MUSKEGO-NORWAY, ETC. v. W.E.R.B.

32 Wis (2d) 478

Rehearing

Opinion of May, 1967

Involving:

WERC Dec. No. 7247

The following memorandum was filed January 11, 1967.

PER CURIAM (on motion for rehearing). The motion for rehearing by appellant Wisconsin Employment Relations Board (hereinafter WERB) is granted with respect to the following three issues:

(1) Is noncompliance with the first sentence of sec. 111.07(4), Stats., by WERB jurisdictional?

(2) If such noncompliance is jurisdictional, should the holding of this court in its original opinion be made applicable to the instant case but prospective only as to all other matters pending before WERB?

(3) If such noncompliance is not jurisdictional, what should be the procedure for enforcing compliance?

Appellant WERB is granted twenty days from the date of this order in which to serve and file any additional brief which it wishes to submit to the court with respect to the above three issues; and respondents are granted fifteen days from receipt of appellant's brief to submit their brief with respect to such three issues.

After receipt of the briefs, the court will notify counsel for the parties if the court wishes to hear oral arguments.

On rehearing the cause was submitted for the appellant on the briefs of Bronson C. La Follette, attorney general, and Beatrice Lampert, assistant attorney general, and for the respondents on the briefs of Jack A. Radtke of New Berlin, attorney, and Quarles, Herriott, Clemons, Teschner & Noelke, Laurence E. Gooding, Jr., and Peter J. Lettenberger of counsel, all of Milwaukee.

Briefs amici curiae were filed by (a) Lawton & Cates and John A. Lawton and David F. Loeffler, all of Madison, for the Wisconsin Council of County and Municipal Employees (AFL-CIO), United Professional Firefighters of Wisconsin (AFL-CIO), Wisconsin Paid Firefighters Legislative Association, Wisconsin Professional Policemen's Association, Wisconsin County Police, Deputy Sheriffs, and Radio Operators Association, and the Wisconsin State Employees Association (AFL-CIO); (b) Goldberg, Previant & Uelmen of Milwaukee, for the Federation of Teachers & Bakery Sales Drivers Local 344; and (c) Carston C. Koeller of Muskego.

The following opinion was filed May 4, 1967.

PER CURIAM (on rehearing). After due consideration of briefs submitted on motion for rehearing and pursuant to this court's order granting rehearing, the court's statement of facts is retained and the court's opinion is hereby withdrawn and the following substituted therefor.

A threshold issue presented on this appeal is whether the fact that the Wisconsin Employment Relations Board's order herein was entered more than eleven months after submission of the controversy to it renders that order void and destroys the jurisdiction of the WERB to enter its order herein. Sec. 111.07(4), Stats., provides that:

"Within 60 days after hearing all testimony and arguments of the parties the board shall make and file it findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. . . ."

The question is whether the sixty-day language in sec. 111.07 (4), Stats., is mandatory or directory. Sec. 111.07(12) provides:

"A substantial compliance with the procedure of this subchapter 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 respondent argues that sec. 111.07(12), Stats., makes substantial compliance with sec. 111.07(4) mandatory, and that a decision made by the WERB eleven months after submission of the controversy does not constitute substantial compliance.

In Woracheck v. Stephenson Town School Dist. this court articulated the tests to be applied in determining whether a statutory provision is mandatory or directory:

"'There is no well-defined rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by the terms of the statute, in relation to the scope, history, context, provisions, and subject matter of the legislation, the spirit or nature of the act, the evil intended to be remedied, and the general object sought to be accomplished.'" 1/

The overall purpose of ch. 111, Stats., which must be given overriding consideration, is the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations. This purpose is to be accomplished by the maintenance of suitable machinery for the peaceful adjustment of controversies. 2/ The overall policy of the act is not served by an interpretation of sec. 111.07(4) making the sixty-day requirement mandatory.

In State v. Industrial Comm. 3/ this court considered the problem of whether a time limitation on an administrative agency was mandatory or directory. The court stated a guiding criterion as follows:

". . . [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 power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation." 4/

No such language prohibiting power after the expiration of sixty days can be found in sec. 111.07(4) Stats. Moreover, there is no substantial reason why the decision rendered cannot be made after the sixty-day limitation as well as before. 5/

1/ (1955), 270 Wis. 116, 120, 70 N.W. (2d) 657.

2/ Sec. 111.01 (2), Stats.

3/ (1940), 233 Wis. 461, 289 N.W. 769.

4/ Id. at page 466. See also 67 C. J. S., Officers, pp. 404-406, sec. 114b.

5/ Appleton v. Outagamie County (1928), 197 Wis. 4, 220 N.W. 393.

The function performed by the WERB in the case at bar was adjudicative. Under sec. 270.33, Stats., a trial judge is required to make his decision within sixty days after submission of the cause. This section has been ruled to be directory rather than mandatory. 6/ Analogously, the sixty-day time limitation on the WERB should be directory rather than mandatory, and this holding is not changed by the substantial compliance requirement of sec. 111.07(12). The purpose of sec. 111.07(12) is to avoid the evasion of orders made by the board through technical legal defenses. A holding that the sixty-day requirement of sec. 111.07 (4) is merely directory fosters this purpose.

We conclude that the nine-month delay by the WERB in entering its decision and order, while not to be condoned, does not operate to deprive the WERB of jurisdiction. As a result of this ruling we now reach the merits of the controversy and our decision thereon will be forthcoming in due course.

6/ 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; Merkley v. Schramm (1966), 31 Wis. (2d) 134, 138, 142 N.W. (2d) 173.