STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | BROWN COUNTY

NORTHEAST WISCONSIN TECHNICAL COLLEGE,

Petitioner,

v.

Case No. 01-CV-1245

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Decision No. 29955-C

Respondent,

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

and

NORTHEAST WISCONSIN TECHNICAL COLLEGE FACULTY ASSOCIATION,

Interested Party.

NOTICE OF ENTRY OF DECISION

TO: Attorney Robert W. Burns
Attorney Lisa L. Kristke
Davis & Kuelthau
P.O. Box 1534
200 South Washington Street
Green Bay, WI 54305-1534

Attorneys for Petitioner

Attorney Laura Amundson
Wisconsin Education Association
P.O. Box 8003
Madison, WI 53708-8003

Attorneys for Interested Party, NWTC Faculty Association

PLEASE TAKE NOTICE that a Decision affirming the decision of the Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the court on the 15th day of April, 2002, and duly entered in the Circuit Court for Brown County, Wisconsin, on the 15th day of April, 2002.

Notice of entry of this Decision is being given pursuant to Wis. Stat. §§ 806.06(5) and 808.04(l).

Dated this 17th day of April, 2002.

Respectfully Submitted,

JAMES E. DOYLE
Attorney General

William H. Ramsey /s/

WILLIAM H. RAMSEY
Assistant Attorney General
State Bar No. 1031922

Attorneys for the Wisconsin Employment Relations Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7477

STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | BROWN COUNTY

NORTHEAST WISCONSIN TECHNICAL COLLEGE,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

and

NORTHEAST WISCONSIN TECHNICAL COLLEGE FACULTY ASSOCIATION,

Interested Party.

DECISION

Case No. 01 CV 1245

Decision No. 29955-C

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

I. BACKGROUND

Petitioner, Northeast Wisconsin Technical College (Petitioner) has brought this action seeking review of a Wisconsin Employment Relations Commission (Commission) decision that reversed decision of a Commission-appointed hearing examiner (Examiner). Petitioner disciplined three of its employees for making off-color remarks while in the presence of another employee. Petitioner's employees are represented by a union, the Northeast Wisconsin Technical College Faculty Association (Union). Two of the disciplined employees filed grievances with the Union. To assist in the processing of those grievances, the Union attempted to obtain a copy of the entire investigation report prepared by Petitioner in regards to the disciplinary actions.

On June 28, 2000, the Union filed a prohibited-practice complaint with the Commission, alleging that the Petitioner was unlawfully withholding the report from the Union in violation of Wisconsin's Municipal Employment Relations Act. On January 12, 2001, the Examiner ruled in favor of the Petitioner, and dismissed the complaint. On February 1, 2001, the Union petitioned the Commission for review of the Examiner's decision. On July 24, 2001, the Commission reversed the decision of the Examiner and ordered that the report be given to the Union. On August 22, 2001, Petitioner filed this action seeking review of the Commission's decision. Because the decision of the Commission is based on a reasonable interpretation of the statute and substantial evidence, it is affirmed.

II. ANALSIS

At issue in this case is whether Petitioner has violated the part of MERA outlining prohibited practices by municipal employers, Wis. Stats. § 111.70(3), which provides in pertinent part:

> (3)(a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)[1]
> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collectible bargaining unit. Such refusal shall include ... though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon.

[1] That section outlines the right of municipal employees to join and participate in labor unions. Wis. Stat. § 1170(2).

In its original complaint filed with the Commission, the Union alleged that the Petitioner was committing a "prohibited practice" under MERA by refusing to comply with the Union's request for a copy of the full investigative report. The Union argued that it is necessary for them to receive a copy of the full report so that they could process the grievances of the disciplined employees as contemplated by the collective bargaining agreement. Petitioner argued that the discipline was based solely on the confessions of the employees, which had been provided to the Union, and that all other parts of the report were irrelevant. Petitioner further asserted that providing any further information would jeopardize the integrity of the Petitioner's sexual harassment policies, as the confidentiality of the witnesses involved would be compromised.

The Examiner agreed with the Petitioner and dismissed the complaint. The Commission overruled this decision and held that the parts of the report not provided were "relevant and reasonably necessary for the (Union) to administer the collective bargaining agreement." Therefore, withholding the information is a prohibited practice and the entire report should be provided to the Union. Petitioner asks this Court to overrule the decision of the Commission and find that withholding the report is not a prohibited practice under Wis. Stat. 111.70.

Interpretation of a statute and how it applies to a certain set of facts is a question of law for the courts. *Barron Electric Cooperative v. Public Service Comm'n of Wisconsin,* 212 Wis. 2d 752, 760, 569 N.W.2d 726, 731 (Ct. App. 1997). When interpreting a statute and its application to a set of facts, a reviewing court is not bound by the decision of an administrative agency. *Dodgeland Education Association v. WERC,* 2002 WI 22, 639 N.W.2d 733, 743

(2002); *Harnischfeger Corp. v. LIRC,* 196 Wis.2d 650, 659, 539 N.W.2d 98, 102 (1995). However, there are instances when an agency's interpretation of a statute is entitled to deference by the courts. Id.

There are three levels of deference that Wisconsin courts apply when reviewing agency interpretations of law: "great weight", deference, "due weight" deference, and "de novo" review. Id. "Great weight" deference will be afforded when: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long standing, (3) the agency employed its specialized knowledge or expertise in forming the opinion, and (4) the agency's interpretation will provide consistency and uniformity in the application of the statute. Id. at 743-44. When great weight deference is appropriate an agency interpretation of a statute will be upheld if it is reasonable, even if an alternative interpretation is more reasonable. "Due weight" deference will be afforded when the agency has some experience in an area, but not enough to necessarily place it in a better position to make judgments regarding the interpretation of a statute than a court. *UFE Inc. v. LIRC,* 201 Wis. 2d 274, 286, 548 N.W.2d 57, 62 (1996). Under "due weight" deference, an agency interpretation will be upheld if it is reasonable, and overturned only if another interpretation is more reasonable. Id. at 287. A court will implement "De novo" review when the issue before the agency is one of first impression, or previous agency decisions on the issue are so inconsistent they provide no real guidance. *Barron,* 212 Wis.2d at 763. An agency's decision receives no deference under the de novo standard. Id.

An agency's interpretation of a statute will be considered reasonable unless it is shown: (1) the interpretation directly contravenes the words of the statute, (2) is clearly contrary to

legislative intent, or (3) is otherwise without a rational basis. *Begel v. LIRC,* 2001 WI App. 134, 246 Wis.2d 345, 354, 631 N.W.2d 220, 224 (Ct. App. 2001); *Heritage Mutual Ins. Co. v. Larsen,* 2001 WI 30, 242 Wis.2d 47, 68, 624 N.W.2d 129, 136 (2001).

The factual findings of an agency will be upheld if they are supported by "substantial evidence." Wis. Stats § 227.57(6); *Kitten v. State Dept. of Workforce Development,* 2001 WI App. 218, 247 Wis. 2d 661, 673, 634 N.W .2d 583, 589 (Ct. App. 2001). In other words, when the sufficiency of evidence upon which an agency decision is based is being challenged, a court is limited to determining whether there is "substantial evidence" to support the agency decision. Id. Substantial evidence is the amount and quality of evidence that a reasonable person would consider adequate to support a decision. Id. at 674. A finding of fact supported by substantial evidence is conclusive and may not be disturbed by a reviewing court. Id.

The decision of the Commission in this case is entitled to "great weight" deference. Their decision satisfies all four factors identified in *Harnischfeger* that must be met in order to receive such deference. As an initial matter, there is simply no question that under Wis. Stats. § 111.70 the WERC is the agency charged by the legislature with the duty of administering the MERA. The other three factors are met as well.

The Commission's interpretation here is one of long standing. The question before the Commission was whether Petitioner was engaging in a "prohibited practice" under Wis. Stats. § 111.70(3) by withholding the report. It is apparent that this is a type of question that the Commission has faced on numerous occasions in the past. This case is not analogous to *Kelley Company, Inc. v. Marquardt,* 172 Wis.2d 234, 493 NW.2d 68 (1992), where the decision of the agency was based on no precedent whatsoever. Here, the decision of the agency was based

on precedent, specifically the "discovery-type" standard that the Commission has developed to help decide disputes over the duty to furnish information. Petitioner argues that the Commission's expertise lies in interpreting collective bargaining requirements and should not be allowed to weigh confidentiality concerns or Petitioner's obligations under state and federal law to develop a satisfactory sexual harassment policy. Neither argument has merit. Confidentiality concerns have been addressed by the Commission many times when deciding issues of information disclosure. The argument that somehow the Petitioner would be liable under federal law for failing to maintain a proper sexual harassment policy if forced to divulge this information, and that this places the analysis outside the scope of the Commission's decision making powers, is simply too tenuous to be considered persuasive. Petitioner argues, but fails to demonstrate how allowing a limited group of people involved in the representation of the accused to have access to the report will cause the Petitioner's sexual harassment policy to become ineffectual.[2] The interpretation of whether or not Petitioner committed a prohibited practice under Wis. Stats. § 111.70(3) by the Commission is one of long standing.

The decision of the Commission is based upon specialized knowledge or expertise. The decision of whether the information requested by the Union was relevant to the administration of a collective bargaining agreement was based on a standard developed by the Commission.

[2] Petitioner argues that the Commission places no restrictions as to who may view the information contained in the report. However, the Commission specifically sets out in its "conclusions of law and fact" that access to the report is to be limited to the Union representative handling the case and legal counsel. The fact that the "order" portion of the opinion states only that the Petitioner must "provide a copy of the ... report to (Union) representative Kundin" should not mean that somehow this information will become public domain. It is obvious that the intent of the order is to limit access to the people mentioned in the "conclusions of law and fact." If Petitioner is truly concerned about this issue, they have recourse. They can request that the Commission clarify or modify the Order.

The Commission also has expertise in balancing relevancy and privacy concerns when deciding whether information must be provided. It is clear from the memorandum that accompanies their order in this case that the Commission used its expertise in reaching its decision. The third element is satisfied.

Finally, the agency's interpretation will provide consistency and uniformity in the application of the statute. The Commission used a well-developed standard to help decide this case. Allowing the Commission to apply the statute as it did here will provide consistency with past cases, as the Commission has uniformly applied the standard in several other cases. There will also be more consistency in future cases involving the statute if the Commission's interpretation in this case is allowed to stand. The fourth element has been met.

Having decided that the Commission is entitled to great weight deference, the next steps are to decide whether the decision of the Commission is based on substantial evidence, and the interpretation of the statute has been reasonable. If both elements are satisfied then the decision of the Commission may not be disturbed.

The decision of the Commission is based on substantial evidence. In the memorandum accompanying the order, the Commission lays out the evidentiary facts it considered in making its decision. The Commission felt that it was clear from the testimony of representatives of the Petitioner that the entire report was reviewed in deciding what discipline was to be meted out, and that there may be information in the portions not provided that may be used to attack the level of discipline imposed. Petitioner argues that the Commission improperly disregarded the factual findings of the Examiner and disputes the relevance of the entire report. Petitioner argues that the Commission improperly disregarded the factual findings of the Examiner and

disputes the relevance of the entire report. This Court may not substitute its judgment, or anyone else's judgment, for that of the Commission when it comes to an issue od disputed fact. Wis. Stat. § 227.06. This Court may only decide whether the agency based its decision on a proper factual basis. The evidence relied on by the Commission in this case qualifies as substantial evidence.

Parenthetically, this Court observes that someone on behalf of the College made a decision to rely only on the admissions of the Grievants prior to imposing discipline. How or why such a determination was made is "relevant" to the discipline that was imposed. How or why that decision was made is important to determine whether other employees, similarly situated, were disciplined differently. This Court further observes that such an analysis is an integral part of the determination of whether that discipline is appropriate.

The Commission's interpretation of the statute is reasonable. Using the liberal "discovery-type" standard of relevance, the Commission found that because the Petitioner reviewed the entire report before it determined what punishment to impose, that the entire report was information that was relevant to the administration of the collective bargaining agreement by the Union. Therefore, withholding the report from the Union was a prohibited practice under Wis. Stat. § 111.70(3). The Commission balanced the need to divulge the relevant information with the need for witness privacy, and found that the need for the Union to review the entire report outweighed the privacy factors if access was restricted to the Union representative and legal counsel. I find nothing in the agency's decision that directly contradicts the words of the statute, is contrary to legislative intent, or is otherwise without a rational basis. *See Begel,* 246

Wis.2d at 354. Because the interpretation of the Commission is reasonable, and based on substantial evidence, it may not be disturbed.

For the aforementioned reasons, the decision of the Wisconsin Employment Relations Commission is hereby **AFFIRMED**.

Dated at Green Bay, Wisconsin, this 15th day of April, 2002.

BY THE COURT:

Mark A. Warpinski /s/
Mark A. Warpinski
Circuit Court Judge, Branch II