

MUSKEGO-NORWAY CONSOLIDATED SCHOOLS  
JOINT SCHOOL DISTRICT NO. 9, Town of  
Muskego, Waukesha County, and Town  
of Norway, Racine County; ROBERT J.  
KREUSER, JACK G. REFLING, PAUL  
USSEL and CHARLES LADD,

Petitioners,

VS

DECISION

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

The above entitled matter having come on for hearing on the 23rd day of November, 1965, pursuant to the Petitioners' petition for review, the Petitioners appearing by Attorney Jack Radtke, and the law firm of Quarles, Herriott and Clemons, by Attorney Laurence Gooding and Attorney Peter Lettenberger; and the Respondent, Wisconsin Employment Relations Board, appearing by Assistant Attorney General Beatrice Lampert. The Court having heard arguments of counsel, and having granted leave to the parties to file briefs in support of their respective positions; said briefs having been received and reviewed, now, therefore, upon all of the records and files herein and the transcript of the hearing in the above entitled matter, the Court finds and determines as follows:

That the Respondent, Wisconsin Employment Relations Board, held hearings in the above entitled matter on June 8th, 9th, and 10th, and 15th, 1964. The Respondent issued Findings of Fact and Conclusions of Law and its Order on August 19, 1965.

In its Findings of Fact, at Page 17, Paragraph 29, the WERB found:

"That the primary motivation of Kreuser's recommendation to the School Board not to renew Koeller's teaching contract for the 1964-1965 school year was not based on any shortcomings Koeller may have had as a teacher, nor upon his differences with certain policies with the School Board, but rather upon Koeller's activity and efforts on behalf of the MNEA Welfare Committee as the collective bargaining representative of the majority of the professional teaching personnel in the employ of the School District; that the discriminatory refusal of the School Board to renew Koeller's teaching contract and the recommendations with respect thereto made by Superintendent Kreuser and other supervisory

employees of the School District, interfered, restrained and coerced not only Koeller, but also the remaining teachers in the employ of the School District in the exercise of their right to engage in lawful concerted activities."

In the Conclusions of Law found by the WERB, Paragraphs 1 and 2, at Page 17, it is determined:

1. "That the Muskego-Norway Consolidated Schools Joint School District No. 9, Town of Muskego, Waukesha County, and Town of Norway, Racine County, by its agents, Robert J. Kreuser and Jack G. Refling, by threatening its teachers with the forfeiture of two days pay, if they failed to attend teachers' conventions and failed to retain membership in the sponsoring organization, interfered with, coerced, and restrained teachers in its employ in the exercise of their right to freely affiliate with, or decline to affiliate with, any employee organization, and, thereby, has committed, and is committing, prohibited practices within the meaning of Section 111.70 (3) (a) 1 of the Wisconsin Statutes."

2. "That Muskego-Norway Consolidated Schools Joint School District No. 9, Town of Muskego, Waukesha County, and Town of Norway, Racine County, by its School Board, by refusing and failing to renew Carston C. Koeller's teaching contract for the year 1964-1965 upon the recommendation of Kreuser, Refling, Ussel and Ladd, discriminated against him in regard to the conditions of his employment, for the purpose of discouraging membership in and activities on behalf of the Muskego-Norway Education Association and, thereby, has committed, and is committing, prohibited practices, within the meaning of Section 111.70 (3) (a) 1 and 2 of the Wisconsin Statutes."

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Board then made an Order directing the School Board, the School District, Robert J. Kreuser, Superintendent of Schools, and other administrators to cease and desist from certain actions set forth in the Order, and further directed the Petitioners herein to immediately offer to Carston C. Koeller a teaching contract for the school year 1965-1966, and further action to correct conditions found by the WERB to exist in the School District.

Sections 40.40 and 40.41 of the Wisconsin Statutes deal with the provisions of teachers' contracts and the renewal of teachers' contracts, delegating to the District School Board the authority to enter into such contracts with teachers in its school system.

Section 111.07 of the Wisconsin Statutes provides in part at Sub-Paragraph (3):

. . . . . "Any such proceedings shall be governed by rules of evidence prevailing in courts of equity, and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

The Supreme Court of Wisconsin has held:

"The Wisconsin Employment Relations Board is the judge of the credibility and the weight of the testimony, and of the inferences which may be drawn from it insofar as such inferences are reasonable." 8 Wis. (2) 308.

However, for a reasonable inference to be drawn, the proof must pass beyond the stage of mere possibility.

"While it is within the province of the Commission to draw inferences, they must be drawn from established facts which logically support them, if not so supported, the findings of the Commission based on its inferences are mere conjecture in excess of its powers, and the action of the Commission must be reversed." 211 Wis. 326; 170 Wis. 532.

In its findings at Page 24, the WERB stated:

"The timing of the events surrounding the notification to Koeller that his contract for the year 1964-1965 was not being renewed strongly supports the inference that such action was discriminatory, and therefore illegal, under Section 111.70 of the Wisconsin Statutes."

"The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence." 134 Fed. (2) 970.

Finding Number 29, which states in part:

"That the primary motivation of Kreuser's recommendation to the School Board not to renew Koeller's teaching contract for the 1964-1965 school year was not based on any shortcomings Koeller may have had as a teacher, nor upon his differences with certain policies with the School Board,"

is in error for the following reasons: It is based purely upon conjecture. It is clear from Findings 26 and 27 that there was ample reason for the School Board's actions in refusing to renew Koeller's contract. In view of this, for the Board to state what the primary motivation of one individual was, is purely conjecture.

Additionally there was nothing in the Findings of the WERB to establish that Kreuser was an agent for the Muskego-Norway School

Board. A review of the record reveals no evidence that would support a finding that Kreuser, Refling, Ladd or Ussel were agents of the Muskego-Norway School Board, and the WERB made no such finding. The only testimony with respect to the actions of the School Board was by the School Board Members themselves, who testified they made the decision not to renew Koeller's contract based solely on his record as a teacher at Muskego High School. All of the board members, who testified, stated positively that their action was in no way based on Koeller's activities as Chairman of the Welfare Committee.

It is undisputed that, insofar as Koeller's status as a teacher was concerned, he was subject to discharge for legal cause, or for no cause at all, within the discretion of the School Board, which has the sole responsibility for the hiring and discharge of employees under the Statutes.

By omitting in its Findings and Conclusions a determination of an express or implied principal-agency relationship between the school administrators and the School District, the WERB could not impute to the School Board the alleged prohibitive conduct of the administrators found to have existed. If the Superintendent of Schools or other administrators of the School District committed an unfair labor practice and discriminated against the complainant, they did so not as agents of the School Board or School District but as co-employees of Koeller, and could have been charged only with prohibitive practices as employees under the provisions of Section 111.70 (3) (b) of the Statutes.

In its Findings, Number 9, Number 11, Number 12, Number 15, Number 20 and Number 23, the WERB set forth a list of deficiencies and shortcomings of Carston C. Koeller as a teacher, which, by themselves, would be sufficient grounds for the School Board to terminate the contract of Mr. Koeller.

The WERB has in this case erroneously assumed and concluded that the School District Board is required, under Section 111.70 of the Statutes, to negotiate with the teachers' organization MNEA, and respond to each of its demands; and has further erroneously assumed and concluded that Section 111.70 is not modified by the Wisconsin Individual Teachers Contract Law.

Under Sections 40.40 and 40.41 of the Statutes, the School Board has the duty to contract annually with each individual teacher, and each contract, when made, remains subject to modification by mutual agreement of the individual teacher and the School Board.

The WERB has based its Order in this case on the Conclusion of Law that the School District cannot do what the Statute specifically says it can and must do, that is, close the schools for the State Teachers' Convention, and offer the teachers a choice of attending or losing two days of pay. The School Board is directed not to have school taught on the days the State Convention is held and authorizes teachers time off with pay only if they attend and file a certificate to such effect.

The WERB has in this case erroneously assumed, concluded and determined that it had the power, under Section 111.70 to, and it did substitute its motivation, discretion, will and judgment for that of the School Board in ordering the non-renewal of the teaching contract of Carston C. Koeller.

Under the Wisconsin Private Employment Peace Act, the WERB is denied the right to substitute its judgment or view for that of the private employer or to determine whether a valid or invalid reason for discharge motivated the private employer to discharge the employee, if a valid reason for discharge is found to exist.

In 228 Wis 473 our Supreme Court has held:

"When a valid reason, as heretofore defined, is found to be present, it is relatively difficult and may be impossible to more than guess which reason motivated the discharge. The Board could find discrimination here only by finding that the assigned reason for the discharge of Assaf was false because if it was not the evidence is in such state that a finding of discrimination would be pure conjecture. Furthermore, we have some misgivings whether, if a valid and sufficient reason for discharge exists, the real or motivating reason has any materiality whatever, unless it can be shown that in other cases where similar grounds for discharge of nonunion men existed, no such action was taken."

The Petitioners have also raised the question as to whether or not the Order of the WERB is void because it has failed to comply with Section 111.07(4), by its failure to issue its Order within sixty (60) days after the hearing of testimony and arguments of the parties.

Section 111.07 (4) of the Statutes provides in part:

"Within 60 days after hearing all testimony and arguments of the parties, the Board shall make and file its Findings of Fact upon all of the issues involved in the controversy, . . . ."

Section 111.07 (12) of the Statutes provides:

"A substantial compliance with the procedure of

this sub-chapter shall be sufficient to give effect to the orders of the Board, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

The undisputed facts in this case are that the Board's hearings were concluded on the 15th day of June, 1964, with a final brief being served on September 15, 1964. The issuance of the Findings of Fact and Conclusions of Law and Order were dated August 19, 1965.

It is the opinion of this Court that a delay of eleven months, in making and filing its Findings of Fact, is not an omission of a technical nature. A delay of eleven months, in view of the legislative directive requiring the Board to make and file its Findings within sixty days, can hardly be termed a technical omission, and certainly is not substantial compliance with the statutory requirement.

It is the opinion of the Court that the WERB's failure to comply with Section 111.07(4) of the Statutes in not filing its Findings of Fact until eleven months after the conclusion of the hearings invalidates the Order of the WERB.

It is the further opinion of the Court that the Wisconsin Employment Relations Board in their Findings and Conclusions acted in an arbitrary and capricious manner and came to its Findings and Conclusions erroneously in that said Findings of Fact and Conclusions of Law are unsupported by the substantial evidence required by Wisconsin Statute 227.20.

IT IS ORDERED that the Findings of Fact and Conclusions of Law and the Order of the Respondent, Wisconsin Employment Relations Board, be and the same hereby are set aside and declared null and void.

Dated this 1st day of March, 1966.

BY THE COURT:

Clair Voss /s/  
CIRCUIT JUDGE