COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1360 **Cir. Ct. No. 99-CV-1671**

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

LOCAL 1901-F, AFSCME, AFL-CIO,

PETITIONER-APPELLANT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND BROWN COUNTY,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Local 1901-F, AFSCME, AFL-CIO, (the Union) appeals an order affirming a decision of the Wisconsin Employment Relations Commission. The commission found that Dallas Maass, an employee at the

Brown County Shelter Care for juveniles, had sexually abused a resident of the shelter.[1] As a result, the commission concluded the County had just cause to discharge Maass. The Union[2] argues that the commission improperly based its material findings of fact on uncorroborated hearsay. We agree. Therefore, we reverse the order and remand to the commission for further proceedings consistent with this opinion.

BACKGROUND

¶2 Maass began employment at the shelter in 1989 and became a full-time employee in 1994. His responsibilities were to care for and supervise the children who were residents. Maass first began working with Joshua B., a fourteen-year-old male, in 1994. Joshua had a history of neglect and abuse, including sexual abuse. He was a resident at the shelter on nine different occasions in 1994 and 1995.

¶3 On April 14, 1995, a hearing was held before a court commissioner regarding an appropriate placement for Joshua. At the hearing, Joshua expressed an interest in returning to the shelter. Maass attended on behalf of the shelter. When asked by the court commissioner about the appropriateness of returning Joshua to the shelter, Maass stated that he doubted the shelter could provide the level of supervision that Joshua required. However, the commissioner ordered that the shelter was the preferable placement.

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[1] Both the commission and Brown County are respondents in this appeal. We refer to them collectively as the commission.

[2] The Union represents employees of the Brown County Shelter Care facility.

¶4 On April 16, 1996, Maass sent Joshua to his room because of disciplinary problems. Joshua accused Maass of kicking him in the face and threatened to have his job. Maass noted this in the log. Joshua's allegation was investigated and found to be unsubstantiated.

¶5 Shortly after that, Joshua was transferred to the Brown County Mental Health Center. On April 30, 1995, he told Sally Jo Ledvina, a nurse, that Maass had fondled his penis. He complained of an upset stomach at the time and later became sick. Ledvina reported Joshua's allegations to her supervisor.

¶6 WISCONSIN STAT. § 48.981(3)(c)4 requires a county to investigate reports of child abuse. A Manitowoc County social worker investigated the allegation against Maass.[3] Joshua told the social worker that Maass had touched his penis on several different occasions while he was sleeping. On June 15, 1995, the social worker filed her report, substantiating the allegation of sexual abuse. Specifically, the social worker concluded that Maass had touched Joshua on his penis.

¶7 On June 23, 1995, the County discharged Maass based upon the social worker's finding of sexual abuse. The Union filed a grievance on behalf of Maass challenging the discharge. The County declined to submit the grievance to arbitration.

[3] WISCONSIN STAT. § 49.981(4)(d) provides that if an individual accused of child abuse is an employee of an agency required to investigate reports of child abuse, another licensed child welfare agency may be designated to conduct an independent investigation. Brown County has an agreement with Manitowoc County whereby allegations of child abuse against County employees are to be investigated by a Manitowoc social worker.

¶8 The Union then filed a prohibited practice complaint with the commission under the Municipal Employment Relations Act. The Union alleged that the County violated WIS. STAT. § 111.70(3)(a)(1) and (4) by failing to bargain and by failing to maintain the status quo upon expiration of the 1993-1994 collective bargaining agreement, specifically the provision of the agreement requiring just cause for discipline. The complaint also requested a hearing on the merits of the allegation against Maass.

¶9 As a result of Joshua's allegation, Maass also was charged criminally with two counts of second-degree sexual assault with a person under the age of sixteen, contrary to WIS. STAT. § 948.02. On July 29, 1996, a preliminary hearing was held. Joshua testified that while he was a resident at the shelter, Maass had touched his penis on two separate occasions. Joshua stated that Maass would come into his room while he was sleeping. Maass was bound over for trial at the conclusion of the hearing.

¶10 While housed in secure detention prior to the preliminary hearing, Joshua spoke with Jennifer M., a female juvenile who had also been a resident at the shelter. Joshua told Jennifer that he was there to testify against Maass for sexually assaulting him. According to Jennifer, Joshua said that he had made up the charges to get even with Maass and that Maass had not assaulted him.

¶11 Jennifer later told workers at the shelter that Joshua had admitted he was lying when he accused Maass. On August 27, 1996, Jennifer signed an affidavit stating that Joshua was lying. Consequently, the district attorney dismissed the criminal charges against Maass. At the dismissal hearing, the district attorney stated that the dismissal was based upon Jennifer's affidavit and Joshua's unreliability.

¶12 In late 1997 and early 1998, extensive hearings were held before an examiner regarding the Union's complaint. During the hearings, the guardian ad litem stated that Joshua would not be available to testify because he was hospitalized in an adolescent psychiatric unit following an overdose of Tylenol. Joshua's psychologist at the time wrote a letter explaining that it would not be in Joshua's best interests to testify. According to the psychologist, the anticipation of testifying would produce a great deal of anxiety for Joshua and would threaten to undo his recent improvement.

¶13 The examiner determined that Joshua was unavailable as a witness. Based upon Joshua's unavailability, the examiner admitted into evidence the Manitowoc County social worker's report regarding Joshua's allegation against Maass, the testimony of nurse Ledvina, who related Joshua's report of fondling by Maass, and the transcript of Joshua's testimony at the preliminary hearing.

¶14 On December 29, 1998, the examiner issued a decision concluding that the County had violated the collective bargaining agreement by discharging Maass without just cause. The examiner found that none of the witnesses was overwhelmingly credible. However, he attached some weight to Jennifer's testimony and to Maass's denials. Given the weakness of Joshua's credibility, the examiner concluded that the hearsay statements did not satisfy even a preponderance burden of proof much less rise to the level of clear and convincing evidence. Accordingly, the examiner held that the allegations of sexual abuse were not proved and the County did not have just cause to discharge Maass.

¶15 The County petitioned the commission for administrative review of the examiner's decision. The commission reversed the examiner's decision, finding that Maass did have sexual contact with Joshua and concluding that there

was just cause for the County to discharge him. Specifically, the commission concluded that: (1) Maass's conduct with other residents of the shelter substantially increased the probability that the sexual abuse occurred; (2) Maass's lack of recollection damaged his overall credibility; (3) Jennifer's testimony was not credible; and (4) Joshua's hearsay statements that Maass sexually abused him were credible and persuasive.

¶16 The Union then petitioned for review in the circuit court. The court remanded to the commission to explain what evidence it relied on to determine that Jennifer was not a credible witness. The commission complied, and the circuit court affirmed the commission's decision.

STANDARD OF REVIEW

¶17 On appeal, we review the commission's decision, not the circuit court's. ***Public Serv. Corp. v. Public Serv. Comm'n***, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). We may set aside the commission's order if the order depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. ***General Cas. Co. v. LIRC***, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991).

¶18 "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." ***Cornwell Pers. Assocs. v. LIRC***, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). We will construe the evidence most favorably to the commission's findings of fact and we may not overturn the commission's order if there is credible evidence "sufficient to exclude speculation or conjecture …." ***General Cas.***, 165 Wis. 2d at 179.

DISCUSSION

I. UNCORROBORATED HEARSAY RULE

¶19 The Union argues that the commission's material findings of fact are not supported by substantial evidence. In particular, the Union contends that Joshua's hearsay statements that Maass sexually abused him are uncorroborated. According to the Union, uncorroborated hearsay statements do not constitute substantial evidence. Therefore, the Union concludes the commission's decision is not based on substantial evidence.[4]

¶20 The commission counters that hearsay evidence does not have to be corroborated. In the alternative, it argues that Joshua's hearsay statements were corroborated.

¶21 The Union relies on ***Folding Furn. Works v. Wisconsin L. R. Bd.***, 232 Wis. 170, 188-89, 285 N.W. 851 (1939), in arguing that the commission cannot rely on uncorroborated hearsay. In that case, our supreme court addressed the significance of WIS. STAT. § 111.10(2) (1937), and its relation to the "substantial evidence" standard.[5] ***Id.*** The court expressly identified

[4] The Union also argues that that the commission: (1) disregarded unrebutted evidence; (2) erred by concluding that Joshua was unavailable as a witness; (3) relied on untrustworthy hearsay by admitting into evidence the Manitowoc County social worker's report, the testimony of the Mental Health Care nurse to whom Joshua first reported the alleged sexual abuse by Maass, and the transcript of Joshua's testimony at the preliminary hearing; and (4) applied the wrong burden of proof. We do not address these arguments because we resolve this appeal on the uncorroborated hearsay issue. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). We have substantial concern about the admissibility of the social worker's report, Nurse Ledvina's testimony, and the transcript of Joshua's former testimony. However, we need not decide those issues. ***Id.*** at 67.

[5] WISCONSIN STAT. § 111.10(2) (1937) provided that "the rules of evidence prevailing in courts of law or equity shall not be controlling."

"uncorroborated hearsay" as evidence that is not substantial evidence to support the findings of the Wisconsin Labor Relations Board. ***Id.*** The court stated:

> The obvious purpose of [WIS. STAT. § 111.10(2) (1937)] and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. … But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. *Mere uncorroborated hearsay or rumor does not constitute substantial evidence*.

Id. (emphasis added).

¶22 Subsequent to ***Folding Furniture Works***, WIS. STAT. § 111.10(2) (1937) was repealed and § 111.07(3) (1939) was created to govern proceedings before the commission. The statute now provides that proceedings "shall be governed by the rules of evidence prevailing in courts of equity." ***Id.***

¶23 The commission states that before hearsay evidence now may be admitted in proceedings before the commission, the hearsay evidence must fall within one of the recognized hearsay exceptions. *See* WIS. STAT. CH. 908. It contends that because hearsay falling within one of the exceptions is reliable, there is no need for the rule requiring hearsay to be corroborated.

¶24 However, since the statutory change, we held in ***Village of Menomonee Falls v. DNR***, 140 Wis. 2d 579, 610, 412 N.W.2d 505 (Ct. App. 1987), that "administrative bodies should never ground administrative findings

upon uncorroborated hearsay."[6] We are bound not only by ***Folding Furn. Works***, but also by ***Village of Menomonee Falls***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). The rule that "uncorroborated hearsay … does not constitute substantial evidence" remains the law. ***Folding Furn. Works***, 232 Wis. at 189.

II. APPLICATION OF THE UNCORROBORATED HEARSAY RULE

¶25 Here, the commission based its finding that Maass did sexually abuse Joshua on hearsay evidence, specifically the report of the social worker, nurse Ledvina's testimony regarding what Joshua told her, and Joshua's former testimony at the preliminary hearing. The commission argues that even if it is prohibited from relying on uncorroborated hearsay, the hearsay evidence was corroborated.

A. Expert Testimony

¶26 Both Nurse Ledvina and psychologist Stephanie Heuseman testified at the hearing as expert witnesses and offered their opinions that Joshua's conduct was consistent with that of a victim of sexual abuse. Ledvina testified that Joshua had the attributes of a sexual assault victim. She stated that in her experience, many victims of sexual abuse complain of chronic stomach pains. Heuseman also

[6] The uncorroborated hearsay rule is especially important in a case like this. Joshua has severe emotional and mental problems, including both suicidal and homicidal tendencies. The commission found that Joshua has a history of falsely accusing other people of wrongdoing. He has accused both his parents of sexual abuse. He has falsely accused other Shelter Care workers of injuring him and has made false accusations against other young people with whom he has resided at the various county facilities. He has also accused the Mental Health Care staff of stealing his jacket and money. And, as stated earlier, he previously accused Maass of kicking him in the face, an accusation that was found to be unsubstantiated.

testified that the way Joshua responded to questions was consistent with sexual abuse victims. The commission contends this expert testimony corroborates the hearsay.

¶27 We disagree. It is undisputed that Joshua had already been sexually abused at another facility. Therefore, the expert testimony, at most, only reinforces what was already known, namely that Joshua was a victim of sexual abuse. The expert testimony does nothing to corroborate Joshua's allegations against Maass.

B. Consistent Statements

¶28 The commission also appears to argue that the hearsay is corroborated because Joshua made consistent statements to Ledvina, the social worker, and in his preliminary hearing testimony. However, whether hearsay is corroborated is not dependent upon the number of times a story is told or the number of people the story is told to. Mere repetition does not amount to corroboration.

C. Opportunity

¶29 The commission contends that the hearsay is corroborated by evidence indicating that Maass had the opportunity to sexually abuse Joshua. The examiner found that at the time of the alleged assaults: (1) Maass was working on the midnight to 8 a.m. shift; (2) the normal staffing pattern is one male and one

female; and (3) employees sometimes fall asleep on the midnight to 8 a.m. shift.[7] In addition, Maass testified "if someone really wanted to do something of this type, you know, you could …."

¶30 However, Joshua's allegations that Maass sexually abused him were very vague and unspecific. Joshua was unable to say what time of night the abuse occurred. He simply described the abuse by stating that he would wake up to Maass fondling his penis. Maass's testimony that anyone could do something like this if they wanted to does not corroborate the hearsay, either. Any employee who was on duty while a resident was sleeping would have had an opportunity to sexually abuse that resident. Just because Maass had the general opportunity does not mean it is more likely that he did in fact commit the assault.

¶31 Other than Joshua's hearsay allegation, there is no evidence in the record placing Maass in Joshua's room on the nights of the alleged abuse. Therefore, the hearsay is not corroborated by so-called opportunity evidence.

D. Other Acts Evidence

¶32 Last, the commission argues the hearsay was corroborated by other acts evidence[8] of Maass's inappropriate work behavior. The commission found that Maass had engaged in other inappropriate behavior with other residents of the

[7] The commission concluded that Maass had ample opportunity to sexually abuse Joshua without detection because staff members sometimes fall asleep on this shift. However, the commission did not find that any staff members were asleep when the alleged sexual abuse occurred.

[8] Other acts evidence is admissible under WIS. STAT. § 904.04(2) if: (1) the evidence is offered for an acceptable purpose; (2) the proposed other acts evidence is relevant; and (3) the prejudicial effect of the other acts evidence substantially outweighs its probative value. ***State v. Sullivan***, 216 Wis. 2d 768, ¶¶6-8, 576 N.W.2d 30 (1998).

shelter. The commission adopted the examiner's findings that Maass: (1) had another resident of the shelter grab his ankles before entering the shower; (2) allowed other boys to spank a resident on his sixteenth birthday and then had the resident remove his shirt so Maass could draw a smiley face on the resident's stomach; (3) had a flirtatious exchange with a resident; and (4) told other staff that he knew why a particular resident was popular with the ladies because he was "hung like a horse."

¶33 These findings may constitute inappropriate behavior. However, they are not instances of sexual abuse. None of the findings is similar to Joshua's allegation. The instances of inappropriate behavior did not occur at night when the residents were asleep. Further, the instances did not consist of Maass touching the genital area of any resident. Maass's inappropriate work behavior with other residents does not corroborate Joshua's allegation that Maass sexually abused him. As a result, the hearsay evidence is uncorroborated.

CONCLUSION

¶34 We conclude there is no substantial evidence to support the commission's finding that Maass sexually abused Joshua. That finding was based entirely on uncorroborated hearsay. Therefore, we reverse the commission's decision finding just cause to terminate Maass's employment based on the alleged sexual assault.

By the Court.—Order reversed and cause remanded with directions.

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