STATE OF WISCONSIN CIRCUIT COURT - Branch 1 BROWN COUNTY

BOARD OF EDUCATION, JOINT SCHOOL DISTRICT No. 1, CITY OF GREEN BAY, ET AL, GREEN BAY, WISCONSIN, and EDWIN OLDS, Superintendent,

Decision No. 9095

Petitioners,

- vs -

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Decision: On Petition For Review

A. The Proceedings Before The Wisconsin Employment Relations Commission

The petitioners in the above-entitled action filed a "Petition For Review" in the Circuit Court, from which it appears that two matters were consolidated and heard in the proceedings which were conducted before the Wisconsin Employment Relations Commission, and which were entitled as follows:

1. Norbert McHugh, Louis Hutzler, Darrel Molzahn, Ann McHugh and Green Bay Employees, Local 1672-B, AFSCME, AFL-CIO,

complainants,

vs

Board of Education, Joint School District No. 1, City of Green Bay, Wisconsin, and Edwin Olds, Superintendent,

respondents.

(This appears to be Case No. VI, No. 12944, MP-63, as appears from the records of the commission.)

2. Board of Education, Joint School District No. 1, City of Green Bay, et al, Green Bay, Wisconsin, and Edwin Olds, Superintendent,

complainants,

vs

Norbert McHugh, Louis Hutzler, Darrel Molzahn, Ann McHugh and Green Bay Employees Local 1672-B, AFSCME, AFL-CIO,

respondents.

(This is designated as Case No. VII, No. 13098, MP-70)

It appears that the examiner (Robert H. McCormick), on February 25th, 1971, issued Findings of Fact, Conclusions of Law, and Order in the above-entitled matters, wherein he concluded that Board of Education, Joint School District No. 1, City of Green Bay, Et Al, its officers and agents, including Superintendent Edwin Olds, had committed, and were committing, certain prohibited practices, within the meaning of sec. 111.70 of the Wisconsin Statutes (Municipal Employment). The examiner issued an order to remedy the acts found to be prohibited by the examiner.

It appears that the Board of Education, Joint School District No. 1, City of Green Bay, Et Al, and its superintendent, Edwin Olds, timely filed a petition with the Wisconsin Employment Relations Commission for review of the examiner's Findings of Fact, Conclusions of Law, and Order.

It further appears that the commission reviewed the entire record, the examiner's Findings of Fact, Conclusions of Law, and Order, the Petition for Review, and the brief in support thereof. The commission made and filed an order, dated September 16th, 1971, which amended the examiner's Findings of Fact, Conclusions of Law, and Order.

The commission found that the school board had committed certain prohibited practices within the meaning of sec. 111.70 of the Wisconsin Statutes, and ordered the school board, pursuant to sec. 111.07(4) of the Wisconsin Statutes, to take certain action in order to effectuate the purposes of Chapter 111 of said statutes.

The commission also dismissed the charge of prohibited practices brought by the school board against the labor organization involved, Local 1672-B, AFSCME, AFL-CIO.

As stated above, the petitioners in the present proceedings filed a "Petition For Review" in the Circuit Court, alleging that they are aggrieved by the commission's order issued on September 16th, 1971, which amended the examiner's Findings of Fact, Conclusions of Law, and Order. The petitioners further allege in said "Petition For Review" that they are directly affected by the aforesaid order of the commission, that the substantial rights of the petitioners have been prejudiced as a result of such action by the commission (which is alleged to be unreasonable and unlawful) as well as by such administrative findings, inferences, conclusions and decisions contained in the commission's order, in that the same are:

(a) Contrary to constitutional rights or privileges;

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

(c) Made or promulgated upon unlawful procedure;

(d) Unsupported by substantial evidence, in view of the entire record as submitted;

(e) Arbitrary or capricious.

In the "Petition For Review" the petitioners ask the Circuit Court to issue an order reversing the order of the Wisconsin Employment Relations Commission issued on September 16th, 1971, and that the commission be directed to hold further proceedings in accordance with law, and further relief as may be necessary, just and equitable in the premises.

B. Review Confined To The Record -- Action Which Court May Take

The Circuit Court of Brown County has jurisdiction over these proceedings, by reason of sec. 111.07(8) of the Wisconsin Statutes, which provides:

> "The order of the commission shall also be subject to review in the manner provided in ch. 227, except that the place of review shall be the circuit court of the county in which the appellant or any party resides or transacts business."

Chapter 227 of the Wisconsin Statutes (Administrative Procedure and Review Act), in sec. 227.20(1) thereof, makes provision for the scope of review in this matter. The portion of that section which is material herein provides as follows:

> "(1) The review shall be conducted by the court without a jury and shall be confined to the record . . . The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:
>
> (a) Contrary to constitutional rights or privileges; or
> (b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or
> (c) Made or promulgated upon unlawful procedure; or
> (d) Unsupported by substantial evidence in view of the entire record as submitted; or
> (e) Arbitrary or capricious.
>
> "(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it . . ."

It should be noted that the petitioners have cited all of the grounds for judicial review of an administrative decision which are set forth in sec. 227.20(1) of the Wisconsin Statutes. (The State's brief in circuit court refers to the citing of all of the grounds as being "boiler-plate pleading" on the part of petitioners.)

C. Contentions Of Petitioners In Support Of Request That Circuit Court Should Reverse Commission's Order.

A copy of the commission's order dated September 16th, 1971, is attached to the "Petition For Review" (in circuit court) and includes the Amended Findings of Fact of the commission. Although the petitioners have alleged in said "Petition For Review" all of the grounds for judicial review of an administrative decision which are contained in sec. 227.20(1) of the Wisconsin Statutes, the petitioners, in their brief filed in circuit court, in advance of the oral arguments on said petition, do not take issue with any of the amended findings of fact as they relate to the facts of the case or the inferences drawn therefrom. Furthermore, the petitioners did not indicate in their said written brief or in the oral arguments, how the evidentiary facts or inferences drawn from them are in error. Consequently, the Court is considering the amended findings of fact as conclusive upon this review.

The contentions of the petitioners as set forth in their written brief and oral arguments in circuit court are summarized as follows:

First: (Delay) The initial proceedings held before the examiner were completed on December 19th, 1969, and the order of the commission was not made until September 16th, 1971, which is three days short of being 21 months. Nowhere in the findings of fact, conclusions of law, and order, is there any indication of the reasons for the delay in the issuance of the order of the commission. By failing to issue a decision within 60 days of December 19th, 1969, the board of education has been denied the due process it is entitled to under the Wisconsin Constitution, Article I, section 9. The 21-month delay in this case, without explanation, warrants [according to petitioners] a holding of unreasonable delay and a violation of the rights of the board of education.

In connection with the first contention of petitioners [as stated in the preceding paragraph], they also point out that the commission's order requires the board of education to "make whole" Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh for any loss of wages and other benefits which each of them may have suffered as a result of their discharge, by payment to each of them of a sum of money equivalent to that which each would normally have earned as wages from May 12th, 1969, to the date of an unconditional offer of reinstatement to each of them, together with other benefits each may have earned during said period, less any earnings which each of them may have received during said period. The petitioners claim that the commission's order requiring to make whole from the date of discharge to the date of reinstatement operates to the prejudice of the board of education in the pursuit of its right to appeal the decision of the commission.

Second: (Claim against school district) The nature and effect of the decision of the commission is such that it results in a claim against the board of education, whereas sec. 118.26 of the Wisconsin Statutes requires that before an action can be maintained against a school district, the claim must be presented to the school district prior to the maintenance of the action. The commissioner's order requires the board of education to make the four employees whole. The commission's order does not state the amount of money demanded by each individual claimant and fails to comply with the requirement that the claim set forth the amount demanded.

Third: The commission's order does not effectuate the purposes of the Employment Peace Act.

The Court will now consider, and make a ruling, as to each of the contentions of the petitioners which are listed above.

Delay

In the opinion of the Circuit Court, the lapse of approximately 21 months between the close of testimony before the commission's examiner and the final decision and order of the commission does not void the commission's decision and order.

Sec. 111.07(4) of the Wisconsin Statutes provides as follows:

"Within 60 days after hearing all testimony and arguments of the parties the commission shall make and file its 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. Pending the final determination by it of any controversy before it the commission may, after hearing, make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the commission deems proper. Any order may further require such person to make reports from time to time showing the extent to which he has complied with the order."

With respect to the 60-day provision in sec. 111.07(4), the Supreme Court has ruled that this section is directory, and not mandatory.

In the case of Muskego-Norway, Etc. v. WERB, 32 Wis. 2d 485b (Rehearing), the Wisconsin Employment Relations Board's order was entered more than eleven months after submission of the controversy, and one of the issues presented on the appeal to the Supreme Court was whether that fact [the delay] rendered the board's order void and destroyed the jurisdiction of the WERB to enter its order. The question before the Supreme Court, in that regard, was whether the 60-day language in sec. 111.07(4) of the Wisconsin Statutes is mandatory or directory.

The Supreme Court pointed out in the Muskego-Norway case that the overall purpose of Chapter 111 of the Wisconsin Statutes, which must be given overriding consideration, is the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations; and that this purpose is to be accomplished by the maintenance of suitable machinery for the peaceful adjustment of controversies. The Supreme Court held:

> "The overall policy of the act is not served by an interpretation of sec. 111.07(4) making the sixty-day requirement mandatory." [Underscoring supplied]

In the Muskego-Norway case, the Supreme Court referred to the case of State v. Industrial Commission (1940), 233 Wis. 461, wherein consideration was given to the problem of whether a time limitation on an administrative agency was mandatory or directory, and in that case it was held that 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." However, in the Muskego-Norway case, the Supreme Court said, at page 485c:

> "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." [Underscoring supplied]

The Supreme Court also said, in the Muskego-Norway case, at page 485d:

> ". . . the sixty-day limitation on the W.E.R.B. 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 W.E.R.B. in entering its decision and order, while not to be condoned, does not operate to deprive the W.E.R.B. of jurisdiction." [Underscoring supplied]

[This last-quoted paragraph refers to a nine-month delay beyond the sixty days, which means that the WERB's order was eleven months after the matter was finally submitted to it.]

In addition to the fact that the sixty-day requirement of sec. 111.07(4) of the Wisconsin Statutes is merely directory, and not mandatory, the Circuit Court also believes there are valid reasons to explain the delay of the commission in issuing a final decision in the instant case. In the Muskego-Norway case there was no explanation of the delay, but in the present case there are specific factors [in addition to the heavy case-load of the commission] which tend to explain the time involved in the issuance of the final order. They are listed in the State's brief as follows:

"(1) In addition to the pleadings of the parties, there are 544 pages of testimony that the examiner had to consider in rendering his decision.

"(2) There are 55 exhibits, many of them multi-paged, that the examiner had to consider before rendering his decision.

"(3) There were lengthy briefs filed by the parties to the proceedings with the examiner that deserved consideration by him prior to the issuance of his decision.

"(4) The Findings of Fact, Conclusions of Law, Order and Decision of the examiner comprised 61 pages of legal-sized paper,--single-spaced typing.

"[The case was submitted by December 19, 1969. The examiner rendered his Findings of Fact, Conclusions of Law, Order and Memorandum Decision on February 25, 1971.]

"(5) On March 18, 1971, the School Board filed with the WERC a Petition for Review pursuant to sec. 111.07(5), Stats. (This petition itself is 15 legal-sized pages,--much of it single-spaced typing.)

"(6) The WERC then had to consider the original pleadings of the parties, the 544 pages of testimony, the 55 exhibits, and the briefs of the parties.

"(7) The Findings of Fact, Conclusions of Law, Order, and Memorandum Decision of the WERC was 38 legal-sized pages,--single-spaced typing.

"[The WERC issued its Findings of Fact, Conclusions of Law, Order, and Decision on September 16, 1971.]

"Thus, the record itself explains the time involved in issuing a final decision in this matter."

Furthermore, with respect to valid reasons to explain the delay of the commission in issuing a final decision, the following appears in the brief of intervenors (in Circuit Court), commencing on page 6:

"There are some facts that bear on this contention. The hearings ended on August 21, 1969. It was agreed at that time that the parties would have three weeks after receipt of transcript to file briefs. The transcript was received on November 13, 1969, three months later. It was 544 pages long. The employer's brief was filed on December 18, 1969, and exchanged on December 22, 1969. The examiner's decision was rendered on February 25, 1971. Thus the typing of the transcript took three months, briefing took one month, and the initial decision took thirteen months.

"According to Wis. Stats. s. 111.07(5), the employer had 20 days to file for review by the whole Commission. The employer's Petition for Review was dated March 16, 1971. One of the points raised in the Petition was the Examiner's delay in issuing a decision. Yet on March 31, 1971, the WERC granted the employer an extension of time to file his brief to April 16, 1971. Our reply brief was submitted on May 7, 1971. The Commission rendered its decision on September 16, 1971."

Moreover, in regard to the contention of "Delay" there is no showing by the school board that it has been prejudiced by the delay in the issuance of the final order of the commission in the instant matter. The commission's order required that the school board grant lost pay to the wrongfully discharged employees, less any income they received during the interim period. While this could result in substantial payments, it could also result, as is sometimes the case, in no payment at all, since discharged employees occasionally find employment elsewhere.

Whether or not substantial monies must be paid out in the present case is not part of the record, was not shown to the commission on review or considered by the commission, and hence is not properly a part of the review now being made by the Circuit Court. Part of the delay which occurred in the proceedings before the commission was caused by the fact that the board of education petitioned the commission for a review of the examiner's findings of fact, conclusions of law, and order.

Finally, on the contention of "Delay," the following appears in the brief of intervenors (in Circuit Court) commencing at page 7:

". . .Furthermore, the matter could have been terminated way back in July of 1969. As the record shows, we negotiated a settlement on the afternoon of July 17, 1969. The hearing was adjourned pending presentation of the settlement to the full Board of Education for its approval. On July 28, 1969, the School Board met and rejected the settlement. The terms of the settlement included reinstatement with back pay. The terms of the settlement were published in the Green Bay Press-Gazette, as was a statement by Board President, John M. Rose, 'We just didn't like the offer.'

"As to the employer's problem with its appeal, it could be solved simply by having offered the employees employment pending the outcome of the appeal. These four employees had 23, 14, 22 and 30 years of service, respectively. The WERC found as a fact 'that the school board had no reservations with respect to the quality of work performed by the four AFSCME officers while all were employed' and further, 'that the school board as of May 9, 1969, had no knowledge of any acts of special avoidance, intimidation, or coercion engaged in by AFSCME officers or members, directed at non-member custodians at their work place.' (Finding of Fact #27.)

"Thus, the employer could have taken them back unconditionally in July of 1969, but refused to do so. After the Examiner's order in February of 1971, it could have taken them back at any time on the condition that if the appeal was successful they would be terminated. The employer has refused to do so. Whatever plight the employer imagines itself to be in now flows from its own adamant refusal to reinstate these employees who are the four officers of the union."

Claim Against School District, Section 118.26

It is the further opinion of the Circuit Court that the order of the commission is not subject to the provisions of sec. 118.26 of the Wisconsin Statutes, which provides as follows:

> "118.26 Claim against school district. An action upon any claim shall not be maintained against a school district until the claim has been presented to the school board of the district and disallowed in whole or in part. Failure of the school board to allow the claim within 60 days after it is filed with the school district clerk is a disallowance. The school district clerk shall serve notice of disallowance on the claimant by registered mail with return receipt signed by the claimant required. Such receipt shall be proof of service. The claimant may accept a portion of his claim without waiving his right to recover the balance. No interest may be recovered on an allowed claim after an order of the school board is available to the claimant. If the claimant recovers a greater amount than was allowed by the school board he shall recover costs; otherwise the school board shall recover costs. No action on a claim may be brought after 6 months from the date of service of the notice of disallowance."

It is the opinion of the Circuit Court that the commission is not a "claimant" within the meaning of the language of sec. 118.26. The commission is an administrative agency that has been vested with quasi-judicial powers in adjudicating employment relations controversies. The orders of the commission are issued not to make a claim or to settle the claims of any party but to effectuate the purposes of Chapter 111 of the Wisconsin Statutes relation to Employment Relations.

Furthermore, sec. 118.26 refers to "an action upon any claim . . ." In the opinion of the Circuit Court, the proceedings before the commission, and the review or enforcement proceedings of a commission order and decision are not "an action" within the meaning of sec. 118.26 but are in the nature of a special proceeding.

It appears that sec. 118.26 of the Wisconsin Statutes, upon which petitioners rely, was in existence at the time of the creation of sec. 111.70 (Municipal employment). If the legislature intended to make commission proceedings subject to the provisions of sec. 118.26, it is presumed that the legislature would have so provided.

The Supreme Court of Wisconsin has held in some cases, that "claim statutes" [such as sec. 118.26] do not apply in all legal controversies involving municipalities.

In the case of Ashland County v. Bayfield County, 244 Wis. 210, the Supreme Court held that the legislature by certain statutes had given to the industrial commission [and later the state department of public welfare] "exclusive jurisdiction to hear and determine controversies between municipalities and counties as to poor relief, and the limitations are those provided in that section," and that the statute [sec. 59.76(2)] relating to claims against counties did not apply.

As far as the instant matter is concerned, the legislature has given jurisdiction over unfair labor practice controversies to the Wisconsin Employment Relations Commission. Sec. 117.07(14) provides that the right of any person to proceed under sec. 117.07 shall not extend beyond one year from the date of the specific act or unfair labor practice alleged. No requirement for filing a claim is provided. The Circuit Court relies upon the statement at page 13 in the brief of intervenors, that

"The WERC has never in the past required that filing of a claim be alleged in unfair labor practice complaints as a condition of its jurisdiction. Such long-standing administrative application of the law is entitled to great weight."

Another case in which the Supreme Court held that claim statutes do not apply to all controversies involving municipalities is Hasslinger v. Hartland (1940), 234 Wis. 201. This action was commenced by the plaintiffs (husband and wife) against the village of Hartland. The complaint charged that the maintenance of a sewage disposal plant by defendant in the immediate vicinity of the property of the plaintiffs constituted a nuisance, and demanded its abatement and damages. Plaintiffs prevailed in the trial court, and the defendant appealed. Defendant contended on the appeal that plaintiffs had no standing to recover in the action, for the reason that they failed to file a claim as provided by sec. 61.51 of the Wisconsin Statutes. However, the Supreme Court held:

"We deem this position not to be well taken. Where the action is for equitable relief (as for abatement of a nuisance by injunction) no claim need to be filed under this or statutes having a similar purpose."

In the case of Madison v. Frank Lloyd Wright Foundation, 20 Wis. 2d 361, the city of Madison entered into a contract with the Foundation for the purpose of building an auditorium and civic center. One of the clauses of the contract provided for arbitration of questions in dispute under the contract. Subsequently, the Foundation served on the city a demand for arbitration of the Foundation's claim against the city for architect's fees. In response, the city commenced action for declaratory relief, seeking a declaration that the contract was invalid and also seeking to enjoin arbitration proceedings.

One of the issues before the Supreme Court (assuming the contract was valid) was whether the demand for arbitration was premature because the Foundation had not made a claim for services rendered against the city in accordance with the requirements of sec. 62.25(1)(a) of the Wisconsin Statutes, which provided:

"No action shall be maintained against a city upon a claim of any kind until the claimant shall first present his claim to the council and it is disallowed in whole or in part. Failure of the council to pass upon the claim within 90 days after presentation is a disallowance."

The city of Madison argued that even though there may be a valid arbitration clause in the contract, in order for that clause to be operative a claim must first be filed with the city as a condition precedent to any arbitration proceeding. The city relied on the case of Matter of Board of Education (Heckler Electric Co.) (1960), 7 N. Y. 2d 476, 166 N. E. 2d 666, wherein the New York court said that where there was a dispute between the board of education and the electric company, and the electric company tried to proceed under the arbitration clause of the contract, such clause was inoperative until the time when a claim was made to the board of education, because under section 3813 of the education law (p. 482), "no action or special proceeding may be maintained against a school district or board of education," unless a claim be first filed. [underscoring supplied.]

The Supreme Court of Wisconsin, in the City of Madison case, supra, pointed out that the Wisconsin statute and the New York statute differ in that the New York law includes the words "no action or special proceeding," whereas sec. 62.25(1)(a) of the Wisconsin Statutes states only that "no action shall be maintained." The Supreme Court of Wisconsin further pointed out that in Matter of Board of Education, supra, it is obvious that the New York court held that a claim for arbitration was considered a special proceeding, and added, at page 381:

"No such ruling has been made in Wisconsin, and sec. 62.25(1)(a), Stats., refers only to 'actions,' which obviously refers to suits at law . . . We conclude that the fact that no claim was filed against the city under sec. 62.25(1)(a), Stats., was not fatal to the demand for arbitration."

It is deemed significant that sec. 118.26 of the Wisconsin Statutes, relating to claims against a school district, also refers only to "an action."

In the opinion of the Circuit Court, an unfair labor practice brought before the Wisconsin Employment Relations Commission is not an action. Sec. 260.03 of the Wisconsin Statutes provides:

"An action is an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding."

In the case of Federal Rubber Co. v. Industrial Commission, 185 Wis. 299, the Supreme Court said that the enforcement of a claim under the workmen's compensation act is not the prosecution of an action as defined by statute.

The case of Baker v. Department of Taxation, 250 Wis. 439, involved an appeal from a judgment of the circuit court of Milwaukee County affirming an order of the Wisconsin board of tax appeals upholding an assessment of income tax on the appellant's income. The Supreme Court held that such appeal is a special proceeding under the definition of sec. 260.03 of the Wisconsin Statutes.

In the opinion of the Circuit Court, an unfair labor practice brought before the Wisconsin Employment Relations Commission should not be deemed an "action." In the case of Appleton Chair Corporation v. United Brotherhood, 239 Wis. 337, starting at page 342, the Supreme Court said:

"In dealing with this matter of labor disputes the legislature has recognized a public interest in the relation between employer and employee. It grows out of the employment and the operation of the industry of the employer. The enactments in relation thereto do not destroy nor are they calculated to invade contract rights, but they do seek to protect the public against unfair labor practices and to foster the continuance of that relation in which the public is interested. Wisconsin Labor R. Board v. Fred Rueping L. Co., 228 Wis. 473, 279 N. W. 673. It has been definitely declared that the relation shall not be dissolved because of differing ideas as to the right of collective bargaining or union membership. It is an established and justified rule which gives the authority to the labor board to determine, in a labor dispute over wages or working conditions, whether the act of an employee or employees is a complete and irrevocable termination of the employee status. Bitterness engendered at such time might lead either side to act in utter disregard of the public interest which the legislation has declared shall be protected. As pointed out in the case of Allen-Bradley Local 1111 v. Wisconsin E. R. Board, 237 Wis. 164, 183, 295 N. W. 791, the legislature deals with a labor dispute, not primarily as a method of enforcing private rights, but to enforce the public right as well.

The following is quoted from the case of General D. & H. Union v. Wisconsin E. R. Board, 21 Wis. 2d 242:

"In Consolidated Edison Co. v. National L. R. Board (1938), 305 U. S. 197, 236, 59 Sup. Ct. 206, 83 L. ed. 126, the court said that the function of the administrative agency designated to deal with unfair labor practice is 'removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the act.' . . ."

"We are not here required to resolve the question whether the individual employees involved would also be free to pursue relief in the courts under sec. 111.07(1), Stats. . . In any event, the existence or nonexistence of the right of individuals to sue in the courts does not preclude the W.E.R.B. from taking such affirmative action as it believes is necessary to effectuate the policies of the Act."

"The union as a party to the contract which was allegedly breached is the statutory representative of the employees and therefore a party in interest, as that term is used in sec. 111.07(2)(a). . ."

It is the finding of the Circuit Court that the back pay portion of the commission's order is not a private "claim" in the usual sense of that term, and that an unfair labor practice proceeding is not an "action" to enforce the claim. The back pay portion of the said order is incidental to the overall remedy which the Wisconsin Employment Relations Commission has decided would effectuate the purposes of the Act.

Effectuate Purposes Of Employment Peace Act

In the case of Wisconsin E. R. Board v. Algoma P. & V. Co., 252 Wis. 549, the Supreme Court, referring to final orders of the commission under sec. 111.07(4) of the Wisconsin Statutes, held, at page 561:

"We deal here with a matter committed by statute to the discretion of the board, and in order to reverse we must find that the order had no reasonable tendency to effectuate the purposes of the Act."

In the instant case, the petitioners have not shown that the commission's order in question has no reasonable tendency to effectuate the purposes of the act. It is the finding of the Circuit Court that the said order does have reasonable tendency to effectuage the purposes of the act.

In the case of Libby, McNeill & Libby v. Wisconsin E. R. Comm., 48 Wis. 2d 272, the Supreme Court stated:

"The order of the WERC should be affirmed unless the respondent can show that the order has no tendency to effectuate the purposes of the Employment Peace Act."

In the Libby case, supra, the Supreme Court also pointed out:

"An attitude of deference by courts to administrative agencies is well established. This principle was most recently affirmed in NLRB v. Drapery Mfg. Co. (8th Cir. 1970), 425 Fed. 2d 1026, 1028, where the court stated:

'. . . It is an established principle that a Board order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric & Power Co. v. NLRB, 319 U. S. 533, 540, 63 Sup. Ct. 1214, 1218, 87 L. Ed. 1568 (1943). The rationale for the rule is that the Board, as an administrative agency, "must draw on enlightenment gained from experience" in fashioning its remedies, NLRB v. Seven-Up Co., 344 U. S. 344, 73 Sup. Ct. 287 (1953) . . .'"

The overriding purpose of sec. 111.70 of the Wisconsin Statutes is to promote industrial peace and provide for settlement of municipal labor disputes. The petitioners have not shown that the findings and conclusions of the commission are "unsupported by substantial evidence in view of the entire record as submitted" within the meaning of sec. 227.20(1)(d) of the Wisconsin Statutes.

Circuit Court Affirms Decision Of Commission

The "Petition For Review" in the Circuit Court is hereby dismissed.

The Circuit Court hereby affirms the decision and order of the Wisconsin Employment Relations Commission dated September 16, 1971, which amended the examiner's findings of fact, conclusions of law, and order.

The Circuit Court finds that substantial rights of the petitioners have not been prejudiced as a result of the findings, inferences, conclusions, decision and order of the commission.

The Circuit Court finds that the findings, inferences, conclusions, decision and order of the commission are not

(a) Contrary to constitutional rights or privileges; or

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

(c) Made or promulgated upon unlawful procedure; or

(d) Unsupported by substantial evidence in view of the entire record as submitted; or

(e) Arbitrary or excessive.

It is the request of the Circuit Court that the proper order consistent with this decision, dismissing the "Petition For Review" and affirming the decision and order of the commission dated September 16th, 1971, be prepared by William H. Wilker, Assistant Attorney General, and be approved by Attorney John C. Carlson, and be submitted to the Circuit Court for signature as soon as possible.

Dated this 20th day of December, 1972.

By the Court,

Donald W. Gleason /s/

Circuit Judge.

DWG:lp