STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENNETH N. SORTEDAHL, Appellant

vs.

DEPARTMENT OF ADMINISTRATION and ST. CROIX COUNTY
DISTRICT ATTORNEY, Respondents.

Case 9
No. 71522
PA(adv)-211

DECISION NO. 34688-A

KENNETH N. SORTEDAHL, Appellant

vs.

DEPARTMENT OF ADMINISTRATION and ST. CROIX COUNTY
DISTRICT ATTORNEY, Respondents.

Case 11
No. 71694
PA(adv)-229

DECISION NO. 33915-A

Appearances:

Mr. William Haus, Attorney, Haus, Roman and Banks, LLP, 48 East Wilson Street, Madison, Wisconsin, appearing on behalf of Appellant Kenneth N. Sortedahl.

Ms. Paege Heckel, Chief Labor Relations Specialist, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin, appearing on behalf of Respondent, Department of Administration and the St. Croix County District Attorney. In addition, Mr. Michael Soehner, Chief Labor Relations Specialist, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin, appeared at hearing on behalf of Respondent, Department of Administration.

DECISION AND ORDER

Appellant Kenneth Sortedahl filed an appeal with the Wisconsin Employment Relations Commission contesting his partial layoff and reduction in base pay from the St. Croix County District Attorneys Office on January 31, 2012. Sortedahl filed a second appeal on July 27, 2012, contesting his layoff from his position with the St. Croix County District Attorneys Office.

The matter was heard on December 4 and 5, 2012, before Lauri A. Millot as hearing examiner. Briefing by the parties was completed by June 20, 2013. On January 28, 2014, Examiner Millot issued a Provisional Proposed Decision rejecting the layoffs. Subsequently, Sortedahl filed a motion for attorney fees and costs.

Examiner Millot issued a Proposed Decision and Order on June 11, 2014, awarding certain fees and costs. Respondents Department of Administration and St. Croix County District Attorney filed a written objection to the proposed order on July 11, 2014. Sortedahl also filed objections to the proposed decision. Briefing by all parties was completed by September 10, 2014. The Commission has reviewed the file and the complete record of proceedings including the transcript. The Commission has consulted with the examiner regarding her credibility impressions. We issue the following:

FINDINGS OF FACTS

1. Appellant Kenneth N. Sortedahl was employed as an assistant district attorney in the St. Croix County District Attorney's Office, on a one-half time basis from 2004 through 2008 and, thereafter, as a full-time employee until January 2, 2012.

2. Sortedahl earned $26.956 per hour and, as a State employee in the unclassified service, he received the customary fringe benefits.

3. The St. Croix County District Attorney is an elected position and has been held by Eric G. Johnson from 1989 through the present.

4. From the beginning of his employment through March 13, 2011, Sortedahl was covered by the terms of a collective bargaining agreement entered into between the State of Wisconsin and the Association of State Prosecutors.

5. During 2011, the St. Croix District Attorney employed three full-time assistant district attorneys with less seniority than Sortedahl. The three and their seniority dates were: Sharon Correll, January 17, 2008; Amber Hahn, January 5, 2009; and Elizabeth Rohl, January 3, 2011.

6. In September 2011, Johnson became aware that he would lose one full-time equivalent position because of the loss of a grant from the attorney general's office.

7. Effective January 1, 2012, Johnson reduced Sortedahl's employment to .20 FTE and arranged for Sortedahl to be appointed as a special prosecutor for 32 hours per week at the rate of $40.00 per hour. The special prosecutor work was as an independent contractor.

8. Kathleen Grosdidier who had worked part-time as an assistant district attorney for .20 FTE hours was laid off at the same time.

9. Johnson made the decision to substantially reduce Sortedahl's hours based upon his assessment that Sortedahl was the weakest performer among the full-time assistant district attorneys.

10. In the spring of 2012, Johnson learned he would lose another assistant district attorney position as a result of the loss of another grant.

11. Effective July 1, 2012, Johnson eliminated Sortedahl's .20 FTE position as he had previously determined Sortedahl was the least capable of the assistants.

12. Johnson reduced Elizabeth Rohl to a .20 FTE position. The selection of Rohl was based upon his judgment that the three post-2007 hires were all substantially equivalent in their abilities and Rohl was selected because she was the newest hire.

13. In the same timeframe, the most senior assistant district attorney, Francis Collins, announced his intention to retire. He was the most experienced assistant and responsible for the most serious matters.

14. Johnson sought applicants for the position and Sortedahl as well as others applied.

15. Johnson hired Michael Nieskes, a former district attorney in Racine County and circuit court judge. Nieskes had strong qualifications for the position.

Based on the foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §§ 230.44(1)(c) and 230.45(1)(a), Stats.

2. The Respondents, Wisconsin Department of Administration and St. Croix District Attorney, have established just cause for the decision to reduce the pay and partially layoff Sortedahl on January 1, 2012.

3. The Respondents have established just cause for the decision to layoff Sortedahl on July 1, 2012.

4. Sortedahl had no recall or restoration rights to a position in the St. Croix District Attorney's Office and, to the extent he asserts a claim that he should have been rehired, we lack jurisdiction over such a claim.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

That the decisions of the Respondents' are affirmed in all respects.

Dated at Madison, Wisconsin, on the 11th day of November 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

We reject the examiner's reasoning and analysis in its entirety and conclude that the St. Croix County District Attorney had just cause for its decision to layoff and reduce the hours of Appellant Kenneth Sortedahl.[1]

First Layoff

Late in 2011, the St. Croix County District Attorney Eric Johnson was advised that he would lose funding for one full-time assistant district attorney position effective December 11, 2011. There is no dispute that the need to reduce the size of the assistant district attorney workforce was legitimate. The standard in evaluating whether there was just cause for the layoff is set forth in *Weaver v. Wisconsin Personnel Board*, 71 Wis.2d 46, 237 N.W.2d 183 (1976). Essentially, the court required that in order to establish just cause for an economic layoff the appointing authority need only prove that it acted in accordance with statutory requirements and that the decision was not arbitrary and capricious. The court clearly recognized that the decision as to who would be selected for layoff involved the exercise of subjective judgment.

In a reduction in force situation the employer is often called upon to make difficult selections among a staff of competent individuals. That task may be incrementally more difficult when selecting among a group of professionals. Johnson who had been in office for over twenty years employed an attorney staff of seven individuals. Two were long-time employees and the other five relatively short in terms of tenure with the office. Sortedahl had been employed as a part-time employee from 2004 to 2008 and full time thereafter. The other four "newer" staff were hired between 2003 and 2011. Johnson made the decision to reduce Sortedahl from full time to .20 FTE and Grosdidier who held a .20 FTE position was laid off. Johnson also arranged to have Sortedahl appointed as a special prosecutor for 32 hours per week. He was treated as an independent contractor for those hours and received payment of $40.00 per hour. His regular hourly rate while employed was $26.956 per hour.

When asked why he selected Sortedahl over the individuals he retained, Johnson stated:

> … in my opinion, his performance and his possible future performance were not as good as – as them. And a couple of the young lawyers with less seniority have some real potential that I saw and that could be – could be excellent lawyers. And if I'm going to rate them, I would have rated them an "A" whereas I would rate Ken as a "C." And so that's how I made the decision for Ken.

[1] Strictly speaking Sortedahl's first "layoff" was a reduction in hours of work and the second event was a layoff. We use the terms interchangeably as there is no difference in our analysis.

Tr.50-51.

The examiner found that Johnson's letter grade ranking was a "system" and that there was no structure to the system. We reject that analysis. Johnson's use of letter grades was simply an offhand means of describing the relative difference between Sortedahl who he considered "average" and several others he considered "superior." The fact that Johnson did not have "documentation" to support his judgment is irrelevant. Johnson was a veteran prosecutor who held his office for more than 20 years. Clearly, Johnson was in a position to form considered judgments about the seven lawyers who worked for him. As the supervising attorney in a small office, he no doubt would have received information from a variety of persons. To suggest that Johnson was incapable of evaluating his small staff because he lacked "paper" or a "system" to back up his judgment is simply wrong. The examiner found that the absence of a formal annual evaluation process somehow undercut Johnson's oral assessment of his attorneys' relative merits. We disagree with that reasoning. Annual performance reviews are often nothing more than "atta boys" designed to justify merit pay increases. *See, gen., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1398 (7th Cir. 1997) ("Employee evaluations like school report cards serve a variety of purposes only one of which is objective evaluation. They are also morale builders and motivators."); *Pryor v. Seyforth Shaw Fairweather and Geraldson*, 212 F.3d 976, 979 (7th Cir. 2000) ("It is common for supervisors to overrate their subordinates for purposes of building morale, avoiding conflict and deflecting criticisms that the supervisor isn't doing a good job … ."). They seldom reflect accurate judgments about employees' capabilities. What purpose would a series of annual evaluations rating Sortedahl as "average" have done to encourage hard work and improved performance? What is important here is Johnson's evaluation, not whether it is memorialized on some Department of Administration form.

The examiner also seized on two elements of the layoff process which she believes supported her conclusion that Johnson lacked just cause for the initial layoff decision.

Johnson learned sometime late in the year that he would lose funding for one full assistant district attorney position. The funds would run out on December 11, 2011. Johnson obtained County funding for two and one-half more weeks to keep Sortedahl employed until the start of January 2012. Sortedahl argued that the purpose of the delay was to avoid the application of the seniority provisions of the collective bargaining agreement. The beginning of January 2012 marked the effective date for the 2011-2013 compensation plan which provided that for unclassified employees the decision as to who was to be laid off was at the discretion of the employer. The problem with the examiner's analysis is that the collective bargaining agreement was cancelled in March of 2011. Any uncertainty as to its continuing viability was extinguished with the Supreme Court's decision in *State ex rel Ozanne v. Fitzgerald*, 2011 WI 43, 374 Wis.2d 70, 798 N.W.2d 439. When Act 10 became fully effective following the court's decision in June 2011, it was clear the state prosecutors union had no collective bargaining agreement in force. While there may have been confusion among some at the Office of State Employment Relations

as to what standards may have been applicable, it is clear that the seniority provisions of the prosecutors' collective bargaining agreement were null and void as of June 2011.[2]

Even if we assume that Johnson's two or three week "extension" of Sortedahl's employment was motivated by a desire to avoid either administrative or contractual restrictions, we believe that does not demonstrate improper motive. Individuals and institutions frequently adjust their behavior based upon pending changes in the law. A number of unions rushed to enter collective bargaining agreements during the spring of 2011 in anticipation that the Supreme Court would uphold Act 10. Pending tax increases or decreases often compel changes in behavior before the change becomes effective. We assign no improper motive to Johnson's desire (if one existed) to take advantage of the discretion available to him.

The examiner was also apparently troubled by the layoff letter Sortedahl received in which Johnson stated that Sortedahl's position "is funded by a grant from the Wisconsin Attorney General's office" and that the loss of the grant "forced" the reduction of hours. Jt.Ex.20. From a budgetary standpoint grants are not directly tied to specific positions and therefore the statement was not literally true. Johnson apparently did not understand the particulars but, in any event, the misstatement had no adverse impact on Sortedahl. He filed a grievance on December 22, 2011 challenging the decision and a formal civil service appeal with the Wisconsin Employment Relations Commission on January 31, 2011. Jt.Exs.1, 2. Johnson's misstatement of fact is just that and is not evidence of improper motive.[3] The reality is the letter would have helped Sortedahl if he was seeking employment elsewhere. It would provide a ready explanation for his departure from the District Attorney's office and avoid questions about why he was selected.

Johnson clearly satisfied his burden of proof when he explained that in his considered judgment Sortedahl was the weakest of his five assistants. Sortedahl made no effort to prove that his skills were clearly superior to those of the four who remained. He chose to attack the process rather than the result. Additionally, the fact that Sortedahl was offered and accepted an appointment as a special prosecutor, a position he held continuously through the time of the hearing, demonstrates that Johnson was not using the layoff as a subterfuge to get rid of him. Although the change in status resulted in a loss in benefits his gross income increased significantly.[4] Johnson clearly met his burden of demonstrating just cause for his decision.[5]

July Layoff

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[2] The examiner's statement of the legal status of the expired contract contained in Proposed Finding of Fact No. 14 is simply wrong.

[3] Johnson readily acknowledged that his decision to reduce Sortedahl's hours was not directly forced by the grant reduction but rather was a consequence of the loss of funding.

[4] Sortedahl's pay rate as an assistant district attorney was $26.956 per hour. Assuming a 2,080 hour work year, that would generate $56,068 in annual income. A .20 FTE would generate $11,213 in annual salary, plus 1,664 special prosecutor hours at $40 per hour ($66,568) would result in a total annual income of $77,773.

[5] Inexplicably the State raised the issue of Sortedahl's job performance in 2006 which led to a one-year performance improvement plan. Given the fact that the event occurred six years prior to the layoff, together with the lack of evidence that it played *any* role in Johnson's decisions, we agree with the examiner's conclusion that it is of no evidentiary value.

In July 2012, the District Attorney's office lost another position as a result of the loss of another grant. Johnson made the decision to reduce Assistant District Attorney Rohl from full time to .20 FTE and to eliminate Sortedahl's .20 FTE position. In the interim between January and July 2012, Sortedahl had obtained a .50 FTE position with the Polk County District Attorney's office. He was working .20 FTE of his time at St. Croix County as an employee, .30 FTE as a special prosecutor and the balance at Polk County. Johnson applied the same rationale he used in January in reducing Sortedahl's .20 FTE position. For the remaining .80 FTE reduction, Johnson chose Rohl, the least senior of the remaining individuals who had been hired since 2008. He described it as a difficult choice.

The examiner concluded that Johnson "could not have it both ways," i.e. using seniority among the three remaining individuals after having used merit with Sortedahl. The examiner described the process as "irrational" which in in our judgment is illogical. In Johnson's judgment, Sortedahl was clearly well below Correll, Hahn and Rohl who he viewed as superior in terms of their skills. To choose between three people who were all very good performers he opted to use seniority. He had the discretion to use whatever lawful standard he choose. The fact that he used merit in the first reduction does not foreclose his use of a different standard in a subsequent layoff.

There is nothing in the record contradicting Johnson's evaluation of his staff. He had a close call with regard to selecting one of the three and took the easy way out. Easy is not synonymous with irrational. We find no fault with the methodology and conclude that there is ample just cause for the decision.

Although characterized as an argument that Sortedahl was "constructively discharged" the gist of the claim is that Sortedahl was not the subject of an economic layoff but rather the victim of an improper retaliatory motive. If that were the case, it would undermine the legitimacy of the layoff decision rendering it arbitrary and capricious.

Sortedahl offered no evidence that Johnson had any motive other than his judgment regarding the relative strengths of the assistant district attorneys. The decision to replace Collins with Nieskes (rather than retain Rohl or return Sortedahl to full-time status) was logical and understandable given the need for an experienced prosecutor. Johnson faced a triple homicide which would clearly tax the resources of a small district attorney's office.[6]

Ultimately, as the examiner found, Johnson's decision to utilize Sortedahl as a special prosecutor belies any improper motive. If Johnson wanted to retaliate against Sortedahl, he selected an odd way of doing so. While the special prosecutor position lacked the fringe benefits of regular employment, it did carry the opportunity for significantly increased compensation.

[6] The fact that the Attorney General ultimately provided an assistant attorney general to help try the case rather than use Nieskes does not undermine the legitimacy of the concern at the time of hire. The examiner's reference to the result as "obscene" is a reckless overstatement of the incident.

There is simply nothing in the record to support the claim that Johnson's decision was a pretext for some improper motive.

Failure to Rehire / Recall

As the examiner correctly concluded, Sortedahl had no right to recall or restoration in July 2012. Johnson was free to hire whomever he chose for a vacancy which occurred as a result of the retirement of his most senior, experienced assistant. The successful applicant, Mike Nieskes, had been a district attorney for eight years and a deputy district attorney for twelve years in Racine County. He had served as a circuit court judge and possessed the skills necessary to fill a key spot in Johnson's office. Sortedahl applied to fill the position but was not selected. Clearly, Nieskes had superior qualifications and Sortedahl had no recall or restoration rights.[7]

Most importantly, our jurisdiction under § 230.44(1)(c), Stats., is limited to appeals from discharges, layoffs, demotions or reductions in base pay. Our involvement in hiring decisions is limited to conduct which is illegal or an abuse of discretion within the classified service. Sortedahl of course was in the unclassified service.

[7] As noted *infra*, the labor agreement between the State of Wisconsin and the Association of State Prosecutors had been cancelled effective March 13, 2011. Jt.Ex.11.

Dated at Madison, Wisconsin, on the 11th day of November 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner