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[Decision No. 28525-E]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

You are hereby notified that the Court has entered the following opinion and order:

00-1293 Douglas Hafer v. Wisconsin Employment Relations
Commission, Milwaukee County, Local 822, Milwaukee
District Council 48, AFSCME, AFL-CIO
(L.C. #98 CV 7223)

Before Fine, Schudson and Curley, JJ.

Douglas Hafer, formerly a seasonal worker for Milwaukee County (the County), filed grievances claiming that the County violated a labor agreement with his union when it failed to hire him as a laborer. When he did not achieve the results he sought, he filed a

complaint with the Wisconsin Employment Relations Commission (WERC). A hearing examiner dismissed Hafer's complaint, WERC affirmed that decision, and Hafer appealed to the circuit court. The circuit court affirmed WERC's decision, but Hafer did not appeal timely from that decision. Hafer did appeal timely from a subsequent circuit court order denying his request that the entire matter be remanded to WERC for submission of additional evidence, however. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (1999-2000).¹ Because we conclude that the circuit court did not erroneously exercise its discretion when it denied Hafer's remand request, we affirm the circuit court's order.

Hafer, as a seasonal employee of the County from 1974 to 1995, was represented by Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO (the Union). In 1984, Milwaukee County and the Union settled a hiring dispute by entering an agreement that established that the County would give hiring priority to laborers who were on its eligibility list from 1977. Hafer was on that list. In 1991, the County and the Union entered a "collateral agreement," arising from the reorganization of the County Parks Department, which clarified the rights of those subject to the reorganization, while continuing use of the 1977 eligibility list.

Hafer was never hired by the County as a laborer, however, and filed grievances against the County. In 1995, Hafer filed a complaint with WERC alleging that the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

County had violated the settlement agreement by not hiring him from the 1977 list, a violation of WIS. STAT. § 111.70(3)(a)5 (1993-94), and that the Union had violated the agreement by failing to fairly represent him in his grievances, a violation of WIS. STAT. § 111.70(3)(b)5 (1993-94).

A WERC examiner held a hearing and concluded that Hafer had failed to demonstrate that the Union failed to fairly represent him in his grievances against the County.² Because it is well settled that a represented employee cannot prosecute a claim that an employer has violated a collective bargaining agreement unless the employee demonstrates that the union “failed in its duty of fair representation,” *Mahnke v. WERC*, 66 Wis.2d 524, 532, 225 N.W.2d 617 (1975), the examiner dismissed Hafer’s claim.

WERC affirmed the examiner’s decision, and Hafer sought circuit court review, contending that he had filed other grievances on which the Union had not properly represented him. He contended that the matter should be remanded to WERC so that he could present evidence of those additional grievances. He also argued that WERC’s

² In her decision, the examiner discussed, by grievance number, the three grievances filed by Hafer that were in the record. The examiner noted that one of the grievances had been filed in May 1994 and was numbered “18583.” The examiner concluded that Hafer had not demonstrated that the Union did not fairly represent him in that grievance. In the request for remand that is the subject of this appeal, Hafer maintained that the matter should be returned to WERC for consideration of grievance number “18538,” dated May 25, 1994. Hafer claimed that this grievance had not been presented to the hearing examiner and, because the Union had failed to process it, constituted evidence that the Union had not fairly represented him. In a conclusion that will be discussed in greater detail below, the circuit court concluded that the examiner’s reference to grievance “18583” was, in all likelihood, a typographical error, and that the grievance on which Hafer based his remand request had already been litigated.

decision should be set aside because, contrary to the agency's determination, he had met his burden of demonstrating that the Union did not fairly represent him.

The circuit court affirmed WERC's decision and denied Hafer's request for a remand. In denying the request for remand, the circuit court noted that Hafer had not properly supported his request with adequate additional documentation and with a showing that such documentation was material to his claim.³ Hafer moved the court to reconsider its decision declining to remand the case to WERC for presentation of additional evidence. In support of his motion, Hafer provided the court with copies of a number of grievances that he claimed the Union had not pursued. Of those grievances, only one was filed during the time relevant to his complaint *and* was related to a claimed violation of the settlement agreements. After holding a hearing, the circuit court denied Hafer's reconsideration motion, reasoning that Hafer had still failed to demonstrate that there was additional evidence material to his complaint and that there were good reasons for failing to present it to WERC. Hafer appealed to this court for both orders.

By order dated August 11, 2000, this court noted that the first circuit court order disposed of the entire matter in litigation and that Hafer's appeal from that order had not been commenced timely. We noted, however, that Hafer's appeal was timely as to the order denying reconsideration, and we concluded that because Hafer's reconsideration motion alleged that he had "new" evidence in support of his request for remand, the court had jurisdiction over Hafer's appeal from the order denying reconsideration. The court

³ Relative to the remand request, the circuit court noted that WIS. STAT. § 227.56 permits a party to seek leave to present additional evidence to an agency.

noted, however, that because the scope of our review was limited to the new issue raised in the reconsideration motion, *see Silverton Enterprises v. General Casualty Company*, 143 Wis.2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988), the sole issue on appeal would be whether the circuit court properly exercised discretion when it denied Hafer's reconsideration motion. *See* WIS. STAT. §227.56(1) (circuit court may order that additional evidence be taken by agency if it is shown to court's satisfaction that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency); *see also Shoreline Park Preservation, Inc. v. DOA*, 195 Wis.2d 750, 762-63, 537 N.W.2d 388 (Ct. App. 1995) (whether to order remand to agency to take additional evidence is within the circuit court's discretion). We will sustain a circuit court's discretionary determination if the record demonstrates that the court considered the facts of record applicable law, and, using a demonstrated rational process, reached a reasonable result. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981).

As noted, Hafer supported his reconsideration motion with a number of grievances he claimed the Union had not processed. His argument, however, concentrated on grievance number 18538, filed in May 1994, which, he claimed, had never been processed or acted upon by the Union. In denying remand, the circuit court noted, however, that it appeared highly likely that the reference in the examiner's decision to grievance number 18583, filed in May 1994, was actually a reference to

grievance 18538 with the final two numbers transposed.⁴ Hafer presented no evidence to the contrary, nor is there any evidence to the contrary in the record. The circuit court noted that it therefore appeared that Hafer's "new evidence" was in fact evidence that had already been considered by the examiner.

In addition, as WERC points out, even were we to assume that grievance 18538 and the other grievances had never been presented to WERC or the examiner, it was Hafer's burden to establish the materiality of those grievances to his complaint. He failed to present any evidence to suggest that the Union had violated its duty of fair representation, however. Thus, in denying Hafer's motion, the circuit court reasoned that Hafer had failed to present anything to suggest that the additional evidence he wished to present to WERC was material to his complaint.

Finally, the circuit court reasoned that Hafer had failed to demonstrate a sufficient reason for his failure to present the additional evidence at the original hearing. See Wis. Stat. §227.56(1). In its oral decision, the circuit court, referencing its original decision, noted that it could not find that Hafer had demonstrated good reason for failing to present the purportedly new material in his first appearance before WERC. Although Hafer suggested that he was unable to present the material in prior proceedings because he did not have it in his possession, the circuit court concluded that Hafer could have, but did not, subpoena the documents from Milwaukee County or the Union. In addition, although Hafer claimed there were witnesses who could testify that he filed additional

⁴ Among other things, the circuit court stated: "[A]ll indications are [that the grievance Hafer is] trying to pursue was before the examiner."

grievances that the Union had failed to process, Hafer failed to establish why he did not have those witnesses testify at the original hearing.

In denying Hafer's reconsideration motion, the circuit court considered the relevant facts before it, applied the appropriate statutory standards, and reached a result that a reasonable judge could reach. Therefore, the circuit court properly exercised discretion in denying Hafer's motion.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to Wis. Stat. Rule 809.21.

Cornelia G. Clark
Clerk of Court of Appeals