Nos. 296 and 297

August Term - 1968

STATE OF WISCONSIN : IN SUPREME COURT

City of Milwaukee, a municipal body corporate,

Appellant,

v.

Wisconsin Employment Relations Commission,

Respondent.

(Cir. Ct. No. 350-731)

FILED

Jul -3 1969

Franklin W. Clarke
Clerk of Supreme Court
Madison, Wisconsin

City of Milwaukee, a municipal body corporate,

Appellant,

v.

Wisconsin Employment Relations Commission,

Respondent.

(Cir. Ct. No. 351-727)

APPEAL from a judgment of the circuit court for Milwaukee county: MAURICE M. SPRACKER, Circuit Judge. Affirmed.

Action to review a certification by the Wisconsin Employment Relations Commission (hereinafter "WERC") of the Association of Municipal Attorneys of Milwaukee (hereinafter "Attorneys' Association") as the collective bargaining representative for the attorneys employed in the office of the city attorney of Milwaukee.

Although two separate cases are presented here, there is only one issue involved. The WERC filed only one memorandum decision; the circuit court filed only one decision; and only one judgment is appealed from. The two cases will be treated as one for the purposes of appeal.

The facts are undisputed. On November 16, 1966, the Attorneys' Association requested an election pursuant to sec. 111.70, Stats., to determine whether the Attorneys' Association was entitled to act as the collective bargaining representative for the attorneys employed in the office of the city attorney of Milwaukee. The city attorney and his deputy were excluded from the collective bargaining unit.

The city of Milwaukee contested the election request on the ground that the attorneys in question were members of the city management team and that they were not eligible for collective bargaining under sec. 111.70.

The matter of the election request was heard before the WERC

on January 5, 1967. On July 10, 1967, the WERC ordered that the election be held. In a memorandum opinion accompanying the directive, the WERC admitted that the attorneys employed by the city attorney's offic furnished legal assistance and advice to various boards and commissions of the city of Milwaukee, that the attorneys had access to classified information, and that while the attorneys might be considered part of the management team of the city, they were not managerial employees in any employer-employee relationship. In addition to excluding the city attorney and the deputy city attorney from the collective bargaining unit, however, an assistant city attorney, John Kitzke, who actively participated as a labor negotiator for the city of Milwaukee, was barred from participating in the employee unit.

On August 9, 1967, an election was held to determine whether the attorneys wanted to be represented by the Attorneys' Association. Twenty attorneys were eligible to vote, and 19 actually voted. All votes cast were in favor of the Association.

On August 24, 1967, the WERC certified the Attorneys' Association as the exclusive bargaining agent of the attorneys.

The city of Milwaukee filed two petitions for judicial review pursuant to sec. 227.20, Stats. That is why two cases are technically involved in this appeal. The first petition asked for a review of the WERC's directive ordering the election. The second petition asked for a review of the WERC's certification of the election. The basis for review in both petitions was that the attorneys in the city attorney's office of the city of Milwaukee are not municipal employees within the meaning of sec. 111.70(1)(b), Stats.

The circuit court affirmed the decision of the WERC. The city of Milwaukee appealed.

HANLEY, J. A single issue is presented on this appeal; and that is whether the attorneys employed by the Milwaukee city attorney's office are "municipal employes" within the meaning of sec. 111.70(1)(b), Stats.

Sec. 111.70(1)(b), Stats., provides:

"'Municipal employe' means any employe of a municipal employer except city and village policemen, sheriff's deputies, and county traffic officers."

Under sec. 111.70(2), Stats., municipal employees are given the right to be represented by labor organizations of their own choice.

Literally read, the definition of "municipal employe" would extend the right to organize to all employees, except law enforcement officers. Obviously, this was not the intent of the legislature, and all of the parties to this appeal have recognized the problem that such a broad interpretation would create. No party is contending that the definition should be read literally. On the contrary, the city of Milwaukee argues that supervisory and managerial employees should be excluded from the definition, while the WERC argues that only supervisory employees should be excluded.

Before any discussion of the merits of the question presented here, we should first consider the scope of review in a case such as this and the standards applicable thereto.

Sec. 227.20(1), Stats., provides that an administrative agency's decision may be reversed or modified by the circuit court:

"...if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

"...

"(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law;"

This court has previously held that its scope of review is

"...identical to that given to the circuit court by sec. 227.20, Stats." Scharping v. Johnson (1966), 32 Wis. 2d 383, 389, 145 N. W. 2d 691.

In Pabst v. Department of Taxation (1963), 19 Wis. 2d 313, 120 N. W. 2d 77, 5 A. L. R. 3d 594, this court pointed out that there are two methods of reviewing an administrative agency's application of a statute to certain facts. The first method is the analytical approach whereby the court decides which part of the agency's determination presents a question of fact and which part a question of law. The second method is the practical or policy approach which avoids allocating labels of "fact" of "law" to the agency's determinations. When the practical approach is used, judicial review is exhausted if there is found to be a rational basis for the conclusions approved by the administrative body.

"We believe that pars. (b) and (d) of sec. 227.20(1), Stats., require Wisconsin courts to employ the analytical approach when reviewing agency decisions. Nevertheless, in fields in which an agency has particular competence or expertise, the courts should not substitute their judgment for the agency's application of a particular statute to the found facts if a rational basis exists in law for the agency's interpretation and it does not conflict with the statute's legislative history, prior decisions of this

court, or constitutional prohibitions," Pabst v. Department of Taxation, supra, at pages 323 and 324.

There can be no doubt that the question presented in this case is one of "law." In decisions even more recent than the Pabst Case, this court has further discussed its obligation in reviewing an administrative agency's interpretation of questions of law.

"The Supreme Court is not bound by an administrative agency's construction of a statute...." National Amusement Co. v. Dept. of Revenue (1969), 41 Wis. 2d 261, 274, 163 N. W. 2d 625. See also: Johnson v. Chemical Supply Co. (1968), 38 Wis. 2d 194, 156 N. W. 2d 455.

However,

"...the construction and interpretation of statute adopted by an administrative agency charged with the duty of applying the law is entitled to great weight...." Cook v. Industrial Comm. (1966), 31 Wis. 2d 232, 240, 142 N. W. 2d 827. See also: National Amusement Co. v. Dept. of Revenue, supra; Chevrolet Division, General Motors Corporation v. Industrial Comm. (1966), 31 Wis. 2d 481, 143 N. W. 2d 532.

This court does not independently redetermine every conclusion of law made by an administrative agency.

"...If several rules, or several applications of a rule are equally consistent with the purpose of the statute, the court will accept the agency's formulation and application of the standard." Milwaukee Transformer Co. v. Industrial Comm. (1964), 22 Wis. 2d 502, 510, 126 N. W. 2d 6.

In applying the standards to this case, it should be noted that the application of the municipal employment law (sec. 111.70, Stats.) is one of the areas of the law requiring expertise. Therefore, the only determination this court should make is whether the WERC's interpretation of "municipal employe" is consistent with the purpose of sec. 111.70, Stats.

The broad definition of "municipal employe" found in sec. 111.70 certainly indicates a legislative desire to make collective bargaining units available for as many municipal employees as is consistent with sound municipal government. It is conceded by all the parties that every employee of a city cannot belong to a labor organization. The city of Milwaukee properly points out that someone has to sit on the city's side of the bargaining table. For this reason, the WERC interprets "municipal employe" to exclude supervisory personnel. The city also points out that in a similar construction problem, the National Labor Relations Board interpreted the National Labor Relations Act to exclude both supervisory and managerial personnel.

Even conceding that the National Labor Relations Board has decided this same question to a different conclusion than the WERC, it is quite apparent that the WERC's determination is not inconsistent with the purposes of sec. 111.70, Stats. The city of Milwaukee does not even argue that it is. While we agree that the city's argument leads to a reasonable application of the statute, the WERC's determination is neither without reason nor inconsistent with the purposes of the statute. Since that is the ultimate test, the circuit court's decision affirming the determination of the WERC will be affirmed.

We conclude that the exclusion of John Kitzke by the WERC ruling is based on the fact of his assignment as a labor negotiator. Such exclusion should apply to all personnel assigned as labor negotiators.

By the Court -- Judgment affirmed.