

STATE OF WISCONSIN  
CIRCUIT COURT  
BROWN COUNTY  
BRANCH III

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LOCAL 1901-F, AFSCME, AFL-CIO

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS  
COMMISSION and BROWN COUNTY,

Respondents.

**DECISION**

Case No. 99-CV-1671

[Decision No. 29094-C]

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

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**BACKGROUND**

Petitioner seeks judicial review of a decision of the Wisconsin Employment Relations Commission, which dismissed a prohibited practice complaint brought by the petitioner against respondent Brown County. The commission ruled that the respondent had just cause to discharge the petitioner, and therefore did not commit a prohibited practice of altering the status quo as to discipline during a contract hiatus in violation of Wis. Stat. § 111.70(3)(a)(4).

The petitioner asks this court to reverse the commission's decision, claiming that: (1) the commission denied the petitioner his constitutionally secured due process of law by committing prejudicial procedural error in arriving at its decision; (2) there was not "substantial evidence in the record" within the meaning of Wis. Stat. §227.57(6) to support the material findings of fact made by the commission; and (3) the commission erred in determining that its authority is limited to concerning investigatory findings made pursuant to Wis. Stat. § 49.981.

## DECISION

Wis. Stat. § 227.57 sets forth the scope of review a trial court applies when it reviews an administrative decision. Wis. Stat. §227.57 provides in pertinent part:

- (1) The review shall be conducted by the court without a jury and shall be confined to the record...
- (2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

The scope of judicial review of an agency decision is limited to review of the agency's actions based on the record developed before the agency. See Wis. Stat. § 227.57(1); see Charter Mfg. Co., Inc. v. Milwaukee River Restoration Council, Inc., 102 Wis.2d 521, 528 (Ct. App. 1981). In addition, the court must separately consider questions of law, fact, and procedure. See Wis. Stat. § 227.57(3). The following standards are established by Wis. Stat. § 227.57(4), (5), (6) for reviewing issues of fact, law, and procedure:

- (4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.
- (5) The court shall set aside or modify the agency action if it finds the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
- (6) If the agency's action depends on any fact 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 Commission's Findings of Fact**

As a preliminary matter, this court recognizes that under Wis. Stat. § 227.57(6), a court upon judicial review of an administrative decision may not “substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.” Rather, a reviewing court must uphold the agency findings unless they are not supported by “substantial evidence.” Id; see Hamilton v. Department of Industry, Labor and Human Relations, 94 Wis.2d 611, 617 (1980). Wisconsin courts have defined “substantial Evidence” as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Bell v. Personnel Bd., 259 Wis. 602, 608 (1951). Moreover, the standard does not require that the evidence be subject to no other reasonable, equally plausible interpretation. See Hamilton, 94 Wis.2d at 618. In other words, the 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.” Bucyrus-Erie Co. v. ILHR Dept., 90 Wis.2d 408, 418 (1979).

Although this court's function with regard to review of agency decision-making is a narrow one, this court cannot properly carry out its limited role on review unless the agency follows statutory procedure by providing the court with adequate facts and reasoning upon which its decision was based. This is particularly true in cases such as the one at hand where the commission's decision reverses the proposed legal and factual findings of a hearing

examiner who heard testimony from and observed witnesses during hearings that spanned seven days.

Under Wis. Stat. 227.46(2), “if any agency’s decision varies in any respect from the decision of the hearing examiner, the agency’s decision shall include an explanation of the basis for each variance.” Id. Wisconsin courts have also stressed the significance of reasoned agency decision-making on the judicial review process. Voight v. Washington Island Ferry Line, Inc., 79 Wis.2d 333, 343 (1977)(stating that “[w]here an agency’s decision is contrary to recommendation of the hearing examiner responsible for making findings initially, the agency must itself explain on what evidence it has relied to support its result.”); and Heine v. State Chiropractic Examining Bd., 167 Wis.2d 187, 191-92 (Ct. App. 1992)(stressing that “[w]here the agency’s decision is contrary to the recommendation of the hearing examiner, the agency must explain on what evidence it has relied to support its result, and even where the agency does not set aside findings, it still must give adequate reasons for departing from the proposed order.”).

An administrative agency’s explanation of its conclusions not only permits the reviewing court to carry out its judicial review function, but also ensures that the proceedings do not violate fundamental notions of fairness. See Transamerica Ins. Co. v. ILHR Dept., 54 Wis.2d 272, 284 (1972). As stated by the court in Transamerica:

The parties...are entitled to know, not only that the department set aside the findings of an examiner but why it did so—not only what independent findings the department found proper, but on what basis and evidence it made such findings. Particularly is this true where credibility of witnesses is involved. Fundamental fairness requires that administrative agencies, as well as courts, set forth the reasons why a fact-finder’s findings are being set aside or reversed, and spell out the basis for independent findings substituted.

Id. at 284.

Guided by the statutory authority and case law as set forth above, this court finds that the commission failed to state the reasons for its affirmance in part, and reversal in part, of the Examiner's Finding of Fact number 25. On page two of its decision, the commission made the following finding as part of its order:

- B. Examiner Finding of Fact 25 is affirmed in part and reversed in part through the deletion of the stricken through language and the addition of the underlined language:

25. In preparation for his testimony at the preliminary hearing, JB was transported from his new home in another state to Brown County and was housed in Secure Detention. While in Secure Detention, he encountered a female juvenile, JM. JM has also been a resident at both the Mental Health Center and Shelter Care from time to time, and knew JB from both places. JM was in Secure Detention for having run away from Shelter Care. JM approached JB in the common room at Secure Detention, just outside the jailers' office. She asked JB what he was doing there, and JB replied that he was there to testify against M for sexually assaulting him. ~~JM asked if he had sexually assaulted him, and JB said that he had not, that he had made up the charges to get even with M. JM rebuked him for this.~~ During their conversation, JB did not tell JM he had made up the charges to get even with M. The following morning, JM was returned to his new home state. Later that day, JM was placed in lockdown for being too loud.

Decision No. 29094-B, p.2

In the discussion section of the opinion, the commission's sole comment on its action regarding Examiner Finding of Fact 25 was as follows:

Third, I find J.M.'s testimony regarding J.B.'s alleged recantation to be less credible and persuasive than the Examiner's analysis reflects. I conclude that J.B. did not recant and thus the Examiner Finding of Fact 25 has been reversed to that extent.

Decision No. 29094-B, p.9.

As stated above, questions concerning the weight and credibility of the evidence are solely for the agency. See Bucyrus-Erie Co. v. ILHR Dept., 90 Wis.2d 408, 418 (1979); Wis.

Stat. §227.57(6). Thus, the court's limited function is to determine whether there is substantial evidence in the record to support the agency's factual findings. However, the court cannot adequately determine whether the findings are supported by substantial evidence if the findings presented for review fail to include an evidentiary basis for the conclusion reached.

Here, the commission's only written explanation for its reversal of Examiner Finding of Fact #25 that J.B. told J.M. he made up the charges to get even with M was that it found "J.M.'s testimony regarding J.B.'s alleged recantation to be less credible and persuasive than the examiner's analysis reflects." Decision No. 29094-B, p.9. This court concludes that the commission's cursory statement does not satisfactorily explain the commission's variance from the finding of fact recommended by the hearing examiner, and therefore fails to satisfy the requirements of Wis. Stat. § 227.46(2).

For the aforementioned reasons, the case is remanded under Wis. Stat. §227.57(4) to the commission with orders that the commission solely explain in detail on what evidence it relied in determining that J.M. was not a credible witness, and ultimately reversing the Examiner Finding of Fact 25 that J.B. recanted.

Dated at Green Bay, Wisconsin, this 5 day of October, 2000.

BY THE COURT:

Sue Bischel /s/

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Honorable Sue Bischel  
Circuit Court, Branch III