STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | DANE COUNTY

RECEIVED
MAR 23 1998
PERSONNEL COMMISSION

MARILYN WILLIAMS
Petitioner,

V.

Case No. 96 CV 2353

WISCONSIN PERSONNEL COMMISSION,
Respondent.

State of Wisconsin County of Dane This document is a full true and Correct copy of the original on file and of record in my office and has been compared by me. Attest JUDITH A. COLEMAN Clerk of Courts By Deputy Clerk
NOV 19 1997

DECISION AND ORDER

BACKGROUND

Marilyn Williams (Petitioner) has petitioned the court to review the Wisconsin Personnel Commission's (Respondent) decision which dismissed her complaint pursuant to §227.57 Wis. Stats. Petitioner states that she seeks review as the decision is based on an improper interpretation and application of the law and is based on findings of fact that are not supported by substantial evidence in the record. After review of the record I conclude that Respondent correctly interpreted and applied the law, and that substantial evidence does support the decision. Therefore, I affirm Respondent's decision.

FACTS

Petitioner is a part-time food service worker at the University of Wisconsin Hospital and Clinics (UWHC). In addition, Petitioner functions as a union steward for Local 171. In this capacity, Petitioner represents a number of UWHC employees in disputes between employees and management. Petitioner held this position at all times relevant to this action.

Ms. Renae Bugge (Bugge) and Mr. Phil Moss (Moss) are employed by UWHC in the Department of Human relations. One of their duties is to represent management in disputes

between employees and supervisors. Both Bugge and Moss held these positions at all times relevant to this action.

In October 1993, Petitioner filed a health and safety grievance with the Environmental Health Department (EHD), which is a department of University Health Services (UHS), regarding an alleged cockroach infestation on the University campus. At the time of filing, UHS was neither under the direction of, nor affiliated with Petitioner's employer, UWHC. Upon receipt of the grievance, Mr. Rick Johnson (Johnson) spoke to his director about how to process the grievance. Since cockroach management was not something that UHS handled, Johnson denied the grievance on the grounds that it had been filed with the wrong unit. Johnson may have been aware that Petitioner was an employee of UWHC. However, due to the appearance that the nature of the grievance was unrelated to UWHC, Johnson did not inform anyone at UWHC about the existence of the grievance.

Prior to the time period in which Petitioner was pursuing the grievance, she had been subject to discipline by UWHC. On October 29, 1993, Bugge held a grievance meeting with Petitioner and her union steward regarding the previous discipline.[1] At the close of this meeting, Bugge instructed Petitioner to treat others with respect and to act in a professional manner at all times[2] when associated with UWHC. Petitioner acknowledges that this conversation took place and that she understood Bugge.

During October 1993, Petitioner filed a number of open records requests regarding

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[1]This discipline occurred several weeks earlier in response to Petitioner's rude behavior toward a UWHC supervisor during a union related meeting.

[2]Whether it be on union time or UWHC time.

cockroach control. With the exception of one, all the requests were made to University personnel. All but two of the requests were answered. The two requests that were not answered were (1) one made to Moss who had no cockroach information, and (2) one made to Mr. Bruce Fueger (Fueger),[3] who operates a private business and is not subject to the opens records statute.

In pursuit of her open records request with Fueger, Petitioner contacted Fueger three times on November 2, 1993. The first call took place at approximately 9:00 a.m. In this conversation, that lasted approximately 45 minutes, Petitioner demanded to see Fueger's pest control records, and Fueger stated that he was not required to disclose his private records. During the course of the conversation, petitioner threatened Fueger, shouted at him and consistently demanded to see the records. Fueger, shocked and concerned about Petitioner's attitude, remained on the line in an attempt to calm Petitioner and to end the conversation amicably.

At approximately 11:00 a.m., Petitioner called Fueger again. Petitioner again demanded to see Fueger's records and told him that if he refused, she would find a way to come in and see his records. This conversation lasted about ten minutes. After this conversation, Fueger called Mr. Allen Lee (Lee), Assistant Attorney General, who Petitioner had mentioned as an open records attorney, to find out if he was required to show Petitioner his records. Lee explained to Fueger that he was not subject to the open records law. Fueger also contacted a University purchasing agent to inform her that Petitioner was demanding to see the University records. It is Fueger's understanding that the purchasing

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[3]Fueger is the President of Fueger Pest Control.

agent checked with legal counsel who informed her that Fueger did not have to turn over his private business records.

Following those conversations, Fueger attempted to call Petitioner back to let her know that he would not allow her to view his records. During an earlier conversation, Petitioner had provided Fueger with two telephone numbers at which she could be reached. The first number Fueger tried was the UWHC kitchen, the second was the Local 171 office. Fueger left messages for Petitioner at both places. About 3 p.m., Petitioner returned Fueger's call. During this conversation Fueger told Petitioner about his conversation with Lee, and that Petitioner would not be allowed to view his records at his business.

At least one of Petitioner's morning conversations with Fueger took place in the UWHC kitchen office. Ms. Ann Starr (Starr) was working in the office at the time and allowed Petitioner to use the telephone. Starr overheard much of the conversation between Petitioner and Fueger. Disappointed with the manner in which Petitioner had treated Fueger, Starr later called Fueger to apologize for Petitioner's behavior. Starr also told Fueger that if he wished to complain about Petitioner's behavior, he should contact Moss.

On November 3, 1993, Fueger contacted Moss to report Petitioner's behavior. Moss scheduled an appointment for the following day to discuss the incident. Moss then contacted Starr to hear her version of what transpired between Petitioner and Fueger. Moss met with Fueger on November 4, 1993, at Fueger's office. Following the discussion, Moss met with Bugge to determine how to deal with Petitioner's behavior. After concluding that this behavior might be subject to discipline, a pre-disciplinary meeting was scheduled.

A pre-disciplinary investigation was held on November 18, 1993. During the course

of the meeting, Moss explained that Petitioner's behavior toward Fueger was a direct reflection on UWHC and, in this particular incident, may have caused UWHC embarrassment. In Petitioner's defense, Petitioner's union steward, Ms. Anne Habel (Habel), explained that Petitioner was conducting union business when speaking with Fueger and, accordingly, it would be inappropriate to discipline her. At no time during the pre-disciplinary investigation did the health and safety grievance filed by Petitioner enter the discussion.

Petitioner subsequently filed a complaint, pursuant to §230.80 Wis. Stats., *et seq.*, with Respondent alleging retaliation under the Whistleblower Statute. After an investigation, Respondent issued an initial determination that there was probable cause to believe that such retaliation had occurred. A hearing was held[4] and a proposed Order and Decision was issued. Petitioner objected to the proposed Order and Decision, and oral arguments were held. A final decision was issued November 17, 1996. On October 9, 1996, Petitioner filed a petition with this court for review of Respondent's Decision and Order.

STANDARD OF REVIEW

When reviewing an administrative agency's findings under ch. 227, the court will only reverse if the agency's findings are not supported by substantial evidence in the record. 227.20(6), Wis. Stats. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Tatum v. LIRC, 132 Wis. 2d 411, 417, 392 N.W.2d 840 (Ct. App. 1986) (Citations omitted). Review is limited to determining whether the evidence is such that the agency might reasonably make the finding it did. Id.

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[4]The hearing was held October 26-27, November 7, and December 5, 1995.

The court must search the record to locate substantial evidence supporting the agency's decision. Id. When more than one inference reasonably can be drawn, the agency's finding is conclusive. Id. The reviewing court cannot evaluate the credibility or weight of the evidence. Id.

When reviewing an agency's statutory interpretation, there are three levels of deference that a court may give that interpretation: 1) "great weight" if the agency's experience, technical competence. and specialized knowledge aid the agency in its interpretation and application of the statute; 2) "due weight" standard where the agency's decision is very nearly one of first impression; and 3) "no weight" standard where the issue is clearly one of first impression and where the agency has no special experience in determining the issue. Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992). However, an agency interpretation of an unambiguous statute is entitled to no deference. City of Milwaukee v. Lindner, 98 Wis. 2d 624, 634, 297 N.W.2d 828 (1980). Further, an administrative agency's decision that deals with the scope of its own power is not binding. Loomis v. Wisconsin Personnel Commission, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993).

DECISION

Petitioner alleges that errors were committed in relation to both factual findings and questions of law addressed by Respondent's November 17, 1996, decision, which determined that Petitioner was not given a five day suspension in retaliation for her whistleblower activities. (Petitioner's brief at 1.) Respondent urges that there is substantial evidence in the record to support the finding that Petitioner's five-day suspension was not in retaliation for

her protected speech.

Factual Findings

A. Exhibits

Petitioner's first argument is that the exhibits do not lead a reasonable person to the conclusion which the Personnel Commission reached. (Petitioner's Brief in Support at 24.) Petitioner lists sixteen different exhibits under this section. (Petitioner's Brief in Support at 24-26.) Based on these exhibits, Petitioner urges that Moss' version of events cannot be believed by any reasonable person. (Petitioner's brief in Support at 26.) Petitioner is requesting that the court evaluate the credibility of Moss. The reviewing court cannot evaluate the credibility or weight of the evidence. Tatum v. LIRC, 132 Wis. 2d 411, 417, 392 N.W.2d 840 (Ct. App. 1986) (Citations omitted). Accordingly Petitioner's arguments regarding the exhibits are without merit.

B. Testimony on Critical Issues

Petitioner next argues that a review of the testimony on critical issues also does not support the conclusions of the Personnel Commission. Petitioner's arguments are set forth as questions and/or statements. Petitioner argues her position on the individual questions/statements, asserts that the testimony supports her position, and does not cite to the record.

First, it is unacceptable for Petitioner to not cite to the record in support of her summary of the testimony. Just as the court requires legal citations for statements of law, this court requires reference to the record when statements are made about individual testimony. It is not the court's responsibility to do legal research for the parties to support

their legal arguments. Likewise, it is not the court's responsibility to pinpoint testimony in the record that might support Petitioner's assertions.

Second, as stated above, the court is not to evaluate the credibility of the witnesses and assign weight to their testimony. Tatum, 132 Wis. 2d at 417. To the extent that Petitioner requests that the court weigh testimony,[5] the court declines to do so.

Finally, as suggested by Respondent, where conflicting views of the evidence may each be sustained by substantial evidence, it is for the agency to determine which view it chooses to accept, not the court. Hamilton v. ILHR Dept., 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). Assuming that the testimony referenced by Petitioner throughout this section of her argument is accurate, it in no way detracts from that which Respondent found.[6] Accordingly, the court is satisfied that there is substantial evidence to support Respondent's factual conclusions.

C. Specific Findings of Fact Are Incorrect and Not Supported By the Evidence

Petitioner's next argument is that specific findings of fact are incorrect and not supported by the evidence. In the context of this argument, Petitioner attacks individual findings of fact made by Respondent. Once again, Petitioner does not bother to support her arguments with citations to the record. Accordingly, the court finds all of the findings are support by substantial evidence, as indicated below:

Finding of Fact 2 (T at 279-280); Finding of Fact 4 (T at 345-346); Finding of Fact 5 (T at

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[5]Section "B" is a weight of evidence argument.

[6]Section A - Transcript at 320, 506, 580-581. Section C and D - Transcript at 335. Section E - there is nothing that contradicts this statement, so the court has no idea why Petitioner asserts that Respondent found otherwise.

348); Finding of Fact 10 (The reviewing court cannot evaluate the credibility or weight of the evidence. Tatum, 132 Wis. 2d at 417); Finding of Fact 11 (T at 23, 335, 452, 494); Finding of Fact 15 (The reviewing court cannot evaluate the credibility or weight of the evidence. Tatum, 132 Wis. 2d at 417); Finding of Fact 18 (T at 23, 335, 494); Finding of Fact 20 (What Petitioner states and what the Finding of Fact states are exactly the same.); Finding of Fact 21 (T at 26, 42, 52, 320, 506); Finding of Fact 22 (T at 406, 496); Finding of Fact 23 (T at 406, 496); Finding of Fact 26 (Petitioner's argument on this finding of fact is a characterization of what an article in a union newsletter stated and asserts that this characterization "is consistent with her testimony and does not justify the discipline." The court sees no relevance in this argument).

Questions of Law

A. The Protected Disclosure

Petitioner argues here that Respondent incorrectly identified the filing of the grievance as the disclosure protected by the act. Petitioner urges that it is the public disclosure she made, to the newspaper(s), that is the protected disclosure.

Section 230.81 discusses employee disclosure. Under this section there are two ways to disclose information to someone other than the employee's attorney, collective bargaining representative or legislator.[7] The employee shall do either of the following for protection:

[7]Also note, §230.81(2): "Nothing in this section prohibits an employee from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83."

> (1) An employee with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, he employee shall do either of the following:
>
> > (a) Disclose the information in writing to the employee's supervisor.
> >
> > (b) After asking the commission which governmental unit is the appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employee to receive information under this section.

§230.81(1)(a) and (b). Accordingly, if Petitioner wanted to disclose the information in this case to "any other person," or the newspaper(s), and she wanted protection under §230.83, stats., she would **first** have to follow the procedure delineated in subsection "a" or "b."

In the decision, Respondent stated, in pertinent part:

> Complainant argues that her protected disclosure satisfies the requirements of 230.81(1)(a). Section 230.81(1)(a), however, requires that the information be disclosed in writing to the employe's supervisor. In its decision in Morkin, the Commission interpreted this provision to extend to those in the employe's chain of command as well as to the employe's immediate supervisor. In the instant case, however, the record does not show that complainant provided to her immediate supervisor or anyone else in her supervisory chain of command a copy of her written disclosure, i.e. the union grievance relating to the presence of cockroaches in campus buildings. Complainant argues, however, that the Capital Times newspaper article provided those in her supervisory chain of command notice of the existence and content of such written disclosure and, as a result, satisfies the requirements of §230.81(1)(a), Stats. . . . The clear language requires more from an employee than publicizing the existence and content of such a writing in a newspaper, i.e. requires the employee to provide the written disclosure to one of his or her supervisors.

(Proposed Decision and Order at 11-12.) Petitioner's argument that she need not notify her supervisor because that individual had no authority to correct the problem, ignores the plain language of the statute. Having offered no legal argument to support her position that the court ignore the language of the statute, this court finds Petitioner's argument to be without merit. Accordingly, the court finds that Respondent correctly found that the disclosure that Petitioner identified as the "protected disclosure" in this case, the disclosure to the newspaper(s), was in fact not protected because petitioner failed to follow the procedure outlined in §230.81(1)(a), stats. Having so found, the court need not address Petitioner's other legal arguments in this section.

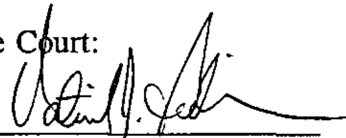
CONCLUSION

For the reasons stated above, Respondent's decision is AFFIRMED, and this case is DISMISSED.

IT IS SO ORDERED.

Dated this 19 day of November, 1997.

By the Court:



Patrick J. Fiedler, Judge
Circuit Court Branch 8

cc: Attorney Helen Marks Dicks
AAG John D. Niemisto