

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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WISCONSIN DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

MEMORANDUM DECISION

JAN 11 1989

vs.

AND ORDER

**Personnel
Commission**

WISCONSIN PERSONNEL COMMISSION,

CASE NO. 88-CV-2029

HON. ROBERT A. DE CHAMBEAU, CIRCUIT JUDGE, BRANCH 1

This is an action by petitioner for Chapter 227, Wis. Stats., judicial review of both an interim and final order and decision by respondent, which concluded that petitioner's action in laying off employee John H. Givens III was not based upon just cause. Based upon the record before me, the parties' submissions, as well as my independent review of the relevant law, I conclude that the respondent's decisions and orders must be affirmed. The reasons for this decision follow.

FACTS

This action was commenced on April 8, 1988, when petitioner Wisconsin Department of Industry, Labor and Human Relations (Department) filed a Petition for Review, pursuant to Secs. 227.52 and 227.53, Stats., of respondent Wisconsin Personnel Commission's (Commission) interim Decision and Order (dated March 10, 1988) and Final Decision and Order (dated March 28, 1988). In its petition, the Department seeks review of the Commission's decision which concluded that the Department's action in laying off employee John H. Givens III was not based upon just cause. Petitioner alleges

that it is aggrieved by the Commission's interim and final decisions, and orders, and that its substantial interests are adversely affected because:

- a. The Commission has erroneously interpreted provisions of the law and a correct interpretation compels that the decision and order be reversed;
- b. The Commission's conclusions of law are inconsistent with certain of the Commission's findings of fact;
- c. The Commission's decision and order exceed the discretion and authority delegated to the Commission by law; and
- d. Certain findings of fact are unsupported by substantial evidence.

Petitioner also requests that this Court "review the decision and order of the Commission, reverse the decision and order, remand the matter to the Commission with directions to dismiss Mr. Givens' appeal, and grant whatever other relief may be appropriate."

The parties have submitted briefs which affirms the merits of this action for judicial review, and this matter is before me today. Additional facts appear in the decision below, as are appropriate.

STANDARD OF REVIEW

The right of judicial review is entirely statutory. Orders of administrative agencies are not reviewable unless made so by statute. Wis. Environmental Decade v. PSC, 93 Wis. 2d 650, 657, 287 N.W.2d 737 (1980). Sections 227.52, 227.53, and 227.57, Stats., govern this Court's scope of review of the Commission's determinations.

Section 227.52, Stats., provides in part that,

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"[a]dministrative decisions which adversely affect the
substantial interests of any person, whether by action or
inaction, whether affirmative or negative in form, are
subject to review as provided in this chapter. . ."
Section 227.53, Stats., sets forth the procedure for such
review. And, Sec. 227.57, Stats., provides that:

Scope of review. (1) The review shall be
conducted by the court without a jury and shall be
confined to the record, except that in cases of
alleged irregularities in procedure before the
agency, testimony thereon may be taken in the court
and, if leave is granted to take such testimony,
depositions and written interrogatories may be
taken prior to the date set for hearing as provided
in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting
aside, modifying, remanding or ordering agency
action or ancillary relief under a specified
provision of this section, it shall affirm the
agency's action.

(3) The court shall separately treat disputed
issues of agency procedure, interpretations of law,
determinations of fact or policy within the agency's
exercise of delegated discretion.

(4) The court shall remand the case to the agency
for further action if it finds that either the fair-
ness of the proceedings or the correctness of the
action has been impaired by a material error in
procedure or a failure to follow prescribed
procedure.

(5) The court shall set aside or modify the agency
action if it finds that the agency has erroneously
interpreted a provision of law and a correct
interpretation compels a particular action, or it
shall remand the case to the agency for further
action under a correct interpretation of the
provision of law.

(6) If the agency's action depends on any fact
found by the agency in a contested case proceeding,
the court shall not substitute its judgment for
that of the agency as to the weight of the evidence

on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion if outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

QUESTIONS OF LAW

The construction of administrative rules and statutes presents a question of law. Basinas v. State, 104 Wis. 2d

539, 546, 312 N.W.2d 483 (1981). This Court is not bound by an administrative agency's determination of a question of law. Nottelson v. DILHR, 94 Wis. 2d 106, 115, 287 N.W.2d 763 (1980). However, an administrative agency's conclusions of law will be sustained if reasonable, even if an alternative view is equally reasonable. Kenwood Merchandising Corp., et al. v. LIRC, 114 Wis. 2d 226, 230, 338 N.W.2d 312 (Ct. App. 1983).

Some deference must be given to the agency in those areas where it has specialized knowledge, technical competence, and expertise. Great weight is to be accorded to the construction and interpretation placed on a statute by an administrative agency charged with the duty to apply such statute. Wis. Environmental Decade v. IHLR Dept., 104 Wis. 2d 640, 644, 312 N.W.2d 749 (1981). Therefore, reviewing courts should not upset an agency's conclusions of law if any rational basis exists for such conclusions. Dairy Equipment Co. v. IHLR Dept., 95 Wis. 2d 319, 327, 290 N.W.2d 330 (1980). "Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy." West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984).

QUESTIONS OF FACT

The standard of review differs as to an agency's findings of fact. An agency's findings of fact will not be disturbed upon judicial review if "supported by substantial evidence in the record." Section 227.57(6), Stats. "Substantial evidence", for purposes of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Gilbert v. Medical Examining Bd., 119 Wis. 2d 168, 195, 349 N.W.2d 68 (1984). Substantial evidence does not mean a preponderance of the evidence, but rather whether taking into account all the evidence on the record, reasonable minds could arrive at the same conclusion. Madison Gas & Elec. Co. v. PSC, 109 Wis. 2d 127, 133, 325 N.W. 2d 339 (1982).

DECISION

In its petition for review, the Department alleged that it was aggrieved by the Commission's interim decision and order (dated March 10, 1988), and by the Commission's Final Decision and Order (dated March 28, 1988). I begin by addressing the Department's request that this court review the Commission's Final Decision and Order.

It is well-settled that only a party aggrieved by a judgment or order may appeal such judgment or order. Hammond-Chandler Lumber Co. v. Industrial Comm., 163 Wis. 596, 599, 158 N.W. 292 (1916). Section 227.01(9), Stats., defines "Person Aggrieved" as "a person or agency whose

substantial interests are adversely affected by a determination of an agency." In its March 28, 1988 Decision, the Commission denied Givens' application for costs against the Department. Since the Commission denied Givens' request for costs, and decided this issue in favor of the Department, I must conclude that the Department's interests are not substantially affected by the Commission's March 28, 1988 determination. I therefore find the Department is not aggrieved by the Commission's March 28, 1988 Decision and Order, as is required by Sec. 227.53(1), Stats., and I affirm the Commission's March 28, 1988 Final Decision and Order.

I next address the Commission's interim Decision and Order, dated March 10, 1988.

In its petition for review, the Department alleged that certain of the Commission's findings of fact were unsupported by substantial evidence, and that the Commission's conclusions of law are inconsistent with certain of its factual findings. However, in its submissions to the Court, the Department has failed to indicate which of the Commission's findings of fact it believes are not supported by substantial evidence in the record. Nor has the Department set forth the conclusions of law it believes to be inconsistent with some of the Commission's findings of fact.

As the party challenging the Commission's prior determination, the Department bears the burden to demonstrate to the Court which of the Commission's findings of fact it believes were not based upon substantial evidence in the

record. The Department has failed to meet this burden. Nor has my review of the record revealed any findings of fact by the Commission that appear not to be supported by substantial evidence. I therefore find that the Commission's findings of fact contained within the March 10, 1988 interim Decision and Order are based upon substantial evidence in the record, and are consistent with the Commission's conclusions of law.

I next address the Department's allegation that the Commission's March 10, 1988 interim Decision and Order exceed the discretion and authority delegated to it by law. Application of the legal standard "abuse of discretion" to a particular set of facts presents a question of law. See v. Personnel Commission, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987). Under Secs. 230.44(1)(c) and 230.45(1)(a), Stats., the Commission is authorized to review employee demotion, layoff, suspension, or discharge actions. In Frank v. Personnel Commission, 141 Wis. 2d 431, 434, 415 N.W. 2d 533 (Ct. App. 1987), the Court extended deference to the Commission in its review of personnel decisions under Sec. 230.44. Stats. Additionally, the Commission has developed a significant body of administrative precedent involving lay-off appeals, which demonstrates that the Commission has special competence and significant experience in deciding layoff appeals. These factors argue in favor of giving great weight to the Commission's rulings on layoff appeals, and this Court will affirm the Commission's

conclusions regarding layoff appeals if a rational basis exists for them.

I also note that the Department has failed to demonstrate to the Court how the Commission's decision and order exceeded the discretion and authority delegated to the Commission by law. Rather, upon my review of the record, I must conclude that the Commission's determinations were not arbitrary or capricious, since the March 10, 1988 interim Decision and Order articulated a rational basis for its conclusions, and was based upon sound policy considerations. Therefore, I find that, in its March 10, 1988 interim Decision and Order, the Commission did not exceed the discretion and authority delegated to it by law.

Finally, I address the Department's allegation that the Commission as erroneously interpreted provisions of the law. In its brief, the Department argues that the Commission's construction of the term "vacancy" in Section ER-Pers 1.01(15), is erroneous as a matter of law based upon the uncontradicted testimony of its witnesses Sallstrom and Lawton. It is well-settled, however, the Commission need not accept such testimony as binding. In McCarthy v. Sawyer-Goodman Co., 194 Wis. 198, 204, 215 N.W. 824 (1927), the Court concluded:

The convincing power of expert testimony depends somewhat upon the knowledge and experience of the one who is called upon to weigh such testimony. The untutored are likely to accept the opinion of an expert at its fact value, while those possessing knowledge upon the subject concerning which he testifies may discount it

or entirely disregard it as unsound. In this case the trial judge apparently accorded the testimony of these physicians full faith and value. But it does not follow that the Industrial Commission attached any such weight to their testimony, nor do we think that they were bound to do so. If the testimony of these witnesses was contrary to their own expert knowledge upon the subject they were at liberty to disregard it.

Some deference must be given to the agency in those areas where it has specialized knowledge, technical competence, and expertise. Where a legal question is intertwined with policy determinations, or where the agency's interpretation and application of the law is long standing, the Court should defer to the agency. This Court will sustain the Commission's conclusions of law if they are reasonable, even if another view is equally reasonable. Clearly the Commission articulated a rational basis for its conclusions of law, and upon review, I find the Commission's conclusions of law to be reasonable.

Additionally, I must conclude that the Department failed to sustain its burden to demonstrate that, in the Commission's March 10, 1988 interim Decision and Order, the Commission erroneously interpreted provisions of the law, and that a correct interpretation of the law compels that the decision and order be reversed. The Department has not shown that the Commission's interpretation lacks a rational basis. Nor has the Department shown that the Commission's interpretation conflicts with the intent of the relevant statutes

and regulations, with prior case law or administrative determinations, or is unconstitutional.

Section 227.57(2), Stats., provides that absent a grounds for setting aside, modifying, remanding or ordering agency action or ancillary relief, this Court shall affirm the agency's action. Given all the above, I hereby affirm the Commission's March 10, 1988 interim Decision and Order. This decision shall stand as my findings of fact and conclusions of law. IT IS SO ORDERED.

Dated this *6th* day of January, 1989.

BY THE COURT:


Circuit Judge