

1-6-06

JAMES A. STEINKE,

Petitioner,

DECISION AND ORDER

vs.

Case No. 05 CV 408

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,
AND OFFICE OF STATE
EMPLOYMENT RELATIONS,

Respondents.

SHEBOYGAN COUNTY
WISCONSIN
FILED
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CLERK OF CIRCUIT COURT

I. NATURE OF PROCEEDINGS

This proceeding was brought under chapter 227 of the Wisconsin Statutes to review a decision of the Wisconsin Employment Relations Commission (WERC). WERC decided that the petitioner failed to establish that the decision of the Department of Natural Resources and the Office of State Employment Relations denying his request to reallocate his position from Fisheries Technician to Fisheries Technician-Advanced, was incorrect.

II. STATEMENT OF THE CASE

The petitioner has been employed as a Fisheries Technician by the Department of Natural Resources at Kettle Moraine Springs Fish Hatchery (KMSFH). Prior to 2002 he had attained the level of Fisheries Technician III. In 2002, following a 1998 study of Fisheries Technicians positions, the petitioner's position was reallocated to Fisheries Technician.

On October 7, 2002, the petitioner filed a civil service appeal with the Wisconsin Personnel Commission, the predecessor of WERC as to this type of claim. The appeal was held in abeyance for a period of time while the Department of Natural Resources reviewed the petitioner's position description but the Department eventually determined that the petitioner was properly classified as a Fisheries Technician.

On December 30, 2002, the petitioner appealed this decision to the Personnel Commission. On January 6, 2004, WERC Commissioner Paul Gordon conducted a hearing on the petitioner's appeal. On October 7, 2004, Commissioner Gordon issued a proposed interim decision and order.

Commissioner Gordon determined that the petitioner's position was more appropriately classified as a Fisheries Technician-Advanced than as a Fisheries Technician. He based his determination upon the classification specifications, represented position, and the position descriptions of Steinke and others.

The classification specification for the Fisheries Technician position states that the classification "encompasses positions found within [DNR's] basins and fish production facilities throughout the state" and involve a variety of programs support activities such as spawning, rearing and planting fish, repairing and maintaining fyke nets, and involvement in lake and stream surveys, data tabulation and stream and lake habitat development design and planning projects.

The Fisheries Technician classification specifications specifically excludes positions "which are for a majority of time, engaged in technical paraprofessional fisheries management activities and are more appropriately classified within the Fisheries Technician-Advanced classification specification".

The Fisheries Technician-Advanced classification specification encompasses "technical paraprofessional positions located within [DNR] which perform a full range of fisheries management activities within fish production facilities or basins throughout the state". The classification specification expressly defines "paraprofessional" to mean "[a] type of work closely relating to and resembling professional level work with a more limited scope of functions, decision making and overall accountability. A paraprofessional function may have responsibility for segments of professional level functions but is not responsible for the full range in scope of functions expected of a professional position." The Fisheries Technician-Advanced excludes "[t]echnical positions whose primary emphasis is performing technical support activities within the Fisheries program and are more appropriately classified within the Fisheries Technician classification specification."

The Fisheries Technician-Advanced classification specification further provides:

Positions allocated to this classification are responsible for technical paraprofessional fisheries management activities which have significant scope and impact. These positions (1) have a major role in developing the annual production plan for a fish production facility and have specific independent responsibilities for carrying out that plan. . . . ; (2) perform the full range of technical paraprofessional fisheries activities for a specific portion of the fisheries program in a basin(s); or (3) perform the full range of technical paraprofessional fisheries management technician duties with responsibility for the development, design and implementation of fisheries management projects. These projects have independent responsibility for the design and implementation of fisheries

management projects which may include habitat development and planning, conducting and interpreting analytical studies and preparing or assisting in the preparation of technical publications and reports. This work is performed with significant delegation and under general supervision.

KMSFH has three separate buildings, each of which is responsible for the production of various species or strains of fish, and each of which has a single position responsible for the operations in that building. The petitioner occupies one of the three positions, all of which were reallocated to the Fisheries Technician classification. The petitioner and the other two Fisheries Technicians supervise limited term employees and summer interns.

There is also a position of supervisor/manager for the entire KMSFH. The petitioner and the other two Fisheries Technicians perform the duties of the Supervisor position, on a rotating basis, on weekends and when the Supervisor otherwise is absent. There is also a position of hatchery foreman that was vacant at most times relevant to this case.

The position summary contained in the petitioner's position description states in pertinent part:

The focus of this position is a fish culturist at (KMSFH), the sole wild steelhead production facility for Lake Michigan. The position plans, implements and operates Hatchery building #1 system . . . This position directs operations . . . in the absence of the Hatchery Supervisor.

KMSFH Building #1 produces all of the wild Steelhead stocked in Wisconsin waters of Lake Michigan each year. This position is ultimately responsible for the design, construction and management of funded propagation projects within the Building #1 System.

The Steelhead propagation program results in millions of dollars of revenue for the Coastal Communities of Lake Michigan . . .

Commissioner Gordon found that the petitioner performs a full range of paraprofessional work for a majority of his job duties and that the "best fit" of the duties and activities of the petitioner's position is the Fisheries Technician-Advanced classification rather than the Fisheries Technician classification. He found that the petitioner's position satisfied the first requirement for a Fisheries Technician-Advanced classification in that the petitioner has "a major role in the annual production plan for a fish production facility and [has] specific independent responsibilities for carrying out that plan."

Commissioner Gordon noted that the Fisheries Technician-Advanced classification involves work that requires independent judgment and discretion in decision making. He also found that the petitioner "does this from start to finish in the fish propagation cycle." Finally, he found that the petitioner's position had duties and responsibilities that are similar to those of the representative positions contained in the classification specification and to those of other persons whose positions are classified as Fisheries Technician-Advanced.

On November 8, 2004, the Department of Natural Resources formally objected to the proposed interim decision. On May 20, 2005, WERC issued its decision. The majority of the WERC, with Commissioner Gordon dissenting, decided that the petitioner's position was more appropriately classified as a Fisheries Technician position than as a Fisheries Technician-Advanced.

WERC found that the petitioner does not spend the majority of his time performing "paraprofessional" work as that term is defined in the Fisheries Technician-

Advanced classification. WERC also found that the petitioner's role in establishing the production goals for Lake Michigan's wild steelhead is to offer his opinion to the KMSFH supervisor. WERC further found that although the petitioner may act as a lead worker for some tasks, at any given time, but that one of three other positions may lead his work. Finally, WERC determined that the Fisheries Technician classification is more appropriate because "the technicians' responsibilities at KMSFH have been divided relatively equally between three positions that operate as a team and because the hatchery is also staffed by a technician foreman".

WERC determined that the petitioner's position did not satisfy the first requirement for a Fisheries Technician-Advanced classification, which is that he play a major role in the annual production plan for a fish production facility and have specific independent responsibilities for carrying out that plan. They said this is the case because he is responsible for only one building and not for the entire KMSFH fish hatchery. WERC also determined that the petitioner's position was less like the representative positions contained in the Fisheries Technician-Advanced classification and less like the position description of Fisheries Technician-Advanced positions with respect to "range, scope, independence and focus on management rather than support."

The petitioner has asked this court for certiorari review of this decision.

III. STATUTES INVOLVED

Wisconsin §230.09, Stats., provides in part:

(1) The Director [of OSER] shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications

for, all positions in the classified service. Each classification so established shall include all positions which are comparable with respect to authority, responsibility and nature of work required.

(2)(a) After consultation with the appointing authorities, the director shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The director may reclassify or reallocate positions on the same basis.

IV. ADMINISTRATIVE RULE INVOLVED

Wis. Adm. Code §ER 2.04 provides:

(1) Class specifications define the nature and character of the work of the class through the use of any or all of the following: definition statements; listings of areas of specialization; representative examples of work performed; allocation patterns of representative positions; job evaluation guide charts, standards or factors; statements of inclusion and exclusion; and such other information necessary to facilitate the assignment of positions to the appropriate classification.

(2) Class specifications shall be the basic authority for the assignment of positions to a class.

V. STANDARD OF REVIEW

An agency's statutory interpretation is reviewed according to one of three levels: great weight deference, due weight deference and de novo review. *Responsible Use of Rural and Agricultural Land v. Public Service Commission of Wisconsin*, 2000 WI 129, 239 Wis. 2d 660, 676, 619 N.W. 2d 888.

The petitioner argues that no deference should be accorded to the decision of WERC as there is no evidence that the agency used any special knowledge or expertise as WERC is applying case law established by the now abolished Personnel

Commission to the facts of this case. The petitioner argues that the issues presented are ones of first impression for WERC.

The respondents argue that the decision made by WERC should be accorded great weight deference.

Great weight deference is appropriate once a court has concluded that:

- (1) The agency was charged by the legislature with the duty of administering the statute;
- (2) that the interpretation of the agency is one of long-standing;
- (3) that the agency employed its expertise or specialized knowledge informing the interpretation; and
- (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660, 539 N.W. 2d 98 (1995)

In order for a decision to be given great weight deference all of the requirements would have to be met. It is clear that WERC is now charged by the legislature with the duty of administering the statute. I find, however, that the interpretation of WERC is not one of long-standing and that the agency is not employing its expertise or specialized knowledge informing the interpretation. The respondents argue that the interpretation by the predecessor agency, the Wisconsin Personnel Commission should be imputed to WERC. I am unaware of case law that would support this particular position and have a concern that there is no "institutional memory" in WERC as to the decisions made concerning the classification of various jobs.

The respondents argue that WERC has applied similar statutory standards to employment-based actual situations for many decades. The cases cited by the respondents with respect to application of similar statutory standards do not seem to be compelling. The decisions by WERC are generally dealing with collective bargaining

agreements and only in a limited manner as to the nature of an individual's specific duties.

I believe, however, that the middle standard of review is appropriate in this instance, that of due deference. This level of deference is appropriate "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 286, 548 N.W. 2d 57, 62 (1996). The deference accorded the agency in this situation "is not so much based upon its knowledge or skill as it is upon the fact that the legislature has charged the agency with the enforcement of the statute in question." *Id.* Giving an agency decision due weight, we will also sustain the agency's interpretation if it is reasonable – even if another interpretation is equally reasonable. We will not do so, however, if another interpretation is more reasonable than the one employed by the agency. *Id.*, at 287, 548 N.W. 2d at 62-63.

In making a determination as to the reasonableness of WERC's decision, the court must consider the findings of fact made by that commission. These findings of fact must be affirmed if they are supported by substantial evidence. 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); *Chicago, M., St. P. & P. RR. Co. v. ILHR Dept.*, 62 Wis. 2d 392, 396, 215 N.W. 2d 443 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" *Gateway City Transfer Co. v. Public Service Comm.*, 253 Wis. 397, 405-06, 34 N.W. 2d 238 (1948).

It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. *Hamilton v. ILHR Dept.*, 94 Wis. 2d 611, 617, 288 N.W. 2d 857 (1980). If there are 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 *Robertson Transport. Co. v. Public Service Comm.*, 39 Wis. 2d 653, 658, 159 N.W. 2d 636 (1968).

The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to evaluate. See *Bucyrus-Erie Co. v. ILHR Dept.*, 90 Wis. 2d 408, 418, 280 N.W. 2d 142 (1979). When more than one inference reasonably can be drawn, the finding of the agency is conclusive. See *Vocational Technical & Adult Dist. 13 v. ILHR Dept.*, 76 Wis. 2d 230, 240, 251 N.W. 2d 41 (1977).

On review, the court may not make an independent determination of the facts. See *Hixon v. Public Serv. Comm.*, 32 Wis. 2d 608, 629, 146 N.W. 2d 577 (1966). The court is "confined to the determination of whether there was . . . [substantial evidence] to sustain the findings that were in fact made." *E. F. Brewer Co. v. ILHR Dept.*, 82 Wis. 2d 634, 636, 264 N.W. 2d 222 (1978).

A court may not "second guess" the proper exercise of the agency's fact-finding function even though if viewing the case *ab initio* it would come to another result. See *Briggs & Stratton Corp v. ILHR Dept.*, 43 Wis. 2d 398, 409, 168 N.W. 2d 817 (1969). The court must search the record to locate substantial evidence that supports the agency's decision. See *Vande Zande v. ILHR Dept.*, 70 Wis. 2d 1086, 1097, 236 N.W. 2d 255 (1975).

VI. REASONABLENESS OF WERC'S DECISION

In support of its decision, the majority of WERC made twenty-one findings of fact. As discussed above, the findings of fact must be affirmed if they are supported by substantial evidence. These findings include a history of the matter prior to the decision by WERC as well as definitions of the positions of Fisheries Technician and Fisheries Technician-Advanced, and set forth certain representative positions for these classifications.

The findings of fact further addressed the specific attributes of KMSFH and determined the work that the petitioner did at that facility. The findings of fact also set forth the table of organization at that facility and found that above the petitioner in that organization would be the Hatcheries Supervisor/Manager and the Hatchery Foreman.

It should be noted that there appears to be a mistake in the Findings of Fact in that it is said that Mr. Hron has a request pending to reclassify his position to F.T.-Advanced. I believe that the evidence in the case would show that it is Mr. Nelson who has also made a request similar to that of the petitioner. That finding has no bearing on this court's decision.

WERC noted that the petitioner sometimes supervises limited term employees and on a rotating basis carries out the weekend operation of the entire facility. Further, it was noted that the petitioner has temporarily performed some of the duties normally carried out by the Foreman while that position has been vacant.

WERC acknowledged that the petitioner's position description dated September 2002 is an accurate, but incomplete, description of the work and duties he was performing before June of 2000 until September of 2002.

The majority of WERC decided that the petitioner does not spend a majority of his time performing "paraprofessional" work as that term is applied in the Fisheries Technician-Advanced specifications. They found that his role in establishing production goals for Lake Michigan's wild steelhead population is to offer his opinion to the Hatchery Supervisor/Manager as to the number of fish that can be propagated in Building #1 system. The petitioner uses the Building #1 and other components of KMSFH and works with other staff to meet and implement those goals. He exercises his judgment in all other aspects of fish propagation, including spawning, egg incubation, numeration, health, water quality and food. The majority further found that he may act as a lead worker for some tasks but at any given time, three other positions at the facility, including the Hatchery Foreman, may lead his work.

In making its decision, WERC relied primarily upon the testimony of Cornell Johnson, a human resource specialist for the Department of Natural Resources. He had determined the reallocation of classifications when that was determined to be done by the Department of Natural Resources.

In making this reallocation, he visited 3 of the 14 state fish hatcheries but that did not include KMSFH. After he made his preliminary determination that information was sent to various supervisors at upper levels in the state. It appears that certain of those supervisors sent that information down to persons who served as Hatchery Supervisor/Manager. It is not clear whether or not that was done at KMSFH.

Mr. Johnson relied upon his years of experience as a human resource specialist and he also relied upon information that was provided to him by persons in the field after his initial determinations were made.

The petitioner called several witnesses who work directly in the field of fish propagation. These persons offered opinions that much of the work that the petitioner engages in is of a paraprofessional nature. It appears that these individuals had much more in depth understanding of the particular jobs carried out by the petitioner.

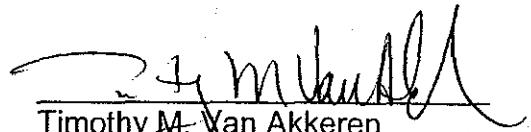
As mentioned previously, it is not for this court to make an independent determination of the facts in the case. Since the court is confined to a determination of whether there was substantial evidence to sustain the findings that were made, I am compelled to conclude that the majority of WERC could rely upon the testimony of Mr. Johnson to support its findings in this case.

With the findings that have been made, I believe that the conclusion of law made by WERC that the petitioner failed to sustain his burden of establishing that the decision to reallocate his position from Fisheries Technician to Fisheries Technician-Advanced was incorrect is inevitable. The petitioner has failed to show that his interpretation of the classification is more reasonable than that excepted by the majority of WERC.

ORDER

Based upon the decision of the court as set forth above, it is hereby ordered that the decision of the Wisconsin Employment Relations Commission that was subject to review by this court in the above entitled matter is hereby affirmed.

Dated this 6th day of January, 2006.


Timothy M. Van Akkeren
Circuit Court Judge

