No. 43

August Term, 1966

STATE OF WISCONSIN : IN SUPREME COURT

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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, Respondents,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant.

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APPEAL from a judgment of the circuit court for Waukesha county: CLAIR VOSS, Circuit Judge. Affirmed.

In May of 1964 a group of teachers employed by the petitioner Muskego-Norway Consolidated Schools Joint School District No. 9 filed a complaint with the respondent Wisconsin Employment Relations Board (WERB) alleging the school district and the individual petitioners Robert J. Kreuser, Jack G. Refling, Paul Ussel and Charles Ladd, who were supervisory personnel employed by the school district, violated secs. 111.70 (2) and 111.70 (3)(a) 1 and 2, Stats. The complaint specifically alleged the school district coerced the teachers into joining the Wisconsin Education Association (WEA), Muskego-Norway Education Association (MNEA) (an affiliate of WEA), or the Wisconsin Federation of Teachers Union by threatening to enforce a rule providing that wages would be deducted from the salary of any teacher taking off the two days of the annual teachers' conventions who was not a member of any convening labor organization, and discouraged labor activity on the part of the teachers by its failure to renew the teaching contract of Carston C. Koeller because of his labor activities on behalf of the MNEA.

The respondent heard the matter on June 8, 9, 10, and 15, 1964, and the final brief was submitted on September 15. On August 19, 1965, some 11 months thereafter, the WERB made and filed its findings of fact and conclusions of law and its decision. In its conclusions of law the WERB determined the school district, by threatening its teachers with the forteiture of two-days' pay if they failed to attend teachers' conventions and failed to retain membership in the sponsoring organization, interfered with and coerced teachers in its employ in the exercise of their right to

affiliate or not to affiliate with labor organizations, a practice forbidden by sec. 111.70 (3)(a) 1, Stats. The board also determined the school district by refusing and failing to renew Koeller's teaching contract for the year 1964-65 upon the recommendation of the individual respondents discriminated against him for the purpose of discouraging membership in and activities on behalf of the MNEA, a practice prohibited by sec. 111.70 (3)(a) 1 and 2.

The school district was ordered to cease and desist from threatening teachers with forfeiture of pay in the event they did not attend teachers' conventions or retain membership in a labor association, from threatening to change any term or condition of employment for the purpose of encouraging membership in any such organization; and from failing to renew Koeller's contract and in any other manner discriminating against him or any of its teachers. The school district was also ordered to offer Koeller a teaching contract for the year 1965-66 and to make him whole for any loss of pay and other benefits he had suffered during the 1964-65 school year.

A review of the WERB's order was taken to the circuit court for Waukesha county pursuant to chapter 227 and sec. 111.07 (8), Stats., the latter section providing such reviews are to be held in the circuit court of the county where the appellant or any party resides or transacts business. The circuit court held that the failure of the WERB to file its findings of fact, conclusions of law and decision until 11 months after the last brief was submitted invalidated the WERB's order and, in respect to the merits, decided the WERB's finding that Koeller's labor activity was the reason for not renewing his contract was based on speculation and conjecture. The court also found the school district's policy of deducting wages of certain teachers during a teachers' convention was required by sec. 40.40 (3), Stats., and was not subject to the limitations of sec. 111.70. From the order setting aside and declaring null and void its findings of fact and conclusions of law and order, the WERB appeals.

HALLOWS, J. Because we are of the opinion the circuit court was correct in holding the WERB was without jurisdiction to make findings of fact, conclusions of law and its order 11 months after the matter was finally submitted to it on briefs, we do not reach or decide the important questions of whether the school board violated any of the practices prohibited by sec. 111.70, Stats., relating to the rights of public employees to organize or join labor organizations.

We construe sec. 111.07 (4), Stats., in the light of sub. (12), to be a limitation upon the jurisdiction of WERB

and to command the making of findings substantially within a period of 60 days from the hearing of all testimony and arguments of the parties.1/ The WERB points out that statutes setting time periods within which various officials or agencies are to perform an act are generally construed to be directory and not jurisdictional or mandatory and relies on Appleton v. Outagamie County (1928), 197 Wis. 4, 220 N.W. 393; State v. Industrial Comm. (1940), 233 Wis. 461, 289 N.W. 769; and Worachek v. Stephenson Town School Dist. (1954), 270 Wis. 116, 70 N.W. (2d) 657.

The difference between what is mandatory and directory lies mainly in the duty to comply and the consequence of noncompliance. Generally, a mandatory provision must be strictly complied with and there is no discretion in the agency or public official. Failure to comply with a mandatory statute renders the proceeding void, while noncompliance with a directory provision does not invalidate the proceeding. But we think the jurisdictional aspect of a mandatory requirement is not lost because a standard of compliance less than literal or strict is provided. Such a standard, while more flexible, is nonetheless a limitation upon the exercise of the power or the performance of the duty. Directory provisions can be permissive, enabling or precatory.

In State v. Industrial Comm. (1940), 233 Wis. 461, 466, 289 N.W. 769, the court stated "(a)s a rule a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of the power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation." This is a generalization of the holdings in cases interpreting time provisions of statutes and furnishes some guide of statutory construction for this case. See also 50 Am. Jur., Statutes, p. 49, sec. 28; 82 C.J.S., Statutes, p. 869, sec. 376.

True, in this case there is no language in the statute prohibiting the exercise of the power to issue an order after 60 days, but implicit in the language of sec. 111.07 (12), Stats., which provides that substantial compliance shall be sufficient to give effect to the orders of the Board, is the intent that compliance which is not substantial in point of time is fatal.

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1. "111.07 Prevention of unfair labor practices.

(4) 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, . . .

(12) 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."

This statutory language indicates that substantial compliance with the 60-day period in sec. 111.07 (4) was intended to be a limitation. In this instance we cannot read the word "shall" in sec. 111.07 (4) as "may" or merely precatory. See Scanlon v. Menasha (1962), 16 Wis. (2d) 437, 114 N.W. (2d) 791; Wauwatosa v. Milwaukee County (1963), 22 Wis. (2d) 184, 125 N.W. (2d) 386; Worachek v. Stephenson Town School Dist., supra.

Because of the express language of these sections, it is not important there is an absence of a positive prohibition on the exercise of the power after 60 days. The equivalent of a positive prohibition of excessive delay is stated affirmatively by requiring substantial compliance. Furthermore, it is in the public interest that questions of unfair labor practices be decided expeditiously. Originally, this section as enacted by chapter 57, Laws of 1939, provided "(a)fter the final hearing the board shall promptly make and file its findings. . . ." By chapter 437, Laws of 1949, "promptly" was changed to "within 60 days." If this period is not sufficient for the efficient operation of the WERB, the need should be addressed to the legislature.

We think a nine-months' delay beyond the 60 days cannot be said to be substantial compliance. This delay is more than four times the original period allowed for the making of the findings of fact. It is not contended and it cannot be successfully that this delay constitutes an "omission of a technical nature." which is to be disregarded under the mandate of sec. 111.07 (12), Stats. We need not now decide the periphery of delay after the 60 days beyond which compliance would not be substantial. We hold only that the making and filing of the findings of fact after nine-months' delay, even considering the length of the record before the WERB and the complexity of the legal questions involved, simply does not constitute substantial compliance with sec. 111.07 (4), Stats.

By the Court. -- Judgment affirmed.

Dated November 1, 1966.

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WILKIE, J. (dissenting). I would reach the merits of this controversy. I would not hold the failure of the WERB to decide the matter before 11 months to be fatal. In so doing I submit that the majority is really applying a double standard to these proceedings as compared with quite comparable proceedings in the trial courts.

Under sec. 270.33, Stats., [1] a trial judge is required to make his decision within 60 days after submission of the cause. This section has been ruled directory rather than mandatory, [2] and a five-month delay has been tolerated in the case of Merkley v. Schram. [3]

Sec. 111.07 (4), Stats., states that the WERB must also make its findings within 60 days after hearing testimony and argument. It is my opinion that sec. 111.07 (12), Stats., is directory rather than mandatory.

"(12) 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."

To hold otherwise would place a higher standard on administrative agencies than is placed on trial courts.

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[1] "270.33 Trial by court; findings, judgment. Except in actions and proceedings under ch. 299, upon a trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk within 60 days after submission of the cause, and shall state separately the facts found and the conclusions of law thereon; and judgment shall be entered accordingly."

[2] Galewski v. Noe (1954), 266 Wis. 7, 16, 62 N.W. (2d) 703; Kamuchey v. Trzesniewski (1959), 8 Wis. (2d) 94, 101, 98 N.W. (2d) 403.

[3] (1966), 31 Wis. (2d) 134, 142 N.W. (2d) 173.

By not reaching the merits in this case, we may deprive the employees of their remedy through no fault of their own.

I have been authorized to state that Mr. Justice HEFFERNAN joins in this dissent.

Dated November 1, 1966