BY THE COURT:

DATE SIGNED: July 29, 2022

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

WERC Case ID: 460.0011
WERC Decision: 38939-B

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

DOUGLAS J. SMITH,

Petitioner,

vs. Case No. 22-CV-51

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

DECISION AND ORDER

INTRODUCTION

This is a review under Wis. Stat. ch. 227 of two decisions of the Wisconsin Employment Relations Commission ("WERC"). Douglas Smith ("Smith") argues that WERC erroneously defined "furlough" as different than the exclusive statutory categories of actions—layoff, suspension, or reduction in base pay—for which WERC has jurisdiction to hear an appeal. Smith further argues that WERC committed errors in procedure, improperly applied its own policies, and also violated his constitutional rights.

"The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178,

353 N.W.2d 68 (Ct. App. 1984). To prevail, Smith must show that WERC relied on an erroneous interpretation of the law, committed a material error in procedure, or abused its discretion. Wis. Stat. §§ 227.57(4)-(8). Upon careful consideration of the record and briefs in this matter, I conclude that Smith fails to meet his burden.

Accordingly, WERC's final decisions must be affirmed. Wis. Stat. § 227.57(2).

I. BACKGROUND

On May 1, 2020,[1] the University of Wisconsin-Madison ("UW") enacted a policy of furloughing employees under its statutory authority to manage its personnel. Administrative Record ("R.") 75-77; *See* Wis. Stat. § 36.115. "Furlough" was defined by that policy to mean:

> [T]he involuntary, temporary placement of any university faculty or staff member on a partial or full unpaid leave of absence because of reduction of work, reduction of funding, or for other non-disciplinary reasons. A furlough shall constitute a "leave of absence" as defined in Wis. Stat. sec. 40.02(4).

R. 76. The policy further defined a "Position-Specific Furlough" as appropriate "if an employee cannot work remotely." R. 77.

Smith is employed by UW. R. 1. On May 12, 2020, UW notified Smith that it intended to furlough him from May 19 through July 31, 2020. R. 11. Smith asserts that this furlough decision was "a guise" or "nefarious targeting" motivated by one supervisor's personal animus, and that the furlough was later extended. Smith Br., dkt. 40:10-11. Smith appealed the furlough decision to UW, which found on July 27, 2020 that Smith was properly furloughed under UW's policy. R. 39-43.

Smith next appealed to WERC. R. 1-9. UW responded by moving to dismiss Smith's

[1] At this time, Wisconsin and indeed much of the world tried prevent the spread of what is commonly referred to as COVID-19 by encouraging people to stay home. *See Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶5-7, 391 Wis. 2d 497, 942 N.W.2d 900 (detailing similar statewide preventative measures.).

appeal for lack of jurisdiction. R. 55-62. WERC agreed and dismissed Smith's appeal. R. 158.

After WERC dismissed Smith's appeal, Smith moved for a rehearing and to amend his appeal. R. 161-163. WERC denied Smith's motion for a rehearing, concluding that the interest in finality of decisions outweighed "the opportunity to revive the dismissed appeal by now amending same." R. 165.

On January 10, 2022, having exhausted his administrative remedies, Smith filed this action seeking review of WERC's decisions under Wis. Stat. ch. 227. Dkt. 1-3. On February 7, 2022, WERC filed the certified record of its decision. Dkt. 27. Since then, Smith has moved the Court to expand the scope of the record to include an unrelated case also before WERC. After briefing[2] and oral argument, I denied Smith's motion to expand the record. Order (April 26, 2022), dkt. 39.

The parties have now fully briefed the matter before the Court. Having considered their arguments, and upon my review of the record, I issue this decision.

II. LEGAL STANDARD

Chapter 227 of the Wisconsin statutes governs judicial review of WERC's decisions. Wis. Stat. § 227.52. Review is limited to the record. Wis. Stat. § 227.57(1). A court shall affirm an agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). A court gives "no deference to the agency's interpretation of law." Wis. Stat. §

[2] Smith's reply brief is thirty-one pages, even longer than his twenty-one page initial brief. Because the purpose of a reply is to reply to arguments raised in the other parties' response, and not to entirely re-state one's case, a party must seek leave to file a reply brief exceeding ten pages. Dane County Local Rule 115, available online at https://courts.countyofdane.com/Prepare/Rules, last visited Mar. 23, 2022 (reply briefs "shall be limited to 10 pages...").

Smith did not seek leave to file an overlong reply, however, I grant him a degree of leeway and consider his reply in full.

Smith's reply brief appends an eight page document he claims to have been omitted from the record. Smith Reply Br., dkt. 45:27. An identical document already appears in the record, R. 55-62, and the record has been certified. Dkt. 27.

227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21. However, a court shall accord due weight to the discretionary authority, if any, and specialized knowledge of the agency involved. Wis. Stat. § 227.57(10).

Relief from an agency decision may be appropriate for several reasons, including if "the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action…" § 227.57(5).[3] Or if "either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure …" Wis. Stat. § 227.57(4).[4] Or if "the agency's exercise of discretion is outside the range of discretion delegated to the agency by law…" Wis. Stat. § 227.57(8).[5]

III. DISCUSSION

Before turning to the substance of Smith's arguments, I begin by recognizing that he is not represented by a lawyer. Self-represented litigants are "generally granted 'a degree of leeway' in recognition of the fact that they are ordinarily unfamiliar with the procedural rules and substantive law that might govern their appeal." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶25, 389 Wis.

[3] Wis. Stat. § 227.57(5) reads, in full:

> The court shall set aside or modify the agency action if it 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.

[4] Wis. Stat. § 227.57(4) reads, in full:

> The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

[5] Wis. Stat. § 227.57(8) reads, in full:

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

2d 516, 936 N.W.2d 587. Accordingly, I liberally construe Smith's arguments, but cannot create "the best argument [he] could have, but did not, make." *Id.*

A. Smith fails to meet his burden to show WERC erroneously interpreted the law.

Smith's first argument is that WERC's decision must be reversed because it erroneously interpreted two provisions of law and that a correct result compels a contrary action. *See* Wis. Stat. § 227.57(5). I address these arguments in turn.

1. Smith fails to show WERC erroneously defined "furlough."

The first law Smith claims WERC erroneously interpreted is Wis. Stat. § 230.44(1), which confers jurisdiction on WERC to decide only certain types of actions. Although WERC interpreted this statute to mean it had no jurisdiction to hear an appeal of a furlough (R. 159), I give no deference to this interpretation. *Tetra Tech,* 2018 WI 75, ¶84; *See also Loomis v. WPC,* 179 Wis. 2d 25, 505 N.W.2d 462 (Ct. App. 1993).

I turn to Wis. Stat. § 230.44(1) to independently interpret its meaning. Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). This statute sets forth which kinds of actions are appealable to WERC and reads, in relevant part:

> (1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45 (1) (a):
>
> …
>
> **(c)** *Demotion, layoff, suspension or discharge.* If an employee has permanent status in class, or an employee has served with the state as an assistant district attorney or an assistant state public defender for a continuous period of 12 months or more, the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission as the final step in the state employee grievance process established under s. 230.445, if the appeal alleges that the decision was not based on just cause.

Wis. Stat. § 230.44(1)(c).[6] In interpreting this statue, I must also consider "[o]ne of the well-known and often-applied canons of statutory interpretation … expression of one thing excludes another." *State ex rel. Riegert v. Kopke*, 13 Wis. 2d 519, 522, 109 N.W.2d 129 (1961); *James v. Heinrich*, 2021 WI 58, ¶18, 397 Wis. 2d 517, 960 N.W.2d 350 (discussing the canon of *expressio unius est exclusio alterius*.). In other words, a statute which lists certain matters is generally understood to have meant to exclude unlisted matters. This statute lists certain matters: "demotion, layoff, suspension, discharge or reduction in base pay…" Wis. Stat. § 230.44(1)(c). Accordingly, the most reasonable interpretation of Wis. Stat. § 230.44(1)(c) is that a "furlough," or any other matter not listed in Wis. Stat. § 230.44(1)(c), is not appealable.

However, as Smith succinctly puts it: "The real issue … was if the actual action taken against [Smith] constituted a layoff …" Smith Br., dkt. 40:14-15. Smith argues that what UW called a "furlough" was "for all practical intents and purposes nothing but a layoff by another name…" Smith Br., dkt. 40:16. He points out that the date of the furlough could have been extended, perhaps indefinitely, and that at the time he was furloughed he had no guarantee of a return to work. *Id.* He further distinguishes his furlough from the statutory definition of a "leave of absence" under Wis. Stat. § 40.02(4).

The problem with this argument is that Smith's furlough was not indefinite—it lasted six months—and after the furlough ended, he appears to have resumed work. Accordingly, WERC's finding of fact that Smith was "temporarily" placed on unpaid leave is supported by substantial evidence. And while I give no deference to WERC's legal conclusions, I must accept WERC's

[6] Statutory titles are not part of the statute, but "are permissive indicators of meaning…" *State v. Lopez*, 2019 WI 101, ¶25, 389 Wis. 2d 156, 936 N.W.2d 125.

factual findings when supported by substantial evidence. Wis. Stat. § 227.57(6); *See Oneida Seven Generations Corp. v. City of Green Bay,* 2015 WI 50, ¶43, 362 Wis. 2d 290, 865 N.W.2d 162 (Substantial evidence" means "evidence of such convincing power that reasonable persons could reach the same decision as the board.") (citations omitted).

In sum, WERC found that Smith was temporarily placed on unpaid leave. This finding is supported by substantial evidence. Temporary unpaid leave is not one of the exclusive categories over which Wis. Stat. § 230.44(1) grants WERC jurisdiction—demotion, layoff, suspension, discharge or reduction in base pay—and accordingly, Smith fails to show that WERC incorrectly interpreted the law.

2. Smith fails to show WERC erroneously denied a re-hearing.[7]

The second law Smith claims WERC erroneously interpreted is Wis. Stat. § 230.45(1)(a), which simply requires WERC to "[c]onduct hearings on appeals…" Smith reads this in conjunction with Wis. Stat. § 227.49(1), which reads, in relevant part:

> Any person aggrieved by a final order may … file a written petition for a rehearing which shall specify in detail the grounds for the relief sought and supporting authorities.

Together, Smith argues these statutes mean that WERC erroneously denied Smith's petition for a rehearing based only on "the interest in finality." Smith Br., dkt. 40:7.

I do not agree that Wis. Stat. §§ 230.45(1)(a) and 227.49(1) required WERC to grant Smith's request for a rehearing. Nothing in the text of either statute requires a rehearing. Further,

[7] It is unclear from Smith's papers why precisely WERC erred by denying him a rehearing. WERC appears to interpret this argument as a claim that it abused its discretion. WERC Resp. Br., dkt. 41:14-16.

I construe Smith's argument to be that WERC erroneously interpreted the law because Smith claims "WERC has a statutory duty to hold hearings under Wis. Stat. § 230.45(1)(a) … WERC was required to grant [Smith's] request for rehearing." Smith Br., dkt. 40:7. However, Smith also relies on his due process rights and other statutory and constitutional provisions. I address his constitutional arguments below.

the context of these statutes supports the conclusion that WERC had no obligation to even respond to Smith's request for a rehearing, let alone respond by granting the request. "Context is important to meaning." *Kalal*, 2004 WI 58, ¶45.

> So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id.

Three contextual clues related statutes suggest that the legislature did not intend a rehearing to be mandatory. First, Wis. Stat. § 227.49(5) provides: "The agency may order a rehearing … and shall dispose of the petition within 30 days …" The use of the word "may" in statutory text suggests discretion, and when used in the same sentence with the mandatory "shall," even more clearly so. *See Karow v. Milwaukee Cnty. CSC*, 82 Wis. 2d 565, 570-71, 263 N.W.2d 214 (1978). Second, in the same vein, the statute makes explicit provisions for when "the agency does not enter an order disposing of the petition … the petition shall be deemed to have been denied." Wis. Stat. § 227.49(5). A third contextual clue is that a related statute, Wis. Stat. § 227.49(3), provides only three bases on which a rehearing "will be granted." These three bases are "material error of law,'' or "material error of fact," or "discovery of new evidence sufficiently strong to reverse or modify the order and which could not have been previously discovered by due diligence." Smith does not argue that his petition for a rehearing satisfied any of these three conditions for which a rehearing "will be granted."

Instead, Smith misses the point by arguing that WERC failed to give "legitimate reasons to deny the rehearing …" Smith Reply Br., dkt. 45:6. On the contrary, there are only three legitimate reasons on which to grant a rehearing: those three reasons listed in Wis. Stat. §

227.49(3). Having failed to show any of those reasons, Smith was not entitled to any response at all, and accordingly, Smith fails to show WERC erroneously denied his petition for a rehearing.

B. Smith fails to meet his burden to show WERC's action was inconsistent with an officially stated agency policy.

Smith's second argument is that UW improperly applied its policy when it failed to consider Smith's seniority in the process used to determine the order of furloughed employees. Smith Br., dkt. 40:18. Under UW's policy, it was supposed to furlough, in order, "temporary employees, probationary employees, and then employees based on years of university service," although exceptions could be requested. R. 3-4. Briefly put, Smith's argument is that junior employees were not furloughed while Smith was, and in doing so, UW exceeded its discretion under its official agency policy. *See* Wis. Stat. § 227.57(8).

WERC did not respond to this argument because it concluded, as a threshold matter, it had no jurisdiction to do so. I concluded, above, that Smith fails to show WERC's interpretation of its lack of jurisdiction was incorrect. Having properly dismissed Smith's appeal, WERC did not err by not addressing this argument further.

C. Smith fails to meet his burden to show WERC committed procedural irregularities.

Smith's third argument is that even if WERC correctly interpreted the law, the fairness of the action has nevertheless been impaired by material errors in procedure. *See* Wis. Stat. § 227.57(4). In support of this argument, Smith relies on a decision which is not part of this record, apparently involving a UW employee named "Heidel." Smith Br., dkt. 40:19-20. For example, Smith complains that "[t]he unequal treatment of the two WERC Appellants (Smith and Heidel) on this constitutes an unfair procedural process …" *Id.*

My review of WERC's decision "shall be confined to the record." Wis. Stat. § 227.57(1).

The "Heidel decision" is not part of the record. *See* Order (April 26, 2022), dkt. 39. Accordingly, I do not consider it.

D. Smith's remaining constitutional arguments.

Finally, liberally construing his papers, Smith argues that he has a broad constitutional right "to seek remedy under due process." Smith Br., dkt. 40:8-9 (citing Wis. Const. art. I, § 9; U.S. Const., amend. XIV). "Due process" has many meanings but is often understood to mean "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quotations and citations omitted).

Generally, courts "do not decide the validity of constitutional claims that are broadly stated but not specifically argued…" *State v. Nienhardt,* 196 Wis. 2d 161, 168, 537 N.W.2d 123 (Ct. App. 1995); *In re Paternity of James A.O.,* 182 Wis. 2d 166, 172 n. 2, 513 N.W.2d 410 (Ct. App. 1994) ("constitutional points merely raised but not argued will not be reviewed further.") (quoted source omitted). In this case, Smith cites no authority and develops no argument why his right to be meaningfully heard was denied by the lawful operation of Wis. Stat. ch. 227, and accordingly, I may award him no relief.

ORDER

For the reasons stated, Smith fails to meet his burden to show that WERC erred by dismissing his appeal and by denying his petition for a rehearing. Accordingly, WERC's decisions must be affirmed. Wis. Stat. § 227.57(2).

This is a final order for purposes of appeal. Wis. Stat. § 808.03(1).