COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1938 **Cir. Ct. No. 2014CV553**

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

KENNETH N. SORTEDAHL,

PETITIONER-APPELLANT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND WISCONSIN DEPARTMENT OF ADMINISTRATION,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for St. Croix County: ROD W. SMELTZER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kenneth Sortedahl appeals a circuit court order affirming a decision by the Wisconsin Employment Relations Commission that rejected Sortedahl's claims contesting his layoffs from the St. Croix County District Attorney's Office. Sortedahl contends the Commission irrationally

applied the "just cause" standard governing his layoffs. He also argues certain of the Commission's factual findings were not supported by substantial evidence. Applying great weight deference, we conclude the Commission reached a rational decision. We also conclude there was sufficient evidence to sustain its factual findings. Accordingly, we affirm.

BACKGROUND

¶2 This appeal concerns two instances in 2012 in which Sortedahl was laid off from his employment with the St. Croix County District Attorney's Office. The Commission found that Sortedahl was employed as an assistant district attorney on a one-half time basis from 2004 through 2008, and, thereafter, as a full-time employee until January 2, 2012.

¶3 From the inception of his employment through March 13, 2011, Sortedahl was covered by the terms of a collective bargaining agreement between the State of Wisconsin and the Association of State Prosecutors. According to the Commission, the collective bargaining agreement required that any layoffs be done on the basis of seniority. The collective bargaining agreement was cancelled on March 13, 2011. The Commission concluded that by June 2011, it was clear the collective bargaining agreement, including its seniority requirement, was no longer in force as a result of our supreme court's decision that month in ***State ex rel. Ozanne v. Fitzgerald***, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, which upheld 2011 Wis. Act 10 against various procedural attacks. As a result, as of that time, the order of any layoffs was left to the discretion of St. Croix County District Attorney Eric Johnson.

¶4 In September 2011, Johnson learned that effective December 11, 2011, his office would lose one full-time equivalent (FTE) position as a result of

the loss of a grant. Although there were three full-time assistant district attorneys with less seniority than Sortedahl, Johnson selected Sortedahl for layoff.[1] Johnson obtained funding from St. Croix County to keep Sortedahl full time until January 1, 2012, at which time Johnson reduced Sortedahl's employment to .20 FTE hours. Concurrently with this action, Johnson laid off a part-time assistant district attorney that had been working .20 FTE hours, and Johnson arranged for Sortedahl to be appointed a special prosecutor for thirty-two hours per week.[2]

¶5 In the spring of 2012, Johnson learned he would lose funding for another assistant district attorney position. Effective July 1, 2012, Johnson laid off Sortedahl from his .20 FTE position and reduced another assistant district attorney's employment from full time to .20 FTE. At approximately the same time, the most-senior assistant district attorney announced his intention to retire. Johnson sought applications for the position, ultimately hiring Michael Nieskes, a former district attorney in Racine County and circuit court judge. Sortedahl had applied for this position, but, according to his appellate brief, he was not interviewed or given consideration.[3]

---

[1] As the Commission noted, although this was technically a reduction of work hours and not a true "layoff," we, like the Commission and the parties in this case, use those terms interchangeably.

[2] A special prosecutor, according to the Commission, is an independent contractor, working at a higher hourly wage, but without the benefits of a full-time employee.

[3] Sortedahl's brief lacks record citations for these contentions, in apparent violation of the Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.19(1)(d) (2015-16). Portions of Sortedahl's "Statement of Facts" also appear to contain impermissible argument. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶6 n.4, 293 Wis. 2d 668, 721 N.W.2d 127, *aff'd*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762 ("[T]he fact section should objectively recite the historical and procedural facts; it is no place for argument.").

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶6 On January 31, 2012, Sortedahl filed an appeal with the Commission contesting his first partial layoff and reduction in base pay. He filed a second appeal on July 27, 2012, contesting his layoff from his .20 FTE employment with the district attorney's office. These matters were heard before a hearing examiner on December 4 and 5, 2012. The examiner issued a provisional decision in Sortedahl's favor on January 28, 2014, and later filed a "Proposed Decision and Order" with the Commission that awarded Sortedahl certain requested fees and costs.[4]

¶7 Both parties objected to the proposed order. The Commission reviewed the file and record of proceedings, including the transcript, and consulted with the hearing examiner regarding her credibility impressions. After doing so, the Commission "reject[ed] the examiner's reasoning and analysis in its entirety and conclude[d] that the St. Croix County District Attorney had just cause for its decision to layoff and reduce the hours of Appellant Kenneth Sortedahl." The Commission emphasized Johnson's testimony that the layoffs were necessitated by economic considerations and that Sortedahl was selected because he was the weakest performer and Johnson desired to keep less-senior lawyers with, in his estimation, greater future potential.

[4] Sortedahl's brief-in-chief states one of the issues on appeal is whether he is "entitled to recover his attorneys' fees" pursuant to WIS. STAT. §§ 227.485(3) and 814.245. Despite its identification of the issue, his brief-in-chief contains no argument on the matter. In his reply brief, Sortedahl asserts his entitlement to such fees is "self-evident," but contingent on the outcome of the appeal. We do not generally consider arguments made for the first time in a reply brief, *see* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396, and, in any event, Sortedahl's own argument and his failure on the merits in this appeal produce the conclusion he is not entitled to attorneys' fees.

¶8 Sortedahl appealed the Commission's decision to the circuit court. The circuit court applied ***Weaver v. State Personnel Board***, 71 Wis. 2d 46, 237 N.W.2d 183 (1976), as had the Commission, and concluded the Commission reasonably determined that there was "just cause" for Sortedahl's layoffs. In doing so, the court determined that sufficient evidence supported the Commission's determination.[5] Sortedahl appeals.

DISCUSSION

¶9 WISCONSIN STAT. § 230.44(1)(c) provides, as relevant here, that an assistant district attorney employed continuously for twelve months or more may appeal a layoff "if the appeal alleges that the decision was not based on just cause."[6] Sortedahl contends the Commission misapplied the "just cause" standard, and its decision was not based on substantial evidence.

¶10 On appeal, we review the Commission's decision, not that of the circuit court. *See* ***Coulee Catholic Sch. v. LIRC***, 2009 WI 88, ¶31, 320 Wis. 2d 275, 768 N.W.2d 868. We review the Commission's "just cause" determination using a mixed standard of review. Agency findings of fact will be affirmed if they

[5] The circuit court, while orally granting judgment, used the phrase "credible evidence." We presume this was simply a misstatement. Although credibility is one attribute of evidence that is "substantial," it is not the only feature. *See* ***Sills v. Walworth Cty. Land Mgmt. Cmte.***, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878. In any event, we review the Commission's decision, not the circuit court's. *See* ***Coulee Catholic Sch. v. LIRC***, 2009 WI 88, ¶31, 320 Wis. 2d 275, 768 N.W.2d 868.

[6] While the parties agree WIS. STAT. § 230.44 establishes the Commission's jurisdiction, they do not address the import of WIS. STAT. § 230.34, portions of which appear to concern personnel actions involving assistant district attorneys. Without the benefit of the parties having briefed the significance of this statute, we will not further consider it. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments.").

are supported by substantial evidence. ***Knight v. LIRC***, 220 Wis. 2d 137, 149, 582 N.W.2d 448 (Ct. App. 1998). This court does not evaluate the credibility or weight of the evidence; our only task is to ascertain whether there was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Id.*** (quoted source omitted). "If the issue presented is a question of law, including a question of statutory interpretation, we apply one of three levels of deference to the agency conclusion: 'great weight,' 'due weight' or 'de novo.'" ***Id.*** at 147.

I. The Commission rationally applied the "just cause" standard.

¶11 Sortedahl questions whether the Commission adequately adhered to the supreme court's ***Weaver*** decision.[7] Johnson testified Sortedahl had been the subject of a performance improvement program that terminated in 2007. After that program ended, Johnson had not done any further formal, written evaluations of Sortedahl, nor had Johnson filled out annual evaluation forms from the State Prosecutor's Office. Rather, the Commission relied on Johnson's oral testimony "describing the relative difference between Sortedahl who he considered 'average' and several others he considered 'superior.'" In Sortedahl's view, ***Weaver*** requires more than what he terms "undocumented and unstructured self-serving statements." Rather, Sortedahl contends there must be documented evidence of evaluations that both predate the employer's layoff decision and establish "just cause" for the layoff.

[7] Sortedahl concedes the "Commission was correct in citing ***Weaver v. State Personnel Board***, 71 Wis. 2d 46, 237 N.W.2d 183 (1976) as the leading case regarding the analysis and application of the 'just cause' standard with regard to a layoff situation."

¶12 "When reviewing questions of law, we are not bound by an administrative agency's conclusions." ***Sauk Cty. v. WERC***, 165 Wis. 2d 406, 413, 477 N.W.2d 267 (1991). However, we generally apply one of three levels of deference to an agency's conclusions of law and statutory interpretations. ***Id.*** The "first and highest amount of deference" is the "great weight" standard, under which we will abide by the agency's legal rationale unless it is irrational. ***Id.*** (quoting ***Beloit Educ. Ass'n v. WERC***, 73 Wis. 2d 43, 67, 242 N.W.2d 231 (1976)). Sortedahl never disputes the State's assertion that the Commission's interpretation of ***Weaver*** is entitled to great weight deference.[8]

¶13 The Commission reasonably interpreted ***Weaver*** as not requiring an employer to support its "just cause" determination with documentary evidence that predates the layoff. ***Weaver*** held that while "the appointing authority indeed bears the burden of proof to show 'just cause' for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious." ***Weaver***, 71 Wis. 2d at 52. Here, there is no assertion that Johnson failed to follow any appropriate administrative or statutory guidelines.[9] Rather, Sortedahl's only claim is that Johnson arbitrarily selected Sortedahl for layoff.

¶14 However, ***Weaver*** was quite clear that, in cases in which economic layoffs are necessary, the employer's selection of the person to be laid off "is, to a

[8] In any event, we would conclude all requirements for the application of great weight deference have been satisfied. *See* ***Brown v. LIRC***, 2003 WI 142, ¶16, 267 Wis. 2d 31, 671 N.W.2d 279.

[9] Although Sortedahl points to certain administrative provisions discussed by the ***Weaver*** court, he does not here contend that any legislative or executive authorities—administrative or otherwise—required Johnson to routinely document his employees' performance.

degree, subjective and involves the determination of what the employer or the appointing authority thought of the laid-off employee's work." ***Id.*** at 51-52.

> The evaluation of the relative performances of employees by nature requires the supervisor to make a judgment call. A layoff system based on supervisors' evaluations of employees[,] efficiency and effectiveness—criteria which in themselves involve a great deal of subjectivity—necessarily places great reliance on the supervisors' beliefs and conclusions about their subordinates' relative merits. *Evidence of those beliefs and conclusions—such as standard personnel rating sheets—is relevant, probative and controlling on the issue of whether the most efficient and effective employees have been retained*.

Id. at 52 (internal quotation marks omitted; emphasis added).

¶15 To clear the "arbitrary and capricious" hurdle, the employer must only demonstrate a rational basis for the personnel action; that is, that the action was the result of a "reasoned thought process." ***Id.*** at 54. Under ***Weaver***, the employer satisfies this standard by presenting evidence that the layoff action was taken on the basis of merit, and that the laid-off employee was, in the employer's view, the least "efficient and effective" employee. *See* ***id.*** at 52. Indeed, ***Weaver*** went so far as to say that such evidence is "controlling." *See* ***id.*** Although the ***Weaver*** court mentioned a "standard personnel rating sheet," it did so only by way of example. Contrary to Sortedahl's assertion, nothing in ***Weaver*** renders irrational the Commission's determination that oral testimony from the employee's supervisor regarding his or her subjective and undocumented assessments of the employees' relative merits is sufficient.

II. The Commission's decision was supported by substantial evidence.

¶16 In a variation of Sortedahl's argument regarding the applicable legal standard, he also asserts that Johnson's oral testimony did not constitute

substantial evidence supporting the Commission's "just cause" determination. However, his briefing omits any mention (let alone citations to authority) of the standards applicable to our review of the record in the context of an administrative appeal. Instead, he again asserts that "[l]ayoff decisions on the basis of merit must be based on some form of contemporaneous and substantive records regarding merit that predate the layoff decision." For the reasons set forth above, we reject this argument and conclude the Commission applied a rational legal standard.

¶17 We also conclude substantial evidence supported the Commission's "just cause" determination under that legal standard. "Substantial evidence" is "evidence of such convincing power that reasonable persons could reach the same decision as the board." ***Oneida Seven Generations Corp. v. City of Green Bay***, 2015 WI 50, ¶43, 362 Wis. 2d 290, 865 N.W.2d 162 (quoting ***Clark v. Waupaca Cty. Bd. of Adj.***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994)). The Commission's decision must be supported by "more than 'a mere scintilla' of evidence and more than 'conjecture or speculation,'" ***id.***, ¶44 (quoting ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572), but "substantial evidence is less than a preponderance of the evidence," ***id.*** (citing ***Smith v. City of Milwaukee***, 2014 WI App 95, ¶22, 356 Wis. 2d 779, 854 N.W.2d 857)). As long as a decision is supported by substantial evidence, the weight of the evidence lies within the agency's discretion. *See* ***id.***

¶18 Here, Johnson's testimony provided sufficient evidence in support of the Commission's determination that Johnson had "just cause" for Sortedahl's layoffs, because Sortedahl was the weakest performer among the full-time assistant district attorneys. When asked why he selected Sortedahl for layoff over the other individuals in his seven-person office, Johnson testified as follows:

> I didn't have the money … that was the primary reason. And … the reason he was selected over some of the other younger lawyers is that, in my opinion, his performance and his possible future performance were not as good … as them. And a couple of the younger lawyers with less seniority have some real potential that I saw and … could be and are excellent lawyers. And if I'm going to rate them, I would have rated them an "A," whereas I would rate [Sortedahl] as a "C."

This reasoning applied to both Johnson's decision to reduce Sortedahl's work hours in January 2012, and his decision to lay off Sortedahl in July 2012.

¶19 According to the evidence before the Commission, Johnson was in a position to make such assessments. Johnson was a long-term district attorney and Sortedahl's direct supervisor in a small-office setting. Although Johnson did not conduct formal, written evaluations, he received information regarding his employees' respective performances from his own observation of his employees and others' statements about them. Johnson's custom was to handle employee issues informally on a case-by-case basis by speaking with the employee involved.

¶20 Johnson also elaborated upon Sortedahl's merit as an assistant district attorney. Johnson stated Sortedahl handled primarily misdemeanors and traffic matters. According to Johnson, Sortedahl was "fairly non-communicative," was not a "team player," and was adversarial toward the victim/witness office. It was important to Johnson that assistant district attorneys be able to work with the victim/witness office.

¶21 The Commission observed that Sortedahl had made "no effort to prove that his skills were clearly superior to those of the four [least-tenured assistant district attorneys] who remained." Instead, Sortedahl chose to attack the process by which he was selected for layoff. According to the Commission, there was "nothing in the record contradicting Johnson's evaluation of his staff," and

Sortedahl has not directed us to any such evidence on appeal. Under these circumstances, the Commission's factual findings are conclusive.

¶22 Sortedahl also contends Johnson "manipulated the timing of the layoff in order to avoid a very clear and straightforward layoff procedure based on seniority." However, this argument ignores the Commission's findings—which Sortedahl does not challenge—that the collective bargaining agreement containing those seniority provisions was cancelled in March of 2011 and that any legal uncertainty regarding the process of enacting Act 10 had been resolved by June of that year. In any event, the Commission concluded that even if Johnson had secured additional funding from the County to take advantage of a pending change in the law (i.e., the elimination of the seniority rule), this did not necessarily demonstrate an improper motive. Accepting Sortedahl's argument would require this court to substitute its judgment for that of the Commission, something we will not do.[10] *See* ***Hutson v. State Pers. Comm'n***, 2003 WI 97, ¶29, 263 Wis. 2d 612, 665 N.W.2d 212.

By the Court.—Order affirmed.

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

[10] For this reason, we also must reject any argument Sortedahl makes regarding Johnson's decision to hire Nieskes in lieu of rehiring Sortedahl. The Commission remarked that Johnson's decision in this regard was "logical and understandable given the need for an experienced prosecutor." Moreover, Sortedahl does not contest the Commission's conclusion that it had no jurisdiction to consider such hiring challenges.