COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1384 **Cir. Ct. No. 2014CV26**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

FLORENCE COUNTY, WISCONSIN AND LABOR ASSOCIATION OF WISCONSIN,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

DEFENDANT,

LISA M. GRIBBLE,

INTERESTED PERSON-APPELLANT.

APPEAL from a judgment of the circuit court for Florence County: PATRICK F. O'MELIA, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Lisa Gribble appeals a circuit court judgment reversing a decision of the Wisconsin Employment Relations Commission (WERC) that Florence County violated a collective bargaining agreement when it laid off Gribble, and her labor representative breached its duty of fair representation by failing to take her grievance to arbitration. We affirm the judgment.

Background

¶2 The majority of the facts in this matter are undisputed. In 2002, Gribble was employed by the County in two positions: deputy treasurer and property listing assistant. As a County employee, Gribble was a member of Labor Association of Wisconsin (LAW), a labor organization representing the County's collective bargaining unit.

¶3 In 2007, Gribble was not reappointed to the deputy treasurer position but remained in the property listing position. Gribble contacted LAW, who investigated the matter and filed a grievance but ultimately decided it would not proceed to arbitration because of the elected treasurer's statutory authority to appoint or remove deputies. Gribble then filed a prohibited practice complaint, subsequently adding a claim that LAW breached its duty of fair representation. WERC ultimately dismissed the complaint in its entirety, finding LAW did not breach its duty of fair representation.[1] (***Gribble I***.)

[1] Because it concluded LAW did not breach its duty of fair representation, WERC would not exercise jurisdiction over the merits of Gribble's claim that the County's actions was a prohibited practice by violating the collective bargaining agreement. This decision was affirmed by the circuit court.

¶4 While ***Gribble I*** was being litigated, the County decided to eliminate the property listing position, effectively ending Gribble's employment with the County. The County notified Gribble she was being "temporarily laid-off, due to lack of work[.]" The notice also stated, "As you are aware, partly due to the economy, the workload in this office has declined and can no longer support an assistant at this time." Gribble did not contact LAW directly regarding this layoff, but instead contacted attorney Nicholas Fairweather. Fairweather sent correspondence to LAW advising that Gribble had been laid off and stating, "I trust that your labor organization will file the appropriate grievances."

¶5 Shortly after receiving Fairweather's correspondence, LAW's president, Patrick Coraggio, contacted Fairweather by telephone to discuss Gribble's layoff and the merits of filing another grievance. Coraggio understood Fairweather or Gribble would get back to him. However, after failing to receive a response after a week, Coraggio sent Fairweather correspondence dated October 22, 2009, which stated:

> On October 14, 2009, we discussed the merits of filing a grievance for our mutual client Ms. Gribble. It was my understanding that you were going to contact her and get a seniority list so we could determine if there was someone with less seniority that she could possibly bump, assuming she was qualified to do the work. As you know the contract is silent on this issue. Also it was my understanding that you were going to identify areas of the contract that you believe were breached constituting a grievance. The contract has time limits and a grievance has to be filed not later than November 5, 2009. LAW is willing to process the grievance if Ms. Gribble wishes to proceed. However, as of this date I have not heard from her or you regarding this matter. Accordingly, if we do not hear from you or her we will conclude that the matter is over and there is no desire to proceed.

Coraggio received no response to this correspondence.

¶6 On the same date Coraggio sent the above–cited correspondence, Gribble filed her own grievance with the County treasurer and department head, which was subsequently denied. Gribble did not provide LAW with a copy of her grievance, nor did she inform LAW prior to filing that she was going to file her own grievance.

¶7 Gribble subsequently requested the grievance proceed to Step 2 of the grievance procedure, when she forwarded it to the Personnel Committee Chairperson. Gribble did not contact LAW before requesting Step 2, and Gribble did not provide a copy of her request to LAW, who did not learn about Gribble's grievance until after the Step 2 grievance was denied.

¶8 On November 13, 2009, Coraggio sent a letter to Fairweather indicating he had recently been advised Gribble filed a grievance with the County, and that "[t]he facts surrounding this matter and a copy of the grievance have never been presented to my office, any of our labor consultants or our attorneys." This correspondence also stated:

> I have repeatedly indicated we were willing to investigate this matter on behalf of Ms. Gribble and file a grievance if she requested same. This is to put you on notice that without LAW knowing the facts surrounding this matter, LAW will not support or pay for this matter going to arbitration.
>
> Therefore, if my office does not hear from you regarding this matter, my office will notify the County that we do not intend to be a party to any proceedings, nor will we be responsible for costs attributed thereto.

¶9 Fairweather responded to this letter, enclosing a seniority list and stating, "We anticipate that you will advance this grievance to Step 3 in the process based on the clear contractual violation …." To avoid running afoul of

arbitration time limitations, LAW requested Step 3 arbitration although it had not fully investigated Gribble's layoff. Coraggio then sent a letter to Fairweather, stating:

> I have represented public employees for 31 years and worked with numerous attorneys during that time, even some from the law firm you are currently with. I have never experienced such a lack of cooperation we are getting from your office. Your lack of communication and cooperation is making it extremely difficult to work with you on this matter.
>
> On October 13, 2009, we discussed Ms. Gribble's potential grievance. I advised you that to file a grievance, we needed a seniority list. We needed a list of less senior employee's [sic] that Ms. Gribble was qualified to do their work and that Ms. Gribble should put in a written request to bump one of the less senior employee's [sic].
>
> Instead of complying with this, you proceeded to file a grievance and never notified my office that you were filing a grievance and did not have the professional courtesy to provide us with a copy. Nor did you provide us with a copy of the denial or the request to go to Step 2 until we requested same. You obviously did not want our input or assistance and did not keep us copied on any of the above paperwork.
>
> On November 24, 2009, I received a letter from you dated November 16, 2009, requesting that we advance the grievance to Step 3. The letter indicated it was also faxed but was never received at my office. November 24th is the last day that the grievance can be advanced to Step 3. Due to the late date that I received your letter, I called the county to extend the time limits to file. The request was denied by Attorney James Scott. In order to preserve the grievance, I filed a request with the WERC for a panel of arbitrators.[2]

[2] LAW requested a panel of WERC staff arbitrators, but on December 3, 2009, the County objected to the use of the staff arbitrators, which halted the arbitration process, and WERC returned the arbitration filing fee.

> In reviewing the grievance, it is my opinion that it is flawed and has little if any chance of success. You ignored my advice to have Ms. Gribble request to bump a less senior employee and you have requested her job back with full pay and benefits. …
>
> Your requested remedy flies in the face of prior WERC decision. Had you have done some research or discussed this with the undersigned the grievance would have been drafted properly.

¶10 On February 11, 2010, Coraggio sent Gribble correspondence requesting she affirm the accuracy of a 16-paragraph chronology of facts. Coraggio also requested she waive any conflict of interest that may exist, due to Gribble requesting LAW's assistance at the same time she was accusing LAW of violating its duty of fair representation in ***Gribble I***. Coraggio further advised Gribble of his opinion that the grievance was flawed because she had failed to make any effort to bump a less senior employee prior to filing the grievance. He also stated that he had advised Fairweather the grievance should have been filed by LAW to avoid any question about Gribble's standing to individually file a grievance once she was no longer a County employee. Moreover, LAW contended the collective bargaining agreement recognized it as the exclusive bargaining agent of selected courthouse employees.

¶11 Although Gribble responded to Coraggio's February 11 correspondence, she did not address LAW's requests. Coraggio again asked Gribble to review and confirm the accuracy of the sixteen factual paragraphs, and waive any conflict of interest. Gribble again responded to Coraggio, but again failed to address or act on the requests contained in Coraggio's letter. LAW replied indicating that it intended to close out the file because of Gribble's failure to respond to LAW's requests that Gribble verify the accuracy of the chronology and waive any conflict of interest.

¶12 On October 12, 2012, Gribble filed a prohibited practice complaint with WERC alleging the County violated the collective bargaining agreement when it laid her off from the property listing position. Gribble also alleged LAW violated its duty to fairly represent her when it failed to process her grievance to arbitration.

¶13 On July 1, 2014, WERC issued a decision in ***Gribble II*** concluding LAW breached its duty of fair representation, and the County violated the collective bargaining agreement by failing to recognize seniority and afford Gribble the opportunity to qualify for positions held by junior employees. WERC concluded "LAW's conduct breached the arbitrary and discriminatory prongs of the duty of fair representation analysis." WERC specifically concluded, "LAW arbitrarily failed to assess the merits of the grievance and therefore made no credible judgment on the merits."

¶14 The County and LAW sought review in the circuit court. The court reversed WERC's decision. The court concluded LAW did not breach its duty of fair representation during the handling of Gribble's grievance. The court also stated:

> LAW also asserts that the Commission acted outside its discretion when it found that the contract contained a bumping provision. Since the Commission could have only made these determinations having first found that the union breached its duty of fair representation, the Court will not need to address this issue, since the court will be ordering that the Commission's determination regarding LAW's breach of fair representation be reversed. Even if this Court affirmed the Commission's findings and legal conclusions regarding LAW's breach of duty of fair representation, this Court agrees with both the County and LAW regarding the issue of whether there is bumping in the collective bargaining agreement. The Court would find that there is no bumping in this contract, specifically

> because all parties understood that the contract contained no bumping.[3]

(Footnotes omitted.) Gribble now appeals.

Discussion

¶15 On appeal of an administrative agency decision, we review the decision of the agency, not the decision of the circuit court. *See* ***Jefferson Cty. v. WERC***, 187 Wis. 2d 647, 651, 523 N.W.2d 172 (Ct. App. 1994). We will not disturb an agency's factual findings unless they are not supported by substantial evidence. WIS. STAT. § 227.57(6); ***Clean Wis., Inc. v. Public Serv. Comm'n***, 2005 WI 93, ¶46, 282 Wis. 2d 250, 700 N.W.2d 768. Application of factual findings to legal standards is a question of law that we review independently. *See* ***State v. Lala***, 2009 WI App 137, ¶8, 321 Wis. 2d 292, 773 N.W.2d 218.

¶16 The duty of fair representation arises from a union's statutorily created exclusive ability to negotiate collective bargaining agreements, and to decide whether to arbitrate grievances regarding the meaning and application of such agreements. *See* ***Service Emps. Int'l Union Local No. 150 v. WERC***, 2010 WI App 126, ¶22, 329 Wis. 2d 447, 791 N.W.2d 662. Unions have a great deal of latitude in deciding whether to represent an employee's grievance, and only in extreme cases will courts interfere with the union's decision not to represent an employee's grievance. *See* ***Mahnke v. WERC***, 66 Wis. 2d 524, 531-32, 225 N.W.2d 617 (1975).

[3] The court noted, "Even Gribble acknowledges during the hearing that she was aware that the county employees did not want bumping in their contract."

¶17 In order to demonstrate the violation of a duty of fair representation, a union member must demonstrate actions that were arbitrary, in bad faith, or discriminatory. *See* ***id.*** at 531. A union's actions are arbitrary only if, after considering the facts of the case, they are "so far outside a wide range of reasonableness that the actions rise to the level of irrational or arbitrary conduct." *See* ***Service Emps.***, 329 Wis. 2d 447, ¶22. Discriminatory conduct requires proof that a union's actions were motivated by an improper discriminatory motive. *See* ***Whitten v. Anchor Motor Freight, Inc.***, 521 F.2d 1335, 1340-41 (6th Cir. 1975). Simple negligence, ineffectiveness, or poor judgment on the part of a union is insufficient to prove a breach of the duty of fair representation. "[N]ot even proof that a grievance was meritorious is sufficient by itself to prove breach of the duty of fair representation …." *See* ***Tully v. Fred Olson Motor Serv. Co.***, 37 Wis. 2d 80, 91, 154 N.W.2d 289 (1967). The burden ultimately lies with the employee to prove the union breached its duty of fair representation. *See* ***Mahnke***, 66 Wis. 2d at 533.

¶18 We conclude WERC erred in determining that LAW's actions "rise to the level of irrational or arbitrary conduct." *See* ***Service Emps.***, 329 Wis. 2d 447, ¶22. From the outset we note Corragio made numerous attempts to obtain the facts and circumstances from Gribble and Fairweather. Despite Coraggio's efforts, Gribble and Fairweather repeatedly ignored LAW's requests. Coraggio was unable to reach Gribble to discuss her case and was only able to talk once with Fairweather, who repeatedly failed to communicate and ignored Coraggio's advice on how to proceed with the grievance.

¶19 In addition, Coraggio advised Gribble and Fairweather that LAW believed the grievance to be flawed and unmeritorious. LAW's belief was based

in part on the fact that LAW had already investigated, reviewed and evaluated the potential of a grievance in ***Gribble I***. Indeed, the examiner in ***Gribble I*** found:

> [LAW representative Thomas] Bauer then called Patrick Coraggio, LAW's president, and reviewed Gribble's case with him. After getting what Coraggio characterized as the five W's (who, what, where, why and when) from Bauer, Coraggio and Bauer undertook the following actions to investigate, review and evaluate a potential grievance against Florence County. First, both reviewed and researched the state statutes dealing with deputy positions, namely Sections 17.10 and 59.25. Second, Coraggio spoke with one of LAW's attorney's law clerks regarding the matter. Third, Bauer researched the WERC's database for any applicable case law. Fourth, both Bauer and Coraggio reviewed the collective bargaining agreement to determine if there was any pertinent language relating to Gribble's issue. … [B]oth concluded that the collective bargaining agreement did not contain any bumping language that could assist Gribble. While some LAW contracts contain bumping language, this one did not. Bauer knew that when the parties had negotiated their first collective bargaining agreement in 2002, he had proposed to the local's membership that they try to get bumping language, but they had decided they did not want it.

The above finding regarding the good faith nature of LAW's investigation, review and evaluation as to bumping is relevant to the duty of fair representation issue. The fact that additional investigation may have been necessary in ***Gribble II*** is not dispositive, because an appropriate investigation for the grievances in both matters would involve an examination of the collective bargaining agreement and a determination whether the agreement contained bumping rights. Given the overlapping issues in the two grievances concerning bumping under the collective bargaining agreement, and LAW's conclusions in ***Gribble I***, no further investigation of that issue was necessary in the present matter.

¶20 WERC also concluded LAW's request for Gribble to sign a written conflict waiver was irrational or arbitrary conduct. However, in order to fully

represent Gribble in the present matter, LAW felt obliged to take positions inconsistent with positions taken in ***Gribble I***, including an assertion that the collective bargaining agreement provided for county-wide bumping rights. The record discloses that Coraggio discussed these issues with an attorney and was advised that a potential conflict of interest existed that required a written waiver. Whatever the relative merits of LAW's belief that a conflict existed, the belief was held in good faith upon the advice of an attorney.

¶21 WERC also stated it was disingenuous for LAW to characterize any communication attempts prior to November 30, 2009, as "uncooperative" since it still filed the necessary paperwork to proceed to arbitration. However, the filing of paperwork to protect Gribble's interests and avoid procedural timelines was necessitated by Gribble's last-minute request to take the grievance to Step 3. LAW was not disingenuous by characterizing the communication between the parties as "uncooperative" merely because it hastily filed the necessary Step 3 paperwork.

¶22 In addition, WERC concluded "LAW's conduct was discriminatory in that it was motivated by LAW's hostility to Gribble as a result of her pending duty of fair representation claim against LAW." However, LAW's opinion concerning bumping rights under the collective bargaining agreement was formulated prior to Gribble filing a duty of fair representation claim against LAW in ***Gribble I***. Moreover, when LAW requested Gribble confirm the sixteen paragraph facts and a chronology of her case, Gribble had already pursued the grievance on her own without any communication with LAW.

¶23 Nevertheless, even if WERC had jurisdiction to reach the merits of the alleged contractual violation because LAW breached its duty of fair

representation by failing to pursue Gribble's grievance to arbitration, we conclude WERC erred as a matter of law by holding that the collective bargaining agreement included a county-wide bumping provision.

¶24 "The interpretation of a contract is a question of law … we review de novo." *See* ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). If the terms of the contract are clear, the contract must be construed as it stands. *See* ***id.*** A contract is ambiguous if it is fairly susceptible to more than one construction. ***Id.*** If the contract is ambiguous we may consider extrinsic evidence such as the negotiations of the parties and their acts and deeds to determine the parties' intent. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶10, 266 Wis. 2d 124, 667 N.W.2d 751. So far as reasonably practicable, a contract should be given a construction that effectuates the intentions of the parties. *See* ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶25, 348 Wis. 2d 631, 833 N.W.2d 586.

¶25 Layoffs are governed by Article IV of the collective bargaining agreement, which contains the following seniority provision:

> Section 4.02: Layoffs and recall from layoff will be determined on the basis of seniority, provided the senior employee can qualify to do the work. Layoff shall be by inverse order of seniority.

¶26 WERC concluded the language of Section 4.02 "is clear and unambiguous." WERC stated:

> Layoffs shall occur by seniority if the employee can qualify to perform the job. While some labor agreements consider departmental seniority or similar sub-groupings of employees for purposes of layoffs, the agreement between the Association and the County does not contain such a provision and, therefore, County-wide seniority applies.

¶27 Similarly, Gribble insists the collective bargaining agreement "plainly provides for county-wide seniority." However, the agreement does not specifically mention bumping, and WERC itself recognized the contract was silent on whether bumping was county-wide. WERC effectively inserted county-wide bumping rights into the collective bargaining agreement by holding that "[i]t is well settled that even in the absence of specific language granting bumping rights, there must be some effective means of protecting the interests of senior employees in a seniority-based layoff[.]" However, this conclusion begs the question. Protecting the interests of senior employees in a seniority-based system does not necessarily equate with county-wide bumping rights.

¶28 Indeed, the contract's silence could be reasonably interpreted to mean layoffs (and recalls from layoffs) applied only if multiple persons populated the same department, or job classification. As the circuit court concluded, the contract's silence could reasonably be interpreted to provide no bumping rights.

¶29 We therefore conclude Section 4.02 of the collective bargaining agreement is ambiguous because it is susceptible to more than one reasonable interpretation. We therefore may consider extrinsic evidence to divine the intent of the parties. *See* ***Kernz***, 266 Wis. 2d 124, ¶¶10, 27.

¶30 No evidence was presented in this case to establish that the parties intended to include county-wide bumping rights in the collective bargaining agreement at issue, and there was no evidence that such bumping rights previously existed. In fact, the examiner in ***Gribble I*** stated:

> [LAW representative Tom] Bauer knew that when the parties had negotiated their first collective bargaining agreement in 2002, he had proposed to the local's membership that they try to get bumping language, but they had decided they did not want it.

¶31 Testimony at the hearing in the present case reiterated that LAW recommended taking up the issue of bumping at one of their bargaining sessions, and the issue was rejected. Local President Matt Dagostino testified:

> Q: Okay. Directing your attention to the labor agreement, I have just one question for you.
>
> What is your understanding concerning the right of an employee who is laid off to bump another –
>
> A: We don't have that.
>
> Q: – another employee?
>
> A: We don't have that.
>
> Q: What do you understand "bumping" to be?
>
> A: For a laid off employee can push a less senior employee out of their position and take that one.
>
> Q: And your testimony is, that's not allowed?
>
> A: Correct.
>
> Q: How did it come to be, as you understood it, that that is not allowed?
>
> A: It has never been in our contracts. We never had it. Um, one meeting, I can't remember when, after I learned about the bumping processes, I asked. We had a meeting and I –
>
> Q: You say "a meeting," who would be present at this meeting?
>
> A: The union members.
>
> Q: Okay.
>
> A: And we discussed the bumping rights. And I kind of explained how they worked and asked if anybody would like to add this to the contract and it was a unanimous no.
>
> ….

> Q: I just want to be clear. If someone is laid off from their position in the courthouse and there is someone less senior than them who works here in a different job –
>
> A: Yes.
>
> Q: – can they push that person out of that job and take it, assuming they are able to do it?
>
> A: No.

¶32 As the circuit court noted, Gribble herself testified that she was aware of the union's position that there were no bumping rights in the contract. Gribble testified that she did not know how the seniority system worked:

> Q: And you are saying that somebody less senior than you should have actually left and you should have taken that job; right?
>
> A: I don't know how the county would lay off by seniority. I am not a County Board member.
>
> Q: But you filed the grievance. I am asking you what you think should have happened.
>
> And you are saying, if they don't need somebody to do what I was doing, they can stop paying for that. I should have been allowed, you are saying, to take someone else's job, who is less senior than me, and that person would then suffer the layoff; right? That is what you are saying?
>
> A: I believe the county would need to make those decisions.

County Treasurer and Property Lister JoAnne Friberg testified as follows:

> Q: Well, in Ms. Gribble's grievance, she indicates that the layoff should be done with respect to seniority; correct?
>
> A: Yes. And I interpreted that to mean that she was the only person in that position so, therefore, she would be the only one – there wasn't any other senior, or less senior people in that position, or even in that department, so that she would have to be the only one laid off ….

¶33 We therefore reject WERC's conclusion that the collective bargaining agreement in the present case contained county-wide bumping rights. We need not otherwise determine the extent, if any, to which bumping rights existed in the agreement, because Frieberg's testimony was unrefuted that there were no "less senior people in that position, or even that department."[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] We also specifically reject Gribble's contention that LAW's actions in filing the Step 3 arbitration request demonstrate LAW's belief that her claim had merit. As mentioned, LAW filed the petition for arbitration to preserve time limitations because Gribble requested LAW proceed to Step 3 arbitration at the proverbial eleventh hour. These actions do not demonstrate LAW's belief that the collective bargaining agreement contained county-wide bumping rights.