

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 1

DANE COUNTY

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J RETELLE,

Petitioner,

v.

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

Respondent.

**FILED**

**FEB - 7 2017**

**DANE COUNTY CIRCUIT COURT**

Decision and Order  
Case No. 2016CV0463  
Administrative Agency  
Review: 30607

[RE: WERC Decision No. 36113]

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Petitioner J Retelle seeks judicial review under Wis. Stat. §§ 227.52-227.57 of a decision of the Wisconsin Employment Relations Commission (WERC) under the Wisconsin Civil Service Law, *see* Wis. Stat. ch. 230, subch. II. Retelle challenges the Commission's decision and order concluding that the University of Wisconsin System (UWS) had just cause to terminate his employment.

The facts and procedural history of the case have been laid out quite clearly in the Commission's decision, respondent's briefing, and briefing by UWS before the Commission, thus it is not necessary to repeat them in great detail. Retelle contests the accuracy of the Commission's presentation of certain facts; however, notwithstanding what are likely typographical errors concerning dates,<sup>1</sup> I find substantial evidence in the record to support the Commission's findings. The following facts are most relevant to my decision.

UWS hired Retelle in May 2006. WERC Hr'g Tr., July 7, 2015, 121. At the time of his discharge in September 2014, Retelle was an Animal Research Technician—Senior at the

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<sup>1</sup> WERC's Decision and Order No. 36113, Findings of Fact # 3 and 4 state that specific events occurred in 2015, rather than in 2014. These errors are not continued in the "Memorandum Accompanying Decision Order."

University of Wisconsin (UW) School of Medicine and Public Health, Department of Laboratory Animal Services. Tr. 15-17, 121; Ex. R. 107, 109. UWS discharged Retelle effective September 25, 2014, as a result of his actions during September 1-22 of that year. Ex. R. 101 at 1.

On September 2, 2014, Retelle's supervisor, Richard Carson, instructed Retelle, both orally and in writing to allow a colleague, Dale Maurer, to accompany him along his route. Tr. 19-21, 23-26, 51-53, 66. Retelle asserted that it was not in his position description to provide training and declined to do so. Tr. 20-21, 23, 172-73. Carson indicated that refusal to follow his instructions was insubordination and grounds for possible discharge. Tr. 24-25, 214; Ex. R. 114. Retelle still declined to follow Carson's instruction. Tr. 24. Carson discussed how to move forward with his superior, Jared Hammer, and human resources manager Kristin Vieth. Tr. 79, 82, 118-120. When both Carson, and later Hammer, attempted to contact Retelle to discuss a pre-disciplinary hearing, Retelle refused to speak with them. Tr. 83-85. Retelle received notice of a pre-disciplinary hearing on September 19, while on vacation. Tr. 125. The hearing was held upon his return on September 22. Tr. 41. Retelle submitted a written statement at the hearing. Tr. 87, Ex. R. 117. He was placed on paid administrative leave pending a decision about discipline. Ex. R. 118. Following the hearing, Hammer and Vieth made the decision to discharge Retelle based on his refusal to permit Maurer to ride along with him. Tr. 90, 116-117, 119-122, 169.

Retelle filed a grievance on October 21, 2014, followed by a civil service appeal to WERC on March 24, 2015. Hearing examiner William C. Houlihan conducted an administrative hearing on July 7, 2015. He issued a proposed decision and order, concluding that UWS had just cause to discharge Retelle on October 26, 2015. Retelle filed written

objections to the decision on November 25. The Commission issued its own decision and order, affirming the hearing examiner's decision on January 20, 2016. Retelle commenced this action for judicial review on February 19, 2016.

### STANDARD OF REVIEW

WERC's interpretation of the Wisconsin Civil Service Law is entitled to "great weight deference," meaning that its conclusions of law must be affirmed if they have any rational basis. *Bd. of Regents v. State Personnel Comm'n*, 254 Wis. 2d 148, 174-175, 646 N.W.2d 759 (2002). This is true even if a court believes another interpretation is more reasonable. *Id.* The state supreme court has previously held that: (1) the legislature has charged WERC with the duty of administering this statute; (2) WERC (and its predecessor agencies)<sup>2</sup> have long-standing experience interpreting and applying the just cause standard for discipline; (3) WERC employs its expertise and special knowledge in deciding cases such as this one; (4) and WERC's interpretations provide uniformity and consistency in applying the statute. *Id.* Likewise, WERC's interpretation in this case is intertwined with the factual determinations and involves value and policy judgments that balance the interests of employers and employees. *See W. Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n*, 121 Wis. 2d 1, 12, 357 N.W.2d 534, 540 (1984).

WERC's findings of fact must also be affirmed as long as they are supported by substantial evidence in view of the entire record. *See Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion after considering all the record evidence. *See Milwaukee Symphony Orchestra, Inc. v. Wis. Dept. of*

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<sup>2</sup> WERC succeeded the Personnel Commission in July 2003 as the agency that hears and defends civil service appeals. *See* 2003 Wisconsin Act 33.

*Revenue*, 2010 WI 33, ¶ 31, 324 Wis. 2d 68, 781 N.W.2d 674. An agency's findings of fact must be set aside only when a reasonable fact-finder could not have reached the findings from all the evidence before the agency, including available inferences. *Id.* It is for the agency, and not the court, to assess the weight and credibility of evidence. *Id.*; Wis. Stat. § 227.57(6). A court may not overrule an agency's determination of fact, where the evidence in the record supports conflicting views. *See Robertson Transport. Co. v. Public Service Comm.*, 39 Wis. 2d 653, 658, 159, N.W.2d 636 (1968). In short, the court is confined to the determination of whether there was "any credible evidence to sustain the findings that were in fact made." *E.F. Brewer Co. v. ILHR Department*, 82 Wis. 2d 634, 636, 264 N.W.2d 333 (1978) (citing *Unruh v. Industrial Comm.*, 8 Wis.2d 394, 99 N.W.2d 182 (1959)).

#### DISCUSSION

The Commission reasonably concluded that UWS had just cause to discharge Retelle.

Wis. Stat. § 230.34(1)(a) states:

It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior, as determined by the appointing authority, but only after imposing progressive discipline that complies with the administrator's standards under s. 230.04(13m).

In *State ex rel. Gudlin v. Civil Serv. Comm'n of City of W. Allis*, the Supreme Court of

Wisconsin held that just cause exists where:

some deficiency has been demonstrated which can reasonably be said to have a tendency to impair [an employee's] performance of the duties of his position or the efficacy of the group with which he works . . . . It must, however, also be true that [the conduct complained of] . . . in violation of important standards of good order can be do substantial, oft repeated, flagrant or serious that his retention in civil service will undermine public confidence in the municipal service.

27 Wis. 2d 77, 87, 133 N.W.2d 799, 805 (1965). The burden is on the state agency that discharges an employee to show just cause existed to a reasonable certainty by a

preponderance of the evidence. *Reinke v. Personnel Board*, 53 Wis. 2d 123, 132-33, 137, 191 N.W.2d 833 (1971). WERC's task was to decide whether Retelle actually was guilty of the misconduct cited by the state agency, and whether the discipline imposed was excessive. See *Safransky v. State Pers. Bd.*, 62 Wis. 2d 464, 472, 215 N.W.2d 379, 383 (1974).

Substantial evidence in the record supports the Commission's finding that Retelle was insubordinate. Tr. 119-122, 175-183. Retelle refused to perform a specific duty assigned by his supervisor. Tr. 122:19-25. Cross training with coworkers was a part of his job description. Tr. 18:7-20, 122:21-23. Human resources determined that this was a reasonable request. Tr. 133:6-19, 181:1-13. His supervisors took specific measures to inform him of their expectations, which he refused to accept, and Retelle went so far as to avoid communication about the issue with Hammer in-person on a loading dock. Tr. 24-25, 83-85, 211, 214; Ex. R. 114.

Retelle's refusal constituted deficient performance on his own part, and also impacted the work unit's efficacy. Tr. 122:19-25. At the administrative hearing, Carson and Hammer also explained that Retelle was the only other certified driver beside Carson and that Retelle's scheduled vacation without additional coverage would make it challenging for the unit to perform its duties. Tr. 20:8-21:6, 78:6-9. Although Retelle presented witnesses who testified to the contrary (Tr. 201:13-15, 208:11-17), it was in the Commission's discretion which testimony to assign greater weight and credibility to in reaching its conclusions; the court cannot overrule the Commission's factual findings where substantial evidence exists in the record to support them. *Robertson Transport.*, 39 Wis. 2d at 658.

There is clear precedent that an act of insubordination can constitute grounds for termination. *Merhemic v. University of Wisconsin System*, Decision No. 34020-C, 34021-C,

34022-C (WERC 9/14). Likewise, WERC has adopted the “work now, grieve later” doctrine. *See Nehmer v. Department of Corrections*, Decision No. 34972 9WERC, 6/14). This means that except in certain exigent circumstances, an employee should first follow a supervisor’s directive and file any formal grievance after the fact. An employee need not follow a supervisor’s directive to do something dangerous or illegal, but must follow a valid directive, even if the employee disagrees, and challenges the order later. Tr. 176:12-23; *see also Nehmer*, Dec. No. 34972.

Retelle argued, at the hearing, that his refusal was based on safety concerns about Maurer’s lack of training for the specific duties of Retelle’s position. Carson and Hammer testified, however, that the instructions clearly were to allow Maurer to ride along to develop familiarity with the route and facilities, not to train Maurer in handling animals or skills specific to Retelle’s role. Tr. 51:7-22, 72:15-73:3, 177-178. Furthermore, substantial evidence in the record supports the conclusion that Retelle did not voice specific concerns about the potential health and safety risk of having Maurer ride along with him to his supervisors prior to refusing to perform the task assigned. Tr. 197:2-198:7.

UWS determined that progressive discipline was not warranted in this case. Tr. 117:3-5; Ex. R. 101. Under Wis. Stat. §230.04(13m), administrators are required to establish policies for progressive discipline, and “[t]he standards established under this subsection shall allow an appointing authority to accelerate progressive discipline if the inadequacy, unsuitability, or inferiority of the personal conduct or work performance for which an employee is being disciplined is severe.” Although the record reflects that Retelle had a good record of employment with UWS, Tr. 89:1-12, the Director of Workforce Relations at UW-Madison, Patrick Sheehan, testified that instances of insubordination are highly unusual; he recalled only

one other case similar to Retelle's, which also resulted in termination. Tr. 185:7-18. Sheehan also testified that failure to obey work-related directives in an area like animal transportation services has the potential to result in substantial economic damages, derail research, and even cause harm to animals. Tr. 186: 22-16. Although Retelle cites safety as a justification for his refusal to comply, in fact, his insubordination undermined the trust his employers placed in him and created an unnecessarily contentious, and potentially risky, situation. Sheehan considered mitigating factors before deciding that termination was the appropriate response, consistent with actions taken in similar circumstances. Tr. 185, 189:8-190:8. The record supports the conclusion that this was not excessive punishment.

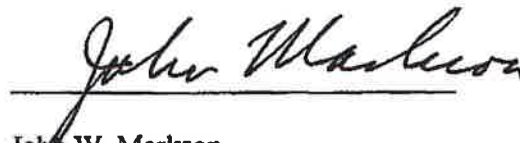
#### CONCLUSION

There is substantial evidence in the record to support WERC's decision that UWS had just cause to terminate Retelle. WERC could reasonably conclude that Retelle's actions constituted insubordination, in violation of his work rules, and were sufficiently egregious not to warrant progressive discipline. Even if I were to apply a "due weight" standard, I would have to affirm the Commission's legal conclusions unless there were a *more* reasonable interpretation of events than the one that the facts support here. *See UFE, Inc. v. LIC*, 201 Wis. 2d 274, 286-87, 548 N.W.2D 57 (1996). I do not believe this to be the case.

For these reasons, WERC's Decision No. 36113 is **AFFIRMED**. This decision is final for the purpose of appeal.

BY THE COURT:

Dated February 7, 2017

A handwritten signature in cursive script, reading "John W. Markson", written over a horizontal line.

John W. Markson  
Circuit Court Judge

cc: J. Retelle  
AAG David Charles Rice  
Atty. Corey F. Finkelmeyer