STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO AND MONROE COUNTY

Involving Certain Employees of

MONROE COUNTY

Case 146
No. 59206
ME-3789

Decision No. 30037-C

Appearances:

Mr. Ken Kittleson, Personnel Director, Monroe County Courthouse, 112 South Court Street, P.O. Box 202, Sparta, Wisconsin 54656, appearing on behalf of Monroe County.

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

ORDER DENYING PETITION FOR REHEARING

On November 30, 2001, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit with Accompanying Memorandum in the above matter wherein we concluded among other matters that the Monroe County Victim Witness Coordinator was not a supervisor or a managerial employee.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

On December 19, 2001, Monroe County filed a petition for rehearing pursuant to Sec. 227.49, Stats., asserting that the Commission had committed errors of law and fact and that it had new evidence 1/ to present regarding disciplinary action taken by the Coordinator after the evidentiary hearing was conducted but before the Commission issued its November 30, 2001 decision.

1/ Section 227.49 (3) provides:

> ***(3) Rehearing will be granted only on the basis of:***
> ***(a) Some material error of law.***
> ***(b) Some material error of fact.***
> ***(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.***

It can well be argued that "new evidence" within the meaning of Sec. 227.49(3)(c), Stats., is limited to matters that occurred after the issuance of our decision. However, because the "new evidence" is not sufficiently strong to reverse or modify our Order, we need not resolve this legal issue.

Wisconsin Council 40, AFSCME, elected not to file a reply to the petition.

Having considered the petition, we conclude that we did not commit errors of law or fact and that the evidence that accompanied the petition is not sufficiently strong to reverse or modify our Order.

NOW, THEREFORE, it is

ORDERED

The petition for rehearing is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Monroe County

MEMORANDUM ACCOMPANYING ORDER DENYING PETITION FOR REHEARING

In its petition, the County asserts that our November 30, 2001 Order as to the Victim Witness Coordinator: (1) is at odds with our decision in TREMPEALEAU COUNTY, DEC. NO. 18380-D (WERC, 4/01); (2) places too much emphasis on the testimony of the incumbent; (3) relies on erroneous testimony by the incumbent; (4) is inappropriately based on the absence of the need to discipline or hire employees; and (5) is contrary to the new evidence presented with the petition.

As to contention (1), above, our November 30, 2001 decision discusses the distinctions between the Trempealeau County Victim Witness Coordinator and the Monroe County Victim Witness Coordinator as follows:

> Our recent decision in TREMPEALEAU COUNTY, SUPRA, creates the standard by which we address whether Rengert's responsibilities are managerial in nature. In reviewing Rengert's job duties and applying the criteria we enunciated in TREMPEALEAU COUNTY, we are convinced that while Rengert performs some managerial functions, she does not have sufficient participation in the formulation, determination and implementation (sic) management policy or sufficient authority to commit County resources to be a managerial employee.
>
> Rengert testified that the segregation of Victim/Witness office in 1992 was to allow the office to:
>
> > . . . remain the same. The district attorney prior to, the one that we had in 1991-1992, treated our position as strictly clerical. After he left office and the new district attorney came in, he allowed us to progress with the program to what it is now, and he had, he wanted to move on, and I felt that that was the time for us to become independent, so that the program wouldn't go backwards.
> >
> > [Tr. 94]

She further indicated that since this independence, there have been only two changes in her responsibilities:

> . . . [t]he only two things that I can think of are that I report directly to the County Board now, rather than to the district attorney, and that I prepare the annual report directly for the County Board. Before then my portion of the annual report would be part of the district attorney's.
>
> [Tr. 93]

Rengert testified that the procedures used by the Monroe County Victim/Witness Department "have to be approved by the state office." [Tr. 72]. She further testified that the Court and District Attorney "order her" to do certain procedures. [Tr. 73] Rengert receives assignments from the judges. Most recently she was directed to conduct a study and benefit analysis to determine whether Monroe County would benefit from a juvenile victim offender reconciliation program. Rengert is given direction by the District Attorney to prepare a victim/witness for trial, to locate additional witnesses for a particular case, to speak to specific individuals, to contact law enforcement to request evidence and to remind law enforcement to bring evidence to trial. In the event that Rengert desires to initiate a new program through the Victim/Witness Department, she would need to obtain approval from the County Board.

Our decision in TREMPEALEAU COUNTY held a victim/witness coordinator who had the discretionary ability to identify priorities and allocate time based on these priorities was a managerial employee. Rengert is not afforded this level of managerial discretion. The record reveals Rengert continues the practices created when the Monroe County victim/witness responsibilities were under the auspices of the District Attorney, she implements the procedures of the State, she follows the directions given to her by the Court and District Attorney, and she does not have the authority to initiate new programs without approval from either her authorizing committee or the County Board.

We are persuaded that our November 30, 2001 decision clearly and correctly distinguishes between the two Victim Witness Coordinators and thus that our November 30, 2001 Order is consistent with and not contrary to TREMPEALEAU COUNTY.

As to contentions (2) and (3), above, the testimony of an incumbent provides direct evidence of the incumbent's actual duties and responsibilities. Where, as here, no rebuttal testimony or argument was presented and there were no internal inconsistencies in the incumbent's testimony, the incumbent's testimony provides better evidence than a job description as to the incumbent's actual duties and responsibilities. OREGON SCHOOL DISTRICT, DEC. NO. 28110-C (WERC, 4/96). Thus, we placed primary emphasis on the incumbent's testimony and have no basis in the record for concluding that she testified erroneously. Given the foregoing, we reject County contentions (2) and (3) above.

As to contention (4) above, we reject the notion that the County's ability to establish supervisory status was hampered by the absence of the opportunity for the Victim Witness Coordinator to discipline or participate in the hiring of an employee produced by a stable competent workforce. While the facts surrounding disciplinary or hiring opportunities provide the best evidence of an employee's authority in these critical areas of inquiry, where such evidence is lacking we rely on the testimony and other evidence presented as to disciplinary and hiring authority. The evidence presented led us to conclude that:

> As to the extent of her authority to hire, promote, transfer or discipline, we begin by noting that in the context of the two person Victim/Witness Department, there are no promotional or transfer opportunities and there have been no hiring or disciplinary instances through which Rengert's authority can be definitively measured. Based on the limited evidence that we do have, we conclude that Rengert's disciplinary authority is best characterized as making recommendations for improved employee performance as opposed to imposing discipline or effectively recommending that discipline be imposed by others. Further, while it seems clear that she would be involved in the hiring process if the Specialist position were to become vacant, the record does not persuade us that her involvement would rise to the level of making an effective hiring recommendation.

As to contention (5), the County's petition for rehearing was accompanied by a document prepared by the Victim Witness Coordinator confirming to the affected employee that the employee had received a verbal reprimand after the hearing in this matter was completed. Because the independent authority to make and confirm a verbal reprimand does not represent a significant exercise of disciplinary authority and does not establish the ability to effectively recommend significant discipline (suspension or discharge), we conclude this rehearing evidence is not sufficient to alter our conclusion that the Victim Witness Coordinator is not a supervisor.

The County also presents on rehearing the pages from the Monroe County Victim/Witness Assistance Program Policy and Procedures on which the verbal reprimand was based and argues that these pages establish the Coordinator's managerial status. We disagree. As evidenced by their attachment to the confirmed verbal reprimand, the pages presented are procedures closely related to the direction and assignment of work rather than policy judgements of the type that demonstrate managerial status. Our November 30, 2001, decision concedes that the Coordinator directs the work of the one employee in the office but concludes that when all supervisory criteria are considered, the Coordinator is not a supervisor.

Given all of the foregoing, we deny the petition.

Dated at Madison, Wisconsin, this 18th day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

rb
30037-C