

IN CIRCUIT COURT

WINNEBAGO COUNTY
BRANCH #2

WISCONSIN

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Petitioner,

and

TEAMSTERS LOCAL 563,

Decision No. 10716-C

Intervenor,

-vs-

CITY OF NEENAH,

Respondent.

IN THE MATTER OF:

D E C I S I O N

Dated: November 22, 1974

File No: 40276

EDMUND P. ARPIN
Judge
Third Judicial Circuit
Branch II
Court House
Oshkosh, Wisconsin

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Pursuant to Section 111.07(7) Stats the Wisconsin Employment Relations Commission has petitioned for an order of enforcement of its order of October 25, 1973, directing the respondent City of Neenah to comply with the terms of an arbitration award. The respondent has in turn requested that the commission's order be set aside for reasons hereinafter stated. Teamsters Local No. 563 has appeared herein as an intervenor in support of the commission's petition. All parties have filed briefs in support of their respective positions.

There is no dispute concerning the facts. To briefly summarize, the grievant employee moved to Menasha and was discharged by the city under authority of a city ordinance requiring all municipal employees to live in the city. The union processed the case to arbitration as a discharge other than for just cause under its labor agreement with the city affecting street and sanitation employees. After a final submission, the arbitrator determined that the discharge under the ordinance was not for just cause within the terms of the labor agreement and based an award of reinstatement offer with back-pay provisions. Upon non-compliance by the city, the union referred the matter to the commission which issued an order directing the city to comply with the terms of the arbitration award. The city failed to comply with the commission order resulting in this proceeding.

Two basic questions have been presented:

- (1) Does this Court have jurisdiction to review the order of the commission sought to be enforced under Section 111.07(7)?
 - (2) If so, does the record present a basis for setting aside such order?
- (1) The jurisdiction of the Court under Section 111.07(7)

It is the apparent position of the Commission that in proceedings for enforcement under Section 111.07(7) the respondent has no right to have the order of the commission reviewed; that any such review is limited to proceedings brought under Ch. 227.

The pertinent parts of Section 111.07(7) provide:

"...Upon such hearing the Court may confirm, modify or set aside the order of the commission and enter an appropriate decree. No objection that has not been urged before the commission shall be considered by the Court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the commission, if supported by credible and competent evidence in the record, shall be conclusive..."

If this language is accorded its plain meaning when such enforcement proceedings are brought before the Court by the commission the Court then has the jurisdiction to confirm, modify or set aside the order within the limitations set forth. The Supreme Court so construed this provision when in substantially the same form in Wisconsin Employment Relations Bd. v. Allis-Chalmers Works Union Local #248 (1948) 252 Wis. 436.

It appears from the record that the respondent raised the same substantive issue in the proceedings before the commission, both by Answer and Argument, now being urged by it as the basis for setting aside the order. Under provisions of Section 111.07(7) it, therefore, retains the right to raise that issue in these proceedings.

(2) Did the arbitrator exceed his powers in making the award underlying the commission's order?

The labor contract provides (Article 11),

" The employer shall not discharge or suspend any employee without just cause...". Article 15 provides for the arbitration of "any grievance relating to the interpretation and application of this agreement.." The agreement was effective on January 1, 1969.

A City of Neenah Ordinance enacted November 2, 1966, as Section 2.05(12) Neenah City Code, provides:

"(12) RESIDENCE OF EMPLOYEES. As a resident of Neenah will normally have more interest in his job and city than will a non-resident, it is expected that all employees of the City of Neenah will live in the city. Any exceptions to the following controls require the authorization of the Finance Committee. The following controls shall be practiced:
... (c) Employees moving out of the city limits shall be removed from the payroll."

It is not disputed that the sole ground for the grievant-employee's discharge was in his moving to the twin city of Menasha which triggered the city's resort to the above ordinance.

The arbitrator determined that the ordinance requiring all city employees to be residents of the city was in essence a "work rule", that, as such, it was not reasonably related to the job performed by the grievant-employee; that just cause for discharge cannot flow from the enforcement of an unreasonable work rule and that consequently the discharge was not for just cause as provided for in Article 11 of the labor agreement. His award was made accordingly.

In issuing the order of enforcement, the commission was of the opinion that the conclusions reached by the arbitrator were based on his interpretation and application of the "just cause" provision of the collective bargaining agreement rather than matters outside the agreement. Therefore, the commission concluded that the arbitrator did not exceed his authority because he did not rule that the ordinance was unconstitutional or otherwise invalid but rather that the ordinance provided an insufficient basis for discharge of the grievant under the "just cause" standard of the contract. It is this conclusion of law by the commission that respondent urges as the ground for setting aside its order.

Obviously, the scope the arbitrator's authority is conferred by the terms of the labor contract itself. Discharge without just cause is prohibited; any grievance relating to the interpretation and application of the agreement is an arbitratable issue. The commission's answer is simple and straightforward: "To the city's question where did the arbitrator get the authority to decide the reasonableness of the residency requirement, comes the answer: from the city when it empowered the arbitrator to rule whether a discharge is for "just cause." Concededly, if the issue is so framed it apparently answers itself, particularly if the ordinance is regarded as a mere "work rule". It seems, however, that the real nub of the issue is whether discharge under terms of a pre-existing ordinance affecting all municipal employees relates to the interpretation and application of this particular agreement in general and the just cause for discharge provision in particular.

As a general rule, every contract is considered as having been made with reference, and subject, to the law in force at the time of its making, 17 CJS Contracts Sec. 22. At the time of the making of the labor agreement the ordinance requiring all city employees to be residents had been in effect for several years. The ordinance applied not only to street and sanitation employees covered by the contract but to all city employees. Its avowed purpose had no relation to mere proximity or convenience to the job site. While it generally limited employment to residents, its status must be regarded as somewhat above a "work rule". Being enacted as an ordinance of the City of Neenah, it has the force of a law, the legality of which is not now in issue. The parties to the contract are presumed to have entered into it knowing that under the existing ordinance the removal from the city by any municipal employee subjected him to discharge. At the time of the contract, such removal was an existing legal cause for discharge under the ordinance distinct, apart and independent from "just cause" within the terms of the contract. There is nothing in the agreement stating or implying that the city agreed to submit to arbitration discharges based on the ordinance on a case-by-case basis. Because of the existence of the law at the inception of the contract, the presumption as to the intent of the parties must be held to be the contrary.

In accordance with the foregoing, it is the determination of the Court that the collective bargaining agreement between the City of Neenah and Teamsters Local No. 563 did not confer authority upon the arbitrator to rule on the reasonable application of the pre-existing residency ordinance under the just cause for discharge standard of the contract; that in so doing he exceeded his powers so conferred; that the resulting award was based substantially upon such ruling; that, therefore, the commission erred in its determination that respondent comply with such award pursuant to Section 111.70(3)(a)5 of the Municipal Employment Act.

Pursuant to the provisions of Section 111.07(7) respondent is adjudged entitled to a decree setting aside the order of the commission dated October 25, 1973, and directing the dismissal of the complaint of the Intervenor.

Dated: November 22, 1974.

BY THE COURT:

Edmund P. Arpin /s/

Edmund P. Arpin, Circuit Judge