

RUSSELL D. ATTOE,

Petitioner,

vs.

Case No. 91 CV 3587
DECISION AND ORDER

WISCONSIN PERSONNEL COMMISSION,

RECEIVED

Respondent.

MAY 15 1992

Personnel

This action is before me on a chapter 227 review of a decision of the Wisconsin Personnel Commission (Commission). For reasons which follow, I must uphold the Commission's decision.

FACTS

The findings of fact from the Commission's Decision and Order provided as follows.

Attoe began his employment with the University of Wisconsin (UW) in 1970 as an Electronics Technician 1 in the Language Laboratories within the College of Letters and Science. From 1970 through 1981, the equipment used by the Language Labs primarily consisted of reel-to-reel tape recorders, overhead projectors, film projectors, and slide projectors. The repair and maintenance unit of the Language Lab included two positions, both classified as Electronics Technicians. These positions, one held by Attoe and one held by James Armbrrecht, were primarily responsible for the repair and maintenance of this equipment. In 1973, the Language Lab was granted department status within the

College of Letters and Science and was renamed the Laboratories for Recorded Instruction (Labs).

In 1981, the Labs began to provide microcomputer training and support for faculty and staff of the College of Letters and Science. Another Electronics Technician position was added to carry out the repair and maintenance of microcomputers. David Hytry was appointed to this new position. Prior to Hytry's appointment, Attoe was responsible for removing and installing microcomputer circuit boards and cables. Subsequent to Hytry's appointment, Attoe was responsible for cleaning microcomputer keyboards, cleaning microcomputer diskettes and repairing microcomputer screens. These responsibilities consumed a small percentage of Attoe's time. At the time of the subject layoff, Attoe did not have the skills or knowledge to perform more complex microcomputer repair or maintenance and would have required additional education and/or training to acquire such skills and knowledge.¹

In 1981, the Labs acquired the Video Resource Center from the School of Social Work within the College of Letters and Science. Armbrecht was assigned primary responsibility for the repair and maintenance of the newly acquired video equipment.

In 1984, the college of Letters and Science purchased microcomputers for use by department chairs and in 1987 and 1988, for use by faculty. The Labs became responsible for the repair and maintenance of these microcomputers. This function was

¹ This finding of fact is vehemently disputed by petitioner Attoe.

primarily assigned to Hytry's position.

On May 17, 1984, in an evaluation of Attoe's work performance, his supervisor, Read Gilgen, stated that "he often finds creative and innovative solutions to technical problems. . . . While continued training in new areas of technology would be useful, Attoe has a firm grasp of the technologies required for his job." Attoe's position was classified at the Electronics Technician 3 - Supervisor level at that time.

In 1986, the Labs were renamed the L&S Learning Support Services department (LSS).

In 1986, LSS's learning and language labs were modernized by replacing the remote access reel-to-reel tape recorders with Sony solid-state self-contained cassette decks. This resulted in a dramatic decrease in repair and maintenance needs of the labs.

In 1986, LSS agreed to provide audio-visual equipment repair and maintenance services to the Communicative Disorders Department within the College of Letters and Science on a fee-for-service basis. This equipment consisted primarily of projectors, tape players, and monitors. The agreement provided that the amount of technician time devoted to this service would not exceed 8 hours per week. Attoe was the technician primarily assigned to carry out this service.

In 1986, LSS began charging departments within the College of Letters and Science for certain repair and maintenance services. This resulted in additional record-keeping and bookkeeping responsibilities for the Department Secretary

(Program Assistant) position within LSS. These responsibilities increased substantially with the College's acquisition of a large number of microcomputers in 1988 and 1989. The warranties on most of this equipment expired after one year.

In March of 1986, Attoe's position was reclassified from Electronics Supervisor 2 to Electronics Supervisor 3. In the memo accompanying the request for reclassification, Gilgen stated that Attoe "is required to supervise all aspects of the electronics repair and maintenance in our facility. While his specific duties do not require as much actual "hands-on" ability, in light of the added knowledge required to supervise these new areas, particularly in the area of microcomputer technology, I suspect that a position upgrade may be in order." The revised position description for Attoe's position which accompanied the request indicated that the position's supervisory duties had decreased from 35% to 10% and that 85% of the position's time was devoted to work similar to that performed by the position's subordinates. The positions supervised by Attoe's position at the time included two Electronics Technicians 3 positions (held by Hytry and Armbrecht) and a vacant Electronics Technician 1 position. As a supervisor, Attoe was responsible for making sure job assignments were made and carried out, for overseeing the job tracing system, and for overseeing the billing system.

During 1988, LSS added a student microcomputer lab to its existing facilities and services.

In a memo dated March 11, 1988, Gilgen discussed the changes

that had occurred at LSS since 1978 and the current needs of the department. In this memo, Gilgen stated that the recent lab modernization "has drastically reduced service, maintenance, and operating expenses. This has freed up technical staff to work with microcomputer repairs (1.0 FTE) or to service A-V and electronic equipment from other L&S departments (.5 FTE).

On or around April 4, 1988, Gilgen designated certain positions within LSS as "group leaders." Gilgen did this in order to delegate more decision-making and problem-solving to his subordinates and to facilitate a team approach to decision-making and problem-solving. Gilgen's intent was not to create a supervisor/subordinate relationship between a group leader and the members of his/her group. Attoe was designated as the group leader for the equipment repair/maintenance unit.

In an April 20, 1988, memo and a May 10, 1988, memo to College Dean Cronon, Gilgen presented certain specific staffing requests related to microcomputer services. One of these was a request for permission to fill the vacant Electronics Technician position due to an increased need for microcomputer repairs and maintenance. Gilgen explained that this need was brought about by the College's acquisition of 400 microcomputers and that in-house repair and maintenance of these microcomputers would save the College \$120,000.

In a letter to Dean Cronon dated September 26, 1988, Gilgen stated that:

"the third priority we listed in our memos of last fiscal year was for a second full-time classified [Electronics

Technician] to help Dave Hytry with repair work. The backlog of repairs is so serious, and Dave is so frustrated, that he had announced his intention to resign several times this past week. We need qualified help in this area, not student help. Please, we need relief now if we are to continue providing service for the some 800 micros throughout the College. (Remember, we are saving over \$120,000 a year by not purchasing Telex service contracts)."

This September 26, letter also requested an increase in LSS's student hourly budget; explained that the student hourly help was used not just for clerical tasks but for tape duplicating, tape cataloguing and processing, picking up computers, installing security cables, delivering new computers, installing memory boards or hard disks, and proctoring all the labs; and stated that student hourly needs of LSS had increased 90% as a result of increased services and demands on existing services.

Gilgen met with Dean Cronon on October 6, 1988. Gilgen's notes relating to the meeting indicate that approval to fill the vacant Electronics Technician position had not been granted yet and that a need for additional student help for receptionist and administrative tasks was anticipated.

In a memo to Phil Hellmuth, Assistant Dean of the College, and Barb Hornick, personnel manager for the College, dated February 20, 1989, Gilgen stated as follows:

In our meeting of last October, I indicated that our projections showed that we would run out of student hourly funds by the middle of February. We were right on target, since we had only enough money to cover about half of the current pay period. the Dean and you indicated at that time that you could cover us for the remainder of the year. This memo is simply a reminder.

We are doing all we can to keep student hourly costs

down and will continue to do so. In addition, we hope to have a proposal to you in the near future for adding a clerical permanent classified staff person for several duties not handles by student. In spite of our rapid growth over the past seven years, we have had no increase in permanent clerical support.

Gilgen did receive authorization to fill the vacant Electronics Technician position, and Colleen Dugan was selected for the position in March of 1989. Gilgen had earlier considered assigning Attoe and Armbrecht to assist Hytry with microcomputer repairs, but Hytry told Gilgen that he didn't feel that either of them could help.

In a memo to Dean Cronon dated March 31, 1989, Gilgen stated as follows:

When I met with you last October to discuss our staffing concerns, Phil Hellmuth suggested that in light of our rapidly growing student hourly costs, we consider converting part of that into permanent help. Over the past several weeks we have been studying our situation, and we are not ready to make a recommendation/request.

* * * *

In all of this time, and in spite of tremendous support from the College for micro related responsibilities, we have had no corresponding increase in clerical help. As a result, although some of us handle certain clerical tasks on our own (with work processing, etc.), there are many things that are now being done by students or not being done at all.

* * * *

We should like to request a full-time classified position to work under the supervision of the Departmental Secretary. This person would assume many duties now being done by permanent and student help in the administrative, lab, and acquisitions areas. . . . Some of the duties of the new person would off-load tasks from other permanent staff which would then free that person to handle tasks now done by students (such as media mastering and production, cataloguing, etc.). And in many cases (such as inventory control, billing and collections, tracking of service

requests, etc.), it would simply allow us to accomplish tasks that now go undone (or get only partial attention)).

We estimate that approximately 20 hours per week of student hourly help would be eliminated by this position, while another 20 hours would be to meet needs which are relatively new (billing) or which have been neglected due to lack of staff (inventory, reports).

I would like to meet with you and Phil to discuss this proposal at your earliest convenience.

In an evaluation of Attoe's work performance on June 28, 1989, Gilgen stated that

"Rus feels the need for additional training in order to keep up with the technical skills required. He will determine courses at MATC or Wisconsin School of Electronics, or elsewhere, that would help him in this and recommend such to the Director. The Director agreed that he feels Rus is not keeping up technically and needs to concentrate on this aspect."²

In a June 29, 1989, memo to Dean Crawford, Gilgen makes reference to their meeting of the week before, discusses student hourly funding needs, and states that, "To date, there has been no response to our requests for additional clerical help."

In a memo to Dean Crawford dated July 24, 1989, Gilgen asks for a response from the Dean to the staffing and funding requests he had presented and reiterated what he felt are the three "items we need to have answers on:" additional clerical help, and adjustment/commitment for increased student hourly budget and capital/lab modernization needs.

Increasing student hourly funding for LSS would have

² Respondent's Exhibit 23. This evaluation also provided, although not part of the hearing examiner's findings of fact, that "basically, the director feels that the position of electronics supervisor now demands real supervision and leadership. Rus has been challenged to keep up with the demands of his position."

required decreasing such funding for other departments within the College. Creating a permanent clerical position freed up some student hourly funding for other functions since some of the duties of this permanent position would include duties previously performed by student hourly employees.

In a memo from Hornick, dated September 26, 1989, Gilgen was advised that \$12,000 in additional student hourly funding had been approved to cover the cost of student proctors for the student microcomputer lab but that the other part of his request for additional staffing was still under advisement.

Some time after September 26, Dean Crawford advised Gilgen that his request for an additional clerical position was denied.

In a document he prepared, dated April 3, 1990, Gilgen outlined the staffing situation he felt he was encountering at that time in LSS as follows:

- I. Need for additional clerical help has been established.
 - A. Additional needs have been growing, especially since LSS is much more involved in tracking charges to departments for service repairs, videotaping, etc.
 - B. Funding from current department budget resources would cover only about .5 FTE (from hourly student savings)
 - C. Additional funding apparently not available
 - f D. Currently handling some of these needs by hiring grad student 20 hours/week at \$6.00
- II. Technical services needs
 - A. Micro repair
 - 1. Grew rapidly, but has stabilized at this point

2. Additional person hired (Colleen Dugan) has helped tremendously

B. Charge-backs

1. Departments are required to pay for parts
2. We order, bill, and follow-up
3. This has become a clerical mess

C. Video repair/service

1. VCR continues to grow and needs for adequate service remain
2. Video use generally is up, and new video equipment is being acquired constantly

D. Learning Labs

1. Switch to new Sony units, all solid-state, has virtually eliminated service needs in that area
2. High speed duplicators need calibration three times a year

III. Proposed program needs change

A. Program needs vs. Performance approaches

B. Decrease in tech services needs means we need one technician less

1. Two micro persons still needed
2. Video still needed
3. Technician supervisor not needed (does not currently serve any useful function)

C. Increase in clerical needs means we need to add a clerical person

1. Increased billing, ordering, tracking, etc.
2. Help to make office more like a "business" office for all of the department.

IV. Where do we go from here?

In a May, 1990, meeting with Hellmuth and Hornick, Gilgen discussed the LSS staffing situation outlined in his April 3 document with them. The discussion centered around how to effect the elimination of Attoe's position and how to find another position for Attoe. All of the available alternatives, including terminating Attoe for cause, were discussed. However, terminating Attoe for cause was summarily concluded not to be a viable alternative.

In a memo to Dean Crawford dated May 24, 1990, Gilgen stated as follows:

As you may recall, the last time we met I brought up a proposal that I felt might help our staffing situation here: eliminate a technical position and use that FTE for a clerical person which we so desperately need. The demands on the technicians (the non-computer ones) has decreased since the installation of our new language labs and I felt this was an area in which we could make some changes based on changing program needs.

I have been meeting with [Hellmuth] and [Hornick] on this, and all the "legal" and technical details are in place so that we can proceed. However, I have two major concerns before I set the wheels in motion to lay off our technician supervisor:

1. During my meeting yesterday . . . [Hellmuth] seemed to hedge rather strongly on whether we would be able to use the position for clerical purposes. That is, just because we are eliminating a position doesn't mean we can use that same position elsewhere in our department. Well, the whole point of this exercise is to get the help we need in the clerical area. We have documented our needs and made requests for some three years now, and knowing that new positions are nearly impossible to find, we have been driven to this measure which I find distasteful (laying off a 20 year employee) but necessary. If we can't be assured that it will produce the desired result (clerical help), then I'm not sure I want to go through with it.

[The following is the text of an electronic mail message from Gilgen to Dean Crawford sent on May 24, 1990.)

2. I am convinced that the current amount of work being handled by our technicians does not justify keeping our technician supervisor. The expertise and quantity of the three remaining technicians is indeed justified (video, microcomputers). The supervisor's main skills seem to be in the A-V equipment area, and definitely is not in the digital electronics area. My only concern is that we don't create problems for ourselves in the long run. In particular, we have talked over the years about providing stronger coordination and servicing of A-V equipment throughout the College. Departments often buy equipment that gets little use (hence the need for coordinated "pools" similar to our Van Hise pool), and much of that equipment gathers dust once problems develop because department don't have the money for repairs. LSS could provide a strong role in both cases: coordination and repair. If we do move in such a direction, then the position we are now proposing to eliminate would be needed once again.

As you can see, I am uncomfortable at this point in moving forward. I think I need some assurances and indications of directions before I can make a fully informed decision in this matter.

Dean Crawford subsequently gave verbal approval to Gilgen to create and fill the clerical position at LSS as requested.

In a memo to Attoe dated June 26, 1990, Gilgen stated that

This note is simply a brief follow-up to our conversation of this afternoon, to let you know in writing that due to changes in our department staffing needs, we intend to eliminate the position of Electronics Technician Supervisor sometime early this fall.

In a memo dated August 22, 1990, James Stratton, Director of the UW-Madison Classified Personnel Office, requested approval of the plan for Attoe's layoff from the Administrator, Division of Merit Recruitment and Selection (DMRS). This memo provided the following rationale for the layoff:

Due to a reorganization and redistribution of duties within the department of Learning Support Services, we find that we no longer have sufficient work of an appropriate level to justify continuing the Electronics Supervisor 3 position.

This plan was approved by DMRS on August 23, 1990.

In a letter dated September 4, 1990, Attoe was officially notified of his layoff. The letter stated in part as follows:

This is to advise you that the Electronics Supervisor 8 position that you occupy is being abolished effective September 28, 1990. The reason for this action is reorganization and redistribution of duties within the department of Learning Support Services. Since you occupy the only Electronics Supervisor 3 position in the employing unit, you will be laid off. This letter is your official notification of layoff from Learning Support Services at the end of the working day on September 28, 1990.

Prior to the layoff, Gilgen had observed one of the technicians doing personal repair/maintenance work during work hours on more than one occasion. Gilgen concluded from this that there was not always enough repair/maintenance work to keep four technicians busy during work hours. Prior to the decision to select Attoe's position for layoff, Gilgen had reviewed the repair/maintenance log and concluded from his review of the workload of each technician that Attoe's position was the one that should be eliminated.

In Gilgen's opinion, prior to the layoff, there had not been significant backlogs in repair/maintenance or non-microcomputer equipment (repair/maintenance not completed within one week). Subsequent to the layoff, there were backlogs in repair/maintenance of this type of equipment.

Subsequent to Attoe's layoff, Gilgen assumed the non-technical administrative and supervisory duties previously performed by Attoe.³

As a result of the layoff of Attoe, LSS discontinued the

³ Petitioner disputes this finding.

repair/maintenance services it had been rendering for the Communicative Disorders Department.

As of March 13, 1991, the new authorized clerical position at LSS had not been filled on a permanent basis. The duties and responsibilities of this new position have been carried out by a full-time limited term employee and, subsequent to her departure from the position, by student hourlies.⁴

On October 25, 1990, Attoe filed a timely appeal of the subject layoff with the Commission. After a hearing on February 27, 1991, Hearing Examiner Laurie McCallum issued a proposed decision and order on June 4, 1991. This decision and order affirmed the layoff action by the University and dismissed the appeal.

On August 16, 1991, the Commission made its final decision and order which modified and adopted the hearing examiner's decision. The Commission adopted the hearing examiner's findings of fact, provided above, and conclusions of law. The conclusions of law were as follows:

1. This matter is appropriately before the Commission pursuant to sec. 230.44(1)(c), Stats.
2. The respondent has the burden to show just cause for the subject lay off.
3. Respondent has sustained this burden.
4. The layoff of appellant was for just cause.

On September 13, 1991, pursuant to ch. 227, Stats., Attoe initiated these proceedings to review the final decision and

⁴ The Commission's findings of fact conclude here.

order of the Commission.

STANDARD OF REVIEW

The scope of judicial review of an administrative agency's decision is defined by sec. 227.57, Stats. That section provides that the court must affirm an agency's decision unless the court finds that 1) the fairness of the proceedings or correctness of the agency's actions have been impaired by a material error in procedure, sec. 227.57(4), Stats.; 2) the agency erroneously interpreted a provision of law, sec. 227.57(5), Stats.; 3) the agency's action depends on findings of fact not supported by substantial evidence in the record, sec. 227.57(6), Stats.; or 4) the agency's exercise of discretion is outside the range delegated to it by law or is otherwise in violation of a constitutional or statutory provision, sec. 227.57(8), Stats. The court cannot, however, substitute its judgment for that of the agency on an issue of discretion. Id.

The standard of review for an administrative decision depends on whether the issue presented involves questions of fact or law. A court will uphold an agency's fact finding if it is supported by credible and substantial evidence found on the record as a whole. Wehr Steel Co. v. ILHR, 106 Wis. 2d 111, 117, 315 N.W.2d 357 (1982). "Substantial evidence" necessary to support administrative decision is such relevant evidence as reasonable mind might accept as adequate to support the conclusion. City of La Crosse Police and Fire Comm'n v. Labor

and Industry Review Com'n, 139 Wis. 2d 740, 407 N.W.2d 510 (1987). In determining whether an agency's factual findings are supported by substantial evidence, it is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 611, 288 N.W.2d 857 (1980).

However, a court is free to review a question of law ab initio when it is as competent as an agency to interpret the relevant law, or when material facts are undisputed. Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). Nonetheless, a court gives great weight to agency decisions when the agency expertise is significant to the determination of a legal issue. Nottelson v. DILHR, 94 Wis. 2d 106, 117, 287 N.W.2d 763 (1980). A court will also sustain a reasonable legal conclusion even if an alternative view may be equally reasonable. United Way v. DILHR, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981).

DECISION

I consider the following questions of fact: does credible and substantial evidence found in the record as a whole support the hearing examiner's finding of fact that (a) at the time of the layoff, Attoe did not have the skills or knowledge to perform more complex microcomputer repair or maintenance and would have required additional education and/or training to acquire such skills and knowledge; (b) Gilgen "exaggerated" when he said that

the repair needs of the language labs had been "virtually eliminated" by the switch to new Sony units, rather than that Gilgen deliberately misrepresented the true repair needs of LSS in order to eliminate Attoe's position; (c) Attoe was truly laid off, as opposed to terminated for unsatisfactory work performance.

I also consider the following questions of law relating to "just cause." Under Weaver, did the appointing authority demonstrate (a) that it followed the personnel statutes and administrative standards set forth in ER-Pers sec. 22.03, Wis. Adm. Code, (b) including necessity; and (c) that the layoff was the result of a rational thinking process.

I. Questions of Fact - Credible and Substantial Evidence Found in the Record as a Whole.

Petitioner challenges the following findings of fact. The law directs me to determine whether credible and substantial evidence found in the record as a whole support the hearing examiner's finding of fact. The agency's finding of fact is to stand unless no reasonable mind could accept the evidence as adequate to support the conclusion.

A. At the time of the layoff, Attoe did not have the skills or knowledge to perform more complex microcomputer repair or maintenance and would have required additional education and/or training to acquire such skills and knowledge.

Petitioner argues that evidence in the record as a whole could reasonably have lead only to the conclusion that Attoe was able to perform more complex microcomputer work, and that UW

failed to meet its burden to prove that Attoe could not.

The record contains facts which could support either conclusion. On one hand, Attoe testified that he is familiar with the basics concerning the repair and maintenance of computers, has overseen and participated in the repair and maintenance of computers since they were first introduced at LSS in the early 1980's. UW itself stated that the duties and responsibilities of Attoe's position included the maintenance, repair and installation of microcomputer equipment and associated peripherals such as disk drives, line printers, and modems. On the other hand, the record shows that Attoe, although he had technical school and on-the-job training relating to electronics in general, had acquired no special expertise relating to video or microcomputer repair/maintenance equipment compared to that acquired by the other technicians, despite UW's suggestion over a period of time that he do so. Although Attoe asserted that the same skills and knowledge are required to fix tape recorders as to fix microcomputers and video equipment, the record shows that, granted the same circuitry and electrical current principles may apply to both, it takes more than the knowledge of such basic principles to do hands-on repair and maintenance of microcomputers. The knowledge that Attoe acquired in technical school of circuitry and electrical currents was acquired over 20 years ago, during which the field of electronics has undergone a revolutionary change.

Given the record as a whole, I find that it was reasonable

for the hearing examiner to conclude that UW had demonstrated that Attoe did not have the skills or knowledge to perform more complex microcomputer repair or maintenance and would have required additional education and/or training to acquire such skills and knowledge. UW satisfied that burden by the evidence that Attoe had not had the training or on-the-job experience by which he would have acquired the skills to do complex microcomputer repair and maintenance. That Attoe could do some tasks related to microcomputers, such as repairing floppy disk drives by cleaning them, repairing keyboards by cleaning the keys, repairing monitors that are similar to TV monitors, and repairing printers by removing labels (TR, p. 222), is undisputed. But that evidence does not rebut or make unreasonable the hearing examiner's finding that Attoe could not do complex microcomputer repair and maintenance. Therefore, this finding of fact must stand.

B. Gilgen exaggerated when he said that the repair needs of the language labs had been "virtually eliminated" by the switch to new Sony units.

Petitioner argues that the hearing examiner should have found that Gilgen deliberately misrepresented the true repair needs of LSS in order to eliminate Attoe's position.

There are facts in the record to support either conclusion. On one hand, Armbrecht did testify that the language labs were almost five years old, and that their repair needs have increased, and are expected to continue to increase in the future

as the labs continue to age (TR, p. 212-213). Furthermore, the record shows that the backlog of equipment waiting for repairs increased dramatically after Attoe's departure (TR, 231-14). However, on the other hand, the record also consistently shows that, at the time of the layoff, the repair/maintenance needs and emphasis of the LSS equipment, on which Attoe's position spent most time, was decreasing, particularly when viewed in relation to the repair/maintenance needs in the video and microcomputer areas. Finally, Gilgen's May 24, 1990, memo to Dean Crawford expressing concern of eliminating Attoe's position in case the repair and maintenance needs of LSS increased suggests that Gilgen was not arbitrarily trying to eliminate Attoe's position.

Therefore, I find that the record viewed as a whole does provide sufficient evidence for a reasonable fact finder to conclude that Gilgen's use of the language "virtually eliminated" was an exaggeration based on significant trends, rather than a purposeful misrepresentation of the repair needs of LSS. The hearing examiner concluded, as I find reasonable, that the increase in backlog is to be expected when three persons assume the work previously handled by four. Furthermore, that the lab work might increase in the future does not rebut the fact that the immediate needs were minimal. Thus, this finding of fact must stand.

C. Attoe was truly laid off, as opposed to terminated for unsatisfactory work performance.

Petitioner argues that the Commission could not have

reasonably accepted the testimony that Attoe was laid off rather than terminated in light of the testimony that Hornick, Gilgen and Hellmuth briefly considered terminating him.

Keeping in mind the deference I owe to the agency's findings of fact, I cannot agree. The petitioner, in effect, argues that the witnesses were not credible, that they hesitated to answer questions directly, etc. However, the credibility of witnesses is exactly the area in which I owe greatest deference to the fact finder who had the occasion to observe the demeanor of the witnesses while testifying. The hearing examiner, who personally observed the entire hearing, believed the witnesses' testimony that Attoe was laid off, not fired, and believed their rationale that, when considering a reorganization, termination may be considered even if briefly. Furthermore, that conclusion is consistent with my impressions from the record that Attoe's job performance was satisfactory.

In short, I defer to the impressions of the hearing examiner that the witnesses' testimony that Attoe was indeed laid off was credible. Furthermore, I do not agree that the only reasonable conclusion to be reached was that Attoe was terminated. Therefore, this finding of fact must stand.

II. Questions of Law - Under Weaver, did the appointing authority act with just cause here, that is, did the appointing authority demonstrate that it followed the personnel statutes and administrative standards, and that the layoff was not arbitrary or capricious.

I am free to review a question of law ab initio, although I

give great weight to agency decisions when the agency expertise is significant to the determination of a legal issue. I find that the Commission's expertise is significant to a determination of whether "just cause" existed, for the Commission has developed significant expertise and a body of precedent in determining "just cause" layoff appeals under sec. 230.44(1)(c), Stats. With this in mind, I consider petitioner's arguments against the Commission's conclusions of law.

Sec. 230.34, Stats., in the chapter on State Employment Relations, Civil Service, provides in relevant part:

230.34 Demotion, suspension, discharge and layoff. (1)(a) An employe with permanent status in class may be removed, . . . discharged . . . or demoted only for just cause.

* * *

(2) Employes with permanent status in class in permanent . . . positions in the classified service . . . may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization, but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

(a) The order of layoff of such employes may be determined by seniority or performance or a combination thereof or by other factors.

(b) The administrator shall promulgate rules governing layoffs and appeals therefrom

* * *

(3) The appointing authority shall confer with the administrator relative to a proposed layoff a reasonable time before the effective date thereof in order to assure compliance with the rules.

Ch. ER-Pers 22 provides in relevant part:

22.03 Application. (1) This chapter shall be applied by the appointing authority in the event of an impending reduction in work force.

22.035 Layoff Group. (1) The layoff group may be identified by, by not limited to:

- (a) A class;
- (b) Class subtitle;

22.05 Layoff plan subject to approval. Whenever it becomes necessary for an agency to lay off employes, the appointing authority shall prepare a comprehensive written plan for layoff following the procedure specified in this chapter and submitted to the administrator for review and approval prior to implementation.

22.06 Procedure for making layoffs. (1) In the layoff plan submitted to the administrator . . . , the appointing authority shall recommend the layoff group in which the layoff is to occur. The layoff group shall reflect the staffing processes followed for included positions. . . .

(2) The appointing authority may exempt from the layoff group up to 2 employes or 20%, whichever is greater, of the number of employes in the layoff group to retain employes having special or superior skills or for other purposes as determined by the appointing authority. In addition, for affirmative action purposes, . . . the appointing authority may exempt, subject to the approval of the administrator, female, minority and handicapped employes in the layoff group. . . .

(3) The remaining employes . . . in the layoff group shall be ranked by seniority computed on the basis of continuous service Employes shall be laid off according to their continuous service ranking, with the employe with the least continuous service laid off first.

The most relevant case to this situation is Weaver v.

Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W.2d 183

(1975).⁵ In Weaver, the Supreme Court held that an appointing

⁵ Another guiding case is State ex rel. Nelson v. Henry, 221 Wis. 127, 266 N.W.227 (1936). This case provides that courts are always open to discharged employee to inquire whether just cause existed for his dismissal, but courts will not control the judgment and discretion of executive and administrative officials, but will only determine whether official deep within their jurisdiction and act in accordance with established principles of law, regardless of their secret motives. Where jurisdictional facts authorizing administrative official to discharge employee were established as a matter of law, no tribunal existed for review of officer's discretion unless created by statute, and inquiry of court were limited to ascertaining whether

authority acts with "just cause" in a layoff situation when it demonstrates that it has followed the personnel statutes and administrative standards set forth in sec. ER-Pers 22.03 of the Administrative Code and when the layoff is not the result of arbitrary or capricious action. Weaver, 71 Wis. 2d at 49. The court stated that the administrative rules (ch. ER-Pers 22) provide that a proper basis for layoff of a permanent employee exists when it is necessary to reduce the work force because of a stoppage or lack of work funds or because of material changes in the duties or organization of the unit concerned. Id.

Weaver also provides that the only questions presented in a layoff review are whether the procedure outlined in sec. 16.28(2), Stats., and Wis. Adm. Code ch. ER-Pers 22 was followed and whether the layoff of the employee otherwise authorized by applicable law. Weaver, 71 Wis. 2d at 51. The appointing authority sustains its burden of proof to show "just cause" when it shows that it has acted in accordance with the administrative and statutory guidelines (including necessity) and the exercise of that authority has not been arbitrary and capricious. Weaver, 71 Wis. 2d at 52.

A. Compliance with Personnel Statutes and Administrative standards set forth in ER-Pers 22.03, Wis. Admin. Code.

I find that UW showed that it acted in accordance with administrative and statutory guidelines. The record shows that the LSS experienced material changes in organization in the past

jurisdictional facts existed.

ten years, and that there were no original appointment, probationary or limited term employes in the Electronics Supervisor III class.

Furthermore, as permitted by regulation, the record reflects that the layoff group, Electronics Supervisors III, was identified by class (Electronics Supervisor) and class subtitle (III). The appointing authority, here James Stratton, Director of the UW-Madison Classified Service Personnel Office (Stratton), prepared a comprehensive written plan for layoff⁶ which followed the appropriate procedure (discussed next) and submitted it to the administrator, here, the Administrator of the Division of Merit Recruitment and Selection (DMRS) for review and approval prior to implementation.

The plan for layoff fulfilled the procedure requirements of ER-Pers sec. 22.06. First, in the layoff plan submitted to DMRS, Stratton recommended the layoff group (Electronics Supervisor III) in which the layoff was to occur. Since this group had only one position, Stratton could not exercise his power to exempt from the layoff any employes in the group having special or superior skills or for other purposes as determined by the appointing authority. Also because Electronics Supervisor III group contained only one position, Stratton could not exercise his power to rank the remaining employes in the layoff group by

⁶ The layoff plan stated that "due to a reorganization and redistribution of duties within the department of Learning Support Services, we find that we no longer have sufficient work of an appropriate level to justify continuing the Electronics Supervisor III position" (Respondent's Exhibit 26).

seniority computed on the basis of continuous service. Thus, because Attoe was the only Electronics Supervisor III, he was the only possible candidate for layoff; no Electronics Supervisor III had less continuous service.

Petitioner argues that the layoff plan (footnote 6) violated the administrative and statutory guidelines by not providing the true reason for the layoff.⁷

I agree that the language of the plan could lead to the conclusion that the department no longer had enough supervisory work to support Attoe's position. However, as seen in the context of the record, I conclude that it refers to the electronics technician work. The language, while vague, admits of either conclusion. Furthermore, petitioner cites no requirement that the plan contain precisely the reason for the layoff; ER-Pers 22.05 does not, on its own, lead me to conclude that the entire layoff procedure should be voided because the plan contained language that was vague.

Furthermore, I am guided by sec. 230.34(2)(a), Stats., which provides in full:

(a) The order of layoff of such employes may be determined by seniority or performance or a combination thereof or by other factors.

⁷ Respondent cites Wis. Admin. Code, ER-PERS 22.05, which provides in full:

22.05 Layoff plan subject to approval. Whenever it becomes necessary for an agency to lay off employes, the appointing authority shall prepare a comprehensive written plan for layoff following the procedure specified in this chapter and submitted to the administrator for review and approval prior to implementation.

This section indicates that management has the prerogative to decide which factors inform the reduction of a workforce; it does not prohibit laying off a person in a position because that position's expertise is less in demand than others'.

Therefore, pursuant to my analysis above, I see no procedural regulation or statute that the UW violated in laying off Attoe. Therefore, subject to the discussion on necessity below, I must find that UW has sustained its burden of proving that it acted in accordance with administrative guidelines.

B. "Necessity."

The administrative rules (ch. ER-Pers 22) provide that a proper basis for layoff of a permanent employee exists when it is necessary to reduce the work force because of a stoppage or lack of work funds or because of material changes in the duties or organization of the unit concerned. (emphasis added) Weaver, 71 Wis. 2d at 49. Petitioner argues that the UW did not prove that the layoff was necessary.

The record reflects that the needs of LSS drastically changed in the past ten years, that the need for clerical help was based on the increasing involvement of LSS in tracking charges to departments for service repairs, videotapings, etc. (Gilgen memo dated April 3, 1990), that the funding from the current department budget resources would cover only about .5 FTE, that additional funding was not available (despite repeated requests for additional funding for clerical needs over many

months), and that some of the clerical needs were handled by a graduate student. The record also shows that the technical services needs in the learning labs had decreased as a result of a switch to new Sony units. Therefore, based on these changes, a reorganization of the unit eliminated petitioner's position.

Based on the above, UW sustained its burden to show that clerical help was necessary, and that LSS technical services had diminished. Some dictionary definitions of "necessary" are "essential," "inescapable," "compulsory," "required." Websters New Collegiate Dictionary, (1979). I find that the needs of the department exceed petitioner's characterization of "could use more clerical help." Although student hourlies had been handling the clerical work prior to the layoff, as petitioner asserts, that does not rebut UW's showing that more clerical help was needed in the department. That hourlies had handled the clerical work in the past or that the clerical position had not yet been permanently filled fail to directly rebut the testimony that more clerical help was needed for present and future needs due to the changes in duties and organization that LSS had undergone.

In conclusion, my reading of Weaver and my respect for the Commission's expertise lead me to find that the lack of funds did necessitate the reduction of the work force in these circumstances. One set of duties had decreased and another set had increased, while the funding for the unit remained the same. Therefore, I must find that the UW sustained its burden of showing the necessity of the layoff.

C. Process - Rational Thinking and "Winnowing and Sifting."

Arbitrary or capricious action on the part of an administrative agency occurs when the action is does not have a rational basis and is not the result of the winnowing and sifting process. Weaver, 71 Wis. 2d at 54. The agency must demonstrate that the layoff was the result of a rational thinking process, and was not arbitrary or capricious.

The record provides that the reorganization and redeployment of staff resources within LSS, as the focus of the department changed, resulted from the ongoing examination by several management employees of a substantial volume of information regarding a variety of alternatives over a considerable length of time. I find that is sufficient to establish that the decision was the result of a winnowing and sifting process and a rational thinking process.

Therefore, I find that UW has sustained its burden of proving that its acts were not arbitrary or capricious.

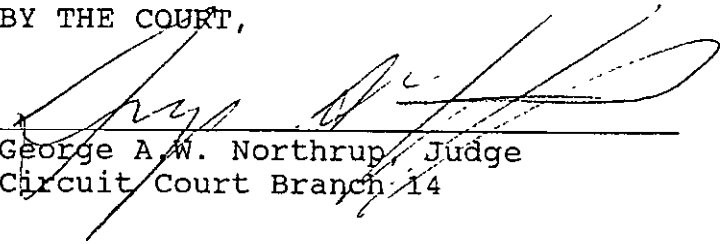
The appointing authority has sustained its burden of proof to show "just cause." It showed that it acted in accordance with the administrative and statutory guidelines (including necessity) and the exercise of that authority was not arbitrary and capricious.

CONCLUSION

The Commission's decision is upheld.

Dated this 12th day of May, 1992.

BY THE COURT,



George A. W. Northrup, Judge
Circuit Court Branch 14