STATE OF WISCONSIN
CIRCUIT COURT
WASHINGTON COUNTY

CEDAR GROVE-BELGIUM EDUCATION ASSOCIATION,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent,

CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT,
An Interested Party.

Case No. 91-CV-368
Decision No. 25849-B

NOTICE OF ENTRY OF DECISION

To: Bruce Meredith
Wisconsin Education Association Council
33 Nob Hill Road
Post Office Box 8003
Madison, Wisconsin 53708

Mark Vetter
Davis & Kuelthau, S.C.
111 East Kilbourn Avenue, Suite 1400
Milwaukee, Wisconsin 53202

PLEASE TAKE NOTICE that a decision, of which a true and correct copy is hereto attached, was signed by the court on the 2nd day of July, 1992, and duly entered in the Circuit Court for Washington County, Wisconsin, on the 2nd day of July, 1992.

Notice of entry of this decision is being given pursuant to secs. 806.06(5) and 808.04(1), Stats.

Dated this 15th day of July, 1992.

JAMES E. DOYLE
Attorney General

/s/ David C. Rice
DAVID C. RICE
Assistant Attorney General
State Bar No. 1014323

Attorneys for Respondent, Labor and Industry Review Commission
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

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DECISION

Cedar Grove-Belgium Education Association, petitioner, has brought an action under Wis. Stats. secs. 111.07(8) and 227.53 for review of a decision of the Wisconsin Employment Relations Commission, respondent, wherein the commission affirmed in part and reversed in part the Examiner's decision. The only issue on review is whether the Commission reasonably found that Cedar Grove-Belgium Area School District, and particularly District Administrator Mary Bowden, was not motivated, in any part, by hostility against the Association or against any employe for engaging in lawful, concerted activity protected under Wis. Stats. sec. 111.70(2) when the District decided to increase the work assignments of its teacher employees, Williams, Gee and O'Keefe and consequently did not illegally discriminate against the Association or any employe within the meaning of Wis. Stats. sec. 111.70(3)(a)3.

The Association contends that when the Commission found that various statements made to O'Keefe by Principal Ron Sternard exhibited animus toward the Union and Sternard thereby interfered with, restrained or coerced municipal employees in the exercise of their rights guaranteed by sec. 111.70(2) the Commission erred as a matter of law in finding that such statements were not imputable to the District. The Association argues that Sternard's statements were clearly not made in a void, that the statements are highly relevant when consideration is given to Sternard's role as an agent of the District, and that in light of the Commission's finding that Sternard's remarks had a reasonable tendency to interfere with, restrain or coerce District employees in the exercise of their rights guaranteed by the Municipal Employment Relations Act the Commission's conclusion that the District had no animus toward employe-union activity is no longer consistent with the Commission's factual finding. The Association further argues that any requirement imposed upon a union to actually prove a statement of animus by an agent of the District in order to establish discrimination is unrealistic because such requirement is virtually impossible to meet.

The Association further contends that the Commission's finding that Bowden assigned employees additional duties in accordance with a preexisting formula was not supported by substantial evidence. The Association submits that even if such a formula existed the formula as described by Bowden was too subjective and allowed her too much discretion to adequately serve as a basis to independently justify the District's increase in the work assignments. The Association argues that Bowden's representation that she used a pre-established formula in determining contract percentages for part-time employees prior to the District attorney's submission of a letter to the union on January 29, 1989, setting forth the formula used to calculate the contracts of part-time teachers is not credible, particularly given the absence of any written evidence of the existence of such formula and the inaccurate results which were obtained upon Bowden's alleged past application of the formula.

The Association contends further that under the facts of the case the methodology which the Commission used in arriving at its conclusion that the District did not practice illegal discrimination was flawed and the Commission failed to consider the statutory test set forth in sec. 111.70(3)(a)3 which requires that the Association need prove only that it is more likely than not that the District's decision to increase the work assignments of the employees was motivated, in part, by employe protected concerted activity.

The Commission contends that it reasonably could find that the District was not motivated, in any part, by hostility against the Association or against any employe for engaging in protected, concerted activity when the District decided to increase the work assignments of Williams, Gee and O'Keefe. The Commission argues that the question of the District's motivation presents an issue of ultimate fact, and the court must affirm the commission's finding on motivation if there is substantial evidence to support such finding.

The Commission submits that the Association's arguments challenging the findings of the Commission and the Examiner that Bowden was not motivated in any part because of hostility against the Association or against any employe for engaging in protected, concerted activity, or against the Association for filing teacher Stephen Moore's grievance, and that Bowden made the decision to increase the work assignments without input from Sternard are properly addressed to the trier of fact rather than to this reviewing court.

The Commission submits further that with respect to the Association's challenge of the reasonableness of its decision the commission reasonably could affirm the Examiner's decision based on crediting Bowden's testimony that Bowden used a formula to determine increases in the teachers' assigned work hours even though the formula was undocumented and the formula did not contain all of the factors which she had considered in the past in determining contract percentages.

A reviewing court's function is confined to a determination of whether there was any credible evidence to sustain the findings that were in fact made. E.F. Brewer Co. v. ILHR Department, 82 Wis.2d 634, 636, 264 N.W.2d 222 (1978). The court must search the record to locate credible evidence which supports an agency's determination of an ultimate fact. Vande Zande v. ILHR Department, 70 Wis.2d 1086, 1097, 236 N.W.2d 255 (1975).

Agencies' factual findings must be supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Hamilton v. ILHR Dept., 94 Wis.2d 611, 617, 288 N.W.2d 857 (1980), citing Bucyrus-Erie Co. v. ILHR Department, 90 Wis.2d 408, 416, 280 N.W.2d 142 (1979), quoting Bell v. Personnel Board, 259 Wis. 60211608, 49 N.W.2d 889 (1951). Chapter 227 does not contemplate that the reviewing court make an independent determination of facts. Hixon v. Public Service Comm. 32 Wis.2d 608, 629, 146 N.W.2d 577 (1966).

An "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." Hamilton, Id. at 618.

The reviewing court cannot evaluate the credibility or weight of the evidence. Bucyrus-Erie Co., Id. at 418. Wis. Stats. sec. 227.57(6). "If only one reasonable inference can be drawn from the evidence, the drawing of that inference is a question of law, and the circuit court is not bound by the determination of the Commission. If, however, different inferences can reasonably be drawn from the evidence, then a question of fact is presented and the inference actually drawn by the commission, if supported by any credible evidence, is conclusive." Vocation. Tech. & Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis.2d 230, 240, 251 N.W.2d 41 (1977).

A question of an employer's motivation constitutes a question of ultimate fact. St. Joseph's Hospital v. Wisconsin E.R. Board, 264 Wis. 396, 401, 59 N.W.2d 448 (1953). The Commission's finding on motivation, being a finding of fact, is conclusive if supported by substantial evidence in view of the entire record. Chicago, M., St. P. & P. RR. Co. v. ILHR Dept., 62 Wis.2d 392, 396, 215 N.W.2d 443 (1974). Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540, 562, 151 N.W.2d 617 (1967).

The evidence shows that Bowden alone made the decision to increase the work assignments of Williams, Gee and O'Keefe. Although Sternard's position as Principal could lead a fact finder to speculate that under the circumstances Bowden must have received some input from Sternard, there is no evidence in the record that Bowden in fact received any such input. The record alludes to Bowden's propensity to dispense her functions in an autocratic manner, and a fact finder likewise could speculate than an autocratic Bowden likely did not seek or receive input from Sternard.

The evidence further shows that there was a short time span between Bowden's issuances of memos to Sternard directing him to increase the assigned work hours of the three teachers and the District's realization via the grievance action of the Association on behalf of Moore that in the application of Bowden's guideline formula with respect to certain District employees there existed a disparity in the amounts of compensation being paid and assigned work hours.

In weighing the testimony of Bowden that she had utilized a pre-existing formula designed by her to determine increases in the assigned work hours and remedy any inequities which existed in the

assignment of contract percentages the Commission agreed with the Examiner that Bowden's explanations were truthful, credible, made good business sense, and should bear the stamp of affirmation.

With respect to the issue as to whether Bowden was not motivated in any part because of hostility against the Association or against any employe for engaging in protected, concerted activity, the Commission found that Bowden was not so motivated, and this finding coincided with that of the Examiner who had the benefit of observing Bowden's demeanor and hearing her testimony face-to-face. Bowden testified that her decision to increase the assigned work hours was based both on a reevaluation of part-time contracts to determine if there was an inconsistency in the treatment of employees and in the calculation formula which she designed. In weighing Bowden's testimony the Commission found it credible.

This court is mindful that consistent with its review of the record and memoranda of counsel it must not succumb to any temptation "to brush over Petitioner's claims." This court is also mindful that a finding of ultimate fact is of necessity based upon inferences from other testimony that is found to show established facts which logically support them, and such findings of ultimate fact, when the Commission makes them, cannot be disturbed by a reviewing court unless they are unsupported by substantial evidence in view of the entire record submitted. Muskego-Norway D.S.J.S.D. No. 9, Id. at 562-563.

The court deems especially significant that at Bowden's conference with Williams and Gee on December 14, 1988, Bowden's statements and remarks on their face, even when they are considered in the context of past problems between the Association and District, did not exhibit hostility or adverse motivation which a reasonable person might relate to the engagement of the Association or any employe in concerted union activity. This court recognizes that the Commission has given due weight to such testimony from which it drew reasonable inferences all of which the Commission found credible.

This court finds upon analysis of the record that there was no nexus between Sternard's remarks to O'Keefe and the decision which Bowden made to increase the work assignments of Williams, Gee and O'keefe, that in the context in which Sternard's remarks' were made and given the record that does not show that there was any input either being sought or received by Bowden such statements cannot be deemed to be imputable to the District, that Bowden's remarks to Williams and Gee during the December 14, 1988, conference did not show any motive of hostility against the Association or against the teachers for engaging in concerted union activity, that Bowden did apply a pre-existing formula to determine contract percentages on behalf of part-time teachers as revealed by her testimony which the Commission found to be credible. This court further finds that Bowden's re-evaluation of the contracts had a reasonable basis given the nature of the Moore grievance and in the interest of equity and good business sense.

Accordingly, upon review of the entire record and the evidence, including reasonable inferences therefrom, this court further finds that there was substantial evidence to sustain the Commission's findings, that, in particular, the Commission reasonably could find that the District was not motivated in any part by hostility against the Association or against any employe for engaging in protected, concerted activity when Bowden decided to increase the work assignments of

Williams, Gee and O'Keefe, and that the conclusions of the Commission support and are consistent with its findings.

On the basis of the foregoing reasons and findings, this court concludes that the decision of the Commission should be affirmed. Accordingly, the Commission's decision is hereby affirmed.

Dated at West Bend, Wisconsin, this 2nd day of July, 1992.

BY THE COURT

/s/ Leo F. Schlaefer
Honorable Leo F. Schlaefer
Circuit Court Judge, Branch IV

Copies of the foregoing Decision were mailed to the following on the 6th day of July, 1992:

Attorney Bruce Meredith, Staff Counsel,
Wisconsin Education Association Council
33 Nob Hill Road
P.O. Box 8003
Madison, WI 53708

Attorney David C. Rice
Assistant Attorney General
State Bar No. 733855 GC
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Attorney Mark Vetter, of
Davis & Kuelthau, S.C.
111 East Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202