

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. MATTHEW J. MUSGRAVE,
Petitioner-Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent-Respondent.

LOCAL 2492-A, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES (AFSCME), AFL-CIO,
Petitioner-Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent-Respondent,

MATTHEW J. MUSGRAVE,
Appellant.

No. 92-1075
Decision Nos.25757-C and 25908-C

APPEAL from a judgment and an order of the circuit court for Marquette county: WALLACE A.
BRADY, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Brown, JJ.

PER CURIAM. Mathew J. Musgrave appeals from an order in which the Marquette County Circuit Court affirmed in part and reversed in part an order of the Wisconsin Employment Relations Commission (commission). The trial court affirmed the commission's order dismissing Musgrave's action against his employer, the Marathon County Department of Social Services. However, it reversed the commission's order refusing to dismiss Musgrave's complaint against his union and union officials for violating their duty of fair representation. We affirm.

FACTS

Two cases have been consolidated in this appeal. Both have been extensively litigated. The complete facts have been set out at length by various adjudicators below 1/ and need not be repeated here. The following summary suffices for the purpose of this opinion.

Mathew J. Musgrave was employed as a social worker by the Marathon County Department of Social Services. Between September 1985 and March 1988, Musgrave's union, AFSCME Local 2492-A, filed several grievances against his employer alleging the impropriety of various unfavorable determinations. However, Musgrave was not pleased with the union's handling of his grievances.

In April 1988, Musgrave filed another grievance (April grievance) based on his employer's written reprimand for an alleged threat Musgrave made against another employee. The union unsuccessfully attempted settlement, and thereafter, informed Musgrave that it would not process his grievance any further. Musgrave challenged the union's determination before AFSCME's national judicial panel, which ruled against him.

In October 1988, his employer suspended Musgrave without pay for poor job performance. Thereafter, he filed another grievance (October grievance). The union represented Musgrave at an initial grievance meeting with his employer.

However, after the employer denied the grievance at the first stage, the union refused to process Musgrave's October grievance further.

Not pleased with his employer or his union, Musgrave filed two separate complaints with the commission. The first alleged that his employer had discriminated against him for union activities. The second alleged that the union and other AFSCME entities and individuals violated their duty to him of fair representation under sec. 111.70(3)(b)1, Stats., for various reasons, including the union's refusal to process the April and October grievances.

The cases were consolidated. After extensive motions, a two-day hearing occurred before the examiner. He dismissed both complaints. Thereafter, Musgrave appealed to the full commission. See secs. 111.07(5) and 111.70(4)(a), Stats.

The commission affirmed the examiner's dismissal of the complaint against the employer and also affirmed the examiner's dismissal of the complaints against various AFSCME entities and individuals. However, the commission reversed the examiner's dismissal of the complaint against the union. The commission determined that the union's executive board permitted "hostility" toward Musgrave to influence its decision not to pursue his various grievances.

The commission did not consult with the examiner 2/ as required by *Hamilton v. DILHR*, 94 Wis.2d 611, 621, 288 N.W.2d 857, 861-62 (1980) (In reversing the examiner an agency must "(1) consult of record with the examiner ... and (2) include in a memorandum opinion an explanation for its disagreement with the examiner. "). Also, when it made its determination, the commission did not have certain portions of the record before it, a matter which later became known when the commission had to request the union's help in filling gaps in its record to be filed before the circuit court. Musgrave appealed to the circuit court under ch. 227, Stats. The union cross-appealed.

The circuit court determined that substantial evidence in the record supported the commission's determination affirming the examiner's dismissal of the employer. The court overturned that portion of the commission's order which reversed the examiner's dismissal of the complaint against

the union. The court reasoned that the commission erred because it failed to consult with the examiner, and because certain parts of the record were not before it.

ANALYSIS

The scope of appellate review is identical to that given to the circuit court under sec. 227.57, Stats. (formerly sec. 227.20, Stats.). *Gilbert v. Medical Examining Bd.*, 119 Wis.2d 168, 194, 349 N.W.2d 68, 79-80 (1984). Thus, we may not substitute our judgment for the commission's in a contested case as to the weight of the evidence on any disputed finding of fact. However, we must set aside or remand the action if the commission's findings of fact are "not supported by substantial evidence in the record." Section 227.57(6), Stats. Further, we must remand if the correctness of the action has been "impaired by a material error in procedure or a failure to follow prescribed procedure." Section 227.57(4), Stats.

We conclude that the commission's action was impaired by a material error in procedure when it failed to consult with the examiner before reversing him. As set forth in *Hamilton*, the commission is bound to consult with the examiner. Failure to do so is a "material error" and a "failure to follow prescribed procedure." Section 227.57(4), Stats. Therefore, we conclude that the trial court correctly reversed the commission's order refusing to dismiss Musgrave's action against the union.

3/

With respect to the commission's determination that the examiner acted correctly in dismissing the complaint against the employer, we conclude that the trial court correctly affirmed the commission. There is substantial evidence that the employer dismissed Musgrave because of Musgrave's poor work performance, rather than for his union activities. The examiner, the commission, and the circuit court agree that the employer found fault with Musgrave's work before Musgrave began the union activities which, he alleges, led to his discharge.

By the Court. Judgment and order affirmed.

This opinion will not be published. See Rule 809.23(1)(b)5, Stats.

Endnotes

1/ In addition to hundreds of pages of hearing transcripts, the record contains a twelve-page determination by the examiner, a fifty-seven page order by the commission (consisting of a nineteen-page order and a thirty-eight page memorandum), as well as a fourteen-page decision by the trial court.

2/ In its brief before the trial court, the commission conceded that it failed to consult with the examiner.

3/ In its brief before this court, the commission implicitly concedes its own error by failing to argue that the trial court acted improperly in reinstating the examiner's dismissal of the union.