STATE OF WISCONSIN **CIRCUIT COURT** **MARATHON COUNTY**
Branch 3

LOCAL 1287, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Petitioner
vs.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent

Decision No. 30272-C

DECISION; Appeal of Administrative Determination

Case #02-CV-1011
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

This is an action for judicial review of an administrative decision. In that decision, the Wisconsin Employment Relations Commission (WERC), concluded that AFSCME Local 1287 (AFSCME or Union) violated its duty of fair representation toward Garry Van Ouse (Van Ouse) and that the Union and the City of Wausau (City or Wausau) had also violated the existing collective bargaining agreement between them. Because there are substantial facts of record supporting the findings of the WERC that Van Ouse changed his work site rather than transferred into a new department and that the Union violated its duty of fair representation by not conducting a good faith investigation of the competing claims, the decision and order of the WERC are hereby affirmed.

BACKGROUND

FACTUAL BACKGROUND

Gary Van Ouse had been hired by the City of Wausau as an Equipment Services Mechanic in 1991 and assigned to the Wausau Fire Department as its only mechanic. In March of 2001 Wausau then informed Van Ouse that his work site was being changed to the Department of Public Works (DPW) Garage. He was further advised that since it was not a change in position, he would retain his seniority for both city-wide purposes and departmental purposes.

On March 19, 2001 Van Ouse reported to the Public Works Garage which resulted in the other three other Equipment Services Mechanics assigned to DPW; Robert Pagel, Gordy Schultz

and Todd Mendlik; to file a grievance (Pagel grievance). That grievance asserted that Van Ouse's departmental seniority date was contrary to Article 34 of the existing collective bargaining contract between the Union and the City and that Van Ouse should be at the bottom of the DPW seniority list. After the City denied the grievance, the Union filed for arbitration. However, prior to arbitration the City and the Union agreed to settle the grievance in which Van Ouse was placed at the bottom of DPW motor pool seniority list.

Van Ouse then filed a grievance which was denied by the City and the Union declined to advance it to arbitration. On January 7, 2002 Van Ouse filed a compliant with the WERC alleging that the City and Union had both violated the terms of his collective bargaining agreement and that the Union had violated its duty to fairly represent him and his interests. The hearing examiner found in favor of the City and Union after which Van Ouse again appealed. On appeal, WERC reversed the examiner's decision and found a violation of both the collective bargaining agreement and the Union's duty to fairly represent Van Ouse in violation of *Wis. Stats. §§ 111.70(3)(a)5 and 111.70(3)(b)4.* The Union now seeks a judicial review of that decision, an action not joined in by the City.

LEGAL ENVIRONMENT

When a court undertakes a judicial review of a determination made by an administrative agency, such as the WERC, it must first determine which level of deference that decision enjoys; great weight, due weight or *de novo*, **Jicha v. DILHR; 169 Wis.2d 284, 290-129; 485 N.W.2d 256 (1992)**.

While the Union contends that it is entitled only to due deference, this court is satisfied that great weight is the correct standard. The great weight standard is applicable when; (1) the agency is charged by the legislature with administering the statute, (2) the interpretation of the agency is one of long standing, (3) the agency employed its expertise in forming the interpretation, and (4) the agency's interpretation will provide uniformity in the application of the statute, **CBS, Inc. v. LIRC; 219 Wis.2d 565; 579 N.W.2d 668 (1998)**.

Here, the legislature has charged WERC with the duty of applying and enforcing Chapter 111, regarding employment relations. The experience required need not be on the precise issue at dispute but rather experience in interpreting and administrating the applicable statutory scheme, **Mineral Point Unified School Dist. v. WERC; 2002 WI App 48, ¶16; 251 Wis. 2d 325, 336; 641 N.W.2d 701**. Here WERC has acquired particular expertise in the area of collective bargaining, **Racine Education Ass'n v. WERC; 2000 WI App 149, ¶20; 238 Wis. 2d 33, 49; 616 N.W.2d 504; rev. denied, 2000 WI 121; 239 Wis. 2d 309; 619 N.W.2d 92**, see also **West Bend Education Ass'n v. WERC; 121 Wis. 2d 1, 13; 357 N.W.2d 534 (1984)**. In particular, WERC has addressed the duty of fair representation numerous times since the state supreme court established the test to be applied in **Mahnke v. WERC; 66 Wis. 2d 524; 225 N.W.2d 617 (1975)**.[1]

Thus, WERC's interpretation of this issue is of long standing and no doubt aided WERC in reaching its decision in this case. Moreover, this interpretation provides uniformity and consistency in applying the standards set forth in **Mahnke**.

Under the great weight standard, a court will uphold and agency's reasonable interpretation not contrary to the clear meaning of the statute, even if the court feels that another interpretation may be more reasonable, **UFE, Inc. v. LIRC; 201 Wis.2d 274, 287; 548 N.W.2d 57 (1996).** The court may not substitute its judgment for that of WERC as to the weight of the evidence on any disputed finding of fact, nor may it set aside WERC's decision or remand the matter to WERC unless it finds that WERC's decision depends upon a finding of fact that is not supported by substantial evidence in the record, Wis. Stats. §227.57(6). In addition, WERC's conclusions of law may also be entitled to deference, **Mineral Point** at ¶12; see also *Wis. Stats.* §227.57(10).

[1] A search of the WERC database on the State Bar website (www.wisbar.org/werc) with the keyword "Mahnke" resulted in 71 hits. In addition, WERC attached to its brief copies of its decisions in several cases addressing this issue, dating from 1976. **See, e.g., Pyka v. Neillsville Co-op Transport; Decision No. 14404-A (WERC Aug. 2, 1976) and Benzing v. Wisconsin Education Ass'n Council; Decision No. 28543-B (WERC Dec. 5, 1997).**

LEGAL ANALYSIS

COMMISSION'S DECISION

The Pagel grievance and the Union's position was based upon Article 34 of the collective bargaining agreement. Under both Article 34 and 8B, those who transfer from one department to another within the City are to be given credit for length of service for all benefits with the exception of department seniority. However, the WERC concluded that Van Ouse had not transferred into the department when he changed his job site in March 2001 but rather had "been employed by the City as an Equipment Services Mechanic in the Department of Public Works, Motor Pool Division since his hire in 1991," (WERC Decision at 9).

While WERC recognized that there was "a perception that Van Ouse was a Fire Department employee," it concluded that the Union's duty of fair representation required it to investigate the merits of the Pagel grievance but that no such investigation had been conducted. It further found that if it had conducted such an investigation, the Union "could not in good faith have entered into the settlement agreement that altered Van Ouse's seniority date," (*Id*. at p. 13.) Despite the perception among City employees, WERC concluded that no departmental transfer had occurred as required under the language of the collective bargaining agreement, (*Id*. at pp. 11-13).

TRANSFER INTO DEPARTMENT

WERC's findings of fact are conclusive on the Court if they are supported by substantial evidence in the record. "Evidence is substantial if a reasonable person relying on the evidence might make the same decision," **Town of Russell Volunteer Fire Dept. v. LIRC; 223 Wis. 2d 723, 730; 589 N.W.2d 445 (CA 1998)**. Here, the record does contain substantial evidence supporting WERC's conclusion that while a change of work site, it was not a transfer into a new department, that of the DPW motor pool.

At the hearing the City's human resources specialist, Ila Koss,[2] testified about the history of Van Ouse's position. Van Ouse's predecessor was an employee of the Fire Department with

[2] Ila Koss was also the author of the March 2001 memo advising Van Ouse that his change in work site was "not a change in [his] position."

the title of a Fire Mechanic. He was considered a protective employee and represented by the Fire Fighter's Union (IAFF). When he retired, the City reviewed the position and determined that it was not really a protective employee position so it bargained with the Union. As a result, the job title was changed, a new position added to the DPW motor pool and the new person (Van Ouse) became a member of the AFSCME, Local 1287, (Tr. pp. 84-85, 87-88). Since he continued to work at the Fire Department, she acknowledged that there still was a perception that it was a Fire Department position, but with her 15 years in Finance and Payroll and 12 years (in 2001) as a Human Resources Specialist it was clear to her that the new position placed him in the motor pool as a DPW mechanic, (Tr. 85).

The Koss memo to VanOuse informing him of the change (Joint Exhibit 1) reflects that conclusion. Although titled as "Transfer to Department of Public Works," the explanation given was that;

> It has been determined that changing the existing method of operations ... by assigning **present employees** to a **combined** Motor Pool at the Public Works Garage will increase the level of productivity **by its employees**," (emphasis added).

This explains a consolidation of current DPW employees in one location to increase productivity and shows the City considered the position as with the DPW. It also accounts for the following portion that states;

> Because this is not a change in your position you will retain your senority date of March 25, 1991, not only for city-wide purposes but also for departmental purposes.

Complainant's Exhibit 2 (C-2) is a copy of a memo sent to Van Ouse from the City's Human Resources Department in January 2002 concerning the hire and transfer records for each of the four affected employees. While prepared after Van Ouse's departmental seniority was reduced to zero, it still gave Van Ouse's hire date as March 25, 1991 but indicated no transfer dates for him. This evidence further supports WERC's finding of fact that Van Ouse was always a Public Works employee and that his move from the Fire Department to the Public Works garage entailed only a change in work site, not a departmental transfer.

Finally, under Article 9, Section B of the collective bargaining agreement, whenever there was a vacancy filled or a new job created, the position had to be posted so other employees could bid for the position. The fact that bidding did not occur is consistent with the 1991 negotiations which transferred this position to the DPW motor pool.

This constitutes substantial evidence in support of the WERC's finding that Van Ouse just changed his job site rather than transferred to a new department and therefore is conclusive upon this court.[3]

FAILURE TO INVESTIGATE

WERC also found that the Union did not investigate the merits of the Pagel grievance. That finding rests on essentially two bases: (1) the absence of any proof of an investigation and (2) the inference that no investigation occurred because the Union did not conclude that Van Ouse was not actually transferred.

With regard to the first, WERC stated, "[t]here is no evidence that such an investigation of this critical factual question ever occurred" (WERC Decision, p. 13). The "critical factual question" was "whether the City was factually correct when it advised Van Ouse on March 12, 2001 that 'this is not a change in your position. . . .' and thus that Van Ouse's change in work site was not a transfer," *Id*. The only evidence submitted at the hearing that related to the Union's handling of the Pagel grievance was Joint Exhibit 7 (J-7), the minutes of the Union's May 1, 2001 meeting at which it voted to advance the grievance to mediation. But that exhibit only shows that an explanation was given of the Pagel grievance; that it was denied by the City but that there was a basis (for the grievance) under Article 11, Section B and that arbitration would be a less expensive option.[4] It does not show any that any real investigation of whether the City was correct, that it was merely a change in Van Ouse's work site and not a new transfer into the DPW

[3] The conclusion that this was not a transfer but rather just a change in work site also supports the WERC's determination that both the Union and City violated the collective bargaining agreement.

[4] Article 11 actually deals with apprenticeship and hence is irrelevant to the Pagel grievance. The Pagel grievance actually referred to Article 34 as its basis.

motor pool. It certainly does nothing to dispel that the Union may have relied upon the mere perception that Van Ouse worked for the Fire Department.

With regard to its second basis, WERC stated, "[h]ad such an investigation occurred, the Mechanics' erroneous belief that Van Ouse had transferred would have been corrected and there would no longer have been a good faith dispute as to the fact which is dispositive as to Van Ouse's contractual rights." Therefore, it concluded that the Union "could not in good faith have entered into the settlement agreement that altered Van Ouse's seniority date," (WERC Decision, p. 13). This second basis depends upon WERC's conclusion that Van Ouse was not, in fact, transferred to a new department in March 2001, as discussed above. This evidence is such that a reasonable person relying on it might make the same decision, and therefore this finding is also conclusive.

DUTY OF FAIR REPRESENTATION

Finally, WERC concluded that the Union had violated its duty to fairly represent Van Ouse by failing to investigate the Paget grievance and by entering into the settlement agreement that resolved that grievance. While this seems like it should be a conclusion of law, the application of the legal standard to findings of fact, courts have stated that whether the union breached its duty of fair representation is a question of fact, **Mahnke** at 532-33; **Coleman v. Outboard Marine Corp.; 92 Wis. 2d 565, 575; 285 N.W.2d 631 (1979)**.[5] As such, it too is conclusive upon the court so long as it is supported by substantial evidence.

The Union admits that the central focus must be whether it breached its duty of fair representation when it entered into the July 2001 settlement agreement. In that regard it asserts that a party seeking to establish such a violation of fair representation must show that the "a Union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith," **Gray v. Marinette County; 200 Wis.2d 426, 442; 546 N.W.2d 553 (CA, 1996)**. Dismissing the grounds of arbitrary or discriminatory action, it attempts to focus solely

[5] It is, perhaps, better understood as a mixed question of fact and law, consisting of finding what events occurred and concluding whether those events satisfy the applicable legal standard. This is how negligence has been treated. See **Millonig v. Bakken; 112 Wis. 2d 445, 450; 334 N. W.2d 80 (1983); DOR v. Exxon Corp.; 90 Wis. 2d 700, 713; 281 N.W.2d 94 (1979); aff'd 447 U.S. 207 (1980)**.

upon "bad faith." It then equates "bad faith" with "hostility in the form of ill will or common law *malitia,*" **Coleman** at 575, and notes that *malitia* is further defined as "actual evil design; express malice," *Black's Law Dictionary, 5th Ed., 1979.* It therefore seeks to focus the inquiry upon whether it acted with actual malice toward Van Ouse.

But to give the WERC's decision the great weight it is entitled to means that the court must examine to see if any reasonable legal theory would support its decision. As here, the court's determination in **Gray** turned on the question of whether the union engaged in a good faith investigation of the grievance, *Id*. at 445-446. But the opposite of good faith is not necessarily the ill will or malice of "bad faith." The entire quotation from **Coleman** is instructive for this purpose.

> [A] union may breach the statutory duty by arbitrary or irrational conduct **even in the absence of bad faith or hostility in the form of ill will or common law malitia**; but although the employee may challenge actions other than those involving anti-minority animus or malice, nevertheless the union has broad discretion to adjust the demands of competing groups within its constituency **as long as it does not act arbitrarily**. *Ib*. at 575 quoting **Jones v. Trans World Airlines, Inc.; 495 F.2nd 790, 798 (2nd Cir., 1974)**.

The absence of a good faith investigation into any grievance is considered to be arbitrary and as such a breach of the union's duty of fair representation, **Mahnke**, at 534. Here, the WERC quoted the factors to be used under **Mahnke** in determining whether the union acted arbitrarily in failing to conduce an adequate, good faith investigation, (WERC Decision at p. 13).

Van Ouse was assigned full-time to the Fire Department and reported to the assistant fire chiefs rather than the supervisors at the DPW motor pool. But these are facts that merely supported the perception that Van Ouse was a part of the Fire Department and that the March 2001 move was a transfer. The WERC recognized that the perception supported a finding of a good faith dispute at the time the Pagel grievance was filed.

But that merely imposed upon the Union the obligation to investigate the City's initial claim that no transfer had occurred, only a change of location of the work site. Had it conducted an adequate investigation, it would have discovered that the fire mechanic position was renamed,

added to the DPW and the position placed under the AFSCME, Local 1287 rather than the IAFF as a result of negotiations with the Union at the time Van Ouse was hired. The decision to act upon a perception rather than the true facts which would have been discovered during a good faith investigation constitutes arbitrary conduct in violation of the Union's duty of fair representation. Therefore, this conclusion must also be affirmed.

CONCLUSION

At the time Van Ouse was hired, the fire mechanic position at the Fire Department was changed to that of an equipment services mechanic and a position added to the DPW motor pool to accomplish that result. At the same time, the position was no longer represented by the IAFF but rather transferred to the AFSCME, Local 1287. Therefore, the WERC's findings that Van Ouse change of work site did not constitute a transfer under Article 34 of the collective bargaining agreement is supported by substantial evidence. In proceeding to settle the grievance under an erroneous perception rather than investigating the truth, the Union acted arbitrarily and hence violated its duty of fair representation. Accordingly, the decision of the Wisconsin Employment Relations Commission is hereby affirmed.

Dated at Wausau, Wisconsin this 10th day of March, 2003.

BY THE COURT:

Vincent K. Howard /s/

Vincent K. Howard
Judge, Circuit Court Branch 3
Marathon County, Wisconsin

Local 1287, AFSCME, AFL-CIO
vs. Wisconsin Employment Relations Commission
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