

BY THE COURT:

DATE SIGNED: April 22, 2019

Electronically signed by William V. Gruber  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

KEVIN DOYLE,

Plaintiff,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,  
DEPARTMENT OF WORKFORCE DEVELOPMENT, and  
RUSS DAVIS, HUBBARD PARK LODGE, LLC,

Defendants.

DECISION

Case No. 18CV1899

The Plaintiff, Kevin Doyle (“Doyle”), seeks review of a September 26, 2018 Labor and Industry Review Commission (“Commission”) determination, which found that he was terminated for misconduct within the meaning of Wis. Stat. § 108.04(5). The decision renders Doyle ineligible for unemployment benefits and liable for repayment of erroneously-paid benefits pursuant to Wis. Stat. § 108.22(8)(c).

For the reasons set forth below, the Commission's decision is affirmed.

BACKGROUND

Doyle worked for the employer interests in 2017 and early 2018. He received and signed an employee handbook, which provides that an employee may be discharged for insubordination. Doyle was terminated on February 6, 2018 because he failed to follow employer directives in the weeks and months leading up to separation.

STANDARD OF REVIEW/ANALYSIS

The circuit court reviews the Commission's decision in light of Wis. Stat. § 108.09. The circuit court cannot substitute its judgment for that of the Commission as to the weight or credibility of the

evidence on any finding of fact. Wis. Stat. § 108.09(7)(f). In seeking reversal of the Commission's decision, Doyle relies<sup>1</sup> upon the very evidentiary substitution forbidden by the statute.

It is the function of the Commission, not a reviewing court, to determine witness credibility and the weight of the evidence. Eastex Packaging Co. v. DILHR, 89 Wis. 2d 739, 745, 279 N.W.2d 248 (1979). "The credibility of the witnesses and the weight of the evidence lie *exclusively* within the province of the commission." Neff v. Industrial Commission, 24 Wis. 2d 207, 213, 128 N.W.2d 465 (1964)(emphasis added).

A reviewing court may set aside a commission decision, only upon one or more of the following grounds: (a) the commission acted without or in excess of its powers, (b) the order was procured by fraud, or (c) the findings of fact do not support the order. Wis. Stat. § 108.09(7)(c)6. (emphasis added).

Even reading the facts and considering inferences from those facts in a light most deferential to Doyle, (which would overstep of the court's review limits), the record exhibits none of these grounds.

The availability of *weight* to be given the agency position is delineated under Tetra Tech EC, Inc., and Lower Fox River Remediation LLC v. Wisconsin Department of Revenue, 2018 WI 75, 382 Wis.2d 496, 914 N.W.2d 21 (where the Supreme Court ended great weight deference to agency legal interpretations). Tetra Tech applies to the review of all administrative agency decisions. Tetra Tech, 382 Wis.2d 496 ¶11, n.8.

Relying on Tetra Tech, the Commission argues that its decision is owed *due weight* consideration. In so arguing, the Commission is required to show "how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why that background should make the agency's view of the law more persuasive than others." Tetra Tech, 382 Wis.2d 496 ¶79.

In conformity with Tetra Tech, the court considers, as a matter of weight – not deference, the following factors:

- (1) whether the legislature made the agency responsible for administering the statute in question;
- (2) the length of time the administrative agency's interpretation has stood;
- (3) the extent to which the agency used its expertise or specialized knowledge in developing its position; and
- (4) whether the agency's perspective would enhance uniformity and consistency of the law.

Tetra Tech, 382 Wis.2d 496 ¶¶78,79.

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<sup>1</sup> Doyle's argument also points to his favorable outcome before the Department of Workforce Development and administrative law judge. The factual impression at these phases of review was, obviously, quite different than that left with the Commission. This consideration is a pointless digression given the controlling standard of review.

Here, the first and final question is readily answered in the affirmative. The Commission has, for several years, considered whether an employee's actions amount to insubordination constituting misconduct. The Commission is plainly charged with the authority to make determinations regarding an employee's eligibility for benefits pursuant to Wis. Stat. § 108.09(6). The Commission's perspective, interpretation and application of Wis. Stat. § 108.04(5), naturally, promotes uniformity and consistency in application. The court is equally satisfied under the second and third considerations. The court recognizes, without the aid of argument, the subject agency's long-standing interpretive role and related involvement in continuity and history, as well as its application of well-defined, unique and focused administrative expertise, specialized knowledge and technical competence in evaluating misconduct disputes. The court is persuaded that the Commission decision is entitled "due weight" per Tetra Tech.

Notwithstanding adherence to a "due weight" analysis, the determination of whether the facts fulfill a legal standard is a conclusion of law, which the reviewing court independently examines. Milwaukee Transformer v. Industrial Comm., 22 Wis.2d 502, 510 (1964).

The court can have no difficulty concluding that the acts of insubordination described on the face of the record, that is, principally, failing to follow clear and specific directives, constitute misconduct within the meaning of Wis. Stat. § 108.04(5).

Doyle seems to argue, as a matter of law *and/or fact*, that he was not insubordinate... and thus not terminated with cause. See e.g., Doyle Reply Brief, p. 2 ("...insubordination never occurred..."). Doyle contends he was not terminated with cause because there was insufficient evidence of insubordination. Id. The Commission determined that Doyle was terminated for cause due to misconduct in the form of insubordination. The court finds that this determination is supported by credible and substantial evidence; it's worth emphasizing: the circuit court cannot substitute its judgment for the Commission's judgment as related to the weight or credibility of the evidence on any finding of fact. Wis. Stat. § 108.09(7)(f). It's also worth noting that the circuit court is not permitted to read-in factual findings that were not made by the Commission; Doyle's argument is dependent on such findings. The reviewing court is limited to determining whether the evidence supports findings the commission did make. Brickson v. DILHR, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968); see also, Appleton Electric Co. v. Minor, 91 Wis. 2d 825, 829, 284 N.W.2d 99 (1979).

The Commission found that Doyle was discharged for misconduct because he failed to follow the Employer's reasonable and unequivocal directives without adequate explanation. There is no basis to upset this finding based upon the information that made its way to the record. The Commission's factual findings are firmly supported by the credible and substantial evidence. There is, as well, no basis to set-aside the Commission's assessment that Doyle engaged in a pattern of insubordination that demonstrated an intentional and substantial disregard of the employer's interests. This is the most reasonable conclusion drawn from the facts. The Commission correctly applied the relevant law to the facts. The court affords the Commission decision due weight and determines that the Commission did not err in concluding that Doyle was discharged for misconduct within the meaning of Wis. Stat. § 108.04(5).

### CONCLUSION

The court confirms the Commission's conclusion that Doyle's discharge was for misconduct connected with his employment within the meaning of Wis. Stat. § 108.04(5).

Therefore, IT IS HEREBY ORDERED that the decision of the Commission is AFFIRMED in all respects.