8707

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LOCAL 882, affiliated with DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

DECISION AND

DIRECTIONS FOR JUDGMENT

Case No. 126-321

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE

This is an action to review an order of the Wisconsin Employment Relations Commission dismissing a complaint of Local 882, which alleged that Milwaukee County had interfered with, restrained or coerced its employees in the exercise of their rights guaranteed them under Sec. 111.70 (2) of the Wisconsin Statutes.

There is no dispute as to the facts in this matter. Briefly, they are as follows: Under Section 63.10, Wis. Stats., the only persons who can initiate disciplinary action in the County of Milwaukee are the appointing authorities. In order to evaluate the circumstances which cause subordinate supervisors to recommend discipline, the appointing authorities set up a pre-disciplinary conference to determine whether an employee should be disciplined and what the discipline should be.

As a result of certain conduct, Edmund Kaczkowski was ordered to such a hearing. He requested the county to permit a union representative to be present at the hearing. This request was denied. A permanent umpire in an advisory decision ruled that the union had failed to establish that this denial violated the agreement between the county and the union. The county has historically denied employees union representation at confrontations between the employee and his supervisor at which the probability of discipline is to be discussed.

As we view this record, there appears to be two issues confronting the court, each of which will be dealt with separately.

PROHIBITED PRACTICE

Was the county's action in refusing to permit an employee to have union representation at a pre-disciplinary hearing a prohibited practice within the meaning of Sec. 111.70 (3) (a), Wis. Stats.?

Petitioner, hereinafter sometimes referred to as the union, contends that Sec. 111.70 (2), which confers upon municipal employees the right to union representation at conferences and negotiations with municipalities on questions of their conditions of employment, entitles a municipal employee to union representation at a pre-disciplinary hearing or conference before the appointed authority. The statute reads as follows:

"111.70 Municipal employment. * * *

"(2) Rights of Municipal Employees. Municipal employees 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 employment, and such employees shall have the right to refrain from any and all such activities." (Emphasis added)

If we assume arguendo[1] that this contention of the union is correct in that sec. 111.70 (2) includes within its ambit the right to union representation at pre-disciplinary hearings, it does not necessarily follow that a refusal by an employer to allow such representation would be a prohibited practice under Wis. Stats., Sec. 111.70 (3) (a). Wis. Stats., Sec. 111.70 (3) (a) 1, provides as follows:

"(3) Prohibited Practices. (a) Municipal employees, their officers and agents are prohibited from:

"1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2)."

In Joint School Dist. No. 8 v. Wis. E. R. Board, 37 Wis. 2d. 483 (1967), the court discussed at length certain rights and remedies under Sec. 111.70, Stats. At pages 488-489 the court states:

"But sec. 111.70 does not use the term 'collective bargaining' in the paragraph referring to the right of municipal employees. It is provided in sec. 111.70 (2) that municipal employees shall have '... 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.' The term 'prohibited practices' is used in sec. 111.70 (3) with respect to municipal employees rather than 'unfair labor practices' as used in sec. 111.06. There is no designation that the failure on the part of the municipal employer to confer and negotiate is a prohibited practice and there is no comparable sanction for such failure as is provided in sec. 111.06 for the unfair labor practice of failing to collectively bargain." (Emphasis added)

In Joint School Dist. No. 8, the court noted that although municipal employees had a right to be represented in conferences and negotiations with the municipal employer, the municipal employer was under no duty to collectively bargain. A refusal on the part of the municipal employer to confer and negotiate would not, by that fact, result in a prohibited practice within the purview of sec. 111.70.

There is no doubt that much of the court's lengthy discussion of sec. 111.70 may be considered dicta. However, it was necessary to the decision and provides a view of the court's interpretation of the statute. Counsel for petitioner cited no cases to support his view

[1]As will be subsequently developed in this opinion we think that when the legislature referred to "conferences and negotiations ... on questions of wages, hours and conditions of employment" in sec. 111.70 (2) it did not intend to include the individual pre-disciplinary conference of the type here at issue.

that a refusal by a municipal employer to allow union representation at a pre-disciplinary hearing was a prohibited practice. He merely states that the court's discussion of sec. 111.70 should be dismissed as dicta. The only case cited on the subject is one in which the commission ruled that sec. 111.70 did not make it a prohibited practice for a municipality to refuse to bargain collectively with a union over questions of wages, hours and conditions of employment. City of New Berlin, Dec. No. 7293.

Applying the reasoning used by the court in Joint School Dist. No. 8 to the subject facts, one readily concludes that a refusal by an employer to allow representation at a pre-disciplinary hearing would not be a prohibited practice under sec. 111.70 (3), Stats. This is so even if we grant petitioner's contention that sec. 111.70 (2) includes the right to union representation at a pre-disciplinary hearing. This refusal is not a prohibited practice because sec. 111.70 (3), Stats., does not make the refusal to confer and negotiate a prohibited practice, as does its counterpart in the Employment Peace Act, sec. 111.06 (1) (d), or in the State Employment Labor Relations Act, sec. 111.84 (1) (d). Joint School Dist. No. 8, supra.

RIGHT OF UNION REPRESENTATION AT

PRE-DISCIPLINARY HEARING

Does Wis. Stats., sec. 111.70 (2) grant municipal employees the right of union representation at a pre-disciplinary hearing?

Sec. 111.70 (3) 1, Wis. Stats., prohibits municipal employers from interfering with, restraining or coercing any municipal employee in the exercise of the rights provided in sub. (2). Therefore, if union representation at a pre-disciplinary hearing is not a right under sub. (2) of 111.70, its denial by the employer could not possibly be a prohibited practice. In our judgment sec. 111.70 (2) does not include within its purview the right to union representation at a pre-disciplinary hearing.

Discipline in municipal service is imposed within the framework of the statutory responsibility vested in various appointing authorities or the civil service commission. Chapter 63 of the Wis. Statutes establishes a system of civil service for counties with a population over 500,000, which, of course, includes Milwaukee County. Sec. 63.10, Stats., provides in material part as follows:

> "63.10 Demotion; dismissal; procedure. (1) Whenever a person possessing appointing power in the county, the chief executive "officer of a department board of institution, the county park commission, county election commission, civil service commission, and county board of welfare as to officers and employes under their respective jurisdictions, believes that an officer or employe in the classified service in his or its department has acted in such a manner as to show him to be incompetent to perform his duties or to have merited demotion or dismissal, he or it shall report in writing to the civil service commission setting forth specifically his complaint, and may suspend the officer or employe at the time such complaint is filed. It is the duty of the chief examiner to file charges against any officer or employe in the classified service upon receipt of evidence showing cause for demotion or discharge of such officer or employe in cases where a department head or appointing authority neglects or refuses to file such charges. Charges may be

filed by any citizen against an officer or employe in the classified service where in the judgment of the commission the facts alleged under oath by such citizen and supported by affidavit of one or more witnesses would if charged and established amount to cause for the discharge of such officer or employe. The commission shall forthwith notify the accused officer or employe of the filing of such charges and on request provide him with a copy of the same. Nothing in this subsection shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding 10 days. In case an employe is again suspended within 6 months for any period whatever, the employe so suspended shall have the right of hearing by the commission on the second suspension or any subsequent suspension within said period the same as herein provided for in demotion or dismissal proceedings.

"(2) The commission shall appoint a time and place for the hearing of said charges, the time to be within 3 weeks after the filing of the same, and notify the person possessing the appointing power and the accused of the time and place of such hearing. At the termination of the hearing the commission shall determine whether or not the charge is well founded and shall take such action by way of suspension, demotion, discharge or reinstatement, as it may deem requisite and proper under the circumstances "and as its rules may provide. The decision of the commission shall be final. Neither the person possessing the appointing power nor the accused shall have the right to be represented by counsel at said hearing, but the commission may in its descretion permit the accused to be represented by counsel and may request the presence of an assistant district attorney to act with the commission in an advisory capacity." (Emphasis added)

Milwaukee County established a forum, in the person of a permanent umpire, for the review of disciplinary suspensions not automatically repealable or reviewable under sec. 63.10. This goes beyond the scope of the statute in granting rights. Under the statute the imposition of discipline, in the form of suspension not exceeding 10 days, is totally within the discretion of the department. Where the form of discipline is discharge, or suspension in excess of 10 days, the employee is entitled to a hearing on the merits; however, even here his right to representation is discretionary with the commission. It seems apparent that the union has no right to be present at a pre-disciplinary hearing.

The union relies on Sec. 111.05 (1), Stats., which is incorporated by reference in sec. 111.70 (4) (d), to support its theory that the imposition of discipline is a modification of working conditions and, therefore, proper subject matter for the grievance procedure. If this theory is correct, there is a conflict between sec. 63.10 and sec. 111.70 (4) (d) and sec. 111.05 (1). Such a conflict, if there be one, must be resolved in favor of sec. 63.10 (1). We say this because where there is a conflict between a general and specific statute the specific controls. Also, sec. 111.05 (1) was created in 1939 while 63.10 (1) was amended in 1963, and, therefore, the later statute controls.

We, therefore, conclude that the decision and ruling of the respondent commission is correct and its order must be affirmed. Counsel for the commission may prepare the requisite form of judgment affirming

the ruling and order hereunder review. A copy of such judgment should be submitted to counsel for the union and counsel for Milwaukee County before submission to the Court for signature.

Dated June 30, 1970.

BY THE COURT:

Richard W. Bardwell /s/
Circuit Judge