

Carmen J. Bertleson

Petitioner

v.

Wisconsin Employment Relations Commission [re WERC Dec. No. 33980-B]
and
Pierce County

Respondent

Case No.: 2014 CV 144

FILED
Pierce County

JUN 26 2015

Peg Feuerhelm
Clerk of Circuit Court

ORDER

The Petitioner filed a prohibited practice complaint with the Wisconsin Employment Relations Commission (herein "WERC"). She alleged Pierce County terminated her without just cause. She further complained that the Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association Local 901 (herein the "Union") violated their duty to fairly represent her. On December 27, 2013 the Hearing Examiner dismissed the Complaint in its entirety. That decision was appealed to the WERC which on May 20th, 2014 affirmed the Examiner's order. This is an appeal from that decision.

This Court reviews the findings of the administrative agency, not those of its examiners. The agency's findings must be supported by substantial evidence. §227.57(6), Wis. Stats. This review is confined to a determination of whether there was substantial evidence to sustain the findings that were made.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If more than one view may be sustained by substantial evidence, the agency is to determine which view it wishes to accept and that determination is conclusive. It is not required that the evidence be subject to no other

reasonable, equally plausible interpretation. An agency's determination may be set aside only when, on examining the entire record, the evidence and inferences therefrom are such that a reasonable person, acting reasonably, could not have reached that decision.

Robertson Transp. Co. v. Public Service Comm'n, 39 Wis. 2d 653.

The Petitioner has the burden of proof.

The first grievance of the three day suspension was denied by Pierce County on February 21, 2012, resulting in the three day suspension. The Petitioner did not advance that grievance to the next step in the grievance procedure. She did not grieve the termination decision. The WERC's finding that the Petitioner failed to exhaust the contractual grievance procedure is supported by the evidence. The Petitioner does not dispute that finding. Rather she claims the union's actions related to that grievance were arbitrary and that further action under the grievance procedure would have been futile.

The WERC determined that the Union did not breach its duty to fairly represent the Petitioner. The Petitioner does not argue that the Union's conduct towards her was discriminatory or in bad faith. Therefore to succeed the Petitioner must prove that the Union's claimed failures were arbitrary.

Whether a union acted arbitrarily requires an inquiry into the objective adequacy of the union action. Unintentional acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employees, they severely prejudice the injured employee and the policies of the underlying duty of fair representation would not be served by shielding the union from liability in the particular circumstances of this case. A union does not breach its duty of fair representation by negligently processing a grievance, simply failing to communicate with the grievant,

simply by making an unwise or improvident decision about the merits of the grievance or by simply settling the grievance against the wishes of the grievant.

A union's action are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's decision is so far outside of a wide range of reasonableness as to be irrational. WERC may not substitute its judgment on the merits of a grievance for that of the union, even if it appears that the union could have made a better decision. Similarly, courts should not substitute their judgment for that of the union even if, with the benefit of hindsight, it appears that the union could have made a better call. *Service Employees International Union Local Number 150 v. WERC*, 329 Wis. 2d 447 at ¶21-23.

The Union did not recklessly disregard the Petitioner's rights. The Petitioner signed the *Separation And Release Agreement* on February 27, 2012. She revoked her signature on March 5, 2012, but did not inform the Union of the revocation. The Petitioner did not timely file a grievance over the termination decision. She did not inform the Union of her of the revocation of the *Agreement* or her termination and never contacted the Union to request representation after terminating the *Agreement*.

Many of the claimed deficiencies relate to communication. The Petitioner claims the Union representative never discussed the status of the grievance with her, that the representative proposed the *Agreement* without first discussing it with the Petitioner, and the Union representative failed to discuss the new performance allegations with her. She further complains that the Union did not talk about the status of the grievances or how execution of the *Agreement* would impact the grievance.

Poor communication in and of itself does not constitute arbitrary conduct. I note the number of meetings between the Union representative and the Petitioner. I also note the first grievance was decided on February 21, 2012, prior to many of the contacts between the Petitioner and the Union representative. The Petitioner did not appeal the denial of the grievance on the suspension and the Petitioner never filed a grievance for the termination.

Further the Petitioner is not shown how she was prejudiced. On February 17, 2012 in the presence of her supervisor, the Union representative and the County's business manager, the Petitioner admitted the conduct which formed the basis of both the first grievance and the additional performance allegations. The WERC could reasonably conclude that in light of the admissions any further grievance would lack sufficient merit to justify arbitration. She has not demonstrated that had the Union taken additional or different steps her grievance would have had merit. There is no showing of prejudice.

The Petitioner complains that the Union did not fully investigate the matter. It was reasonable for the WERC to conclude that, after speaking with legal counsel, the Petitioner abandoned the Union's grievance process and terminated her contact with the Union. She did not seek clarification or more information or request further action from the Union. Petitioner's own *Brief in Support* states on page 31 that "Bertelson abandoned advancing grievance No 2012-20 twice, first when the release and resignation agreement was presented and, second, when she elected to cut off communication with Kraschnewski." The WERC could reasonably conclude the policies underlying the duty of fair representation would be served by shielding the Union from liability under these circumstances.

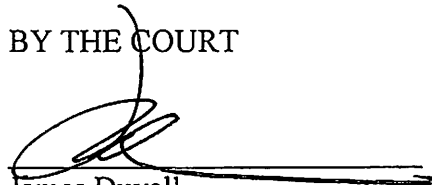
As to the claims against the County, it is clear that the Petitioner failed to exhaust her grievance procedures before resorting to court action. The futility exception does not apply. The WERC concluded there was no evidence to support a finding that the Union would have refused to assist her in filing a grievance challenging her termination had she contacted the Union representative after she revoked the agreement. That finding is supported by substantial evidence.

An agency's findings of fact are entitled to deference from the court. Depending on the circumstances, an agency's findings are entitled to one of the following three levels of deference: great weight deference, due weight deference or no deference. I do not consider it necessary to resolve which one of these standards of review is to be applied because I come to the same conclusion under all three levels of deference. I conclude from the record reasonable minds could come to the same decision as the WERC.

The decision of WERC is affirmed.

Dated: 6-26-15

BY THE COURT



James Duvall
Circuit Court Judge