STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WAUWATOSA BOARD OF EDUCATION OF THE CITY OF WAUWATOSA, a municipal corporation, Petitioner, vs. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	DECISION ON REVIEW Case No. 125-015

Before Hon. Richard W. Bardwell, Judge

The Wauwatosa Board of Education (hereinafter referred to as school board) initiated this proceeding by filing a petition on September 26, 1967, with the Wisconsin Employment Relations Commission (hereinafter referred to as the commission) whereby the school board requested the commission to conduct an election pursuant to sec. 111.70(4)(d) of the statutes. The school board took the position that there was a question as to whether the existing union, which represented certain of its custodial and maintenance employes, actually represented a majority of these employes and, further, that there were certain excluded regularly employed part-time cafeteria helpers who should be permitted to vote on the issue of representation.

It should be noted that after an election Local 1561 and District Council 48, AFSCME, AFL-CIO (hereinafter referred to as the union) was certified as exclusive bargaining representative for all custodial and maintenance employes of the school board, including stock clerks and cooks, but excluding craft, professional and certain white collar employes. Actually the election was conducted pursuant to a stipulation whereby, among other things, the parties stipulated to the appropriate bargaining unit and such unit was certified by the commission on March 6, 1963.

The most recently negotiated collective bargaining agreement between the parties was effectuated for the period January 1 through December 31, 1967, and this agreement was to remain in effect from year to year unless either party requested a change by June 1st of the year preceding the year in which the desired changes were to become effective.

Sometime prior to June 1, 1967, pursuant to the contract, the union served notice on the school board that it was requesting certain changes in the 1968 agreement. Thereafter, on September 26, 1967, the school board petitioned the commission for an election contending that a question of representation existed for the following alleged reasons:

(1) That the union as then certified was inappropriate because it included certain craft employes, namely, a plumber, two painters and an electrician's helper.

(2) The cafeteria employes, including some 35 un-represented regular part-time employes, constituted a separate unit, and that all cafeteria employes, therefore, should be given an opportunity by an election to determine just what representation, if any, they desired.

(3) The union in carrying out its representative status was unfairly distinguisning between members and non-members.

(4) The school board expressed a good faith doubt as to whether or not a majority of the employes at that time desired representation by the union.

After conducting a hearing into the facts on October 12, 1967, the commission, on February 28, 1968, entered an order dismissing the school board's petition for an election on the ground that no question concerning representation existed among the employes involved. From this dismissal, the school board sought a Chapter 227 review in the circuit court for Dane County.

ISSUE

The sole question on this review concerns the question of whether the record supports the commission's determination that the school board failed to establish that a question of representation existed between the union and the school board as to whether or not the union as certified represented a majority of the employes concerned. Counsel for the school board urges strongly that there are other key issues involved, but with one exception, we deem that they are peripheral and do not get to the heart of the matter. However, we will briefly treat these collateral issues in this opinion.

STATUTES INVOLVED

In our judgment, the pertinent statutes which control this review are the following:

Sec. 111.70 (4) (d):

> "POWERS OF THE BOARD. The board shall be governed by the following provisions relating to bargaining in municipal employment:
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> * * *
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> "(d) Collective bargaining units. Whenever a question arises between a municipal employer and a labor union as to whether the union represents the employes of the employer, either the union or the municipality may petition the board to conduct an election among said employes to determine whether they desire to be represented by a labor organization. Proceedings in representation cases shall be in accordance with ss. 111.02 (6) and 111.05 insofar as applicable, except that where the board finds that a proposed unit includes a craft the board shall exclude such craft from the unit. The board shall not order an election among employes in a craft unit except on separate petition initiating representation proceedings in such craft unit." (Emphasis supplied)

Sec. 111.02 (6):

"Definitions. When used in this subchapter:

* * *

"(6) The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the board may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a 'collective bargaining unit.' A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this subchapter I of Chapter III in reference to collective bargaining units otherwise established under said subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do."

The material portions of section 111.05 of the Wisconsin Employment Peace Act, which section is specifically alluded to in section 111.70 (4) (d) quoted above, provides as follows:

"(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

* * *

"(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists." (Emphasis supplied)

The school board takes the position that under the express terms of section 111.70 (4) (d), and more particularly as interpreted by the commission, at least up to this case, any municipal employer could petition for an election whenever it felt for any reason that a question of representation existed. In fairness to the school board, this appears to have been the policy of the commission up to its decision in this case. In that connection, the commission stated as follows at page 12 of its memorandum decision:

"Under the pertinent statutory provisions a question of representation must exist as a condition precedent to the processing of a petition for an election among employes. The Commission has not required any showing of interest to be demonstrated by any petitioner with respect to the processing of election petitions filed pursuant to the Wisconsin Employment Peace Act or the Municipal Employer-Employe Labor Relations Act. The Commission has considered the filing of the petition, whether it be to certify or decertify a representative, as a good-faith claim that the employes desire to be represented or not to be represented. This policy has been applied in initial and subsequent elections on the basis of our experience that the overwhelming number of petitions have been filed in good faith with the expectation of obtaining the results prompting the petition."

Based on the record in the instant case, as well as an influx of other petitions for elections which did not appear to be in good faith, the commission decided to change its policy. At page 13 of its memo decision, the commission stated the reasoning behind this alteration in policy as follows:

"Although the Commission has not in the past processed a substantial number of petitions which have not been filed in good faith, the results of recent elections seeking a change in the present representative status indicate that an increasing number of petitions have been filed where there was little likelihood of success by the petitioner. The processing of such election petitions has resulted in no change in the bargaining relationship and has had an adverse impact upon such existing relationship, in that such processing has interrupted and delayed negotiations, thus affecting the stability of the collective bargaining relationship. Such unwarranted delays create problems especially in municipal employment with respect to the effect of budgetary deadlines and other special deadlines which may be imposed by statute, and in both the private and public employment where such delays create additional issues for bargaining, such as effective dates of agreements, as well as their retroactive application.

"The Commission concludes that there is now sufficient reason requiring parties requesting elections seeking a change in representation or the rejection of the present representative to furnish the Commission with objective "data raising the question concerning representation before it will conduct such an election, which if otherwise held, might delay and frustrate the relationship between the recognized or certified labor organization and the employer. Inasmuch as election procedures with respect to representation and bargaining units are identical in the Wisconsin Employment Peace Act and in the Municipal Employer-Employe Labor Relations Law, the policies which we are herein adopting shall apply to election proceedings processed by this agency under both statutes."

Counsel for the school board argues persuasively that the commission has, in effect, changed the rules after the beginning of the ball game. Counsel points out that if this is a rule change then it should have been done only after notice, hearing and publication. The trouble with counsel's position is that the former policy of the commission to hold

an election, whenever either the employer or the union petitioned for one, was not a published rule of the commission but merely part of its modus operandi. Certainly any administrative agency has the perfect right to make a basic change in policy when conditions clearly warrant the change. Certainly no agency should be hamstrung by a policy which it has adopted that later turns out to be unworkable. It is an elementary proposition in administrative law that governmental boards and bureaus have broad discretion in implementing the duties entrusted to them by the legislature.

Furthermore, it would now appear that the commission's current policy more directly corresponds to the mandate of the statute. Section 111.05 (4) provides, in part, "The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists." (Emphasis supplied)

Section 111.70 (4) (d) provides specifically that "Proceedings in representation cases shall be in accordance with ss. 111.02 (6) and 111.05 insofar as applicable, . . ." (Emphasis supplied)

In other words, it seems apparent from the language of the above statutes that a second or subsequent election concerning representation among the same group of employes should not be held unless the board finds sufficient reason exists for holding such an election. Having determined that the commission was correct in requiring a municipal employer to demonstrate by objective evidence that a good-faith question of representation existed before the commission would order an election, we now turn briefly to the record and the various questions raised on this appeal by the school board.

IMPROPER INCLUSION IN THE UNIT OF CERTAIN CRAFT EMPLOYES

As noted in its petition, the school board alleged that certain craft employes were improperly included as members of the subject union. It is true that the plumber and two painters who were manifestly craft employes should not have been included in the unit. The commission also found that the electrician's helper at issue possessed sufficient craft skills to be properly considered as a craft employe and, therefore, he should not have been included in the unit. The commission further indicated that it would issue an amended certification of representation wherein it would amend the existing unit to exclude the aforementioned four craft employes. However, this change in certification has nothing to do with the question of representation as raised on this appeal. We say this because the record indicates that at the time of the election in 1963 there were 88 eligible voting union members. Eighty-four voted and fifty-one approved the union, while thirty-three disapproved. It is obvious from the foregoing that regardless of how the four craft employes voted, they could not in any way have affected the outcome of the election, and, therefore, the school board's argument concerning the improper inclusion of craft employes is without merit.

CAFETERIA EMPLOYES

The school board here contends that its good-faith doubt concerning a question of representation is further substantiated by the fact that the twenty full-time cafeteria employes, being in a separate division, are entitled to a separate unit vote and, further, that some thirty-five regularly employed part-time cafeteria employes were not included in the original unit and should be permitted to vote as to their wishes in the matter, i.e., whether they wish to join the original unit, form a separate unit with the full-time cafeteria employes, or remain unorganized.

The trouble with the school board's argument is that it presented no evidence in the record to support a finding that any of the cafeteria employes, whether they be full or part-time, desired to constitute a unit separate and apart from the existing union or whether or not the regular part-time cafeteria employes were interested in any representation whatsoever.

At the oral argument, it appeared to the Court that counsel for the school board was, in effect, representing the thirty-five allegedly forgotten part-time cafeteria employes. However, counsel for the school board assured the Court that such was not the case. Nonetheless, we agree with the commission that there was no evidence in the record to support any finding that any of the cafeteria employes were unhappy with the situation as it existed. Moreover, section 111.05 (4) provides, in material part, as follows:

> "Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer." (Emphasis supplied)

The above-quoted statute is clear authority for the right of any employe to petition the commission for an election whenever such employe or employes felt that a question of representation existed. This statute obviously covers the thirty-five part-time cafeteria employes here at issue.

If our interpretation of the right of a non-union member to petition for an election were not sound then it would be a simple matter for some employers with so-called sweetheart or company unions in existence to perpetuate those unions because the non-members would have no right to petition for an election on the issue of representation.

ALLEGED DISCRIMINATION BETWEEN NON-UNION AND UNION WORKERS

Here the school board asserted that certain union newsletters distributed among the employes could be construed as discriminating against the non-union employes and that therefore all the employes should have another opportunity to vote on the issue of representation by the union. However, the record is devoid of any evidence supporting the school board's contention that the employes themselves may have changed their attitude toward the Union or that the newsletters in any way affected the feelings with respect to any employe as to what type of representation he desired.

QUESTION OF REPRESENTATION

As noted, we have already held that sec. 111.70 (4) (d) requires either the employer or the union, whichever petitions for an election, to offer some objective evidence that a bona fide issue of representation exists as between the union and its members. In the instant case, the school board offered no probative evidence at the hearing that such a question actually existed. In addition, the record reflects that counsel for the school board understood his obligation in this respect. At the outset of the hearing, the following colloquy was held between counsel and the commission chairman:

"CHAIRMAN SLAVNEY: Mr. Williamson has gone a little further; he is not willing to take your statement with regard to a reasonable doubt as to whether or not the union represents the people.

"MR. FEREBEE: No, I didn't think he would.

"CHAIRMAN SLAVNEY: I think under his position he wants you to establish the basis for your statement. Is that right, Mr. Williamson?

"MR. WILLIAMSON: That's correct.

"MR. FEREBEE: I think he has a right to that and we are prepared to give some testimony in that area."

Based on its recognized obligation to produce some objective evidence on the issue, the school board called Howard Stone, Assistant Superintendent of Schools. Mr. Stone testified that he attended a school board meeting at which one Kenneth Christensen, a supervisor who answered to Stone, was directed to find out whether or not the custodial and maintenance employes felt that a majority of those in the bargaining unit still wanted to be represented by the union. Mr. Stone further testified that Christensen, at a subsequent school board meeting, reported to the effect that through his contacts with the various buildings there seemed to be a reasonable doubt as to whether or not a majority of those in the bargaining unit wanted continued representation by that unit. (See pages 8 and 10 of the record). It further appears that the first school board meeting was held in early summer, 1967, and Mr. Christensen reported to the school board at a special meeting held in July.

With regard to the testimony of Assistant Superintendent Stone, the commission concluded that such evidence was insufficient to establish any reasonable cause to believe that the union had lost its majority status or that any employes had actually changed their attitude in that regard. The commission further noted that such evidence constituted compounded hearsay which failed to establish a good-faith doubt with respect to the majority status of the union. We agree with the commission that the evidence offered by the school board at the hearing fell far short of establishing to any reasonable probability that an actual question of representation by the union existed. Thus, we have no alternative but to confirm the order of the commission dismissing the petition for the election.

One other point raised by the commission's decision and counsel for the school board in his brief deals with the issue of the timing of the petition.

As noted here the petition for the election was not filed until September 26, 1967. In its memo decision, the board held that petitions for elections under section 111.70 (4) (d) must be filed during the 60-day period prior to the date established for the reopening of the agreement -- in this case, during the period April 1 to May 30, 1967. In view of the fact that the commission dismissed the petition on the merits, the issue of the timing of the petition becomes irrelevant. In other words, the commission's statements about when a petition for election must be filed was merely dicta and in no way binds the commission in future cases. This becomes important for it now appears that on July 23, 1968, the commission entered a decision in Municipal Truck Drivers Local Union 242, involving the employes of the City of Milwaukee, wherein the commission stated as follows:

"In retrospect, the policy as expressed by the Commission in Wauwatosa Board of Education with respect to the time for filing petitions, is too general, and we, therefore, modify it as follows: Where there presently exists a collective bargaining agreement ... covering the wages, hours and conditions of employment of employees in an appropriate collective bargaining unit, a petition requesting an election among said employees must be filed within the 60-day period prior to the date reflected in said agreement ... for the commencement of negotiations for changes in wages, hours and working conditions of the employees in the unit covered thereby ..."

We merely point out this change of policy on the part of the commission for the record so that our decision of affirmance herein cannot be construed as an approval of the commission's direction in this record that petitions for election must be filed within a 60-day period preceding the date established for the reopening of the collective bargaining agreement.

The counsel for the commission may prepare a proper form of judgment confirming the commission's order dismissing the petition for an election. A copy of such judgment should be furnished counsel for the school board and counsel for the union before submission to the Court for signature.

Dated this 2nd day of August, 1968.

BY THE COURT:

Richard W. Bardwell /s/
Richard W. Bardwell
Circuit Judge