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BY THE COURT:

DATE SIGNED: December 10, 2019

Electronically signed by Timothy M Witkowiak
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 22** **MILWAUKEE COUNTY**

KEVIN M. KELSAY,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 19 CV 4103
RE: [WERC Dec. No. 37929]

DECISION AND ORDER

Kevin Kelsay ("Kelsay") seeks judicial review under Wis. Stat. §§ 227.52-227.57 of a declaratory ruling by the Wisconsin Employment Relations Commission ("WERC") under the Wisconsin Civil Service Law, Wis. Stat. ch. 230, subch. II. On April 24, 2019 WERC issued an Order affirming Kelsay's one-day suspension by the Wisconsin State Public Defenders Office. WERC concluded (1) that WERC has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44(1)(c) and (2) the Wisconsin State Public Defenders Office had just cause within the meaning of Wis. Stat. § 230.34(1)(c) to suspend Kelsay for one day. For the reasons stated herein, the Court affirms the Wisconsin Employment Relation Commission's decision.

STATEMENT OF FACTS

Kevin Kelsay is employed by the Wisconsin State Public Defenders Office ("SPD") as a legal secretary. Kelsay has permanent status in class. Kelsay was a defendant in an Arkansas lawsuit in June 2018. The Milwaukee County Sheriff's Department tried multiple times to serve papers on Kelsay related to the Arkansas lawsuit, but were unsuccessful.

William Brown ("Brown"), a sergeant and head of the civil process unit in the Sheriff's Department, was assigned to serve the papers on Kelsay. On August 21, 2018, Brown attempted to serve papers on Kelsay at the SPD Milwaukee office. However, Kelsay refused to accept service of the papers while he was at work. Brown spoke with Paige Styler ("Styler"), the Deputy Regional Attorney Manager in the SPD Milwaukee office, who then went and found Kelsay. Styler did not tell Kelsay that he was required to accept service while at work, but she did tell Kelsay that he had to talk to the service processor so he would stop coming to the SPD office. Kelsay then walked away from Styler and went to the bathroom. Styler told Brown that Kelsay was possibly in the bathroom.

Brown attempted to serve Kelsay papers once Kelsay exited the bathroom. Kelsay refused service, however, and walked away. Brown completed an affidavit of service and left copies of the completed affidavit and papers with the SPD Milwaukee office receptionist. The receptionist gave the papers to Styler, who then placed the papers on Kelsay's desk.

On Oct 8, 2018, Kelsay sent a three-page "Cease and Desist" letter to the SPD's Affirmative action Officer, as well as six other SPD department supervisors. The letter demanded that SPD "cease and desist" from refusing to accommodate his disability and from its ongoing "campaign to punish" him for asserting his rights and retaliating against him because he had previously filed a disability discrimination complaint against SPD with the Equal Employment Opportunity Commission. Kelsay claimed that Styler retaliated against him "by engaging in a

conspiracy with the head of the security of the State Office Building and a Sergeant of the Milwaukee Sheriff's Department Civil Process division by attempting to effect service of process of some paperwork related to an Arkansas lawsuit."

Kelsay alleged that Styler herself decided to serve Kelsay outside the presence of Brown. He also specifically alleged that they "conspired to file a false Affidavit of Service with the Arkansas court in which they claim that the deputy served [Kelsay]..." Kelsay further stated that the "ethical implications of Ms. Styler's behavior in participating in a perpetration of a fraud upon the court will be something she can resolve with the lawyer regulatory agency..."

A SPD human resources specialist, Monica Endres ("Endres"), investigated Kelsay's October 18, 2018 "Cease and Desist" letter. On November 12, 2018 the SPD trial division director, Jennifer Bias ("Bias"), issued Kelsay a letter suspending him for one day. The issuance of the suspension letter was based on the statements made in Kelsay's "Cease and Desist" letter and the investigation that followed. The reason provided for Kelsay's one-day suspension was that Kelsay had violated State of Wisconsin Work Rule 17 by making false, inaccurate or malicious statements about Styler.

Kelsey emailed an appeal from the denial of his grievance regarding his one-day suspension to WERC on Sunday, December 23, 2018. On February 19 and 27, 2019, a WERC hearing examiner conducted a hearing. On April 2, 2019, the hearing examiner issued a proposed decision. The hearing examiner for WERC found that SPD had just cause to suspend Kelsay for one day because of the inaccurate statements he made in is "Cease and Desist" letter, and that these statements amounted to workplace misconduct which warranted discipline. The WERC hearing examiner also found that a one-day suspension was not excessive in this case.

WERC issued its final decision and order on April 24, 2019. WERC found that SPD did, in fact, have just cause to suspend Kelsay and affirmed his one-day suspension. WERC affirmed Kelsay's one-day decision because the inaccurate statements he made about Styler in the "Cease and Desist" letter amounted to workplace misconduct. WERC found that a one-day suspension for the statements made in the letter was not excessive. WERC emphasized in its decision that Kelsay was not disciplined for sending the letter to his employer, but rather for the content of the letter violating State Work Rule #17 which prohibits making false, inaccurate, or malicious statements about another SPD employee.

WERC also rejected the arguments Kelsay made at the hearing. First, WERC rejected Kelsay's argument that he was disciplined because he could not afford to hire an attorney, and if an attorney had written Kelsay's letter for him, he would not have been disciplined. WERC noted that Kelsay was a former attorney with a law degree, and "should have had the proper knowledge to write a letter in a way that was factually correct." Second, WERC rejected Kelsay's argument that enforcing his suspension would impede the ability of workers to protect themselves in the workplace. WERC rejected this argument because employees are still free to communicate their concerns to their employers; however, they are not allowed to make "declaratory summations of law against coworkers that are inflammatory in nature." Further, WERC stated if "Kelsay's argument in this regard prevailed, the consequence would be a carte blanche ability for employees to fabricate any slander regardless of a foundation of truth towards others in the workplace under the guise of a legally protected vessel." WERC noted that this is "clearly not what the law intends." Finally, WERC rejected Kelsay's third argument that his suspension was imposed in retaliation for an earlier matter Kelsay had before WERC. WERC did not find any evidence that the discipline

was retaliatory, and instead found the one-day suspension was strictly related to the false statements made in the "Cease and Desist" letter.

Kelsay filed a summons and complaint with the Court on May 28, 2019. Kelsay demanded judgment that the findings fact, conclusions of law, and decision of WERC be set aside and that his one-day suspension be overturned.

STANDARD OF REVIEW

Petitioner seeks review from this Court under Chapter 227 of the Wisconsin Statutes. An agency's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983). Credible evidence is "that evidence which excludes speculation or conjecture." *Milwaukee Bd. of School Directors v. Wisconsin Employment Relations Com'n*, 2008 WI App 125, ¶ 7. The test for substantial evidence is whether "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5.

A reviewing court is not bound, however, by an agency's conclusions of law. *Richland School Dist. v. DIHLR*, 174 Wis.2d 878, 890 (1993). Wis. Stat. § 227.57(5) provides: "The court shall set aside or modify the agency action if the court finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. *Tetra Tech*, ended the practice of deferring to an administrative agency's conclusions of law. Justice Kelly's decision in *Tetra Tech* noted that the deference doctrine "does not respect the separation of powers, gives insufficient consideration to the parties' due process interest in a neutral and independent judiciary, and 'risks perpetuating erroneous declarations of the law.'"

Tetra Tech, 2018 WI 75, ¶ 83 (citing *Operton v. LIRC*, 2017 WI 46, ¶ 73, 375 Wis. 2d 1, 894 N.W.2d 426 (R. Grassl Bradley, J., concurring)). Consequently, the *Tetra Tech* Court determined that courts must "review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo." *Id.* at ¶ 84. Further, while not explicitly addressed in *Tetra Tech*, the Wisconsin Supreme Court later clarified that "[b]y 'conclusions of law' we mean both the interpretation of the law and the application of that law to the facts of a case." *John McAdams v. Marquette University*, 2018 WI 88, ¶ 51 n.17, 383 Wis.2d 358, 397, 914 N.W.2d 708.

Though administrative agencies are no longer afforded deference in interpretations of law, courts may give persuasive "due weight" to an administrative agency's experience, technical competence, and specialized knowledge. *Tetra Tech*, 2018 WI 75, ¶ 84; *see also Wisconsin Dep't of Workforce Dev. v. LIRC, et al.*, 2018 WI 77, ¶ 4, n.4, 382 Wis. 2d 611, 914 N.W.2d 625. When considering the persuasive value under a "due weight" standard, a court may analyze factors such as (1) whether the agency is responsible for administering a statute, (2) the duration of the interpretation, (3) the extent to which the agency used its expertise, and (4) whether the interpretation enhances the consistency of law. *Tetra Tech*, 2018 WI 75 at ¶ 79. The agency must explain "how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why the background should make the agency's view of the law more persuasive than others." *Id.*

DISCUSSION

Kelsay makes the following two arguments that WERC's decision should be vacated: (1) the limited jurisdiction of WERC to hear and approve of proposed discipline against State of Wisconsin employees expired prior to the issuance of its Decision and Order on April 25, 2019,

and therefore WERC did not have jurisdiction over this matter; and (2) the Decision and Order was based on an erroneous interpretation of a provision or law and the record lacks substantial evidence in support of WERC's decision.

I. Timing of WERC's Decision

When an employee grieves a suspension, Wis. Stat. § 250.445(3)(c)1 requires that WERC issue a decision on the appeal no later than 120 days after the appeal is filed. WERC may not extend the 120-day limit for issuing its decision. *See* Wis. Stat. § 230.445(3)(c)2d. Kelsay first argues that the limited jurisdiction of WERC to hear and approve of the proposed discipline against State of Wisconsin employees expired under this Wisconsin Statutory provision prior to the issuance of their Decision and Order on April 25, 2019. Kelsay argues that the appeal to WERC was filed by email on December 23, 2018, and the Decision and Order were not issued and mailed until April 25, 2019, more than 120 days later.

WERC is authorized to adopt rules to carry out its powers and duties under the Wisconsin Civil Service Law. *See* Wis. Stat. § 230.45(1)(i). It has adopted administrative rules for the filing of civil service appeals. An appeal is "filed" when it is physically received at the WERC's office. *See* Wis. Admin. Code §§ ERC 91.02(10) and 92.01. However, WERC's website states that an appeal is filed when it is received at the WERC office by email by 4:30 p.m. on the last day it can timely be filed, and lists WERC's hours of operation as 7:45 a.m. to 4:30 p.m. An appeal received by email after 4:30 p.m. on a business day, or at any time on a non-business day, is treated as filed on the next business day.

Kelsay filed his appeal with WERC by email on Sunday, December 23, 2018. However, this date was a Sunday, a day in which WERC was not open. Furthermore, the next two days, December 24 and 25, were legal holidays. *See* Wis. Stat. § 990.001(4)(a)-(c); *see also* Wis. Stat. § 230.35(4)(a)7-8. It is reasonable that WERC permits civil service appeals to be filed only during business hours (7:45 a.m. to 4:30 p.m.), regardless whether the appeal is filed in person or by email. It is also reasonable that WERC treats an appeal filed after hours, or on a day when the office is closed for business, as filed on the next business day. WERC therefore treated Kelsay's emailed appeal on Sunday, December 23, 2018, as filed on the next business day, December 26, 2018.

Kelsay argues that Wis. Stat. § 801.18(4)(c) provides that documents filed electronically with state circuit courts are considered filed at the date and time of the original submission. He also argues that Wis. Stat. § 801.18(4)(e) provides that a document is considered filed on a specific day if the electronic submission is completed by 11:59 p.m. central time. However, these statutory subsections, on their face, only apply to electronic filing in state circuit courts and do not apply to e-filing appeals with the WERC. *See* Wis. Stat. § 801.01(2) (chapters 801 to 847 govern procedure and practice in circuit courts); *Baker v. Dep't of Health Services*, 2012 WI App 71, ¶¶ 11-12, 342 Wis. 2d 174, 816 N.W.2d 337 (although Wis. Stat. ch. 227 contemplates limited use of civil procedure statutes in judicial review proceedings, which do not conflict with ch. 227, civil procedure statutes have no application to an appeal before an administrative agency).

The 120-day limit is mandatory. A reviewing court cannot grant a default remedy even if WERC had failed to issue its decision within 120 days after Kelsay filed his appeal. *See Wagner v. State Medical Examining Board*, 181 Wis. 2d 633, 638, 642-44, 511 N.W.2d 874 (1994).

However, Kelsay is not asking for a default judgment, but rather stating that WERC lost jurisdiction over this matter and its Decision and Order have no legal effect.

The Wisconsin Statutes are silent as to when the appeal to WERC is considered to be filed with an agency when the appeal is sent to an agency during non business hours. In this case, the appeal was emailed to the agency during non-business hours on a Sunday, and the next two following days were holidays (December 24 and 25). Wis. Stat. § 250.445(3)(c)1 requires that WERC issue a decision on an appeal no later than 120 days after an appeal is filed with the agency. How WERC determines what day the appeal is filed will impact when the statutory 120 days begins. Because the statutes are silent as to whether WERC can consider an appeal to be filed on any day or only business hours, it was reasonable for WERC to permit civil service appeals to be filed only during business hours (7:45 a.m. to 4:30 p.m.), regardless of whether the appeal is filed in person or by email. WERC reasonably treats an appeal filed after hours, or on a day when the office is closed for business, as filed on the next business day. WERC therefore treated Kelsay's emailed appeal on Sunday, December 23, 2018, as filed on the next business day, December 26, 2018.

II. WERC's Decision is Supported by Substantial Evidence in the Record

WERC's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983). Credible evidence is "that evidence which excludes speculation or conjecture." *Milwaukee Bd. of School Directors v. Wisconsin Employment Relations Com'n*, 2008 WI App 125, ¶ 7, 313 Wis. 2d 525. The test for substantial evidence is whether "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5. The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to determine. *See*

Milwaukee Symphony Orchestra, 2010 WI 33, ¶32; Wis. Stat. § 227.57(6). 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. *Id.* at ¶ 31. Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. *See Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 2002 WI App 175, ¶29 n. 3, 256 Wis. 2d 941, 649 N.W.2d 356, *quoting Robertson Transp. Co. v. PSC.*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

WERC issued a decision in which it found that SPD had just cause to suspend Kelsay for one day because of the false statements he made about Styler in the "Cease and Desist" letter. WERC found that Kelsay had violated State of Wisconsin Work Rule 17 by making false, inaccurate or malicious statements about Styler. Kelsay falsely accused Styler of conspiring with Brown to file a "false" affidavit with an Arkansas court and participating in fraud on that court. However, WERC found that Styler was not involved in filing a "false" affidavit with the Arkansas court and she did not participate in perpetrating a fraud on the court. WERC determined that Brown completed the affidavit by himself.

Kelsay does not contend that WERC's findings are not supported by substantial evidence in the record, except for claiming that he was actually suspended in retaliation for an earlier matter that Kelsay had brought before WERC. The evidence in the record does not support Kelsay's contention that he was retaliated against. WERC found no persuasive evidence during the hearings that the discipline was retaliatory. WERC found that "the discipline imposed on Kelsay was strictly related to the inaccurate and false statements made in the cease and desist letter." Substantial evidence was established at the WERC hearing showing that the letter Kelsay sent involved several false statements. These false statements, coupled with the lack of evidence in the record that SPD

punished Kelsay in a retaliatory manner, establish that there was substantial evidence in the record to uphold WERC's decision that SPD had just cause to suspend Kelsay for one day.

Kelsay also offers two alternative arguments that WERC's decision should be overturned. However, Kelsay does not contend in either of these arguments that WERC's findings are not supported by substantial evidence in the record, which is the standard of review used to determine whether WERC's decision should be upheld.

First, Kelsay argues that when he sent SPD the "Cease and Desist" letter that he was acting as a "representative for himself" in a WERC matter, not as a SPD employee, and therefore he could not be disciplined for his statements as a representative. However, this argument is without merit and is not compelling. WERC found that Kelsay chose to send a letter as an SPD employee and used "inflammatory declarations stating conclusions of law" that were all found to be false. WERC noted that Kelsay should have used the word "potentially", or another similar word, and because he did not, the "result [was] a letter that state[d] in a declarative fashion that certain individuals were guilty of the various allegations made." WERC also rejected Kelsay's claim that he would not have been disciplined if an attorney had written the letter, which he could not afford to do. Therefore, the fact remains that he wrote the letter as an SPD employee and he was disciplined as an SPD employee. As WERC noted in its decision, although employees are free to communicate their concerns to an employer, they cannot make "declaratory summations of law against coworkers that are inflammatory in nature."

Second, Kelsay argues that WERC erred by not addressing and deciding whether his suspension was imposed in retaliation for the exercise of his rights under the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. § 12101. However, WERC has limited authority to decide

state civil service appeals and this authority does not extend to federal laws like the ADA. *See* Wis. Stat. § 230.45(1).

CONCLUSION

THEREFORE, based upon a thorough review of the record and the arguments of the parties as set forth in the parties' briefs, it is hereby ORDERED that the decision of the Wisconsin Employment Relations Commission is hereby **AFFIRMED**.