they believed that the employees in the District Office were actually confidential, and so excluded them from the unit. The court must accept this finding on this record. To require acceptance of factual findings below, it is not required that the evidence be subject to no other reasonable, equally plausible interpretation. *Hamilton v. ILHR Dept.*, 94 Wis.2d 611 (1980). When more than one inference can reasonably be drawn, the finding of the agency is conclusive. *See Vocation Tech. & Adult Ed. Dist. 13 v. ILHR Dept.*, 76 Wis.2d 230 (1977).

Having made this finding, WERC then determined that, at the time of the agreement, the parties' mutually-held belief was wrong, and that the positions in question were not, in fact, confidential under the applicable statute and case law.

In reaching this decision WERC goes to considerable lengths to minimize the amount of union-related confidential work that either employee performs, which effort this court views as a bit of a stretch. This tends to undermine this court's confidence in the holding of WERC that those concededly confidential job duties can be shifted to other District Office staff without undue disruption. However, the court may not "second guess" the proper exercise of the agency's fact-finding function, even though, if viewing the case *ab initio*, it might come to a different result. *See Briggs and Stratton Corp. v.*

ILHR Department, 43 Wis.2d 398 (1969).

After careful review of the record, pleadings and Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit and accompanying Memorandum, the court holds that there is sufficient evidence in the record upon which the Commission could reasonably base its decision. The Commission explains its reliance on the firmly-rooted exception to the "deal is a deal" doctrine. It does not appear that the Commission's decision was capricious or ill-considered. In its decision, the Commission addressed the concerns of the parties which were, essentially, the same as those raised in this appeal.

BASED ON THE FORGOING, the court DENIES the Petitioner's request to reverse WERC's Order previously entered.

Counsel for the respondent shall prepare a proposed order and judgment in conformance with this Memorandum Decision within 10 days and submit it to the court for signature and entry, after having first given opposing counsel an opportunity to object to the form and content of the proposed documents.

Dated this 1st day of October, 2010.

Edward E. Leineweber
Circuit Court Judge