STATE OF WISCONSIN
CIRCUIT COURT
MARQUETTE COUNTY

STATE EX REL. MATTHEW J. MUSGRAVE,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Defendant.
Case No. 91 CV 38

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

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.
Case No. 91 CV 215

DECISION
Decision Nos. 25757-C and 25908-C

These matters are before the Court to review, pursuant to Chapter 227, Wisconsin Statutes the single decision of the Wisconsin Employment Relations Commission of March 5, 1991 in the two above entitled cases.

BACKGROUND

Mathew J. Musgrave filed complaints with the Commission on September 26, 1988 (Case No. 138) and December 21, 1988 (Case No. 142). These complaints alleged that his employer, Marathon County had discriminated against him because of his union activities. The complaints further alleged that his Union, AFSCME Local 2492-A, as well as certain other individuals and entities within AFSCME, violated their duty of fair representation under Sec. 111.70(3)(b)l, Stats., by refusing to further process certain grievances filed by Musgrave.

A consolidated hearing in regard to both complaints was held on September 19 and 20, 1989, before an Examiner appointed by the Commission. On December 27, 1989, the Examiner issued a decision dismissing both of Musgrave's complaints in their entirety, i.e. both as to the allegations against Marathon County and those against the Union.

Musgrave appealed the decision to the full Commission, pursuant to Sec. 111.07(5) and 111.70(4)(a), Stats. On March 5, 1991, the Commission issued a decision affirming, the Examiner

in part and reversing in part. The Commission affirmed the Examiner's conclusions that the allegations against Marathon County must be dismissed. The Commission affirmed the ruling that the allegations against certain individuals and bodies of the Union must be dismissed. The Commission further affirmed that the Union Local had not violated its duty of fair representation in certain respects. The Commission reversed the Examiner in part, however, concluding that Local 2492-A's Executive Board had violated its duty of fair representation to Musgrave by permitting "hostility" to influence its decision not to further process Musgrave's grievances. The Commission did not consult with the Examiner prior to reversing him in part.

Both Musgrave and the Union petitioned for judicial review of portions of the Commission's decision. Musgrave petitioned for review in Marquette County, pursuant to Ch. 227, Stats., on April 2, 1991 (Case No. 91 CV 38). The Union petitioned for review in Marathon County, pursuant to Ch. 227, Stats., on April 3, 1991 (Case No, 91 CV 215). The two cases have been consolidated, with venue in Marquette County. Per order of the Chief Judge of the Sixth Judicial District, this Judge was assigned to hear this matter.

The Commission filed the record in this case on May 3, 1991. However, it was "unable to locate" certain evidence entered into evidence at the hearing. The Union provided copies of this missing evidence by letter of May 9, 1991. By letter of June 4, 1991, the Commission certified that the record before the Court is now complete.

STATEMENT OF THE CASE

Mr. Musgrave was employed as a social worker in Marathon County's Department of Social Services. Between September 1985 and March 1988, Mr. Musgrave filed five contractual grievances with Local 2492-A alleging that various directives, performance evaluations and discipline he received from his employer were improper. The manner in which Local 2492-A elected to process these various grievances was generally unsatisfactory to Mr. Musgrave, as evidenced by his repeated advisement to Local 2492-A officers of his dissatisfaction. On March 25, 1988, Mr. Musgrave wrote a letter to Robert Lyons, the Executive Director of AFSCME Council 40, stating that Local 2492-A had failed to fairly represent him as to at least two grievances and requested that Council 40 intervene to provide him with fair representation.

On April 18, 1988, Mr. Musgrave received a written reprimand from the Director of Marathon County's Department of Social Services for allegedly threatening another county employee. On the same day, as per the contractual grievance procedure, Mr. Musgrave notified the Director of his grievance in regard to the reprimand. Shortly thereafter, Mr. Musgrave met with representatives of Local 2492-A to discuss the grievance and the facts surrounding the alleged threat. After an unsuccessful attempt at settlement, Mr. Musgrave was notified on May 9, 1988, by Local 2492-A grievance committee that it had decided not to process Mr. Musgrave's reprimand grievance further. Mr. Musgrave responded by seeking intervention by Council 40. This request was denied.

Mr. Musgrave, On May 10, 1988, advised the Local 2492-A Executive Board by letter of his desire to initiate proceedings against members of the Local 2492-A grievance committee for their refusal to further his grievance. On June 10, 1988, Mr. Musgrave advised the Local 2492-A Executive Board by letter of his intent to initiate proceedings against its members for failure to pursue

representation of Mr. Musgrave regarding his grievances. On August 1, 1988 and August 17, 1988, John Seferian, Chairperson of AFSCME Judicial Panel, dismissed Mr. Musgrave's June 10, 1988 charges against Local 2492-A members. On September 28, 1988, ten members of Local 2492-A wrote Mr. Seferian a letter requesting that Mr. Musgrave be expelled from union membership. The Judicial Panel, Council 40 or Local 2492-A took no action regarding Mr. Musgrave's May 10, 1988 charges.

On September 26, 1988, Mr. Musgrave and local 2492-A grievance representative Deborah Morris met with Mr. Musgrave's supervisor to discuss complaints regarding Mr. Musgrave's job performance. On October 7, 1988, Mr. Musgrave was suspended for one day without pay for poor job performance. On October 11, 1988, Mr. Musgrave filed a grievance as to the one day suspension. A Step One grievance meeting occurred with Local 2492-A member Deborah Morris representing Mr. Musgrave. On November 1, 1988, the Director of the Department of Social Services issued a Step One denial of the grievance. Local 2492-A decided not to process Mr. Musgrave's suspension grievance to Step Two of the contractual grievance procedure.

On or about November 22, 1988, Mr. Musgrave advised the Director of the Department of Social Services of his intent to end employment. Prior to the end of Mr. Musgrave's employment on January 3, 1989, Phil Salamone of Council 40 and the Director of Department of Social Services Personnel Department, discussed with Mr. Musgrave the possible settlement of his suspension grievance. To settle the grievance, an offer to withdraw the discipline from Mr. Musgrave's file, make Mr. Musgrave whole for the suspension and give Mr. Musgrave a neutral generic letter of reference. Mr. Musgrave requested the settlement offer in writing. However, it would only be put in writing, if Mr. Musgrave said it was agreeable. No further settlement discussions took place.

The Commission dismissed Mr. Musgrave's complaints as to Marathon County, James Dalland, Brad Karger, AFSCME Council 40 and members of the judicial panel. However, the Commission did find that hostility played a role in AFSCME Local 2492-A Executive Board's decision to not further process Mr. Musgrave's reprimand and suspension grievance. The Commission ordered that AFSCME Local 2492-A, its officers and agents to immediately cease and desist from failing to fairly represent employees of Marathon County and that consistent with their obligations determine whether it will further process Mr. Musgrave's grievances.

SCOPE AND STANDARD OF REVIEW

The scope of this court's reviewing authority is governed by Section 257.57, Wisconsin Statutes. The standard of review for an administrative decision depends upon whether the issue presented involves questions of law or fact. A court is free to review a question of law ab initio when it is as competent as an agency to interpret the relevant law or when the material facts are undisputed (Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 48); however, upon judicial review of an administrative decision due weight shall be accorded the experience, technical competence and specialized knowledge of the agency involved (Sec. 227.57(10), Wisc. Stats.). The agency's finding of fact must be affirmed if support by "substantial evidence in the record." (Hamilton v. DILHR, 94 Wis. 2d 61 1).

ISSUES

I conclude the issues in these cases to be:

> 1. Could the Commission reasonably conclude that there was sufficient substantial evidence to find that Marathon County, its agents and employees, did not retaliate against Musgrave because of his Union activities?
> 2. Could the Commission reasonably conclude that there was sufficient evidence to believe that bad faith and hostility was a motivating factor in AFSCME Local 2992-A and the Executive Committees' decision to not further process Mr. Musgrave's reprimand and suspension grievance?
> 3. Were the Commission's legal conclusions based on a correct application of law?

I.

In this case Musgrave seeks review of the Commission's dismissal of his charges against Marathon County and its agents and employees.

For reasons hereinafter stated, I affirm that portion of the Commission's decision dismissing Musgrave's claims against those entities and individuals.

Mr. Musgrave alleges, inter alia, that both Marathon County Department of Social Services and Marathon County Department of Personnel violated the terms of the collective bargaining agreement and thereby violated the Municipal Employment Relations Act by failing to conduct a Step 1, Step 2, and Step 3 grievance meeting pursuant to the collective bargaining, agreement. See Petitioner's Complaint, p.3. Mr. Musgrave cites as support the 107 exhibits he entered as evidence in the September 19 and 20, 1989 hearing before the Commission's hearing examiner, Christopher Honeyman. See, Petitioner's Brief, p. 2. Mr. Musgrave alleges that the aforementioned exhibits, none of which were challenged by the respondents, illustrate that Marathon County retaliated against him by disciplining him due to his union activities. See, Hearing Examiner's Finding of Fact, Conclusions of Law and Order, p. 1.

Mr. Musgrave received a written reprimand on April 18, 1988, from his employer for allegedly threatening a co-worker. See, WERC, Modified Finding of Fact 7, p.2. Mr. Musgrave subsequently grieved the reprimand. Id. On or about September 15, 1988, Mr. Musgrave received a memo from his supervisor, Linda Duerkop, directing Mr. Musgrave to attend a September 26, 1988 meeting "... to discuss complaints regarding [his] job performance." See, WERC, Modified Finding of Fact 1, p. 11. Following this meeting, Mr. Musgrave received a letter from Ms. Duerkop outlining specific complaints regarding Mr. Musgrave's job performance. Id. This letter gave Mr. Musgrave the opportunity to respond, which he did by memorandum dated October 3, 1988. Id. p. 12.

However, during, this time period, Mr. Musgrave filed a complaint with the Wisconsin Employment Relations Commission on September 26, 1988, complaining against Local 2492-A and Marathon County's handling of his reprimand grievance of April 18, 1988. Id. p. 14. On October 3, 1988, Marathon County received a copy of Mr. Musgrave's complaint. Id. On October 7, 1988, Mr. Musgrave received a memorandum from Ms. Duerkop, his supervisor, suspending him for one day for poor work performance. Id. It is Mr. Musgrave's contention that his suspension was

issued in retaliation of the filing of his compliant with the Commission. See, Petitioner's Brief, p.3.

However, a review of the entire record illustrates that there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Gateway City Transfer Co. v. Public Service Comm. 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948). The weight and credibility of the evidence are matters for the agency and not for the reviewing court to evaluate. Bucyrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 418, 280 N.W.2d 142; sec. 227.57(6), Stats.

I am satisfied upon review that the Commission could reasonably conclude that Marathon County did not retaliate against Mr. Musgrave because of his union activities. It was clearly established that Mr. Musgrave was having problems in the performance of his work duties. See, WERC, Modified Finding, of Fact 7 and 11. Documentation of Mr. Musgrave's poor work habits occurred weeks before the filing of the Complaint on September 26, 1988. See, WERC, Modified Finding of Fact 11. Although he was suspended after Marathon County received notification of the complaint he had filed, the disciplinary process against Mr. Musgrave had been set in motion long before; the suspension was just the culmination of an ongoing cycle of events that had begun months before.

There is substantial evidence in the record to support the Commission's finding, that Marathon County did not retaliate against Mr. Musgrave because of his union activities. That part of the Commission's decision should be affirmed.

II.

The Union seeks review of the Commission's decision to set aside the examiner's order in part where it found as Conclusions of Law that:

> 4. Because hostility by the AFSCME Local 2492-A Executive Board toward Musgrave played a role in the Board's decision not to further process Musgrave's reprimand and suspension grievances, AFSCME Local 2492-A and Executive Committee members Acheson, Conway, Nicholson, Thomas and Wadzinski thereby committed prohibited practices within the meaning, of Sec. 111.70(3)(b) 1, Stats.
>
> 5. Aside from the decision of its Executive Board not to further process Musgrave's reprimand and suspension Grievances AFSCME Local 2492-A, its officers and agents, processed Musgrave's reprimand and suspension grievances in a manner consistent with its duty of fair representation and the contractual grievance procedure and thus AFSCME Local 2492-A, its officers and agents, did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(b)2 or (3)(c), Stats." (Emphasis added by this writer.)

and ordered:

> 2. AFSCME Local 2492-A, its officers and agents shall immediately:
>
> > A. Cease and desist from failing to fairly represent employes of Marathon County who said Local represents for the purpose of collective

bargaining, and contract administration.

B. Take the following affirmative action which the Commission finds will effectuate the purposes and policies of the Municipal Employment Relations Act.

1. Consistent with its obligations under Mahnke v. WERC, determine whether it will further process Musgrave's reprimand and suspension grievance and advise Musgrave and Marathon County of the result of said determination.

2. Post the Notice attached hereto as "Appendix A: in any conspicuous places available in the work place to Local 2492-A. The Notice shall be signed by the President of Local 2492-A and shall be posted immediately upon receipt of a copy of this Order for sixty (60) days. Reasonable steps shall be, taken to insure that said Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order what steps it has taken to comply.

The Union seeks review of that finding. I conclude on careful review of the file and the briefs that the Commission's Findings of Fact (4) as herein set forth and its Order should be reversed and that the Musgrave complaint be dismissed in its entirety for reasons hereinafter set forth.

(1) The Commission failed to consult with its hearing examiner or provide a written explanation for reversing that examiner. The Commission concedes that it is required to show on the record that it had the benefit of the examiner's personal impressions of material witnesses whose credibility is the basis for the findings being modified. (See Commission's brief, P. 11). The Commission contends that it modified the examiner's finding not because it disagreed with the examiner's evaluation of witness credibility, but because it believed that based on the entire record before it that Mr. Musgrave had met his burden of proof by showing hostility and bad faith.

If the Commission did not disagree with the examiner's evaluation of credibility, then could it logically disagree with the examiner's finding of no hostility reflected in the testimony given without the benefit of the examiner's impression? (see Hearing examiner's Finding of Fact 6-8). The Commission contends that giving due weight to the Commission experience, technical competence and special knowledge that this reviewing court must affirm the Commission. Although this Court is obligated to take such experience, competence and special knowledge into account, I consider the Commission's omission to require reversal.

(2) The Commission misplaced certain Union minutes which were ultimately provided by the Union. The Commission contends that this evidence argued by the Union to illustrate lack of hostility on the part of the Union is of "no moment because the factual findings by the Commission are supported by substantial evidence in the record" and that the misplacement of the minutes was

harmless error. If the minutes were not reviewed by the Commission (admittedly a conjecture) the Commission's decision could not have been on the entire record.

If the entire record was not reviewed and the missing portion reflecting lack of hostility was not before the Commission, the Commission's conclusions are flawed and lose the deferential force which is imputed to them by case law and statute. Those missing pieces of evidence reached this reviewing Court from the Commission under cover letter of June 10, 1991 to complete the record for review (see letter to Clerk of Court Marquette County dated June 4, 1991 and enclosures). This evidence consisting of minutes of the Local 2492-A meetings of June 27, 1988 and August 22, 1988 were reviewed by this Court. The evidence was misplaced by the Commission between October 3, 1989 and May 3, 1991. Their minutes are devoid of any evidence of hostility or acrimony toward Mr. Musgrave.

This failure to review the entire record supports a reversal.

(3) The Commission contends that its Findings of Fact are conclusively supported by substantial evidence.

Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Gateway City Transfer Co. v. Public Service Comm 253 Wis. 397, 405-406, 34 N.W.2d 238 (1948), quoting Edison Co. v. National L.R. Board, 305 U.S. 197, 229 (1938). It is not required that the evidence be subject to no other reasonable equally plausible interpretations. Hamilton v. ILHR Dept., 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Robertson Transport. Co. v. Public Serv. Comm., 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

In "utilizing the substantial evidence test, the court must decide whether reasonable minds could have reached the same conclusion that was reached by the commission." Samens v. LIRC, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984). This standard has been codified in sec. 227.57(6), Stats., which states, "If the agency's action depends on any fact found by an agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." A reviewing court may only reverse an agency's decision when it "is not supported by substantial evidence in the record." Sec. 227.57(6), Stats.

However, as the Court stated in Hamilton, 94 Wis. 2d at 618:

> [T]he agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting, reasonably, could not have reached the decision from the evidence and its inferences." [Case citations omitted.]

As previously noted herein, the Commission states that it reversed its examiner "not because it disagreed with examiner's evaluation of witness credibility. The hearing examiner in his findings 6 & 10 found that the evidence failed to demonstrate by a clear and satisfactory

preponderance of the evidence that the respondent Local 2492-A's handling of the April 18, 1988 grievance was arbitrary, discriminatory or in bad faith and likewise that the record demonstrates that the Union dropped representation of the complainant as to the October 7, 1988 grievance only after the complainant failed to respond to the employer's settlement offer and failed to demonstrate that the Union officials acted for reasons which were arbitrary, discriminatory or in bad faith. Nevertheless, the Commission concludes that its findings of hostility and bad faith are apparently distinct from the credibility of the parties involved. The Commission's decision must be based upon substantial evidence. It has ignored its own finding that witnesses were credible and makes it evaluation not based upon substantial evidence but rather upon its own conclusion that the Union and its officials acted with hostility and bad faith. The examiner's finding of no hostility reflected testimony given before him. It seems to me that credibility is very much an issue in this case and it is difficult for this reviewing Judge to conclude that the entire record as referred to in the Commission supports its finding. The Commission's reversal of its hearing examiner based on "the entire record" has to involve the credibility of the relevant witnesses who testified and were found to be credible by the hearing examiner and showed no animosity to Mr. Musgrave. On this basis, this Court cannot find that the Commission in its reversal of its hearing examiner's findings did, in fact, have the substantial evidence necessary to make its decision and that on the entire record it is not possible for a reasonable person to conclude that the hearing examiner erred.

CONCLUSION

In sum although the Commission's findings and conclusions are entitled to deference by statute (sec. 227.57(6)(10) and case law hereinabove quoted. Nevertheless, such finding, must be supported by substantive evidence. In this case, the Commission reversed its hearing examiner on credibility issues without consulting with him; made its finding without the entire record before it; conceded that there was no direct evidence of bad faith (Commission's initial brief p. 11) but nevertheless inferred hostility to Musgrave.

The record in this case includes over 100 exhibits, hundreds of pages of record and voluminous briefs. I conclude that on the entire record there is not the substantial evidence necessary to support the Commission's findings nor that a reasonable mind could reach the Commission's conclusion.

ORDER

1. The Decision of the Commission in Case No. 91 CV 38 is affirmed.
2. The Decision of the Commission in Case No. 91 CV 215 is reversed.
3. The complaints of Musgrave are dismissed in their entirety.

Dated this 27th day of February, 1992.

BY THE COURT:

/s/ Wallace A. Brady
WALLACE A. BRADY
Circuit Judge