

MAY 04 2009

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 42

MILWAUKEE COUNTY

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL NO. 150,

Petitioner,

v.

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

Respondent.

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION  
MAY - 8 2009

Case No. 08CV13043

Decision No. 31602-GCI

FILED  
CIVIL DIVISION  
42 MAY 1 - 2009 42  
JOHN BARRETT  
Clerk of Circuit Court

**DECISION AND ORDER**

The petitioner, Service Employees International Union, Local No. 150 (Local 150), seeks judicial review of a decision by the Wisconsin Employment Relations Commission (WERC), regarding the discharge by Milwaukee Public Schools (MPS) of an employee, Karen Bishop. WERC held that Local 150 had breached its duty of fair representation to Ms. Bishop, and ordered Local 150 to pay her attorney's fees and costs incurred in litigating her claim against MPS.

The Court has reviewed the record and, for the reasons stated herein, affirms the decision of WERC.

**STATEMENT OF FACTS**

On March 8, 2004, Ms. Bishop, a Handicapped Children's Assistant for MPS, and a member of Local 150, was discharged by MPS for pushing a developmentally disabled

student, as well as for her attendance record. She advised the representative of Local 150 that she felt she had been unjustly terminated; as a result, Local 150 filed a written grievance with MPS on March 18, 2004.

In early November 2004, a representative of Local 150 called Ms. Bishop with an offer from MPS to reinstate her with 18 months probation and no back pay. Ms. Bishop refused this offer. The grievance was then ultimately denied by MPS on January 5, 2005. However, Ms. Bishop claims that she never received this denial, and further, that she was not contacted regarding her grievance by Local 150 between November 2004 and November 2005.

On September 1, 2005, Ms. Bishop sent a letter to the president of Local 150, requesting that her grievance be "re-started." She explained that she had rejected the offer by MPS because she felt it amounted to an admission of wrong-doing; that her calls to local representatives of Local 150 had not been returned; and that it was her understanding that the grievance would eventually go to a formal arbitration hearing. Upon receiving no response to her letter, she sent a letter to the president of Local 150's parent company in Madison. She also contacted WERC.

Subsequently, on November 14, 2005, Ms. Bishop was contacted by Local 150, advising her that her grievance had been settled, and that MPS had offered her a "Last Chance Agreement." After reviewing the terms of that Agreement, Ms. Bishop refused to accept it. Her grievance was never sent to formal arbitration, because Local 150 had determined that it lacked merit. Ms. Bishop claims that this was never communicated to her.

Ms. Bishop filed a prohibited practice complaint with WERC against both MPS and Local 150 on January 4, 2006. The allegations in the complaint relevant to this petition were that Local 150 had breached its duty of fair representation in handling her grievance. The complaint was reviewed by WERC examiner Coleen A. Burns. On July 25, 2006, Examiner Burns issued an order dismissing the complaint, on the grounds that Ms. Bishop had failed to prove her allegation that Local 150 had breached its duty of fair representation. Ms. Bishop then sought review of the examiner's decision.

On January 2, 2007, WERC issued a decision reversing the decision of the examiner. In its decision, WERC ordered Local 150 to pay Ms. Bishop's attorneys' fees for her proceedings against MPS. In addition, after an appeal by MPS, WERC issued a subsequent decision on August 29, 2008, that MPS is solely liable for the backpay WERC determined is owed to Bishop.<sup>1</sup>

Local 150 now petitions the Court for review of WERC's determination that the union breached its duty of fair representation.

#### STANDARD OF REVIEW

Petitioner seeks review from this Court under Chapter 227 of the Wisconsin Statutes. Specifically, Wis. Stat. § 227.57(1) mandates that this Court's review of an agency's decision "shall be confined to the record." The agency's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983). Credible evidence is "that evidence which excludes speculation or conjecture." *Milwaukee Bd. of School Directors v. Wisconsin Employment Relations Com'n*, 2008 WI App 125, ¶ 7, 313 Wis. 2d 525.

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<sup>1</sup> Local 150 had previously filed a petition for appeal, in case 08CV8437, which was dismissed by this Court, pending the outcome of the appeal filed with WERC regarding the backpay issue.

The test for substantial evidence is whether "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5.

A reviewing court is not bound, however, by an agency's conclusions of law. *Richland School Dist. v. DIHLR*, 174 Wis.2d 878, 890 (1993). On judicial review, there are three levels of deference which may be given to an administrative agency's conclusions of law: great weight, due weight, and de novo review. *Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 244-45 (1992). The level of deference afforded by the reviewing court depends on the agency's experience, technical competence, and knowledge with regard to the question presented. *Id.*

For example, a court will accord an agency's determination great weight if: (1) the legislature has charged the agency with the duty of administering the statute; (2) the agency's interpretation is long standing; (3) the agency used its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Mattila v. Employees Trust Funds Bd.*, 2001 WI App 79, ¶ 9. In contrast, the "due weight" standard is appropriate when an "agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 286 (1996). Under the due weight standard, a court will not overturn a reasonable interpretation "that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." *Id.* at 286-87. Finally, the "de novo" standard is applicable when the issue before the agency is clearly one of first

impression or where the agency's position on an issue has been so inconsistent that it provides no real guidance. *Id.* at 285.

The Court finds that the "due weight" standard is appropriate in this case. WERC has some expertise in deciding these issues, so *de novo* review is not appropriate; however, it does not meet all of the requirements for great weight deference. *See Milwaukee Bd. of School Directors v. Wisconsin Employment Relations Com'n*, 2008 WI App 125, ¶ 11, 313 Wis. 2d 525. Accordingly, the Court will defer to WERC's interpretation unless Petitioners' interpretation is more reasonable.

#### ANALYSIS

Like many labor unions, Local 150 has a contract with MPS which outlines a grievance procedure that is to be followed in the event that a member is involved in a dispute with the employer. (*See Ho Aff., Ex. 2.*) This contract includes an arbitration provision, designed to limit "numerous and expensive forays into court to settle grievances." *Mahnke v. Wisconsin Employment Relations Commission*, 66 Wis.2d 524, 531, 225 N.W.2d 617, 622 (1975). However, because under such a contract the union has that authority to act for the employee, the union's "wrongful refusal" to fully process a grievance effectively leaves the employee without a remedy. *Id.* This is considered a breach of the duty of fair representation by the union. *Id.*

Still, an employee does not have an absolute right to arbitration. *Id.* at 532. As such, the decision of a union to settle a grievance without arbitration is not in and of itself a breach of the duty of fair representation. Rather, the test for a breach is "whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member." *Id.*

WERC found that Local 150's conduct during the appeals process for Ms. Bishop's termination rises to the level of a breach of the duty of fair representation. In a twenty page opinion, WERC cites specific examples regarding Local 150's handling of Ms. Bishop's claim that support its finding that Local 150's conduct, taken as a whole, did not adequately protect Ms. Bishop's interests. (WERC Decision No. 31602-C, 4.) In particular, WERC notes that it is not the failure to arbitrate that is troubling, but the lack of communication regarding this decision with Ms. Bishop by the representative who made the determination. (*Id.* at 10-11.) In support of its determination, WERC points out that there was essentially no communication with Ms. Bishop for an entire year, between November 2004 and November 2005. (*Id.* at 10.)

Additionally, WERC focuses on the testimony of the union representative who claimed that she determined early on in the process that Ms. Bishop's grievance would not proceed to arbitration. Not only did that representative not discuss this matter with Ms. Bishop, she did not discuss it with anyone else within Local 150. (*Id.* at 8, note 3.) Furthermore, it appears that she made this determination when there were still questions of fact relating to the incident due to conflicting testimony of the witnesses for MPS. (*Id.*) These examples of the mishandling of Ms. Bishop's complaint by Local 150 demonstrate the reasoning behind WERC's finding that Local 150 breached its duty of fair representation, resulting in an arbitrary decision against Ms. Bishop.

This Court believes that finding is more than reasonable. Local 150 does not offer any explanation as to why it did not advise Ms. Bishop earlier on in the proceeding that her grievance lacked merit to advance to arbitration, or even how it came to that conclusion. Moreover, Local 150 failed to adequately explain why it neglected to

communicate with Ms. Bishop regarding the status of her claim for a year.

Consequently, this court agrees with WERC's decision that in short, Local 150 dropped the "ball". Local 150 has failed to meet its burden of providing a more reasonable explanation that is sufficient to overturn WERC's determination that Local 150 breached its duty of fair representation.

CONCLUSION

THEREFORE, based upon a thorough review of the record and the arguments of the parties as set forth in the parties' briefs, it is hereby ORDERED that the decision of the Wisconsin Employment Relations Commission is hereby AFFIRMED.

Dated this 1 day of <sup>May</sup>~~April~~, 2009, in Milwaukee, Wisconsin.

BY THE COURT:

DAVID A. HANSHER

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Hon. David A. Hansher  
Milwaukee County Circuit Court, Branch 42