

No. 347

August Term, 1974

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Appellant,

v.

Decision No. 11457-D

Wisconsin Employment Relations Commission, et al.,

Respondents.

APPEAL from an order of the circuit court for Dane County: HON. W. L. JACKMAN, Circuit Judge. Affirmed.

This is an action contesting a Wisconsin Employment Relations Commission order dismissing a petition for review of an examiner's order granting a new hearing and denying petitioner's motions as premature.

The appeal is from a part of an order of the circuit court of Dane County entered August 14, 1973. The order granted the respondents' motion to dismiss the appellant's amended petition for review. The parts of the order appealed from dismissed the appellant's amended petition to review an order of the commission denying the appellant's motion to dismiss on the ground that it was premature and it dismissed the appellant's request, in the alternative, for a declaratory judgment.

On July 14, 1972 Sam Guthrie, a building maintenance helper for the University of Wisconsin-Milwaukee, was discharged from his employment. He had been a Chief Steward for Local 82, American Federation of State, County and Municipal Employees, Council 24 (hereinafter Union.) The Union and the University had entered a collective bargaining agreement which applied to Guthrie. Article III of the agreement provides that management has the right to discharge employees for "just cause." Article IV of the agreement sets out a four step grievance procedure in which the fourth step is final and binding arbitration. An employee can present his own grievances or he may choose to have his union represent him.

Following his discharge, Guthrie had the Union take his grievance through the first three steps of the grievance procedure. The grievance was denied at all three steps and Guthrie was not reinstated. Guthrie requested the Union to take the matter to arbitration one or two days after receiving notice of the grievance having been denied at step three. The requests were made orally to various union officials, but he never attempted to take his grievance to arbitration himself and he did not make use of the alternative procedure of taking the matter to the Personnel Board. The local Union's president later claimed that no request to go to arbitration had been made, although Guthrie had inquired about his grievance.

After the time for taking the grievance to arbitration had passed, Guthrie filed an unfair labor practice complaint with the WERC. The complaint was against both the employer and the Union alleging they violated the collective bargaining agreement. Both the Union and the employer moved to dismiss or, alternatively, to have the complaint made more definite and certain. The same day that the employer's motion was filed, Guthrie filed an amended complaint. The amended complaint incorporates the complaint by reference and alleges that Guthrie was discharged without "just cause" and that the Union breached its duty of fair representation of Guthrie following the step three grievance procedure. The Union and the employer renewed their motions. The hearing examiner denied their motions. The basis for the denial of the employer's motion was that to dismiss it would be a clear violation of Sec. 111.07(2)(a), Stats., and Ch. 227, Stats., which set forth the procedural rules for

administrative agencies. Specifically, the hearing examiner pointed out that Sec. 227.07, Stats., requires a full hearing in "contested cases" as that term is defined in Sec. 227.01(2), Stats. The Union was considered a necessary party to the determination of the fair representation issue and the same rights to a fair hearing apply to the Union. Both the employer and the Union then answered the complaint.

A hearing was held on January 30, 1973. The employee adduced evidence tending to show that he was discharged without "just cause" and that the Union failed to represent him fairly. The Union adduced evidence tending to show that it represented Guthrie fairly.

The hearing was adjourned. The Union and the employer had both moved to dismiss and the employer had asked for a ruling on the fair representation question prior to taking evidence on the "just cause" question. The Union and the employee resisted any separation of these issues in respect to taking evidence. The examiner took the motions to dismiss as well as the separation question under advisement.

On February 6, 1973, the employer moved for summary judgment. On March 12, 1973 the hearing examiner ordered a further hearing in the matter on all issues joined in the pleadings. He stated that the motions to dismiss and for summary judgment were premature since the fair representation and "just cause" questions were "commingled."

The employer petitioned the WERC to review the examiner's order for further hearing. The Union opposed the petition. The WERC denied the petition on the ground it was premature. It stated in its memorandum that:

"Under the Respondent State's theory any party who is dissatisfied with a ruling made by an Examiner during the course of a hearing could petition the Commission for a review of the Examiner's ruling. Such a procedure is not contemplated either under Chapter 227 of the Wisconsin Statutes nor under the rules of the Commission."

After the denial of the petition for review, the employer appealed the denial of the "Motion for Summary Judgment." The WERC dismissed the appeal.

On April 26, 1973 the employer petitioned the circuit court of Dane County to review the WERC's orders. While only the WERC was named as a respondent, both Guthrie and the Union answered the petition for review. The WERC, Guthrie and the Union all moved for dismissal of the petition for review.

On August 14, 1973 an amended petition for review was filed by the employer. Only the WERC was named as a respondent. The amended petition also included a prayer for a declaratory judgment under Sec. 269.56, Stats., as to the proper procedure to be followed by the Respondent "as an alternative to reversal of the Commission's orders."

The circuit court treated the WERC's denial of the petition for review as a refusal to grant the employer's motion to dismiss and the dismissal of the appeal as a refusal to grant summary judgment. The court sustained the WERC as to both refusals. The employer has appealed from all parts of the circuit court's order except the order sustaining the WERC's refusal to grant the motion for summary judgment.

HANLEY, J. The appeal presents these two issues:

1. Is an order of the Wisconsin Employment Relations Commission refusing to grant a motion to dismiss and permitting a hearing examiner's order for further hearing on the merits of the case to stand reviewable under Ch. 227, Stats?

2. Is the employer entitled to a declaratory judgment, as an alternative to a petition for review, declaring that the unfair labor practice charge must be dismissed and declaring that the Wisconsin Employment Relations Commission must make a determination as to the breach of a Union's duty of fair representation prior to a hearing on the merits of the charge against the employer?

Question of Review

Here, the hearing examiner issued an order for further hearing on the merits of the dismissal of Guthrie. This decision was accompanied by a decision that the employer's motion to dismiss was "premature." No findings of fact or conclusions of law were entered and the examiner made no determination as to the questions raised by the employer.

The first question for determination is whether the orders of the WERC are reviewable. Sec. 227.15, Stats., provides that administrative decisions which directly affect the legal rights, duties or privileges of any person shall be subject to review, with some exceptions. If the order sought to be reviewed is not a "decision" within the meaning of the statute, the circuit court was without jurisdiction to proceed upon the merits and had jurisdiction only to dismiss the petition for review. Universal Organization of Municipal Foremen, Supervisors and Administrative Personnel v. Wisconsin Employment Relations Commission (1969), 42 Wis. 2d 315, 166 N.W. 2d 239. The right to judicial review of administrative decisions is entirely statutory and administrative orders are not appealable unless made so by the statutes. When an attempt is made to appeal a non-appealable order, this court only has jurisdiction to dismiss the appeal. Wisconsin Telephone Company v. Wisconsin Employment Relations Board (1948), 253 Wis. 584, 34 N.W. 2d 844.

The question of what administrative decisions are reviewable was thoroughly discussed in the recent case of Pasch v. Department of Revenue (1973), 58 Wis. 2d 346, 206 N.W. 2d 157. In that case this court said:

"An order that directly affects the legal rights, duties or privileges of a person is appealable pursuant to secs. 227.15 and 227.16, Stats., whether such order is denominated 'final' or 'interlocutory.'" P. 356.

In Pasch, it was determined that an order of the board of tax appeals finding jurisdiction to proceed to a hearing upon the merits of the controversy is not an order directly affecting the legal rights, duties or privileges of the petitioner in that case. The appellant argued that the jurisdiction question should be determined before the appellant is put to the expense and inconvenience of a lengthy proceeding. In reply to this argument, this court said:

"We are mindful of the fact that much time and expense might be saved if the courts would decide at this time that the commission had exceeded its jurisdiction; however, this consideration is outweighed by the resultant delay that would accompany review of these agency determinations and the disruption of the agency's orderly process of adjudication in reaching its ultimate determination." supra, p. 357.

It was pointed out that the jurisdiction of the commission could be challenged upon review of the final decision of the commission. There was also a holding that at this stage of the proceedings, the appellant did not have an interest recognized by law that had been grievously affected.

This case controls the present action. The order involved did not determine the rights of any of the parties. It only held that motion to dismiss to be premature and found the two issues involved in the case to be so commingled that the efficiency of the commission's processes and the interests of justice required the taking of evidence on all the issues prior to the making of any determinations in the case.

The employer argues that the collective bargaining agreement provides the exclusive grievance procedure and order affects the employers in that it vitiates completely the exclusivity of the grievance procedure. It also asserts that the WERC has no authority to second-guess the Union on the merits of the case and the WERC, therefore, must determine the fair representation question in order to maintain jurisdiction over the employer. The employer questions how often will it have to go through a full hearing where its contract provides the exclusive remedy.

The order of the hearing examiner did not, however, raise the issue of whether or not the employer's asserted defense is a valid one. The employer will still be able to argue that the grievance procedure was the exclusive remedy and if there is a determination in favor of the employee, the employer can appeal that determination. As was stated by the circuit court:

"The decision of the hearing officer to take all of the evidence before ruling may very well have prolonged the hearing somewhat, but at the same time having a complete record permitted both the Commission and reviewing court to have a complete record if they should find that a dismissal on the issue raised by the motion was improper. This in effect follows the philosophy of Davis v. Skille, (1961) 12 Wis. 2d 482, 490, 107 N.W. 2d 458, and seems to us to be in accordance with a reasonable discretion to be exercised by the hearing officer in building a record, so that all of the facts are in the record and there is no likelihood that the case might be returned for further hearings after appeal and review. This tends to the more prompt disposition of cases."

The circuit court's order as to the motion to dismiss the petition to review must be affirmed on the basis that the court had no jurisdiction but to dismiss the petition because the orders sought to be reviewed were not "administrative decisions" as that term is used in Sec. 227.15, Stats.

Declaratory Judgment

The employer, in the amended petition for review, sought a declaratory judgment as to the proper procedure to be followed by the WERC. The procedure requested to be recognized would require the WERC to dismiss a complaint in a case like this if the employee fails to allege and prove that the employer prevented the employee from utilizing the contractual grievance procedure and that where the employee alleges unfair representation by the Union and violation of the collective bargaining agreement by the employer, the employee must first prove and the WERC must first determine the unfair representation question prior to a hearing on the merits of the charge against the employer. The request for declaratory judgment specifically states that it is made pursuant to Sec. 269.56, Stats.

A complaint for declaratory judgment must state:

"(1) A justiciable controversy (2) ripe for judicial determination (3) between persons whose interests are adverse and (4) involving a legally protectible interest in the plaintiff." American Med. S., Inc. v. Mutual Fed. S. & L. (1971), 52 Wis. 2d 198, 203, 188 N.W. 2d 529.

The trial court, however, does have discretion to not entertain an action for declaratory judgment at all if a judgment declaring rights would not settle the controversy and be merely an advisory opinion.

The declaratory judgment requested here basically asks the court to declare that the procedure argued by the employer in the motion to dismiss and petition to review the orders denying that motion is the proper procedure to be followed.

In a number of cases this court held that a declaratory judgment could not be granted in a case like the present one. In Thomson v. Public Service Commission (1940), 236 Wis. 157, 294 N.W. 517 it was held that an attempt to join with an action for review of commission orders an action for declaratory judgment was unwarranted and that the trial court only had the power to affirm the order or to vacate it and set it aside. In Cheese Makers Mutual Casualty Co. v. Duel (1943), 243 Wis. 406, 10 N.W. 2d 125 this court pointed out that the purpose of Sec. 269.56, Stats., was to expedite justice and to avoid long and complicated litigation, not to interrupt legal proceedings presently in operation. The court went on to say:

"After careful consideration, we are of the view that this is not a case for declaratory relief, and in any event, that the trial court did not abuse its discretion in refusing a declaration. Proceedings are pending in which the question submitted for declaration may be fully and finally determined, and the fact that plaintiff's peculiar position and necessities make it desirable from its viewpoint to have a declaration is not a sufficient ground for disturbing the ordinary processes of liquidation. To yield to such considerations would inject innumerable and unwarranted interruptions into a proceeding which, as we can attest, has sufficient difficulties without such complications." Supra, p. 415.

In Superior v. Committee on Water Pollution (1953), 263 Wis. 23, 56 N.W. 2d 501, it was held that a review of the orders of the committee could not be had through the medium of a declaratory judgment action because Ch. 227, Stats., provides the exclusive remedy for review.

Here, the employer brought a petition to review an administrative order. The hearing examiner's order which is the basis for the review ordered a further hearing after which it will determine the issues involved in the requested declaration. Allowing the action for declaratory judgment would seriously interfere with the administrative process. This court has indicated its disfavor of laying down rules which will interfere with the efficient operations of administrative bodies: See: State ex rel. Cities Service Co. v. Board of Appeals (1963), 21 Wis. 2d 516, 541, 124 N.W. 2d 809. Considering that the employer can seek review of an adverse determination on the issues involved in this case following further hearing, it is more proper to allow the agency to proceed to a final determination without interruption.

There is also a question as to the application of the doctrine of exhaustion of remedies. The doctrine does not go to the subject matter jurisdiction of the court, but it is addressed to the trial court's discretion to decline jurisdiction in favor of that of the agency. It contemplates a situation where some administrative action is under way but is as yet uncompleted. Sawjka v. Morgan (1972), 56 Wis. 2d 70, 201 N.W. 2d 528.

There is some language in cases by this court which indicates that the exhaustion doctrine only applies to review of agency action.

"To distinguish between the exhaustion rule and the primary-jurisdiction rule, it has been stated that the exhaustion rule relates to judicial review of an uncompleted administrative proceedings, whereas the primary-jurisdiction rule applies when there has been a total absence of any formal proceedings before the agency." Wisconsin Collectors Asso. v. Thorp Finance Corp. (1966), 32 Wis. 2d 36, 47, 145 N.W. 2d 33.

However, this court has applied the doctrine to deny injunctive relief where the plaintiff had made a timely application to abate a tax assessment. Metzger v. Department of Taxation (1967), 35 Wis. 2d 119, 150 N.W. 2d 431.

Under the exhaustion of remedies doctrine the question is whether the circuit court abused its discretion in declining jurisdiction. Because the same issues were before the hearing examiner there would be no abuse of discretion in letting the examiner make a determination on the issues and then review the entire proceedings if that were necessary. Additionally, the statutes provide that review of the commission's orders is either to be brought by the commission seeking to enforce an order or pursuant to Ch. 227, Stats. See Secs. 111.07(7) and (8), Stats.

The trial court also was of the opinion that a declaration such as requested by the employer would not terminate the controversy before the agency and would be only advisory. If that is the case it is within the discretion of the trial court to refuse to render a declaratory judgment. Sec. 269.56(6), Stats., and American Medical Services, Inc. v. Mutual Federal Savings and Loan Assoc., supra.

In Neider v. J. G. Van Holten & Son, Inc. (1969), 41 Wis. 2d 602, 165 N.W. 2d 113, this court held that:

"As a general rule, before one can obtain court relief to acquire job reinstatement under a collective bargaining agreement, the employee must show he has exhausted the grievance procedure set up in the agreement." P. 606.

This is what the employer asked to be declared. The declaration of this principle would merely be advisory pending a determination of its applicability to the controversy.

The employer also has asked the court to declare that a determination must be made on the fair representation question prior to a determination of the merits of the discharge. This is a general rule but is inapplicable here because the issues are commingled. Therefore, a hearing on the merits of the discharge is necessary prior to the determination of the fair representation issue. In its answer to the amended complaint before the WERC, the Union asserted that any action or inaction on its part was based on a good faith investigation of the facts presented. This defense put forth by the Union would require the hearing examiner to determine the facts surrounding the discharge prior to ruling on the fair representation issue. Therefore, a declaratory judgment such as requested here would not terminate the controversy because the hearing of the merits of the discharge would still have to be heard as a part of the fair representation question.

If a proceeding of the nature involved here were allowed, administrative proceedings could be constantly interrupted and shifted back and forth between the agencies and the courts. While the employer is faced with a further hearing in this matter, to allow a proceeding of this nature would seriously hamper the efficient conduct of administrative proceedings. We think the better practice would be to have the examiner make a determination after hearing all of the testimony where he feels the issues cannot be separated and then have that determination reviewed in its entirety if review is necessary.

By the Court: Order Affirmed.