STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CIVIL DIVISION

JAMES R. WITTLIEFF,

Petitioner,

-vs-

Case No. 98-CV-009379

LABOR AND INDUSTRY REVIEW COMMISSION and
GREENDALE SCHOOL DISTRICT,

Respondents.

MEMORANDUM DECISION AND FINAL ORDER

STATEMENT OF THE CASE

The Petitioner, James R. Wittlieff, appeals the November 4, 1998 decision of the Labor and Industry Review Commission ("LIRC") affirming the decision of the administrative law judge ("ALJ") Paul E. Gordon. In his decision the ALJ determined that the Greendale School District ("District") terminated the petitioner's employment because of the petitioner's misconduct. A termination for misconduct rendered the petitioner ineligible for unemployment benefits pursuant to section 108.04(5) of the Wisconsin Statutes.

For the reasons established below, the decision of the Commission is affirmed.

STATEMENT OF THE FACTS

The District employed the petitioner, a physical education teacher, for twenty-two years. During the 1996-97 school year, several students lodged complaints against the petitioner concerning the petitioner's behavior toward them. One student testified that petitioner placed his hands on her buttocks while spotting her during a pull-up exercise. She

told the petitioner to never touch her again. She also complained about an unrelated incident that occurred during a push-up exercise. The petitioner's arm touched her breasts during the exercise while she lowered her chest to a toilet paper roll. Another student also testified to a similar incident. This student, however, was required to perform a push-up by pushing the petitioner's fist to the floor with her chest. The petitioner's arm touched her breasts during this exercise.

In a separate incident, the petitioner required his students to perform stretching exercises during their swimming unit. The students were not allowed to cover themselves during exercises which required them to keep their legs apart.

Finally, the students testified that the petitioner made inappropriate comments to them. For example, the petitioner stated that one student was "looking pretty sexy" when she wore a tight shirt that showed her navel. The petitioner also referred to another student as "sweetheart", "honey", or "dear" even after she requested that the petitioner not use these pet names. After the students reported the aforementioned incidents, the petitioner was placed on administrative leave with pay on August 22, 1997.

The District adopted an anti-sexual harassment policy in 1993; a policy prohibiting employees from sexually harassing students. The petitioner had been aware of the policy since at least 1994. The board of education terminated the petitioner's employment effective November 10, 1997. He applied for unemployment benefits on November 17, 1997. On November 29, 1997, a deputy of the Department of Workforce Development determined that the District did not terminate the petitioner for misconduct; allowing the petitioner to receive unemployment benefits. The District appealed that determination. On December 4, 1997, the ALJ determined that the petitioner was terminated for misconduct, rendering him ineligible for unemployment benefits. On

appeal by the petitioner, LIRC upheld the ALJ's determination.

Petitioner seeks review of LIRC's decision; arguing the following: 1) a de novo standard of review should be applied to the question of law at issue; 2) a rational basis did not exist to allow the Commission to consider an adverse inference against the petitioner's invocation of his Fifth Amendment privilege against self-incrimination; and 3) the petitioner invoked his Fifth Amendment rights through his attorney.

STANDARD OF REVIEW

This court reviews the Commission's decision pursuant to section 102.23(1)(e) of the Wisconsin Statutes. The court may set aside LIRC's order only upon the following grounds: 1) the commission acted without or in excess of its powers; 2) the order was procured by fraud; and 3) the commission's findings of fact did not support its order.

This court has no authority to make its own findings of fact. McGraw-Edison Co. v. DILHR, 64 Wis.2d 703, 710 (1974). LIRC's findings of fact are conclusive if there is any credible, relevant evidence to support those findings. Princess House, Inc. v. DILHR, 111 Wis.2d 46, 53 (1983); Eastex Packaging Co. v. DILHR, 89 Wis.2d 739, 754 (1979); R.T. Madden, Inc. v. ILHR Dept., 43 Wis.2d 528, 548 (1969); Boynton Cab Co. v. Giese, 237 Wis. 237, 248 (1941). Questions regarding employee conduct and intent are questions of fact. Holy Name School v. ILHR Dept., 109 Wis.2d 381, 386-87 (Ct. App. 1982).

De novo review of an agency decision is only appropriate where the issue before the agency is clearly one of first impression or where the agency's position on the issue has been inconsistent, providing no real guidance. Margoles v. LIRC, 221 Wis.2d 260, 266 (1998). Courts show great deference to agency conclusions of law where: 1) the legislature charges the agency with the duty to administer the statute; 2) the agency's interpretation of the statute is long-standing; 3) the

agency employs its expertise or specialized knowledge in making its determination; and 4) the agency's interpretation will provide uniformity. See id.; Kelly v. Marquardt, 172 Wis.2d 234, 244 (1992). LIRC meets all of the factors listed above. Therefore, LIRC's decision should be sustained if it is reasonable. See UFE, Inc. v. LIRC, 201 Wis.2d 274, 287 (1996); Harnischfeger v. LIRC, 196 Wis.2d 650, 661 (1995).

ANALYSIS

"An employe whose work is terminated by an employing unit for misconduct connected with the employe's work is ineligible to receive benefits . . . ." § 108.04(5) Stats. The Wisconsin Supreme Court defined "misconduct" as:

> [C]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60 (1941).

LIRC reasonably applied the facts presented at the hearing to the definition of "misconduct" cited above to determine that the petitioner's actions constituted misconduct. The District established through testimony that the petitioner made comments and took actions toward a number of students in violation of the District's sexual harassment policy. The District also established that it informed and educated the petitioner about the District's sexual harassment policy before he took these actions. Therefore, LIRC reasonably concluded that the petitioner's actions, in light of his knowledge of the District's sexual harassment policy, met the definition of "misconduct" found in Boynton Cab Company.

"[W]hen the direct consequences of an act or omission are fairly obvious to an [employe], and are such as to be likely to cause serious loss to the employer, his business or his property, a finding of misconduct is not unreasonable." Boynton Cab Co., 237 Wis. at 261. The petitioner had an opportunity to rebut the evidence presented by the District at the hearing. For example, the petitioner could have entered evidence of the push-up testing methods endorsed by the American Council on Exercise, referenced in his brief to this court.. He failed, however, to put evidence of this type, or any type, on the record.

Although thoroughly briefed by the parties, whether Petitioner properly invoked his Fifth Amendment right against self-incrimination is inconsequential. Even assuming he properly invoked his rights through his attorney, the trier of fact could permissibly make an adverse inference from the his failure to testify because this was a civil matter. State v. Heft, 185 Wis.2d 288, 300 (1994).

CONCLUSION

THEREFORE, based on a thorough review of the record and the arguments of the parties as set forth in their briefs, this court is satisfied that LIRC's conclusion that the petitioner's employment was terminated for misconduct is sustained, and IT IS HEREBY ORDERED that the decision of the Commission is hereby **affirmed** and the appeal is **dismissed**.

Dated at Milwaukee, Wisconsin this 29 day of November, 1999.

BY THE COURT:

Thomas P. Donegan

Honorable Thomas P. Donegan
Circuit Court Judge
Branch 45