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Kewaunee County, WI
2019CV000028

BY THE COURT:

DATE SIGNED: January 7, 2020

Electronically signed by Keith A. Mehn
 Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

KEWAUNEE COUNTY

Robert D. Stroess,

Petitioner,

Decision and Order

-vs-

Case No.: 19 CV 28

State of Wisconsin Employment Relations Commission,

RE: [WERC Dec. No. 37483-A]

Respondent.

Petitioner Robert Stroess (“Stroess”) requests judicial review under Wis. Stats. §227.52-227.57 of the Decision and Order of the Wisconsin Employment Relations Commission (“WERC”) dated April 11, 2019. The Decision and Order determined that in April 2014, Stroess was properly classified as a Special Investigative Warden.¹

ISSUES

Stroess argues that the issue, in this case, is whether there is substantial evidence to support the conclusion of WERC that Stroess’ position was properly classified as a Special Investigative Warden in 2014. All parties agree that as of 2016, Stroess was performing the job

¹ While the Decision in this matter, in some places mislabeled Stroess’ position in 2014 as a Special Administrative Warden rather than Special Investigative Warden position, it is clear from the memorandum accompanying the Decision and Order and the Findings of Fact and Conclusion of Law that WERC understood the appropriate comparison between a Special Investigative Warden and an Administrative Warden.

of an Administrative Warden. Stroess argues that to determine if his position was properly classified, it must be determined whether or not his duties changed between 2014 and 2016. Stroess also argues that the effective date of reallocation should be the date of hire since the position was misclassified due to error. Stroess argues past practice when correcting errors has been to use the hire date. Additionally, Stroess cites ER 29.05, which provides that pay may be retroactive if done to correct an error. Stroess suggests that since WERC did not make a determination regarding an effective date of the reallocation that this Court should make a De Novo determination of that issue.

WERC argues that Stroess' position was properly classified in 2014. Additionally, WERC points out that there was testimony that, even if it was improperly classified in 2014, the effective date of the change of classification would still be July 10, 2016. That date was the beginning of the first pay period after Stroess asked his supervisor on June 28, 2016, to have the classification reviewed. However, WERC did not argue that position in its brief because, given the finding of proper classification as a Special Investigative Warden in April 2014, it never addressed the issue of the effective date in its decision. WERC suggested that if the Court reverses WERC's decision and order regarding proper classification, the Court should consider remanding the case to WERC to determine the effective date.

STANDARD OF REVIEW

This is an action for certiorari, and therefore the review is conducted based on the record of the proceedings below. The Court shall set aside or modify the agency action if the Court finds that the agency erroneously interpreted a provision of law, and a correct interpretation compels a particular action. An agency's interpretation of a statute is entitled to no deference at all. However, due weight shall be accorded to the experience, technical competence, and specialized knowledge of the agency involved, as well as the discretionary authority conferred upon it. Due weight is a matter of persuasion, not deference.

Regarding WERC's findings of fact, they must be affirmed if they are supported by substantial evidence in the record. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion after considering all the record evidence. An agency's findings of fact may be set aside only when a reasonable fact-finder could not have reached the finding from all the evidence before the agency, including the available inferences from that evidence. Where there are two conflicting views of the evidence, and each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. The weight and credibility of the evidence are matters for the agency and not for the reviewing court to determine. When more than one inference reasonably can be drawn, the agency's finding is conclusive. In Chapter 227 Judicial Review Proceedings the burden rests upon the party seeking to overturn the agency's decision.

FACTS

Christopher Groth ("Groth") is employed by the Wisconsin Department of Natural Resources ("DNR") as a Conservation Warden and Supervisor. In 2013, he began working on a position description ("PD") for a new position to be created within the team he supervised. Groth was looking to have some of his duties transferred to this new position, including the Wholesale Fish Dealer Program, which is a program with statewide responsibility. Groth sent the PD for review to James Feldhausen ("Feldhausen"), a Human Resources Specialist at the DNR, who classified the position as a Conservation Warden 3, a regular Field Warden. Groth did not believe that Conservation Warden 3 was a proper classification. Feldhausen told him in order to qualify this position as a Special Investigative Warden that the position had to have at least 50% investigative duties. Groth then re-wrote the PD to change the word "enforcement" to "investigations". After these changes to the PD, Feldhausen classified the position as a Special Investigative Warden. Groth became Stroess' immediate supervisor on April 6, 2014, when Stroess accepted the position of Special Investigative Warden within Groth's team. Stroess worked under Groth until a restructuring in 2016.

Stroess expressed concerns regarding the PD and thought that many of the duties matched duties assigned to Administrative Wardens. Groth said that the determination of the classification for this position was a human resources decision, but agreed that part of the job would include the Wholesale Fish Dealer Program but not commercial fishing, as that was handled by the individual regions, but Stroess would be a liaison.

Groth believed that the PD accurately described the duties assigned to Stroess' position. He testified that Stroess was performing an audit function and an investigative function and that the time spent on each was about the same. He also stated that oversight regarding these positions was within the Northeast Region.

Groth testified that Stroess' duties included investigation and that duties of management of complex civil and criminal commercial fish and wholesale fish dealer investigations were not considered statewide unless Stroess was helping wardens in other areas to manage those investigations.

In addition, Groth testified that when Stroess came into the position, he had the investigative skills to do the job but needed to understand the industry to help him in those investigations. Stroess was to reach out and have some liaison with other people.

Groth testified that, from his perspective, the word "investigative" was a better description than "administrative" in terms of what Groth understood as to what the job would entail. Groth said that the only thing that would have been administrative would have been the Wholesale Fish Dealer Program. When asked if Stroess had to get to know the players, Groth said yes. He did not believe that those duties were administrative.

After a restructuring in 2016, Stroess was assigned to a new team reporting to Stefan Fabian ("Fabian"). Fabian's immediate supervisor was Karl Brooks ("Brooks"). Brooks subsequently reviewed Stroess' PD and concluded Stroess was acting in a statewide capacity

similar to other Administrative Wardens. There was a new PD drafted, and Brooks concluded that Stroess had been doing the work as described in the new PD since April 6, 2014.

Fabian also reviewed the original PD and found it vague, but believed the position should be reallocated and classified as an Administrative Warden position. He also believed that Stroess' duties had not changed. However, Fabian testified that he had very little firsthand knowledge and not in great detail of what Stroess was doing with commercial fishing or wholesale fishing in 2014 and 2015.

Peter Flood ("Flood") is an Executive Human Resources Specialist with the Division of Personnel Management at the Department of Administration ("DOA"). He testified that he disagreed that Stroess was performing Administrative Warden duties when he was hired in 2014. Flood testified that there were logical and gradual changes in Stroess' job duties. Flood also testified that he reviewed performance evaluations to assist in determining whether Stroess' actual duties changed over time. He cited four evaluations the first year that mentioned specific investigations and regional responsibilities, but no reference to any statewide responsibilities.

Stroess testified that Flood misinterpreted the performance evaluations and pointed out numerous statewide duties among the goals listed on those performance evaluations. Stroess also testified that, prior to assuming the job as Special Investigative Warden as of April 6, 2014, he expressed concerns to Groth about the PD and that he believed the PD language matched duties assigned to Administrative Wardens. Stroess also sent an email to Groth about his concerns that his duties corresponded to an Administrative Warden position and that his duties

did not change over time. Stroess testified that the repeated use of the word “investigation” in the PD leads to a misinterpretation of his actual duties. After the restructuring, Stroess was moved to a new team, and he discussed those issues with his new supervisors. After the PD was revised, the position was reallocated to Administrative Warden effective July 10, 2016.

DISCUSSION

It is clear from the facts in this matter that Stroess has been convinced from the beginning of the hiring process that his position should have been classified as an Administrative Warden. He expressed his concerns early and often to his supervisors; although, it is of note that the original PD for this position was classified as a Conservation Warden 3, a regular Field Warden, and the PD was then amended to enable it to be classified as a Special Investigative Warden. Stroess was hired for that position as a Special Investigative Warden.

There was testimony from Stroess, Groth, Feldhausen, Fabian, Brooks, Flood, and others about how this position was created and the job duties Stroess performed between 2014 and 2016 and thereafter. The testimony of Fabian, Stroess’ immediate supervisor after the 2016 restructuring, was that Fabian found the original PD vague, but he believed that Stroess’ duties had not changed since he was hired. This testimony was tempered by the fact that Fabian had very little first-hand knowledge and not in any great detail of what Stroess was doing in 2014 and 2015. Fabian’s supervisor was Brooks, who concluded that Stroess had been doing the work as described in a second revised PD since April 6, 2014. Brooks had limited knowledge of Stroess’ activities in 2014 and 2015.

The testimony of Flood conflicted with that of Fabian and Brooks as Flood concluded that Stroess had not been performing the duties of an Administrative Warden in 2014 and 2015. This testimony was not first-hand knowledge but was based upon a review of the record, including performance evaluations.

Faced with conflicting evidence, WERC made its findings of fact and conclusion of law. According to the memorandum accompanying the Decision and Order, WERC made its findings “based largely on the disinterested and credible testimony of Stroess’ direct supervisor in April 2014”, that being the testimony of Groth. Groth was the person who wrote the PD, rewrote the PD to ensure it was not classified as a regular warden, and was Stroess’ supervisor in 2014 and 2015. No one was in a better position to know the duties of Stroess from April 6, 2014 to 2016.

Stroess asserts that WERC’s legal conclusions based on the testimony are not supported by substantial evidence, and therefore the Decision and Order must be reversed. Stroess argues that Groth’s testimony does not support the findings of WERC. Stroess points to Groth’s testimony that when Groth wrote the PD, he wanted to move some of the statewide responsibilities to the new position and that Stroess’ job duties did not change from the date of hire to 2016 when Groth stopped being Stroess’ supervisor due to a restructuring of the DNR. Further, he claims that this is not a case where competing views of the evidence might yield different conclusions.

However, Groth made it clear that, while Stroess had statewide responsibility for the Wholesale Fish Dealer Program, he did not have statewide authority over commercial fishing. Each individual region had responsibility for commercial fishing enforcement in their region, but Stroess would be a liaison with other investigative wardens with commercial fishing enforcement. While some of Groth's testimony may have been vague, he testified that Stroess was performing an audit function and an investigative function, and the time spent on each was about the same. Groth thought investigative was a better description than administrative in terms of what Groth understood the job would entail. Only the Wholesale Fish Dealer Program would be statewide, and getting to know the players in the industry, which was needed when Stroess was originally hired, was not administrative. Groth never testified that Stroess performed more than 50% statewide responsibilities from April 6, 2014, until the restructuring. His testimony was at best 50% statewide responsibilities and certainly it could be inferred to be less than 50%.

In this case, there are certainly two conflicting views of the evidence. Stroess, Fabian, and Brooks testified to no change in job duties since Stroess' hire date, although Fabian and Brooks had very little first-hand knowledge of that fact. Flood's testimony, based on a review of records only, was that Stroess' performance evaluations demonstrated Stroess did not have statewide responsibilities in April 2014 and that his duties changed over time. Stroess argues that Flood misinterpreted the performance evaluations. The witness with first-hand knowledge between 2014 and 2016 was Groth.

In light of this conflicting testimony, WERC determined that the testimony of Groth was credible and disinterested and that the testimony supported a finding of fact that Stroess did not spend the requisite “more than 50%” of his time performing the statewide responsibilities needed to be classified as an Administrative Warden between 2014 and 2016.

The testimony of Groth certainly could lead a fact-finder to determine that Stroess did not spend more than 50% of his time on statewide responsibilities between April 6, 2014, and 2016, when the job was reclassified. This testimony was bolstered by the testimony of Flood, although it did not seem to be a major factor in WERC’s decision.

An agency’s findings of fact may be set aside only when a reasonable fact-finder could not have reached the findings from all the evidence before the agency, including the available inferences from that evidence.

This Court finds that WERC’s findings are supported by substantial evidence in the record. A reasonable fact-finder could have reached the findings from all the evidence before WERC, including available inferences from that evidence. Stroess argues that this is not a case where conflicting views of the evidence might yield different conclusions. This Court disagrees.

There are two conflicting views of the evidence which could be sustained by substantial evidence. In that situation, it is for WERC to determine which view of the evidence it wishes to accept. WERC specifically cited the credibility of Groth and found his testimony substantial evidence for the findings made. While WERC did not comment on the credibility of other witnesses, it found Groth credible. The weight and credibility of that evidence are matters for WERC and not this Court.

ORDER

Upon the record and file herein and for the reasons stated in the foregoing Decision,

IT IS HEREBY ORDERED, that the April 11, 2019, Decision and Order of Wisconsin Employment Relations Commission is **AFFIRMED**.²

This is a Final Order for purposes of appeal.

² Since this Court has affirmed the Decision and Order of WERC, it is not necessary for this Court to determine the effective date of the reallocation. However, if the Court had reversed the Decision and Order of WERC, this Court would have remanded the case to WERC to determine the effective date issue as it was not decided by WERC and not fully briefed by the parties.