

LINDA SWENSON,

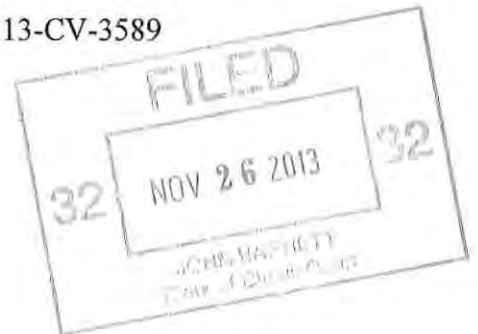
DEC - 6 2013

Petitioner,

DEPT OF LEGAL SERVICES

Case No: 13-CV-3589

vs.



WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

DECISION

This is a final decision per Wis. Stat. §808.03(1).

Linda Swenson, a former lieutenant with the University of Wisconsin-Milwaukee Police Department, seeks judicial review of a final decision of the Wisconsin Employment Relations Commission (“WERC”). WERC concluded that the University of Wisconsin System (“UWS”) had just cause to terminate Swenson’s employment because she violated work rules and failed to perform her supervisory responsibilities. WERC’s findings of fact are supported by credible and substantial evidence, and deference must be afforded to WERC’s legal conclusions.

Accordingly, this Court affirms.

Swenson served as the highest ranking officer below the Chief of Police, Michael Marzion. In October of 2009, Swenson received a written warning for a scheduling error she had made. On June 7, 2010, Marzion met with Swenson regarding potential discipline for: (1) telling a sergeant to deliberately leave things “undone so the chief won’t look much further” on an

upcoming inspection; (2) failure to follow directions from the Chief regarding training of sergeants; (3) failure to follow instructions regarding vehicle inspection duties; and (4) failure to adequately schedule coverage. After the meeting, Swenson received a three-day suspension. Although Swenson could have appealed the suspension, she declined to do so. The suspension was served on June 7–9, 2010.

When she returned to work, Marzion met with her to discuss his expectations and to give her instructions for an improvement plan. Swenson, on the advice of a friend, remained silent throughout the meeting. She sat with her arms crossed and appeared angry. After approximately fifteen minutes, Marzion ended the session, reasoning that nothing could be accomplished.

Shortly after the meeting, Swenson went to the women's restroom near her office. She vomited, and remained there, crying, for approximately twenty to thirty minutes. While Swenson was in the restroom, officers were involved in a confrontation with an individual, and the dispatcher used the radio to request other officers to assist. Swenson did not have her radio with her in the bathroom, so she did not hear the dispatcher's request. Meanwhile, multiple fire alarms went off in a thirteen-story campus building. Again, Swenson did not hear the radio traffic involving this incident. The dispatcher called Swenson's office telephone to get Swenson's permission to allow an officer, who was present in the office before her assigned shift, to respond. Swenson did not respond. Swenson was subsequently terminated for failing to supervise, and for "acting with extreme negligence in the performance" of her duties.

A hearing was conducted on April 7 and 11, 2011, to determine whether there was just cause for her termination. The hearing examiner found that Swenson was incapacitated and therefore unable to perform her duties. He resolved conflicting testimony in Swenson's favor,

and concluded that others were to blame for Swenson's actions (and inactions) which excused her misdeeds.

After consulting with the hearing examiner regarding credibility issues, WERC reversed. The agency found that UWS had just cause to terminate Swenson's employment for violating work rules and failing to perform her supervisory responsibilities. WERC concluded that Swenson was not incapacitated, and that the surrounding events did not mitigate or excuse Swenson's misbehavior. Swenson now seeks judicial review of WERC's decision.

Standard of Review:

A reviewing court will uphold WERC's findings of fact if they are supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6). "Substantial evidence" is evidence that is relevant, credible and probative, upon which reasonable persons could rely to reach a conclusion. WIS. STAT. § 102.23(6); *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54 (1983). The reviewing court's role is to search the record to locate credible evidence that supports WERC's findings, not for evidence to support findings WERC could have made but did not. *See Brakebush Bros. v. LIRC*, 210 Wis.2d 623, 630 (1997).

Because WERC has special competence and experience in applying the "just cause" standard for discipline, its legal conclusion on this issue is entitled to great deference. *See, e.g., Reinke v. Personnel Board*, 53 Wis. 2d 123 (1971).¹ Under the great weight standard, this Court will uphold an agency's interpretation as long as it is reasonable and not contrary to the statute's clear meaning, even if a different interpretation is more reasonable." *Stoughton Trailers, Inc. v. LIRC*, 2006 WI App 157, ¶ 16, 295Wis.2d 750.

¹ Swenson does not dispute that the great weight standard applies. In any event, the Court would reach the same result even if the lesser "due weight" level of deference applied.

Discussion:

In light of the deferential standard of review, the question presented on this appeal is simply whether there was a reasonable basis for WERC to conclude that just cause existed to terminate Swenson's employment. The Court is satisfied that there was.

Swenson does a remarkable job advocating for her position. She submits evidence and arguments that cast Marzion in a negative light. She provides a background and context that paint a picture in her favor. WERC could easily have reached a different conclusion.

Perhaps the bottom line is that there is ample evidence in the record to support the conclusion that Swenson should have made herself available during the incidents in question, and that Swenson chose not to be available. WERC found that Swenson was not incapacitated while in the restroom, and that she "lost her job because of a lapse in judgment." This Court is unwilling to disturb these factual findings, even though there is an abundance of evidence in the record to support different conclusions.

Swenson selectively cites portions of testimony that support the conclusion that her supervision was not required. She also makes numerous arguments to lessen the severity of the incidents. However, as stated by WERC:

Law enforcement personnel are expected to be available to address emergency situations. When a high ranking police supervisor fails to perform her duties because she chose to be unavailable, her subordinates were put at risk and discipline is warranted. Under the circumstances, this discharge was fully warranted.

In other words, WERC was concerned about potential severity, not actual severity in hindsight. Besides, even the dissent stated that "clearly there is potential harm to a police department's operations when the supervisor in charge is not readily available when incidents occur," and "[c]learly also, these were serious incidents."

Swenson argues throughout her brief that WERC ignored various portions of her testimony. This Court is not convinced. Reviewing courts apply a presumption of regularity to the proceedings before the agency. For example, in *Ashleson v. Labor & Indus. Review Comm'n*, 216 Wis.2d 23, 34 (Ct.App.1997), teachers argued that the reviewing court should assume that the Labor and Industry Review Commission did not, as required by law, consider whether each teacher was offered “reasonably similar” employment. According to the teachers, the court should have assumed that the Commission made this error because its decision did not clearly reveal the required consideration. *Id.* The court of appeals rejected this argument, explaining that “[t]he lack of express confirmation that [the Commission] reviewed the entire record before it is an insufficient basis upon which to rebut the presumption and conclude that [the Commission] in fact did ignore the record.” *Id.*

Swenson is correct in her assertion that, under principles of fundamental fairness, an agency is required to explain any decision that reverses the hearing examiner. *See, e.g., Mervosh v. LIRC*, 2010 WI App 36, ¶10, 324 Wis. 2d 134. In particular, an agency must (1) show that it has consulted with the hearing examiner regarding the credibility of the witnesses; and (2) prepare a statement setting forth the reasons, facts, and conclusions it relied upon when rejecting the hearing examiner's findings. After reviewing the record, this Court finds that WERC fulfilled these requirements. Although the hearing examiner indicated in his credibility conference with WERC that “he generally found [Swenson] more credible than Marzion,” the hearing examiner’s decision was premised on inferences drawn from the record rather than on the demeanor of the witnesses. WERC disagreed with the hearing examiner’s conclusion that Swenson was incapacitated, and that the surrounding circumstances mitigated Swenson’s conduct.

According to Swenson, WERC's credibility determinations are not supported by the record. In particular, Swenson testified that Marzion "told [her] that he had wanted to fire [her]," and that her assumption was that his goal was to fire her. Marzion denied making this statement. WERC found that Marzion's version of the events to be more credible. According to WERC:

Why would Marzion tell her he intended to fire her and in the same conversation discuss her future and his expectations? Why require her to put together a performance improvement plan if he intended to fire her? Even if he intended that result, why tell Swenson?

Swenson maintains that WERC erred in making this credibility determination because Swenson was talking about her previous discipline. In other words, Marzion did not tell her that he planned to fire her, but he did tell her that *he had wanted to do so* based on the acts that led to the three-day suspension. While Swenson's argument makes sense, this Court finds Swenson's testimony to be ambiguous, and this Court is unwilling to conclude that WERC erroneously interpreted an ambiguous statement. Besides, the record contains evidence that Marzion planned to *suspend* her for the previous incident, instead of firing her. Moreover, WERC was not convinced that Marzion would even have made such a statement.

Swenson also attacks WERC's conclusion that "[t]here is no evidence to support the conclusion that Swenson could not hear the telephone ring while she was in the bathroom because of her emotional state," and that the examiner's holding on this issue is "simply speculation." At first glance, WERC's conclusion would appear to be unreasonable in light of Swenson's testimony that she did not hear the phone ring. However, when reading the paragraph in its entirety, it becomes clear that Swenson's testimony was not ignored. Indeed, WERC went on to state that "Swenson herself obviously could not explain why she did not hear a telephone ring," and that there was "no basis to conclude *that her emotional state affected her ability to hear a phone.*" (emphasis added). In other words, WERC was explaining Swenson's alleged

incapacity, and *whether her alleged incapacity affected her ability to hear the phone ring.*

WERC's analysis and conclusion are reasonable.

Finally, Swenson criticizes WERC for not explicitly discussing the three-factor test set forth in a previous administrative decision, *Del Frate v. Department of Corrections*, Dec. No. 30795 (WERC 02/27/04). Under *Del Frate*, the underlying questions when considering the propriety of discipline are: (1) whether the greater weight of credible evidence shows the appellant committed the conduct alleged by respondent in its letter of discipline; (2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and (3) whether the imposed discipline was excessive.”

While this Court is not bound by administrative decisions, a brief discussion is appropriate. Again, there is a presumption of regularity in administrative proceedings, and the lack of an express citation to the *Del Frate* factors does not necessarily lead to the conclusion that these factors were ignored. The dissent cited and applied these factors, and presumably the majority considered and rejected the dissent's conclusion. In any event, WERC made all three determinations required by the test. WERC found that Swenson failed to provide supervision, that “discipline [was] warranted,” that “discharge was fully warranted,” and that “[t]he dissent's attempts to minimize or ignore the conduct which led to the suspension is misplaced.” WERC made these determinations after considering Marzion's testimony, which supports the conclusion that termination was appropriate.

CONCLUSION AND ORDER

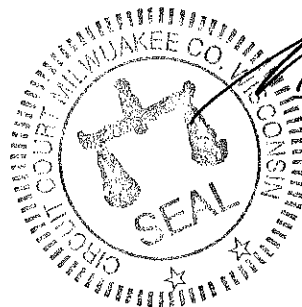
WERC reasonably concluded that just cause existed to terminate Swenson's employment. WERC's decision is reasonable in all other respects. **THEREFORE**, based upon a thorough

review of the record and the parties' briefs, **IT IS HEREBY ORDERED** that the decision of the Wisconsin Employment Relations Commission is **AFFIRMED**.

SO ORDERED.

Dated this 26 th day of November, 2013, at Milwaukee, Wisconsin.

BY THE COURT:



Michael Guolee

**Michael Guolee
Circuit Court Judge
Branch 32**