

COURT OF APPEALS DECISION  
DATED AND RELEASED JANUARY 31, 1995  
STATE OF WISCONSIN  
IN COURT OF APPEALS  
DISTRICT III

JEROME FILBRANDT PLUMBING AND HEATING, INC.,  
Petitioner-Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,  
Respondent-Appellant,

PLUMBERS AND PIPE FITTERS, LOCAL 557,  
Respondent-Co-Appellant.

No. 94-1584  
Decision No. 27045-D

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The Wisconsin Employment Relations Commission and Plumbers and Pipe Fitters Local 557 appeal a judgment overturning WERC's decision that Filbrandt refused to bargain with the union in good faith. Because substantial evidence supports WERC's finding that the delays in negotiations were primarily due to the unavailability of Filbrandt's negotiators and there is a rational basis for WERC's conclusion that Filbrandt violated the employer's duty to bargain in good faith, we reverse the circuit court's judgment and reinstate the WERC decision.

The court must affirm the Commission's findings of fact if they are supported by substantial evidence. *See* Sec. 227.20(6), Stats. Substantial evidence is not equated with a preponderance of evidence. Where there are two conflicting views that might be sustained by substantial evidence, it is for the Commission to determine which view of the evidence it wishes to accept. *Robertson Transp. Co. v. PSC*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968). The weight and credibility of the evidence are matters for the agency, not the reviewing court, to evaluate. *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 146 (1979).

Substantial evidence supports the Commission's finding that delays in negotiations after September 6, 1990, were primarily due to the unavailability of Filbrandt's negotiators. Filbrandt's son and daughter-in-law made up the company's negotiating team. Their busy work and personal schedules made it impossible to hold regular meetings. As a result, the parties only met for negotiation nine times in one year. While the union was responsible for some of the failure to meet due to illness, vacations and unavailability on specific days, the evidence supports the Commission's finding that the primary reason for the failure to meet was the persistent unavailability of Filbrandt's negotiators.

The record shows a rational basis for the WERC holding that Filbrandt's conduct violated the employer's duty to bargain in good faith. Because the Commission has substantial experience in this area, the courts must accord its legal conclusions "great-weight." *See West Bend Educ. Ass'n v. WERC*, 121 Wis.2d 1, 12, 357 N.W.2d 534, 540 (1984). When reviewing a claim that a party has failed to bargain in good faith, the Commission must apply the "totality of conduct" or "totality of the circumstances" test. *See NLRB v. Schwab Foods Mfg.*, 858 F.2d 1285, 1292 (7th Cir. 1988).

The record contains sufficient evidence to establish that Filbrandt violated its duty of negotiating in good faith. The law does not accept a party's excuse that he was too busy to negotiate. *See, e.g., Interstate Paper Supply Co., Inc.*, 251 NLRB 1423, 1425 (1980). Collective bargaining obligations include a duty to make expeditious and prompt arrangements for meeting and conferring. *Quality Motels of Colorado*, 189 NLRB 332, 337 (1971). The small size of the company does not relieve it of the duty to make itself available for collective bargaining. *See Brooks v. NLRB*, 348 U.S. 96, 104 (1954).

Filbrandt contends that the Commission did not apply the "totality of conduct" standard because it focused

only on the company's unavailability and ignored the delays caused by the union and the union's acquiescence in the schedule. While these factors are a part of the totality of circumstances they do not compel a decision favorable to Filbrandt. In addition to the delays caused by the unavailability of Filbrandt's negotiators, the Commission reasonably considered the nonproductive nature of the meetings that occurred due to Filbrandt's focusing on matters as minor as spelling errors. The Commission could also reasonably consider the fact that Filbrandt's only substantive proposal would have been regressive, offering \$2 per hour less than the prevailing rate for a journeyman plumber. While Filbrandt offers other benign explanations for these matters, there was sufficient evidence to support the Commission's conclusion that Filbrandt acted in bad faith, effectively stalling the negotiations until he could file a petition to decertify the union.

*By the Court.*—Judgment reversed.

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