STATE OF WISCONSIN
CIRCUIT COURT BRANCH V
BROWN COUNTY

NORTHEAST WISCONSIN TECHNICAL COLLEGE,

Plaintiff,
vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and NORTHEAST WISCONSIN TECHNICAL COLLEGE FACILITY ASSOCIATION and AIMEE VAN GOETHEM,

Defendants.

File No. 99 CV 517
[Decision No. 28909-E]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

NATURE OF THE CASE

This case is before me on review of the Wisconsin Employment Relations Commission Decision No. 28909-D. The decision concluded that Northeast Wisconsin Technical College (hereinafter the "College") violated Secs. 111.70(3)(a) 1 and 3 of the Municipal Employment Relations Act by laying off Aimee Van Goethem (hereinafter Van Goethem") in retaliation for her use of a unit clarification process.

FACTS

Van Goethem was employed as the College's Student Health Nurse from January of 1987 through June of 1996. Van Goethem was contracted to work 188 days a year, 7.5 hours per day. She earned $18.07 per hour at the time of her layoff. Van Goethem actively pursued having her position included in the Association's bargaining unit. However, the position was never so included.

On March 31, 1994, the Northeast Wisconsin Technical College Faculty Association (hereinafter the "Association") filed a petition with the Wisconsin Employment Relations Commission (hereinafter "Commission"), seeking to clarify the definition of the faculty bargaining unit to include the position of Student Health Nurse. On June 20, 1994, the College

filed its own unit clarification petition seeking to exclude twelve positions from the bargaining unit. A hearing was held on December 6, 1994, and January 30, 1995. On January 30, the parties agreed to hold in abeyance all issues other than the status of the Student Health Nurse position. On November 6, 1995, the Commission issued a decision, holding that the Student Health Nurse was a professional employee within the meaning of Sec. 111.70(1)(1), Stats., and should be included in the faculty bargaining unit.

After this clarification, the parties had a significant disagreement over the wages to be paid to the Student Health Nurse. The Association sought retroactive payment to Van Goethem based on the faculty pay schedule, while the College took the position that Van Goethem's salary should remain the same. The College made repeated efforts to negotiate with the Association, but the Association refused to bargain asserting that the faculty pay schedule automatically applied.

On March 19, 1996, the College filed a complaint with the Commission alleging that the Association committed a prohibited practice within the meaning of Sec. 111.70(3)(b)3 of the Municipal Employment Relations Act by refusing to bargain over the wages, hours, and conditions of employment applicable to the position of Student Health Nurse. In June, 1997, six months after the unit clarification decision, Van Goethem was laid off. The College stated that the layoff was in order to reserve money for "new development." More specifically, it claimed that in order to redirect $20,000 to its new development project, it chose to subcontract for nursing services rather than maintain the Student Health Nurse position. It also claimed that it could achieve health service improvement by redirecting the money. On August 19, 1996, the Association and Van Goethem filed a complaint with the Commission alleging that the

College committed prohibited practices within the meaning of Sec. 111.70(3)(a) 1 and 3, Stats., by laying off Van Goethem. The Commission appointed an examiner to hear both cases.

On December 29, 1997, the record was closed after post-petition briefs had been submitted to the Examiner. The Association petitioned to reopen the record to allow argument over the impact of the Commission's decision in *Green Lake*, Dec. No. 28792-B (Commission 12/97). The *Green Lake* decision involved analysis of Sec. 111.70(3)(a) 1 and 3, Stats. The parties had not anticipated the Commission's reversal of the Examiner's decision in *Green Lake* and, therefore, the Examiner reopened the evidentiary record for further arguments in light of the reversal. On June 26, 1998, the record was again closed.

On August 26, 1998, the Examiner issued Findings of Fact, Conclusions of Law, and an Order pertaining to the two complaints. The Examiner concluded that by laying off Van Goethem, the College violated Secs. 111.70(3)(a) 1 and 3, Stats. The Examiner also concluded that the Association did not refuse to bargain in good faith, and thus did not violate Sec. 111.70(3)(b)3 Stats. The College then sought the Commission's review of the Examiner's decision. On March 23, 1999, the Commission affirmed the Examiner's first conclusion (that the College had violated Sec. 111.70(3)(a) by laying of Van Goethem), but reversed the Examiner's second conclusion pertaining to the issue of whether or not the Association bargained in good faith. The Commission concluded that the Association violated Sec. 111.70(3)(b)3 Stats., when it initially refused to bargain with the College over anything other than Van Goethem's placement in the existing salary schedule.

The College seeks this court's review with respect to the Commission's decision that the College violated Secs. 111.70(3)(a) 1 and 3, Stats. However, the Association has not sought

review of the Commission's decision regarding its refusal to bargain in good faith.

SCOPE OF REVIEW

A. Arguments of the Parties

Relying upon *Muskego-Norway Consolidated Schools v. WERC*, 35 Wis. 2d 540, 151 N.W.2d 617 (1967) and *Copeland v. Wisconsin, Department of Taxation*, 16 Wis. 2d 543, 114 N.W.2d 858 (1962), the College contends that when considering whether the decision is supported by "substantial evidence," the court must consider the record as a whole rather than merely evidence which tends to support the agency's findings. Furthermore, the College contends that under the rule set forth in *Westring v. James*, 71 Wis.2d 462, 238 N.W.2d 695 (1976), both the substantial evidence test and the arbitrary and capricious test are appropriate considerations for an administrative review. It is the College's position that, based on both the substantial evidence test and the arbitrary and capricious test, I must find that the record as a whole lacks sufficient evidence to support the agency's conclusions.

In contrast, the Association argues that the *Westring* decision is not applicable because in 1979 the Legislature eliminated its reference to the arbitrary and capricious test. The *Westring* case was decided prior to this amendment. Thus, it is the Association's position that the applicable test for the administrative review is the substantial evidence test.

B. Discussion

Sec. 227.57 (6) Stats., provides the appropriate scope of review:

> If the agency's action depend on any fact found by the 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. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

The express language of this statute sets forth the foundation of the substantial evidence test. However, this test has been further defined. It is well established under Wisconsin law that to prevail on an allegation of retaliation, the Association must establish by clear and satisfactory preponderance of the evidence that:

1. The Association employee engaged in protected lawful concerted activity;
2. The College was aware of that activity and hostile thereto; and,
3. The College's action was based at least in part upon such hostility.

See Employment Relations Dept. v. WERC, 122 Wis.2d 132, 140 (1985).

The parties do not dispute that the first two elements are present. The parties agree that the Association, on behalf of the employee, exercised its right to a unit clarification proceeding so as to have clarified whether the Student Health Nurse position fell into the faculty bargaining unit, and that the College was fully aware of this activity. The crux of the dispute before the Examiner involved whether the College was hostile to the unit clarification process, and whether the decision to lay off Van Goethem was motivated in whole or in part by that hostility. However, the issues before me are not the same as those considered by the Examiner, rather I must consider whether the Commission's decision to affirm the examiner's findings and conclusions of law was reached in a rational manner. *See Town of Russell Volunteer Fire Dept. v. EMC*, 223 Wis.2d 723, 732-733, 589 N.W.2d 445, 450 (Wis. App. 1988); *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267, 270 (1991).

Under Wisconsin law there are three possible standards of review for an agency's determinations. *Id.* The first standard is great weight deference which is appropriate when an agency's determinations are longstanding. This principle stems from the notion that an

administrative agency has specialized knowledge of the subject matter and is, therefore, best suited to analyze the issue. The proper use of the "great weight" standard has been described as follows:

> If the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's conclusions are entitled to deference by the court. Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy.

West Bend Education Ass'n v. WERC, 121 Wis. 2d. 1, 12, 357 N.W. 534 (1984).

The second standard of review is the "due weight" standard. This standard is applied if the case is "very nearly one of first impression." *See Town of Russell*, 223 Wis.2d at 733, 589 N.W.2d at 450. Finally, the third standard of review is used in cases of first impression under which review is de novo.

In this case, because analysis of Sec. 111.70(3)(a)(3) is longstanding, I must give the agency's interpretation and application of law great weight. Although the agency has not ruled on facts substantially similar to those in the present case, the appropriate test is whether the Commission has experience in interpreting the particular statutory scheme at issue. *See id*. at 733-734, 589 N.W.2d at 451. *See also Barron Elec. Coop. v. Public Serv. Comm'n*, 212 Wis.2d 752, 764, 569 N.W.2d 726, 732 (Ct. App. 1997); *Video Wis., Ltd. v. DOR*, 175 Wis.2d 195, 200, 497 N.W.2d 880, 882-83 (Ct. App. 1993). Because the relevant statutory scheme has been interpreted by the Commission on numerous prior occasions, I must give "great weight" deference to the Examiner's findings and conclusions of law, as adopted by the Commission.

SUFFICIENCY OF THE EVIDENCE

A. Arguments of the Parties

The College alleges that the Association failed to present sufficient evidence to prove that the College acted in bad faith. It contends that the facts which form the basis of the Commission's conclusions fail to link any hostility to the College's decision to lay off Van Goethem. In other words, it argues that the evidence relied upon by the Commission is merely coincidental to the act of laying off Van Goethem. It further contends that the Examiner based his decision upon conclusory allegations not supported by fact. The College cites *Rand v. CF Industries, Inc.*, 42 F.3d 1139 (7th Cit. 1994), which, in the context of a summary judgment motion, discusses the definition of a "conclusory allegation." The *Rand* case sates that "Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuitions, or rumors . . ." The College argues that the Commission made conclusory allegations because it failed to consider the testimony of the College president and vice-president and instead, improperly accepted a factless "conspiracy theory."

The College also asserts that the Association has the burden of proving that the timing of the discipline was more than just mere coincidence. It asserts that the Examiner properly set forth that "timing alone does not generally prove pretext," however, the College argues that the Examiner then contradicted his own statement by failing to cite any evidence other than that the timing was suspicious. Moreover, the College alleges that the Examiner tried to make up for the lack of evidence by using a pretextual argument which should not hold up to scrutiny. It contends that pretextual argument must be based upon some evidentiary foundation of hostility existing at the time the decision was made.

The College also contends that the Commission's affirmation of the Examiner's decision was erroneous because it contradicts the position the Commission has previously taken in *International Union of Operating Engineers, Local 139 v. Green Lake County*, Case No. 69, No. 54035, MP 3166, Decision No. 28792-E. The College draws an analogy between the *Green Lake* decision and the present case because both the present case and the *Green Lake* decision involve analysis of Secs. 111.70(3)(a) 1 and 3 Stats. According to the College, in *Green Lake* the Commission made a clear distinction between "an action taken out of hostility toward the exercise of a protected right" and "an action taken in response to the result secured by the exercise of such a right." It is the College's position that the Commission failed to correctly consider this distinction in its analysis. In other words, the College asserts that it is being unjustly punished for reacting to the result of the unit clarification process rather than receiving punishment for an act of hostility toward the process itself. The College argues that the *Green Lake* decision clearly holds that action taken as a result of a protected activity is not unlawful. It contends that the Commission and Examiner erroneously focused on what occurred later rather than focusing on whether there was hostility at the time of the action.

Finally, the College argues that the College's Board of Directors has the statutory authority to take managerial action, and that the Examiner failed to properly consider the importance of this authority. It argues that, if the Examiner had properly considered the role of the Board, then it would have been clear that the real reasons for the lay off were related to the College's budget. Moreover, in light of the Board's authority to make such decisions, the College argues it exhibited good faith in its decision to lay off Van Goethem.

In contrast to the College's argument, the Association asserts that the record contains

substantial evidence upon which the commission relied. First, the Association argues that the record demonstrates the College's inability to offer a credible explanation for its decision to lay off Van Goethem. Furthermore, the Association argues that the Examiner found that the witnesses who testified on behalf of the College lacked credibility. This led the Examiner to conclude that the pretextual reasons for laying off Van Goethem were designed to mask its hostility toward having the Student Health Nurse position included in the facility bargaining unit. The Association supports its argument by pointing to the specific language of the Examiner's decision, wherein the Examiner stated:

> Accordingly, the Examiner concludes that the cost and service explanation offered by the College are not true reasons for the lay off decision, and that it was instead motivated by hostility to the use of the unit clarification and bargaining process. The use of those processes is a protected activity, and retaliation against employees for such activity is a prohibited practice.

In addition, the Association argues that contrary to the College's assertion, the Commission did appropriately compare this case to the decision in *Green Lake*. The Association argues that it is within the exclusive domain of the Commission to make such a distinction unless the Commission's decision violated a statutory provision. In addition, the Association argues that the Examiner's distinction between the two cases exhibited is based upon sound reasoning. In the *Green Lake* case, the Commission found that the employer had acted in a good faith belief that the results of the process were known or could be predicted with some reasonable degree of certainty. The Association contends that in contrast to *Green Lake*, in the present case, the Commission reasoned that the College failed to establish such a good faith belief. In other words, there was no evidence that the College predicted with any degree of certainty the monetary impact of laying off Van Goethem as compared to subcontracting the position, and that

this lack of predictability distinguishes this case from *Green Lake*.

Finally, in response to the College's argument that the College's Board of Directors has the authority to take managerial actions, the Association asserts that even if the Board members believed the recommendation of the administration was based upon the budget, that does not insulate the College from the action it took. The Association argues that the Commission made an evidentiary finding that the administrator's recommendation to lay off Van Goethem caused the Board to act and that, therefore, the College, as a municipal employer, is culpable for the acts of its agents. Further, the Association maintains that the Commission's decision does not undermine the statutory authority of the Board.

B. Discussion

In applying the great weight standard, I must consider whether the agency's determinations were irrational. *See Town of Russell*, 223 Wis.2d at 732-733, 589 N.W.2d at 450; *Sauk County*, 165 Wis. 2d. at 413, 477 N.W.2d at 270. Under this test, if the record demonstrates sound reasoning for the Examiner's Findings of Fact and Conclusions of Law, the Commission's decision incorporating those Findings and Conclusions must be affirmed.

Although the College argues that the Examiner deviated from the reasoning set forth in *Green Lake*, the record indicates that the examiner found the present case distinguishable from *Green Lake*. In *Green Lake*, the Commission differentiated between adverse employment decisions motivated by hostility to a protected activity and an adverse employment decision motivated by the results of a protected activity. Moreover, an employer is not prevented from responding when valid concerns flow from a protected process. In the present case, the Examiner recognized that the *Green Lake* decision and several other Commission decisions

which provide that an employer may respond to the result of the protected activity. However, unlike the *Green Lake* decision, in the present case the Examiner did not find to be valid the College's concerns that purportedly flowed from the unit clarification process. Moreover, the Examiner found that the College's response to the result of the unit clarification process was not made in good faith.

The Examiner did not fail to properly consider *Green Lake*. The *Green Lake* decision set forth that actions taken in good faith, but possibly misguided, must not constitute grounds for a finding of hostility. The Examiner did not base his decision on the fact that the College's response did not meet its objective. Instead, the Examiner based his decision on the lack of evidence submitted by the College to support its inference that the decision to lay off Van Goethem was triggered by the result of the unit clarification. The fact that the cost saving objective would never be met was only one of several factors that persuaded the Examiner.

The Examiner reasoned that, under the facts submitted, the principal justification for the College's objection to moving the Student Health Nurse position into the faculty unit was that the cost of her service would increase. The Examiner's analysis indicates that the cost and service explanation offered by the College could not be "true reasons." His conclusion was based, in substantial part, on his finding that the College's explanation for the layoff of Aimee Van Goethem lacked credibility. The issue of credibility is for the Examiner alone to determine. As the court in *Bucyrus-Erie Co. v. ILHR Dept.*, 90 Wis. 2d 408, 418 (1979), said, "The reviewing court cannot evaluate the credibility or weight of the evidence." *See also Robertson Transportation Co., Inc. v. PSC*, 39 Wis. 2d 653, 658 (1967). The Examiner's conclusion was also based on his finding that there was no evidence that an increase in the nurse's salary would

impair the College's ability to maintain services. Furthermore, he concluded that maintaining Van Goethem at her position was less expensive than the alternatives. The Examiner demonstrated rational reasoning for discrediting the College's explanation for its action. Therefore, under the great weight deference standard, I must uphold his determination with respect to the College's lack of credibility.

Although *Muskego-Norway Consolidated Schools. v. W.E.R.C.*, 35 Wis. 2d 540, 566 (1967) supports the Association's assertion that the College's Board of Directors is not insulated from the acts of its agents, it appears that the Association has misstated the College's argument. The College's argument is not that the Board was insulated, but rather that the fact that the Board has statutory authority to take managerial action supports its argument that the act of laying off Van Goethem was made in good faith. Nonetheless, I must reject the College's reasoning. It is clear from the record that the Examiner had a rational basis for discrediting the College's evidence. Although the College argues that the fact that the Board took managerial action only after several Board meetings demonstrates good faith, the Examiner was not persuaded by this argument. For reasons already stated, the Examiner discredited such evidence.

The college suggests that the evidence establishes that the decision to eliminate the Student Health Nurse position was one made for fiscal purposes. As part of the budget process, the Board decided to eliminate the position to free up monies for new development. The decision was driven in part by the fact that the Association proposed an annual salary of $39,070 for the Student Health Nurse compared to the $25,478 Van Goethem was previously earning. The Board held a public hearing on its budget and Van Goethem was given the opportunity to

address the board regarding her layoff and provide information to the Board in opposition to that layoff. On the other hand, the evidence also establishes that the College opposed the inclusion of the Student Health Nurse position in the faculty bargaining unit and that after it was determined that the position was to be included in that unit, the College maintained that there should be no increase in compensation. The College claimed that one of the reasons for going from a full time to a contractual student nurse position was to provide greater flexibility in providing health services to its students. However, no effort was made to work with Van Goethem in securing such flexibility prior to her layoff. Although the College's stated principal reason for eliminating the full time Student Health Nurse position was to save money, it did not investigate the cost of hiring a contractual part time nurse prior to terminating Van Goethem. As it turned out, the cost of a contractual nurse providing one-half the hours that Van Goethem had been providing was approximately the same as the existing cost for her services. Significantly, prior to the elimination of the Student Health Nurse position, no study was made of the services being rendered, the cost of those services, or whether an alternative could provide adequate services at a savings that would allow money to be freed up for new development. Thus, there was substantial evidence in the record to support the conclusion of the Examiner and the Commission that Van Goethem's layoff was something more than merely being coincidental to the WERC's November 6, 1995, decision which allowed the inclusion of the Student Health Nurse in the faculty bargaining unit.

It is my opinion that the Examiner thoroughly analyzed each element required for a party to prevail upon an allegation of retaliation under Sec. 111.70(3)(a) 1 and 3 Stats., and rationally arrived at his conclusions of law and fact. In its decision, the Commission carefully considered

the petitioner's arguments. As illustrated above, it considered the opposing facts raised by the parties and the competing inferences flowing from those facts. As the court said in *Vocational, Technical & Adult Education v. DIHLR*, 76 Wis. 2d 230, 240 (1977),

> 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.

The Commission's inferences are supported by the record and are reasonable, particularly when the Examiner's determination of credibility is taken into account. Thus, its findings are conclusive.

Based on these findings and the applicable standards of review, it was reasonable for the Examiner and the Commission to conclude that, at least, "in part," Aimee Van Goethem's layoff was based on hostility. I find that the Commission's conclusions were reached in a rational manner, are supported by substantial evidence, and must be deferred to by giving them great weight. For these reasons, the Commissions' decision is **AFFIRMED.**

DATED: January 14, 2000.

BY THE COURT:

Peter J. Naze /s/
Peter J. Naze, Circuit Judge

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