

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1691

Cir. Ct. No. 2014CV144

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CARMEN J. BERTELSEN,

PETITIONER-APPELLANT,

[Decision No. 33980BA1]

V.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND PIERCE
COUNTY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Pierce County:
JAMES J. DUVALL, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Carmen Bertelsen appeals from an order affirming the decision by the Wisconsin Employment Relations Commission (WERC) that dismissed her prohibited practice complaint alleging that Pierce County terminated her without just cause. The Commission did not exercise jurisdiction over the

complaint on the ground that the contractual grievance arbitration procedure was the exclusive means to enforce the just cause provision in the collective bargaining agreement between the County and Bertelsen's union, the Labor Association of Wisconsin, Inc., and its affiliate, Pierce County Nurses Association Local 901.¹ Bertelsen had argued that her complaint should be permitted to go forward because the union failed in its duty of fair representation, but the Commission found that she had failed to establish that. We affirm the Commission's decision.

BACKGROUND

¶2 Pierce County terminated Bertelsen from her position as a public health nurse on March 6, 2012, after incidents of poor job performance led to a written warning, a suspension, and a failed attempt to resolve the matter by mutual agreement with Bertelsen's resignation. Bertelsen's supervisor had repeatedly identified and brought to Bertelsen's attention performance deficiencies relating to Bertelsen's failure to follow policies and complete her work accurately. A written warning was issued on September 13, 2011. Bertelsen and her supervisor met on December 27, 2011, and discussed fourteen performance issues; no discipline was imposed for those issues. Following additional performance problems, Bertelsen received a three-day disciplinary suspension in January 2012.

¶3 Bertelsen notified her union labor consultant, Daniel Kraschnewski, of the suspension and her desire to file a grievance. Kraschnewski followed up

¹ It is not disputed that Pierce County is a municipal employer; its public health department nurses, including Bertelsen, are members of a collective bargaining unit represented by Labor Association of Wisconsin, Inc., and its affiliate, Pierce County Nurses Association Local 901; and at the time relevant to this case, the County and the union were subject to the 2011-12 collective bargaining agreement.

with her to obtain documentation to support the grievance. The union prepared the grievance, and Bertelsen signed and filed it on February 10, 2012. Kraschnewski accompanied Bertelsen to the first-step grievance meeting with her supervisor and another County official on February 17, 2012. At the meeting, Bertelsen did not dispute the allegations but said that her actions were justifiable and did not warrant discipline. On the same day, the County told Bertelsen that it had identified four new performance concerns that it would be investigating. On February 21, 2012, the County denied the grievance of the suspension.

¶4 After the February 17, 2012, meeting, Kraschnewski discussed Bertelsen's grievance with the president of Local 901 and another County nursing employee who had served on the union's negotiation team; both were of the opinion that the County's assertions of performance deficiencies were valid based on their personal knowledge. On February 23, 2012, Kraschnewski followed up with Bertelsen's supervisor regarding the new performance concerns and learned that the County intended to terminate Bertelsen. Kraschnewski then raised with the supervisor the alternative of a release agreement.

¶5 A release and resignation agreement was prepared by the County, and Kraschnewski reviewed it with Bertelsen prior to a meeting scheduled with County officials to discuss the four newly alleged offenses. The agreement included several benefits to Bertelsen which she would not have received under the collective bargaining agreement if she were terminated, such as pay for unused vacation days. Kraschnewski testified that he "went over the resignation agreement item by item." He stated, "I explained it to her, I explained the upside to it and the downside to it. The upside being if she resigned, she would, number one, get a number of benefits that she had accrued; plus for future employment purposes, she would have the opportunity to very possibly get a job in the nursing

field if she desired. The downside being that she gave up her right to appeal or – or to further contest anything.” At the conclusion of the meeting, Bertelsen asked if she could have until 9:00 a.m. the following Monday, February 27, 2012, to decide whether to sign the agreement, and the County permitted her to do so.

¶6 After modifications were made at Bertelsen’s request to the agreement, Bertelsen signed it on February 27, 2012. After she signed the agreement, Bertelsen retained private counsel, who advised her to cease communication with Kraschnewski and the union, and she did so. She then revoked the agreement by letter on March 5, 2012.² The County immediately notified her that she was terminated.

¶7 Bertelsen did not notify Kraschnewski or the union regarding the revocation or the termination. She did not further pursue the denial of the grievance for the three-day suspension, and she did not file a grievance for the termination. Bertelsen subsequently filed the prohibited practice complaint with WERC seeking reinstatement, back pay, costs, and attorney fees.

STANDARD OF REVIEW

¶8 We review the administrative agency’s decision rather than that of the circuit court. *See Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). Whether a union is performing its fiduciary duty of fair representation presents a question of fact. *Mahnke v. WERC*, 66 Wis. 2d 524, 532-33, 225 N.W.2d 617 (1975); *Clark v. Hein-Werner Corp.*, 8 Wis. 2d

² The agreement included a provision permitting Bertelsen to revoke the agreement within seven days.

264, 272, 99 N.W.2d 132 (1959). We cannot substitute our judgment for that of the agency as to the weight or credibility of the evidence. See WIS. STAT. § 227.57(6) (2011-12);³ *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983); *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). “[A] court will not disturb an agency’s factual findings unless they are not supported by ‘substantial evidence.’ An agency’s findings are supported by substantial evidence if a reasonable person could arrive at the same conclusion as the agency, taking into account all the evidence in the record.” *Clean Wisconsin, Inc. v. Public Serv. Comm’n of Wisconsin*, 2005 WI 93, ¶46, 282 Wis. 2d 250, 700 N.W.2d 768.

DISCUSSION

¶9 “If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted, then it must be proven that the union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the employer.” *Mahnke*, 66 Wis. 2d at 532-33. A union breaches its duty of fair representation “only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The burden lies with the employee to prove that his or her union breached its duty of fair representation. *Mahnke*, 66 Wis. 2d at 533.

¶10 Bertelsen argues that the union breached its duty of fair representation because its conduct was “so far outside of the range of reasonable

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

responses available ... as to be irrational and arbitrary.” She argues that the duty of fair representation required Kraschnewski to evaluate the County’s claims of performance deficiencies more thoroughly, to consult her prior to raising the alternative of a resignation agreement with the County, and to take action on her behalf after she revoked the resignation agreement. She further argues that there is no evidence that she “terminated her contact with the [u]nion or did not wish to avail herself of Kraschewski’s representation.”

¶11 Under the applicable standard of review, the question before us is not whether evidence exists to support her position or whether WERC should have given more weight to evidence that favors her. The question is whether, given the evidence in the record, a reasonable person could arrive at the same conclusion as the agency. See *Clean Wisconsin, Inc.*, 282 Wis. 2d 250, ¶46. Having reviewed the record, we conclude that a reasonable person could arrive at the conclusion that Bertelsen did not establish that the union acted arbitrarily and breached its duty of fair representation.

¶12 The evidence reflects that the union responded to Bertelsen’s request by preparing a grievance for her to sign and file. The evidence further reflects that the union representative attended meetings, reviewed supporting materials Bertelsen provided, communicated with the County on her behalf, suggested a more favorable alternative to termination after the County indicated that was its plan, and reviewed the options with her. There is no evidence that Bertelsen contacted the union after revoking the agreement.

¶13 In sum, a reasonable person could find that Bertelsen did not establish that the union acted arbitrarily.

¶14 Accordingly, we will not disturb WERC's factual finding because it is supported by substantial evidence in the record.

CONCLUSION

¶15 For the reasons stated, we affirm the circuit court's order affirming WERC's decision dismissing Bertelsen's prohibited practice complaint.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.