STATE OF WISCONSIN
CIRCUIT COURT
BROWN COUNTY
BRANCH III

LOCAL 1901-F, AFSCME, AFL-CIO,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION and BROWN COUNTY

Respondents.

SUPPLEMENTAL DECISION
Case No. 99-CV-1671
[Decision No. 29094-E]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

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).

Pursuant to Wis. Stat. § 227.46(2), I remanded this case to the Wisconsin Employment Relations Commission for an explanation of the basis for its variance from the hearing examiner on certain findings of fact. The petitioner now 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 concerning investigatory findings made pursuant to Wis. Stat. §49.981.

FACTS

Considering the voluminous record involved in this case, a brief recitation of the facts is in order.

Defendant Maass began employment as a relief Shelter Care Worker at the Brown County Shelter Care facility in June, 1989. In 1990, Maass was promoted to a permanent part-time position, and became a regular, full-time employee in 1994. As a Shelter Care Worker, Maass' job duties included providing supervision and care for troubled juvenile residents of the facility.

Maass first began working with J.B. in 1994. J.B. was a fourteen year old boy with a history of neglect, family instability, and mental health problems. (Brief for Petitioner AFSCME, p. 6). Apparently, J.B. also had a history of falsely accusing his parents and Shelter Care Workers of physical and sexual abuse.

On April 14, 1995, Maass testified in a hearing before a Court Commissioner that in his opinion, the Shelter Care facility could not offer the level of supervision J.B. needed. Notwithstanding, the Court Commissioner ordered that J.B. be returned to the Shelter Care facility.

On April 16, 1995, J.B. accused Maass of kicking him in the face and cutting his lip. J.B. also claimed he was being discriminated against, and that "he'd have [Maass'] job. The accusation was investigated and proved to be false.

Shortly thereafter, J.B. was transferred to the Brown County Mental Health Center,

where he told one of the nurses that a male staff member "repeatedly fondled his penis during the night." During the investigation of the accusation, J.B. prepared a statement in which he identified Maass as the perpetrator of the alleged sexual abuse.

On June 6, 1995, a criminal complaint was filed by the Brown County District Attorney against Maass. On June 23, 1995, Maass was discharged from his employment at Shelter Care and from all other employment with Brown County. On August 27, 1995, the criminal complaint against Maass was dismissed on motion of the district attorney based on information from an affidavit submitted by J.M., a fellow Shelter Care resident with J.B., in which she stated that in response to asking J.B. what Maass did to him, J.B. responded, "[n]othing, I am just getting even with Shelter Care."

DECISION

Scope of Review

Wis. Stat. § 227.57 sets forth the scope of review of a trial court applies when it reviews an administrative decision. Wis. Stat. § 227.57(1) and (2) provide as follows:

> (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.[1]

[1] Wis. Stat. § 227.57 (4), (5), and (6) set forth the following grounds for setting aside, modifying, remanding or ordering agency action:

> (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.

Applying Wis. Stat. §227.57 as a guide, I will now individually address the Union's arguments as outlined above.

Due Process

The Union first argues that the Commission committed prejudicial procedural error and denied Maass a fair hearing in it's determination of the appropriate burden of proof. The Commission concluded that the County had to prove that "just cause" existed to terminate Maass by "a clear and satisfactory preponderance of the evidence" pursuant to Wis. Stats. §§ 111.07(3) and 111.70(4)(a).[2] Citing various treatises on labor arbitration, the Union asserts that where, as in this case, the alleged misconduct involves moral turpitude and criminal conduct, the higher evidentiary standard of "beyond a reasonable doubt" was more appropriate, and thus should have

(6) If the agency's action depends 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 the substantial evidence in the record.

[2] Wis. Stats. §§ 111.07(3) and 111.70(4)(a) read as follows:

> § 111.70(4)(a):
>
> (4) **Powers of the commission**. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:
> (a) **Prevention of prohibited practices**. Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.
>
> §111.07(3):
>
> (3) A full and complete record shall be kept of all proceedings had before the commission, and all testimony and proceedings shall be taken down by the reporter appointed by the commission. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a **clear and satisfactory preponderance of the evidence**.

been applied.

This court follows the general rule in Wisconsin that, if an administrative agency's expertise, technical competence, and specialized knowledge aid the agency in its interpretation and application of a statute, the agency's conclusions are entitled to "great weight" deference. West Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 121 Wis.2d 1, 12 (1984). Under this standard, it is "only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it." Beloit Education Ass'n v. WERC, 73 Wis.2d 43, 67 (1976) (footnote omitted); see also Robert Hansen Trucking, Inc., v. Labor and Industry Review Comm'n, 121 Wis.2d 509, 513 (Ct. App. 1984) (court stressed that while a reviewing court is not bound by an administrative agency's conclusion on a question of law, if an agency's legal conclusion is reasonable, a reviewing court will sustain the agency's view even though an alternative view may be equally reasonable); and School Dist. of Drummond v. Wisconsin Employment Relations Comm'n, 120 Wis.2d 1, 7 (Ct. App. 1984) (court stated that when the legislature designates an administrative agency to apply a particular statute, the agency's interpretation is entitled to great weight and a reviewing court must defer to the interpretation unless it is irrational).

Upon careful review of the parties' arguments, and recognizing the court's limited role on judicial review, I find no error in the Commission's determination that the County was required to prove "just cause" by a "clear and satisfactory preponderance of the evidence" under Wis. Stat. § 111.07(3). In light of the

Commission's expertise, technical competence and specialized knowledge in the area of labor relations, its interpretation and application of Wis. Stat. §111.07(3) was reasonable, and is therefore sustained.

Secondly, the Union argues that the Commission committed prejudicial procedural error when it upheld the Examiner's decision to consider hearsay statements made by J.B. to several individuals, as well as his preliminary hearing testimony as circumstantial evidence of the alleged contacts with Maass. Specifically, the Union asserts that the County failed to prove J.B. was an "unavailable" witness due to an "existing physical or mental illness or infirmity" within the meaning of Wis. Stats. §§ 908.04(1)(d) and 908.045(1) because it neither exercised a good faith effort to secure J.B's presence at the hearing, nor presented medical evidence of J.B's condition.[3] Moreover, the Union argues that J.B's hearsay statements to other individuals regarding the alleged incident lacked "circumstantial guarantees of

[3] Wis. Stats. §§ 908.045(1) and 908.04(1)(d) read as follows:

Wis. Stat. § 908.045(1):

> The following are not excluded by the hearsay rule if the declarant is **unavailable** as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Wis. Stat. § 908.04(1)(d):

> (1) "Unavailability as a witness" includes situations in which the declarant:
>
> (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;

trustworthiness" under Wis. Stat. § 908.045(6).[4] According to the Union, J.B.'s statements and testimony were therefore inadmissible hearsay.

I am not persuaded by the Union's arguments, and therefore find the Commission properly exercised its discretion in affirming the hearing examiner's findings that J.B's preliminary hearing testimony and statements to others constituted admissible hearsay under the exceptions provided in Wis. Stat. § 908.045(1) and (6). Focusing on the "unavailability" of J.B. due to a "then existing physical or mental illness or infirmity," the Commission upheld the Examiner's findings based on the letter submitted by J.B's psychologist, in which she wrote that "[t]he issue and anticipation of testifying is quite axiety – producing for J.B. and it's (sic) discussion has resulted in considerable regression" and that "J.B's adjustment has been interrupted by ….affective instability including self-injurious behavior, and running away. These episodes have been temporally coincident with the discussion…of his participation in the court proceedings." (Decision of Examiner, p. 37). Upon review, I am not satisfied that the Commission's findings regarding unavailability were erroneous. Moreover, the reliability of J.B.'s preliminary hearing testimony is reflected in the fact that it was given under oath at a prior judicial proceeding. Finally, the Union presents no argument alleging that opposing counsel was denied an opportunity to develop J.B's testimony in cross-examination at the preliminary

[4] Wis. Stat. §908.045(6) states:

> (6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

hearing. As a result, the Union has failed to make an adequate showing that the Commission's findings in this regard violated Maass' due process rights.

Substantial Evidence

The Union's supporting papers also raise the issue of whether the Commission's findings of fact and ultimate determination that Maass sexually abused J.B. was supported by "substantial evidence" within the meaning of Wis. Stat. § 227.57(6).

Pursuant to 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." Wis. Stat. § 227.57(6). Rather, a reviewing court must uphold the agency findings unless they are not supported by "substantial evidence." Id. see also 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). The "substantial evidence" standard does not require that the evidence be subject to no other reasonable, equally plausible interpretations. 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). Moreover, as stated by the Wisconsin Supreme Court:

> [s]ubstantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept.

Robertson Tranp. Co. v. Pub. Serv. Comm'n, 39 Wis.2d 653, 658 (1968). Substantial evidence therefore "does not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence. Such tests are not applicable to administrative findings and decisions." Reinke v. Personnel Bd., 53 Wis.2d 123, 135 (1971)(quoting Gateway City Transfer Co. v. Public Service Comm'n, 253 Wis. 397, 406 (1948).

In determining whether evidence is "substantial," the court cannot rely solely on an isolated piece of testimony which is explained or discredited by other testimony. See Albrent Freight & S. Co. v. Public Service Comm'n, 263 Wis. 119, 128 (1953). The court must consider any impeaching or rebutting testimony in determining whether substantial evidence exists to support the agency's findings. See Motor Transport Co. v. Public Service Comm'n, 263 Wis. 31, 44-45 (1953).

The Union primarily contends that, regardless of the admissibility and weight given to the hearsay allegations by J.B. against Maass, the findings of the Commission are not supported by substantial evidence in the record viewed as a whole. The Union claims that, contrary to the Commission's findings, neither Maass'

past conduct with other boys at Shelter Care nor his testimony concerning those incidents is sufficient to constitute "substantial evidence" that he sexually abused J.B.[5] The Union also stresses that the Commission unfairly ignored testimony in the record that weighed heavy against J.B's credibility, including evidence that J.B. had a history of not telling the truth and that he had a motive to fabricate the allegations.[6] As to the Commission's findings regarding J.M.'s testimony, the Union argues in its brief that rather than "substantial evidence," the Commission "relie[d] on pure speculation to explain [its] disregard of J.M's testimony that J.B. recanted. (Union Reply Brief, p. 3)[7]

Although well conceived, the arguments of the Union ignore the considerable discretion afforded the Commission regarding its findings of fact in this case. Considering there were no eyewitnesses to the alleged incident in this case,

---

[5] Specifically, the Commission upheld the Examiner's findings of fact that:

1. While A.S. was unclothed and about to enter the shower, M had A.S. grab his ankles.

2. M allowed other boys to spank A.S. on A.S.'s 16th birthday and then had A.S. remove his shirt so he could draw a smiley face on A.S.'s stomach and then told A.S. to "make it whistle."

3. M had a flirtatious exchange with a male Shelter resident in which M commented on the boy's necklace. When the boy responded by indicating that he was not "that way," M replied, "I keep hoping" and then asked about the boy's sexual preference and performance.

4. M told other staff that he knew why a particular boy was popular with girls because he had seen the boy in the shower room and observed that he was "hung like a horse."

(Commission Decision, p.9)

[6] As evidence of possible motive, the Union specifically points to Maass' own testimony that after the placement hearing, J.B. got upset with Maass, stated "I'll have his job," and only two weeks later, alleged that Maass sexually assaulted him. (Tr. at 657). According to the Union, J.B.'s untruthfulness is shown in the fact that he falsely accused his parents, shelter care workers, the mental health center staff, other residents and Maass of sexual assault.

[7] In particular, the Union argues that nothing in the record supports Chairman Meier's statements that "J.M. was on a mission to add others to the group of M supporters" and that "M's supporters withheld information from the authorities."

determinations of witness credibility played a substantial role in the findings of fact of both the Examiner and the Commission. Contrary to the Examiner's factual findings, the Commission found that J.M. was not a credible witness and that she therefore lied regarding J.B.'s alleged recantation. Upon remand, the Commission provided the court with detailed documentation from the record in support of its credibility determination, in accordance with Wis. Stat. § 227.57(6). Contrary to the assertions of the Union, the supplementary findings of the Commission are replete with testimonial evidence controverting J.M.'s own statements regarding what actually occurred in her meeting with J.B. in secure detention in 1996. Moreover, it cannot be said that a reasonable person, acting reasonably, could not have reached the decision of the Commission from the evidence presented and its inferences. As noted above, the court may not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.

While due process requires that the Commission must have the benefit of the hearing examiner's personal impressions of the material witnesses when rejecting the examiner's recommendations, the Commission is empowered to reject the recommendations in rendering a final decision. See Hamilton, 94 Wis.2d at 621. When doing so, the Commission must "(1) consult of record with the examiner to glean his impressions of the credibility of witnesses and (2) include in a memorandum opinion an explanation for its disagreement with the examiner." Id. The Union makes no showing that these requirements have not been met. In both its original memorandum and upon remand, the Commission explicitly stated that it reviewed the

record and consulted with the examiner. Therefore, the Commission did not abuse its authority in rejecting the hearing examiner's recommendations.

Investigatory Findings

The Union also argues that the commission erred in determining that its authority is limited concerning investigatory findings made pursuant to Wis. Stat. § 49.981. In light of the findings made above, however, I find it unnecessary to resolve this issue.

Based on the foregoing, I conclude that there is substantial evidence in view of the entire record to sustain the findings of fact of the Commission upholding Maass' discharge. The record also supports the finding that Maass' actions constituted just cause for discharge. As a result, Respondent Brown County did not violate the status quo created by the expired collective bargaining agreement, and therefore did not commit prohibited practices within the meaning of Wis. Stat. § 111.70(3)(a)(1) and (4) by discharging Maass.

Dated this 20 day of April, 2001.

BY THE COURT:

Sue E. Bischel /s/
Sue E. Bischel
Circuit Court Judge, Branch III