

COPY

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

OFFICE OF STATE EMPLOYMENT
RELATIONS, et al.,
Petitioners,

DECISION AND ORDER ON PETITION
FOR JUDICIAL REVIEW

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION, et al.,
Respondents.

Case No. 09CV4449

BACKGROUND

The Office of State Employment Relations (OSER) appeals a decision of the Wisconsin Employment Relations Commission (WERC) that the Wisconsin Law Enforcement Association (WLEA) is entitled under the State Employment Labor Relations Act (SELRA) to the employer's investigative files prior to the pre-disciplinary hearing.

The case arose from the following stipulated facts:

1. In the spring and summer of 2007, the UW-Madison and UW-Milwaukee Police Departments conducted four separate investigations into alleged employee misconduct;
2. An investigatory interview was conducted for each incident, with the employee represented by a WLEA steward;
3. In each instance, the WLEA steward made a request for information gathered during the investigation once notice was given that a pre-disciplinary hearing was scheduled or during the pre-disciplinary hearing;
4. A pre-disciplinary hearing occurred prior to the imposition of discipline; and
5. Prior to the pre-disciplinary hearing, the employer did not produce all of the information pursuant to the requests.

OSER argues that WERC's decision should be reversed, so that employers are not required to provide their investigative files to the union prior to holding a pre-disciplinary hearing. For the following reasons, WERC's decision is upheld.

I. OSER’S OBJECTIONS TO WERC’S COMPETENCY TO PROCEED AND CLAIM OF A DUE PROCESS VIOLATION WERE WAIVED.

OSER argues that WERC lacked jurisdiction or acted outside its authority in this case because the issue it decided was not properly put in controversy by the complaint in this case. This is an objection to competency to proceed, rather than to jurisdiction. (“Subject matter jurisdiction, in general, is the power of a tribunal to treat a certain subject matter in general, while competency is a narrower concept relating to the statutory conditions imposed on the exercise of subject matter jurisdiction in individual cases.” *Stern v. Wisconsin Employment Relations Com’n* 2006 WI App 193, ¶24, 296 Wis.2d 306, 722 N.W.2d 594) A challenge to an administrative tribunal’s competency to proceed is waived if not raised before the tribunal. *Id.* at ¶32. The issue of WERC’s competency to proceed was not raised before the hearing examiner or WERC and is therefore waived.

Even if the argument had not been waived, it is without merit. It appears to rely on OSER’s contention that “no one had ever even asked for and been denied pre-disciplinary information in the Glassmaker case.” Petitioner's Brief at 8. The examiner’s findings of fact included the finding that on June 12, 2007, before any pre-disciplinary hearing concerning Glassmaker, union steward Erik Pearce had “asked for the relevant police reports” and was refused. Petitioner does not contend that this factual finding is contrary to the record. In addition, at the outset of the hearing on February 4, 2007 the examiner stated, without any objection from the parties, that there was a stipulation as to the facts alleged in Issue 1, which issue included the allegation that the employer had refused to provide the requested information in the Glassmaker case. Thus, there was a controversy before WERC about whether the employer was obligated to provide pre-discipline information to the union.

OSER also argues that it was denied due process because the complaint did not give sufficient notice of the alleged unfair labor practices. OSER did not raise this objection before the hearing examiner or WERC and it, too, is waived. A court may on its own initiative consider a constitutional question despite a waiver, *Slawinski v. Milwaukee City Fire and Police Com'n* 212 Wis.2d 777, 810, 569 N.W.2d 740 (Wis.App.,1997). In this case the challenge is not to the constitutionality of a statute or rule and the determination of the constitutional claim is not necessary to the disposition of the case and the court declines to consider the waived due process claim.

II. STANDARD OF REVIEW.

WERC's decision is entitled to "due weight" deference. According to its own decision in this case, WERC has not issued any decisions squarely addressing the issue presented in this case. Decision at 8. Though WERC is charged with the administration of SELRA and has long-standing interpretations of the requirements for information sharing in collective bargaining in a general sense, that general expertise and experience does not satisfy the requirements for great weight deference, which requires interpretations, expertise and experience with the specific issue in litigation. *UFE Inc. v. Labor and Industry Review Com'n*, 201 Wis.2d 274, 284-85, 548 N.W.2d 57, (Wis., 1996) (LIRC's general experience interpreting Wis. Stat. § 102.42(2)(a) did not entitle it to great weight deference when it had only once addressed the specific issue under that statute that was before the court).

Due weight deference, the middle level of deference, is appropriate when an agency has some experience and expertise material to an issue, "but has not developed that expertise to the extent that would necessarily place it in a better position to make judgments concerning the interpretation of the statute than a court." *Milwaukee Bd. of School Directors (MBSD) v.*

Wisconsin Employment Relations Com'n 313 Wis.2d 525, 534-535, 758 N.W.2d 814, 819 (Wis.App., 2008). Because WERC has some material expertise and experience a *de novo* review would be insufficient deference. *UFE*, 201 Wis.2d at 285-286.

Under due weight deference an agency decision is sustained if it is reasonable and there is not a better or more reasonable interpretation. *MBSD* 313 Wis. 2d at 534-535, *UFE* 201 Wis.2d at 286-287.

III. WERC'S DECISION IS AT LEAST AS REASONABLE AS ALTERNATIVE INTERPRETATIONS.

WERC decided that the University violated the duty to bargain in good faith imposed by Wis. Stat. §111.84(1)(d) by “refusing to provide to the WLEA the investigative files regarding alleged employee misconduct in connection with the pre-disciplinary hearing regarding those charges.” Decision at 2. WERC reasoned that the duty to bargain in good faith includes the duty to provide a union with information that is relevant and reasonably necessary to carry out its representational duties. Decision at 8. It interprets reasonable and necessary as essentially meaning “useful” to the union in carrying out its duties. *Id.* at 8-9. Implicit in its decision is that assisting or representing an employee at a pre-disciplinary hearing is a part of a union’s representational duties. It concluded that the investigative files on which an employer has based the potential charges to be presented at a pre-disciplinary hearing would be relevant and useful to the union in assisting its member. Decision at 10. WERC also held that while the state’s interests in protecting the integrity of the investigation and avoiding disruption in the workplace did not entitle it to blanket confidentiality of its investigative files, it was entitled to maintain confidentiality of particular information as reasonably necessary to protect those interests in particular situations. Decision at 14-15. Although there is no precedent squarely on point,

WERC grounded its decision in prior WERC and judicial decisions. WERC's decision is a reasonable one that considered relevant precedent and the interests of the union and the employer. Due weight deference requires that its decision be upheld, unless another decision would be more reasonable.

OSER seems to argue that the duty to bargain in good faith only applies in the actual bargaining negotiations themselves and in the interpretation of language in the subsequent agreement. This is too narrow an understanding and OSER cites no case law in support of its position. The Supreme Court has held that the analogous good-faith bargaining requirement in of the National Labor Relations Act, 29 U.S.C. 158(a)(5), "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *N. L. R. B. v. Acme Industrial Co.* 385 U.S. 432, 436, 87 S.Ct. 565, 568 (U.S. Ill. 1967). It encompasses "the duty to furnish information relevant to a labor union's proper performance of its duties." *N.L.R.B. v. Pfizer, Inc.* 763 F.2d 887, 889 (C.A.7 (Ill.),1985). WERC's past interpretations of the duty SELRA imposes on employers to share information has been in accord with this broader view of the scope of the good-faith bargaining requirement.

IV. WLEA MET ITS BURDEN OF PROOF

OSER's third argument is that WERC did not hold WLEA to its burden to prove that the denial of a pre-disciplinary investigatory file constituted an unfair labor practice. This argument again relies on OSER's position that the Glassmaker case "did not even present the question" of whether the investigation file should be provided to the employee or union before the pre-disciplinary meeting. Petitioner's Brief at 14. As noted above, the Glassmaker case did present that question and sufficient stipulated facts on which the examiner and the commission could conclude that the employer had been asked to provide the file and had declined.

OSER also argues that there was no showing of harm to the union. The facts allowed WERC to reasonably infer, as it did that the denial of the information requested would interfere with the union's ability to monitor the equitable imposition of discipline under the collective bargaining agreement and to represent and assist its members before the imposition of discipline.

ORDER

WERC's decision is at least as reasonable as the alternatives. Therefore, for the reasons stated above, WERC's decision is affirmed. This is a final order for purposes of appeal.

Dated: March 23, 2010

By the Court:

A large black rectangular redaction box covers the signature of the judge. A thin horizontal line extends from the right side of the box.

Juan B. Colás

Circuit Court Judge