STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**
BRANCH 10

DIANNE L. EINERSON,

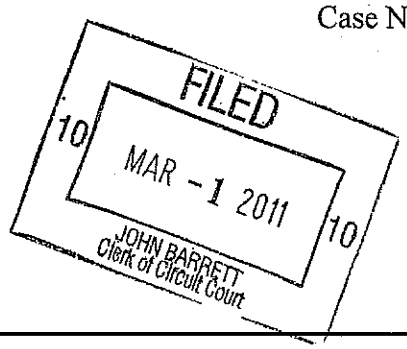
Plaintiff,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, and MILWAUKEE INSTITUTE OF ART AND DESIGN,

Defendants.

Case No: 10-CV-11073



DECISION

The plaintiff, Dianne L. Einerson, seeks judicial review of a decision of the Labor and Industry Review Commission (Commission) in which the Commission found that the plaintiff was not eligible for unemployment insurance benefits because she had failed, without good cause, to accept a bona fide offer of suitable work, within the meaning of Wis. Stat. § 108.04(8)(a) and (d). This court reviewed the record, and for the reasons stated herein, sets aside the Commission's decision and remands the case for further proceedings consistent with this Decision and Final Order.

BACKGROUND

The plaintiff, who has a bachelor's degree in business, worked for the Milwaukee Institute of Art and Design (employer) for about two years and three months as a part-time accounts payable specialist. On August 24, 2009, the employer informed the plaintiff that her part-time position was being eliminated and that she could accept a newly-created full-time position. In the plaintiff's part-time position, she worked 20 to 23 hours per week doing

payables processing. In the new position, the plaintiff was to work 37.5 hours per week, which would be composed of: (1) the payables processing work she did in her previous position; (2) payroll duties; and (3) clerical support functions for her supervisor, the controller, Brenda Jones. The plaintiff turned down the position because of its non-professional responsibilities. The plaintiff's last day of work was September 11, 2009, when she terminated her employment.

The plaintiff subsequently filed a claim for unemployment insurance benefits. On October 16, 2009, the Department of Workforce Development (Department) determined that the plaintiff failed to accept a bona fide offer of work without good cause and thus was ineligible to receive benefits under Wis. Stat. § 108.04(8)(a).

The plaintiff appealed the Department's decision and a hearing was scheduled before Administrative Law Judge Paul E. Gordon (the ALJ) for January 28, 2010. The plaintiff argued that she had good cause to refuse the offer because a majority of the additional 14.5 to 17.5 hours per week would be dedicated to clerical work. The plaintiff testified that while she was being trained to do payroll, she would work on a portion of the payroll responsibilities for eight hours, every other week. She also testified that the human resources manager, who had previously done the payroll, indicated to her that it took only about two hours, twice per month to do the work. In contrast, Ms. Jones, the controller, testified that the clerical tasks would make up only about five percent of the new position and that payroll work would take approximately 16 to 20 hours, every other week, which would include time for answering employees' questions regarding their payments, tax processing, and preparing the requisite tax processing with the employer's third-party vendor.

On January 28, 2010, after the evidentiary hearing, the ALJ issued his decision reversing the Department's determination that the plaintiff was ineligible for benefits. The ALJ found that

of the 37.5 hours per week for the new position, "the remaining responsibilities other than the clerical work comprised no more than at most 10 hours per week, and probably less in most weeks." Therefore, the plaintiff "could expect to spend about 25 percent of her time performing clerical work." The ALJ concluded that that good cause was thus established under Wis. Stat. § 108.04(8)(d), because "[the plaintiff] had not had any time to seek work in line with the skill levels demanded of her on her most recent job and the new work afforded a significant amount of work that involved a significantly lower grade of skill than applied to her most recent job."

The employer appealed the ALJ's decision and, pursuant to Wis. Stat,. § 108.09(6)(d), the Commission conducted a *de novo* review of the case based on the evidence that had been submitted during the evidentiary hearing before the ALJ. On June 17, 2010, the Commission issued its decision, reversing the decision of the ALJ. The Commission concluded that the plaintiff failed, without good cause, to accept an offer of suitable work, within the meaning of Wis. Stat. § 108.04(8)(a) and (d). The Commission stated in its decision:

> While there is some disagreement as to the relative amounts of time that would be dedicated to the various responsibilities, the record shows that of the nine essential duties and responsibilities, six were included in her old job, which took about 23 hours per week to accomplish and that the remaining responsibilities other than the clerical work comprised at most 10 hours per week, and probably less in most weeks. Thus, up to 33 out of 37.5 hours would be spent performing non-clerical tasks. The employee did not establish that she would be spending 20 percent or more of her time on clerical work. Further, the only way to be certain precisely how much time the employee would spend performing clerical work would have been to accept the position and do the work. The employee was going to be performing the same work she previously performed for the employer, for the same number of hours she previously worked. She would be paid her prior hourly rate for performing the additional tasks. Finally, the job offered more benefits and more weekly hours.

Accordingly, the Commission found that the plaintiff was ineligible for benefits. The Commission further found that the plaintiff would have to repay to the Unemployment Reserve Fund the $6,572.00 in benefits already received.

The plaintiff subsequently commenced this action for judicial review of the Commission's decision.

STANDARD OF REVIEW

This court reviews the Commission's decision pursuant to Wis. Stat. § 102.23, which provides that a court may set aside the Commission's decision only upon the following grounds: (1) the Commission acted without or in excess of its powers; (2) the order or award was procured by fraud; or (3) the Commission's findings of fact do not support its order. Wis. Stat. § 102.23(1)(e).

The Commission's findings of fact must be upheld if they are supported by credible and substantial evidence in the record. § 102.23(6); Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). Where different inferences may reasonably be drawn from the evidence, the drawing of one such permissible inference by the Commission is an act of fact finding, and the inference so derived, if supported by credible and substantial evidence, is conclusive on the reviewing court. Universal Foundry Co. v. DILHR, 86 Wis. 2d 582, 589, 273 N.W.2d 324 (1979) (citing Vocational Tech. & Adult Ed. Dist. 13 v. DILHR, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977)). Moreover, "the court shall not substitute its judgment for that of the Commission as to the weight or credibility of the evidence of any finding of fact." § 102.23(6).

The determination of whether the plaintiff failed, without good cause, to accept an offer of suitable work, within the meaning of Wis. Stat. § 108.04(8), is a question of law. See

Nottelson v. DILHR, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980) (stating that whether the facts fulfill a particular legal standard is a question of law). While findings of fact are conclusive if supported by credible and substantial evidence, legal conclusions drawn by the Commission from its findings of fact are not binding on the reviewing court. Vocational Tech., 76 Wis. 2d at 240. However, the fact that the Commission's legal determinations are not binding on the court does not mean that the court does not pay deference to the Commission's conclusion. Charette v. LIRC, 196 Wis. 2d 956, 959, 540 N.W.2d 239 (Ct. App. 1995). Courts have applied three levels of deference to conclusions of law in agency decisions—great weight, due weight, and *de novo*. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992) (citing Jicha v. DILHR, 169 Wis. 2d 284, 290, 485 N.W.2d 256 (1992); Sauk County v. WERC, 165 Wis. 2d 406, 413, 477 N.W.2d 267 (1991)).

Under the highest standard, a court must give "great weight" deference to the agency's decision if the agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of a statute. Id. (citing Jicha, 169 Wis. 2d at 290-91; Sauk County, 165 Wis. 2d at 413-14). "'Great weight' is also applied where a 'legal question is intertwined with factual determinations or with value or policy determinations . . . .'" Berhnhardt v. LIRC, 207 Wis. 2d 292, 303, 558 N.W.2d 874 (Ct. App. 1996) (quoting Sauk County, 165 Wis. 2d at 413); accord West Bend Edu. Ass'n v. WERC, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984). If the agency's decision is reviewed under great weight deference, its decision will be upheld if it is reasonable, even if an alternative interpretation of the statute as applied to the facts of the case is more reasonable. See e.g., Barron Elec. Coop. v. Pub. Serv. Comm'n of Wisconsin, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997) (citing

Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 661, 663, 539 N.W.2d 98 (1995)); Sauk County, 165 Wis. 2d at 413; West Bend, 121 Wis. 2d at 13.

Wisconsin courts have determined that the Commission's decisions with respect to Wis. Stat. § 108.04(8) are entitled to "great weight" deference because the Commission has longstanding experience, technical competence, and specialized knowledge in administering the statute. DILHR v. LIRC, 193 Wis. 2d 391, 397, 535 N.W.2d 6 (Ct. App. 1995); Hubert v. LIRC, 186 Wis. 2d 590, 597, 522 N.W.2d 512 (Ct. App. 1994). Accordingly, the court will uphold the Commission's decision if it is reasonable, even if an alternative conclusion is more reasonable.

On appeal, the plaintiff argues that the Commission misconstrued the testimony and denied her due process rights by failing to consult with and defer to the ALJ regarding the credibility of the witnesses. The plaintiff also argues, as she did before the ALJ, that a significant number of the additional hours would be spent doing clerical work and thus she had good cause to refuse the offer of work.

ANALYSIS

There are two questions before this court: (1) whether the demands of due process were satisfied; and, if they were, (2) whether the plaintiff failed, without good cause, to accept an offer of suitable work, within the meaning of Wis. Stat. § 108.04(8). Because this court finds that the demands of due process were not satisfied, the second issue need will not be addressed.

Where credibility of witnesses is at issue, due process requires that the Commission consult with the hearing examiner and submit a memorandum opinion explaining its basis for rejecting the hearing examiner's findings. Hakes v. LIRC, 187 Wis. 2d 582, 588, 523 N.W.2d 155 (1994) (citing Shawley v. Indus. Comm'n, 16 Wis. 2d 535, 541-42, 114 N.W.2d 872 (1962); Transamerica Ins. Co. v. DILHR, 54 Wis. 2d 272, 284, 195 N.W.2d 656 (1972)). In Shawley,

the Wisconsin Supreme Court stated that "[w]here credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing." In Braun v. Indus. Comm'n, 36 Wis. 2d 48, 57-58, 153 N.W.2d 81 (1967), the court explained further:

> In situations where an examiner hears conflicting testimony and makes findings based upon the credibility of witnesses, and the Commission thereafter reverses its examiner and makes contrary findings, the record should affirmatively show that the Commission had the benefit of the examiner's personal impressions of the material witnesses. . . . The demands of due process cannot be satisfied with anything less.

In Briggs & Stratton Corp. v. DILHR, 43 Wis. 2d 398, 410, 168 N.W.2d 817 (1969), the court again noted that for questions of credibility, "special deference is to be paid [by the agency] to the face-to-face examiner or fact-finder." Finally, in Transamerica, the court stated that in addition to consulting with the examiner, the Commission must "set forth the reasons why a fact-finder's findings are being set aside or reversed, and spell out the basis for independent findings substituted." 54 Wis. 2d at 284.

Unlike factual findings, "legal differences between the appeal tribunal and the Commission do not trigger the special requirements of consultation of record with the examiner and separate explanation by the department of the basis for its disagreement." Carley Ford, Lincoln, Mercury, Inc. v. Bosquette, 72 Wis. 2d 569, 576, 241 N.W.2d 596 (1976) (citing Briggs & Stratton, 43 Wis. 2d at 410 (finding that unlike questions of credibility, the due process requirement does not apply to conclusions of law)).

In this case, the plaintiff asserts that the Commission had a duty to consult the ALJ because the Commission's contrary conclusion is based on testimony that was rejected by the

ALJ. Specifically, the plaintiff asserts that, with respect to the amount of time that would be dedicated to clerical work, the Commission relied on the controller's testimony while the ALJ rejected the controller's testimony in favor of the plaintiff's testimony. In contrast the Commission argues that the requirement to consult the record with the ALJ was not triggered because the Commission reached a different legal conclusion than the ALJ on the same set of facts.

The record indicates the Commission did not reach a different legal conclusion based upon the same facts but, instead, rejected the ALJ's findings of fact with respect to the percentage of time that would be dedicated to clerical work. The Commission agreed with the ALJ that it would take the plaintiff 23 of the 37.5 hours per week to complete the duties of her previous position, and that "the remaining responsibilities other than the clerical work comprised no more than at most 10 hours per week, and probably less in most weeks." However, the Commission rejected the ALJ's finding that about 25 percent of the work would be clerical, and instead found that the plaintiff failed to establish that she would spend 20 percent or more of her time on clerical work.

There was a lot of conflicting testimony about the number of hours that would be dedicated to payroll versus clerical work. Depending on what testimony was believed, the percentage of work dedicated to clerical work could be: (1) 36 percent, based upon the plaintiff's testimony that it took the previous person two hours every other week (or 1 hour per week) to do the payroll; (2) about 28 percent, based upon the plaintiff's testimony that, while she was in training, it took her eight hours every other week (or four hours per week) to do a portion of the payroll; (3) 12 to 17 percent, based upon the controller's testimony that it would take 16 to 20 hours every other week (or eight to ten hours per week) to do payroll; or (4) 5 percent, based on

the controller's other testimony that clerical work would make up only 5 percent of the work. Based upon the different percentages, it seems that the ALJ may have rejected the controller's testimony, although the ALJ found that payroll could take up to 10 hours per week, which is consistent with the controller's testimony. While it is not clear what testimony the ALJ relied on in finding that 25 percent of the work could be clerical, it is clear that the Commission came to a different factual conclusion, and did so without consulting with the ALJ, setting forth the reasons why the ALJ's finding was being rejected, and spelling out the basis for the Commission's different finding.

Additionally, after finding that the plaintiff failed to establish that 20 percent of the position was clerical, the Commission stated in its decision, "[f]urther, the only way to be certain precisely how much time the employee would spend performing clerical work would have been to accept the position and do the work." On this point, the Commission argues that the ALJ's finding that 25 percent of the work would be clerical cannot stand because, given the fact that the employee never actually worked in the new position, the evidence is not sufficient to remove the question from the realm of speculation. However, it was established that 23 of the 37.5 hours per week would be spent performing the work of the previous position, and there was testimony from both the plaintiff, based on her own experience and the experience of the person who previously did the payroll, and the controller as to the number of hours it would take to do payroll. Thus, in finding that there was not sufficient evidence to remove the question from the realm of speculation, it seems the Commission was rejecting that testimony. Before rejecting the testimony and rejecting the ALJ's finding that, based on the testimony, 25 percent of the work would be clerical, the Commission was required to consult with the ALJ.

In sum, the ALJ heard conflicting testimony regarding the number of hours that would be dedicated to payroll and clerical work, concluded that 25 percent of the work would be clerical, and thus found that the plaintiff was entitled to benefits. The Commission thereafter reversed the ALJ and made contrary factual findings. Under those circumstances, the special due process requirements were triggered. Because the Commission did not consult with the ALJ and provide a memorandum opinion stating the basis for its rejection of the ALJ's findings and the reason why it made its own independent finding, the demands of due process were not satisfied.

ORDER

THEREFORE, based on a thorough review of the record, IT IS HEREBY ORDERED that, for the reasons stated in this Decision and Final Order, the decision of the Labor and Industry Review Commission is SET ASIDE. This case is REMANDED for further proceedings consistent with this Decision and Final Order.

March 1, 2011

By The Court:

TIMOTHY G. DUGAN

Hon. Timothy G. Dugan
Circuit Court Branch 10

THIS IS THE FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL, NO FURTHER ORDERS ARE CONTEMPLATED BY THE COURT, AND THE CLERK SHALL ENTER JUDGMENT BASED UPON THIS ORDER.