No. 43

August Term, 1966

STATE OF WISCONSIN : IN SUPREME COURT

Muskego-Norway Consolidated Schools, et al.,

Respondents,

v.

Wisconsin Employment Relations Board,

Appellant.

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

In July, 1960, the Muskego-Norway Consolidated Joint School District was created. Nine graded schools and one high school were located in the district. In 1960 the Muskego-Norway Education Association (MNEA), an organization composed of practically 100 percent of all teaching and administrative personnel in the employ of the school district, was organized. The MNEA is affiliated with the Wisconsin Education Association (WEA), which renders assistance to local affiliates in regard to their representation of teachers in conferences and negotiations concerning salaries and other conditions of employment.

This controversy[1] concerns certain activities in the school district during the period from 1960 through early 1964. On the one hand is a group of teachers employed by the district who in May, 1964, complained of violations of sec. 111.70, Stats., on the part of the school board and certain of its supervisory personnel. These teachers alleged that the school district coerced the teachers into joining the WEA, MNEA, 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' convention 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.

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[1] Other aspects of this controversy were previously considered by this court in Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B. (1966), 32 Wis. (2d) 478, 145 N. W. (2d) 680, 147 N. W. (2d) 541; rehearing granted, (1967), Wis. (2d) , N. W. (2d)

On the other hand are the school district; Robert J. Kreuser, superintendent of schools; Jack C. Rifling, high school principal; Paul J. Ussel, assistant principal; and Charles A. Ladd, coordinator of instruction.

Certain facts in this involved dispute are uncontroverted and best be set forth here. Other pertinent facts, some controverted, are detailed in the opinion.

In the 1960-1961 school year Dr. Rossmiller, the superintendent of the school district at the time, suggested to the officers of the MNEA that they prepare proposals with respect to teachers' salaries and working conditions for the year 1961-1962, and the MNEA, through its welfare committee, formulated and submitted these proposals in the spring of 1961. The school board then directly disclosed to the MNEA the salaries and working conditions that it had decided upon for the year 1961-1962.

During the year 1961-1962 the MNEA welfare committee delayed preparation of its proposals for the year 1962-1963. Such delay was until January of 1962, when Kreuser became superintendent of schools.

By January, 1962, the MNEA had again formulated proposals but Kreuser informed members of the MNEA that they did not need to attend school board meetings as he would represent their interests. The committee's proposals were related orally and not in writing to Kreuser. MNEA members did not attend school board meetings in 1962-1963, but did present their proposals to the board.

Looking toward the school year 1963-1964, the MNEA welfare committee in the 1962-1963 year, then headed by Complainant Allan Walldren, requested Kreuser to furnish information as to the salaries in neighboring districts as well as all salaries being paid in the Muskego-Norway district. Kreuser furnished the information on outside teachers, but not on his district. Nevertheless the welfare committee submitted its proposals in writing and when Kreuser told them he would present the proposals to the board, the committee declined and on February 4, 1963, the full committee appeared at the board meeting for the purpose of discussing its proposals. The committee was dismissed from the board meeting and Kreuser announced the conditions of employment for the year 1963-1964 at a later special meeting of teachers employed by the district.

Carston Koeller, a first-year teacher in the district, was elected chairman of a reorganized and enlarged MNEA welfare committee for the 1963-1964 year. (He remained chairman at all times pertinent herein.) In September of 1963 the committee began operations by requesting salary information from Superintendent Kreuser. When this information was not forthcoming, the committee obtained it by circulating questionnaires to the teachers. The MNEA also began sending representatives to board meetings. Largely through Koeller's efforts, this information was tabulated prior to mid-January, 1964, and proposals for the year 1964-1965 were formulated. The committee worked hard and held as many as 26 meetings. Its proposals, which were very comprehensive and were approved by the MNEA membership, were presented to the personnel committee of the school board. The proposals dealt with matters of teacher salaries, insurance, personal and sabbatical leaves, class size and load, job security, teacher qualifications, and other matters supporting said proposals including various tables and graphs.

The personnel committee took these proposals under advisement. The personnel committee met again with MNEA representatives and questioned the accuracy of these proposals and whether they represented the wishes of a majority of the teachers. Further questionnaires were circulated and modified proposals were submitted (as approved by the MNEA membership). The report and proposals were submitted to the board meeting on March 2, 1964. What transpired at that meeting and subsequently will be described later in the statement of facts.

Paralleling in importance the development of the MNEA as an effective representative of the teachers are the activities of the chairman of its welfare committee, Carston Koeller, both educational and as a leader in the MNEA. Mr. Koeller was hired by the school district in 1962 following three years of teaching experience in the air force and one year at Belleville, Wisconsin. Mr. Koeller taught five classes of general mathematics, a subject taken by students deficient in mathematics and incapable of comprehending algebra. These students were also slower learners in other subjects as well. In 1963, at the end of Koeller's first year of teaching, a report was filed by the then principal, Donald Helstad, listing him in the bottom quarter of the faculty in teaching ability, although this did not necessarily mean he was a poor teacher. Helstad advised that Koeller had shown as much progress as any other high school teacher at the time and Helstad unqualifiedly recommended that Koeller be rehired for the year 1963-1964. Koeller was retained. Subsequently, Koeller engaged in a number of activities related to his duties as a teacher rather than to his extracurricular duties with the MNEA.

1. On October 2, 1963, Koeller mailed to six parents a statement asking them to sign a request to give Mr. Koeller permission to use whatever physical means was necessary in order to enforce discipline. On October 7th the new principal, Refling, held a conference with Koeller informing him he was not to determine a course of discipline contrary to established school procedures. At this conference, Koeller's difficulty in handling students in study hall was also discussed. (Koeller had placed a female student in a large unlighted closet as a disciplinary procedure.)

2. On October 14th Koeller suggested in writing to a committee of teachers established to create procedures for disciplining study halls that enforcement of discipline could be implemented by "tweak or pull an ear, rap on head, pull hunk of hair or sit in front closet with door shut."

3. In the fall of 1963, football players were excused from their seventh-hour classes on the day of the game. On October 22nd Koeller sent a note to Principal Refling, objecting to this practice. Koeller was then called into a conference with Ussel and Refling, in which conference Koeller's disagreement with school policies and his lack of judgment in handling student situations were discussed. Koeller then appealed by letter directly to Mr. Guhr (school board president) but was told to go through the normal grievance procedures. No further action was taken on this matter except that on October 28th Refling sent Koeller a letter warning him about insubordination.

4. On December 2, 1963, following a visit to Koeller's class-room, Coordinator of Instruction Ladd made the following comments and

suggestions for improving inadequacies in Koeller's teaching techniques: (a) More student "involvement," (b) "less teacher talk," (c) the elicitation of "clear, confident responses" from students, (d) personal supervision of assignments, (e) various approaches to various students, and (f) permitting students to make their own evaluations. Koeller visited an experienced mathematics teacher from a Racine school and his class, and thereafter Ladd noticed that Koeller's teaching techniques improved.

5. On December 10, 1963, as a layman, Koeller wrote the state department of public instruction, concerning state aids formulas and the financial condition of the Muskego-Norway district. In this letter Koeller complained of inadequate facilities in the district.

6. On January 28, 1964, Koeller scheduled a meeting of the National Honor Society which conflicted with the meeting of the high school P.T.A. Koeller was given oral confirmation from Ussel but school policy required a written approval. A memo from the principal chastized Koeller for failing to obtain the approval of the principal, and Koeller circulated the memo.

7. On February 5, 1964, Koeller sent a student to the office with a note indicating he had suspended the student for three days. Koeller was told that the administration decided whether suspensions were in order. Koeller then publicly challenged the position of the administration in the MNEA newsletter, quoting from the private memo he had received from the administration. In the newsletter, Koeller maintained he had the right to suspend students for disciplinary reasons. Koeller was called into conference with the principal, where he was advised he was skating on "thin ice" in utilizing the MNEA newsletter to vent a private grievance.

8. On February 18th Koeller read the memo received in regard to the scheduling problem to the National Honor Society students and announced that this was the reason for resigning as adviser from the group. Koeller then sent Kreuser a note explaining his reasons for resigning and charging that Kreuser had exhibited vindictiveness toward him. Koeller subsequently withdrew this statement.

9. Koeller's record as a teacher includes having 43 disciplinary referrals to Principal Refling, while the 49 other teachers on the faculty had a total of 150 disciplinary referrals.

There is a dispute about what transpired at the March 2, 1964, meeting of the board. In addition to the salary-and-working-conditions proposals of the MNEA during executive session the board also considered whether to rehire Koeller. Kreuser denied that he made any recommendations at that session against renewing Koeller's contract. He denied that the subject was even discussed. Yet board member Vogel recalled that Kreuser had advised him on March 3d that Kreuser had made this recommendation at the meeting the previous night. Between March 2 and March 9, 1964, a summary of Koeller's activities was prepared and, upon the recommendation of Kreuser, at another executive session on March 9, 1964, the school board formally determined not to offer Koeller a teacher's contract for 1964-1965. On March 11, 1964, conditions of employment were again announced at a general teachers' meeting. No prior notice of action taken on its proposals was received by the MNEA.

On March 12, 1964, Koeller was called to Kreuser's office and given a notice that his contract would not be renewed. Kreuser read from a sheet of paper a number of reasons for the dismissal, but he did not give Koeller a copy of the list of the reasons even though Koeller requested one. Kreuser also advised Koeller that a successful contest of the discharge was unlikely, because all statutory requirements had been met. Further, Kreuser advised Koeller that such an appeal would be professional suicide because Koeller needed Kreuser's signature to obtain a life-time teaching certificate.

A dispute exists as to whether ot not Kreuser first offered to give Koeller a recommendation for another job if Koeller would resign. Koeller's testimony indicates this is true while the testimony of Kreuser and Refling is that Koeller was only offered the opportunity to resign. Nonetheless, Koeller refused to resign and was then handed a prepared notice of termination, the letter stating that the action was "deemed advisable in view of actions and conduct on your part which have previously been discussed with you."

After a full hearing on the complaints, the WERB found:

"29. 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 employes 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."

And it reached the following conclusion of law:

"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."

As to the allegation that the school board and supervisory personnel had interfered with the freedom of the teachers to join or not join employee organizations, the following appeared in a statement of school policy in a manual for teachers:

"It is expected that when school is closed for the purpose of attending professional meetings, teachers shall be in attendance at such meetings."

The WEA convention was planned for November 7 and 8, 1963. The Wisconsin Federation of Teachers also met on this date. In a November, 1963, memorandum from Kreuser to the administrators of the district it was stated:

"That as a matter of professional ethics no teacher that is not a member of the groups holding convention at this time can really expect time off with pay during these days."

This policy was implemented on the faculty of Muskego-Norway by Refling, who issued a memo (also on November 1, 1963) stating:

"We are making plans for everyone to attend next week's teachers convention. This brings up a matter of professional ethics that might be called to your attention at this time. That anyone not a member of either of the convening groups can hardly expect time off with pay."

Refling told one teacher that this meant he would have to join a teachers' organization in order to get paid.

As a conclusion of law on this matter, the WERB declared:

"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 employe organization, and, thereby, has committed, and is committing, prohibited practices within the meaning of Section 111.70 (3) (a)1 of the Wisconsin Statutes."

The WERB ordered the school district and individual supervisory personnel to cease and desist from similar activities, to offer Koeller his former position without prejudice, to pay Koeller any damages he may have suffered and to post a notice to all teachers notifying them of the actions taken and future policy to be followed by the district.

A petition for review of the WERB's order was filed under ch. 227, Stats. Thereafter, judgment was entered setting aside the order of the WERB. On the merits the trial court found that the finding of the WERB that the school board's primary motivation for firing Koeller was his labor activities was based on speculation and conjecture. As to the teachers' convention issue, the trial court also set aside the WERB order, declaring that state law requires schools to be closed and authorizes teachers' time off with pay only if they attend the conventions. Further, the trial court ruled that there had been no proof of any relationship between the school board and the administrators. The WERB has appealed.

WILKE, J. Four issues are raised on this appeal:[2]

First, is the authority of school boards under secs. 40.40 and 40.41, Stats., subject to the limitations of sec. 111.70, Stats.?

Second, is the WERB finding that respondents interfered with, coerced and restrained teachers in its employ in the exercise of their right to freely decline to affiliate with employee organizations supported by substantial evidence?

Third, is the WERB finding that the refusal of respondents to renew Koeller's contract was prompted by his labor activities supported by substantial evidence?

Fourth, must the WERB make an express finding that Kreuser, Refling, Ladd and Ussel were agents of the Muskego-Norway school board in order to impute their actions to the board in deciding whether unfair labor practices were committed?

Relation of Secs. 40.40, 40.41 and 40.45 and Sec. 111.70, Stats.

One of the principal premises for the trial court's decision was that secs. 40.40 and 40.41, Stats., require the school board to contract individually with each teacher each year. The trial court also approved the school board's policy of offering its teachers the choice of attending conventions or losing two days' pay. This policy, according to the trial court, merely complied with sec. 40.40 (3), which provides:

"The board may give to any teacher, without deduction from her wages, the whole or part of any time spent by her in attending a teacher's institute held in the county, or a school board convention or the meeting of any teachers' association, upon such teacher's filing with the school clerk a certificate of regular attendance at such institute, convention or association, signed by the person conducting the institute or convention, or by the secretary of the association." (Emphasis added.)

The WERB found that by threatening its teachers with the forfeiture of two days' pay if they failed to attend teachers' conventions, the school district interfered with the teacher's rights guaranteed by sec. 111.70 (2), Stats., to freely affiliate with or decline to affiliate with any employee organization.[3]

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[2] The issue of the time taken by the WERB in rendering its decision and related findings, conclusions and order was considered by this court previously. See footnote 1, supra.

[3] "111.70 (2) Rights of Municipal Employes. Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

The provisions of sec. 111.70, Stats., apply to the authority of school districts to the same extent as the authority of other municipal governing bodies.[4] Sec. 111.70 was enacted after secs. 40.40 and 40.41 and is presumed to have been enacted with a full knowledge of pre-existing statutes.[5] Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible.[6]

Sec. 40.40 (3), Stats., provides that a school board may give to a teacher without deducting from her wages the whole or any part of time spent in attending a teachers' convention upon filing with the clerk a certificate showing such attendance. Sec. 40.45 provides that days on which state and county teachers' conventions are held are considered to be school days. Under sec. 111.70 (2) teachers have the right to refrain from affiliating with labor organizations and forcing teachers to join employee organizations is expressly forbidden by sec. 111.70 (3) (a) 1. These statutes are not necessarily in conflict. They can all be given effect by construing them together and ruling that teachers cannot be required to attend such conventions under threat of loss of pay, but that teachers who do not attend such conventions can be required to work for the school. In this way teachers can avoid deductions from their salaries while the right to refuse to join a labor organization guaranteed by sec. 111.70 (2) is preserved. If the teacher refuses to work, deductions from his salary could be made, but if the school does not offer work to teachers not attending conventions, the school cannot deny pay to such teachers.[7]

Respondents also contend that secs. 40.40 and 40.41, Stats., permit the school board to refuse to rehire on any ground or for no reason at all. Assuming this to be true, secs. 40.40 and 40.41 can be modified by subsequent statutes which forbid refusing to rehire a teacher for a particular reason. For example, a school board may not refuse to rehire a teacher because of his race, nationality or

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4 "111.70 Municipal employment. (1) Definitions. When used in this section: (a) 'Municipal employer' means any city, county, village, town, metropolitan sewerage district, school district or any other political subdivision of the state."

5 Town of Madison v. City of Madison (1955), 269 Wis. 609, 70 N. W. (2d) 249.

6 Moran v. Quality Aluminum Casting Co. (1967), 34 Wis. (2d) 542, 553, 000 N. W. (2d) 000; Pelican Amusement Co. v. Pelican (1961), 13 Wis. (2d) 585, 593, 109 N. W. (2d) 82; Brunette v. Bierke (1955), 271 Wis. 190, 196, 72 N. W. (2d) 702.

7 Archy Jaecks v. West Milwaukee-West Allis, Joint City School Dist. No. 1, Case III, No. 10552 M P-24, WERB Decision No. 7664, July 15, 1966, CCH Labor Law Reporter, State Laws, vol. 3, par. 49,757.

political or religious affiliations.[8] Modification of statutes is a question of legislative policy. In 1959 the legislature enacted sec. 111.70 (3) (a), which prohibits municipal employers, including school districts, from:

"1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2).
"2. Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment."

This also restricts the reasons a teacher can be refused re-employment. A school board may not terminate a teacher's contract because the teacher has been engaging in labor activities.

Scope of Judicial Review.

The second and third issues concern whether crucial findings of the WERB are supported by credible evidence. This makes it necessary to state the standard of judicial review of the findings of the WERB. It is well established that under sec. 227.20 (1) (d), Stats., judicial review of the WERB findings is to determine whether or not the questioned finding is supported "by substantial evidence in view of the entire record."[9] This court has held that the key to the application of this standard is to determine what is meant by "substantial evidence."[10]

In Copland this court quoted from an article by E. Blythe Stason[11] as follows:

"'[T]he term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached

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[8] Sec. 40.435, Stats., provides: "(1) No discrimination shall be practiced in the employment of teachers in public schools because of their race, nationality or political or religious affiliations, and no questions of any nature or form shall be asked applicants for teaching positions in the public schools relative to their race, nationality or political or religious affiliations, either by public school officials or employes or by teachers' agencies and placement bureaus.
"(2) Whoever violates this section shall be fined not less than $25 nor more than $50, or imprisoned in the county jail not less than 5 nor more than 30 days. Violation of this section shall be cause for the removal of any superintendent, member of a board of education or school board, or other public school official."

[9] Sec. 227.20 (1) (d), Stats.

[10] Copland v. Department of Taxation (1962), 16 Wis. (2d) 543, 554, 114 N. W. (2d) 858.

[11] "Substantial Evidence" in Administrative Law, 89 University of Pennsylvania Law Review (1941), 1026, 1038.

the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.'"[12]

Moreover, in Copland we reiterated that "'substantial evidence' is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' (Emphasis supplied.)"[13] In Copland we declared that the test of reasonableness "is implicit in the statutory words 'substantial evidence.',"[14] and that the "use of the statutory words "in view of the entire record as submitted' strongly suggests that the test of reasonableness is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's findings."[15]

Interference with Right to Affiliate with Employee Organizations.

In the instant case the evidence supports the WERB's finding and related conclusion that the respondents interfered with, coerced, and restrained teachers in the exercise of their right to freely affiliate with or decline to affiliate with any employee organization. The school district's policy expressed in the teacher's manual strongly implied that teachers were required to join the WEA. Memos circulated by Superintendent Kreuser and Principal Refling indicated that time off with pay would be granted only to teachers who were members of the convening groups (the WEA or the Federation of Teachers). The minutes of an executive committee contain the following statement:

"It was brought to the attention of the executive committee by the membership committee that some of our professional staff are not joining the WEA. Mr. Ussell stated that he had talked to the district office and said that wages will be deducted for anyone not attending the WEA Convention."

One of the complainants stated to Principal Refling, "It appears I have the choice of paying the seven bucks or losing two days pay," to which Refling replied, "That's about the size of it."

All these statements and actions indicate a policy of coercing teachers into joining the WEA (or its competitor organization) by threatening them with the loss of pay for failing to join. The WERB found that the WEA was an employee organization and, although this

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[12] Copland v. Department of Taxation, supra, footnote 10, at page 554.

[13] Copland v. Department of Taxation, supra, footnote 10, at page 554, quoting from Gateway City Transfer Co. v. Public Service Comm. (1948), 253 Wis. 397, 405, 406, 34 N. W. (2d) 238; and Consolidated Edison Co. v. National L. R. Board (1938), 305 U. S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126.

[14] Copland v. Department of Taxation, supra, footnote 10, at page 554.

[15] Ibid. See also Albrent Freight & Storage Co. v. Public Service Comm. (1953), 263 Wis. 119, 128, 56 N. W. (2d) 846, 58 N. W. (2d) 410; Motor Transport Co. v. Public Service Comm. (1953), 263 Wis. 31, 45, 56 N. W. (2d) 548; 4 Davis, Administrative Law Treatise, pp. 129, 130, sec. 29.03.

finding was not challenged, it is supported by the evidence. Coercing teachers to join an employee organization is a prohibited practice of sec. 111.70 (3) (a) 1, Stats. The WERB's order to the respondents to cease and desist from this action is valid.

Termination of Employment for Labor Activities.

The WERB found that the primary motivation for the refusal of the school board to renew Koeller's contract was because of his activities and efforts on behalf of the MNEA welfare committee. The WERB concluded that the school board discriminated against Koeller in regard to the conditions of his employment for the purpose of discouraging membership in and activities on behalf of the MNEA and was thereby committing a prohibited practice under sec. 111.70 (3) (a), Stats.

A major premise in the trial court's argument for reversing the WERB's determination in this respect is that if a valid reason for discharging an employee exists, this is a sufficient basis for holding that the employee was not dismissed for union activities. The trial court quotes Wisconsin Labor R. Board v. Fred Rueping L. Co. as follows:

"... 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."[16]

In other words, if there was good reason for terminating Koeller's employment because of teaching deficiencies and his differences of teaching philosophy with the school board and the supervisory personnel, it would not matter whether the contract was not renewed for his labor activities. But this is not the law. In Rueping there was no speculation as to what the real reason for the discharge was. Moreover, the law concerning discharge for labor activities has changed since 1938. In N.L.R.B. v. Great Eastern Color Lithographic Corp.[17] the federal courts stated:

"The issue before us is not, of course, whether or not there existed grounds for discharge of these employees apart from their union activities. The fact that the employer had ample reason for discharging them is of no moment. It was free to discharge them for any reason good or bad, so long as it did not discharge them for their union activity. And even though the discharges may have been based upon other reasons as well, if the employer were partly motivated by union activity, the discharges were violative of the Act." (Emphasis added.)

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16 (1938), 228 Wis. 473, 499, 279 N. W. 673.

17 (2d Cir. 1962), 309 Fed. (2d) 352, 355.

Several other federal cases are in accord.[18] Although these cases all involve a construction of unfair labor practices under the Wagner Act, the case of St. Joseph's Hospital v. Wisconsin E. R. Board[19] adopts their legal conclusion that an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him.

The trial court opined that the WERB reached finding of fact No. 29 "purely upon conjecture." It concluded that there was ample reason for the school board's actions for Koeller's deficiencies as a teacher and his philosophical differences with the individual respondents on school matters.

But in this court's judicial review we are not required to agree in every detail with the WERB as to its findings, conclusions and order. We must affirm its findings if they are supported by substantial evidence in view of the entire record. Sec. 227.20 (2), Stats., requires that upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved. In short, this means the court must make some deference to the expertise of the agency.

In St. Joseph's Hospital v. Wisconsin E. R. Board[20] the WERB found that the discharge of an employee was primarily because of her union activities. The court discussed the scope of review of this finding as follows:

"Finding 20 is a finding of ultimate fact and is of necessity based upon inferences from other testimony before the board. Such inferences may not be based upon conjecture but must be drawn from established facts which logically support them. The drawing of inferences from other facts in the record is a function of the board and the weight to be given to those facts is for the board to determine. International Union v. Wisconsin E. R. Board, 258 Wis. 481, 46 N. W. (2d) 185. Such findings, when made, cannot be disturbed by a court unless they are unsupported by substantial evidence in view of the entire record submitted."[21]

The board is the judge of the credibility of the witnesses[22] and the reviewing court is not to substitute its judgment for the judgment

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[18] Wonder State Mfg. Co. v. N.L.R.B. (6th Cir. 1964), 331 Fed. (2d) 737, 738; N.L.R.B. v. Symons Mfg. Co. (7th Cir. 1964), 328 Fed. (2d) 835, 837; Marshfield Steel Co. v. N.L.R.B. (8th Cir. 1963), 324 Fed. (2d) 333, 337.

[19] (1953), 264 Wis. 396, 59 N. W. (2d) 448.

[20] Supra, footnote 19.

[21] Id. at page 401.

[22] St. Francis Hospital v. Wisconsin E. R. Board (1959), 8 Wis. (2d) 308, 98 N. W. (2d) 909.

of the board.[23]

In essence, in the instant case we must decide whether the WERB's crucial findings, conclusions and order are based on inferences reasonably drawn on the entire record or whether they are the result of conjecture on the part of the WERB.

On the whole record we conclude that the WERB's finding No. 29 is supported by substantial evidence and reasonable inferences drawn therefrom in view of the entire record, that the failure to renew Koeller's teaching contract was motivated by his activities as chairman of the welfare committee of MNEA and not on any shortcomings Koeller may have had as a teacher nor upon his differences with certain policies of the school board and the respondent supervisory personnel.

The WERB's finding No. 29 is the logical final determination as to the motivation behind the failure to renew Koeller's contract following the stepped-up labor activities of the welfare committee in which Koeller had such a major part and the difficulties had in assembling and presenting proposals on salaries and working conditions to Kreuser and the school board.

The WERB placed heavy emphasis on the timing and manner of the dismissal. Although there was dispute about it the WERB could reasonably find that the first recommendation of Koeller's nonrenewal was made at the executive session of the school board on March 2, 1964, immediately following the very meeting when the MNEA proposals for 1964-1965 were submitted to the school board for the first time and were discussed; that at that time no written reasons were given for the dismissal; that on March 9, 1964, a summary of reasons having been prepared since March 2nd, the school board acted formally to terminate Koeller's services; that Koeller was not notified of this action until March 12, 1964, the day after the school teachers were called together and told of the school board's determinations about salaries and working conditions for the year 1964-1965 (there having been no negotiations about the MNEA proposals).

In a memorandum accompanying its findings of fact, conclusions of law and order the WERB discussed its reasons for concluding that the respondents were motivated by Koeller's labor activities in ending his employment. The WERB also thoroughly discussed and rejected the other reasons that were alleged to have motivated the respondents relating to the shortcomings of Koeller as a teacher and his disagreement with certain policies established by the school board.

The WERB carefully considered each one of the reasons compiled in the summary prepared by supervisory personnel prior to the school board's final action on March 9th as to why Koeller's contract should not be renewed. The WERB's analysis is summed up as follows:

"It seems incredible to us that the Superintendent could be sincere in the gravity of complaints made against Koeller and at the same time

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23 St. Joseph's Hospital v. Wisconsin E. R. Board, supra, footnote 19.

offer to recommend him to another position. We believe this to be a gross act of intimidation."

The WERB concluded:

". . .in light of the entire record, we do not find that Koeller's competence as a teacher or disciplinarian motivated the determination not to extend his teaching contract.

"We have therefore concluded that the Respondent School District refused Koeller a contract in order to discourage membership and collective bargaining activities on behalf of the Welfare Committee of the MNEA."

In any event, it may be assumed arguendo that the school board would have been waranted in terminating Koeller's services on these grounds if the motivation for the action were not connected with his labor activities. Yet the WERB could reasonably find, as it did, that the motivation for failing to renew Koeller's contract was his activities in the MNEA and on behalf of his fellow teachers' welfare.

Agency.

The WERB specifically found that Kreuser, Refling, Ussel, and Ladd were supervisory personnel in the employ of the Muskego-Norway school district. The WERB considered the actions of these supervisory personnel in determining whether unfair labor practices had been committed by the school board and the school district. The trial court ruled that there was nothing in the findings of the WERB or in the evidence to establish that these supervisory personnel were agents of the Muskego-Norway school board. Therefore, ruled the trial court, actions of the supervisory personnel could not be attributed to the board in determining whether unfair labor practices had been committed, and only actions by school board members could be considered.

The trial court's ruling places form over substance. Where the WERB expressly found that Kreuser, Refling, Ussel, and Ladd were "supervisory personnel in the employ of said School District," such employment is sufficient to constitute an agency relationship. The employment policies of the school district are implemented through the actions of the supervisory personnel. Under the trial court's ruling, the school board could tacitly engage in unfair labor practices through actions by the supervisory personnel, and the employees discriminated against would have no effective recourse. Such a technical interpretation--as made by the trial court-- of the findings of the WERB deprives sec. 111.70 (3), Stats., of any real substance.

By the Court. - Judgment reversed.

No. 43

August Term, 1966

STATE OF WISCONSIN : IN SUPREME COURT

Muskego-Norway Consolidated Schools, et al.,

Respondents,

v.

Wisconsin Employment Relations Board,

Appellant,

BEILFUSS, J. (dissenting) I dissent from that part of the opinion which holds that the refusal of respondents to renew Koeller's contract was prompted by his labor activities is supported by substantial evidence.

The facts as set forth in the opinion clearly demonstrate the school board was amply justified in discharging Koeller because of his inadequacy in teaching and discipline methods. There is no substantial evidence that the school board discharged him for his union activities; a finding to the contrary rests only upon speculation and conjecture.