
SAM GUTHRIE,

Petitioner,

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent,

and

LOCAL 82, AFSCME, COUNCIL 24,
WISCONSIN STATE EMPLOYEES UNION,
AFL-CIO,

Petitioner,

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Case Nos. 161-024
and
160-495

Decision No. 11457-F

This is an action for judicial review pursuant to ch. 227, Stats., of an order issued by the Wisconsin Employment Relations Commission (hereafter Commission) on December 16, 1977.

The case is eight years old. It began on November 13, 1972, when the petitioner, Sam Guthrie, filed a complaint with the Commission alleging two causes of action: (1) that he was discharged without "just cause" from his employment at the University of Wisconsin-Milwaukee on July 14, 1972; and (2) that the Union which represented him, Local 82, AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, breached its duty of fair representation under sec. 111.84, Stats., in that it failed to process his grievance relating to the discharge. Hearings on the matter were held on January 30, 1973. The respondent employer and union filed preliminary motions to dismiss which the hearing examiner denied. At the close of the hearing, the University requested that a separate ruling be made in the fair representation issue before evidence was taken on the merits of the discharge. Guthrie and the union objected, and the hearing was adjourned. On March 12, 1973, the examiner denied the University's request for a separate determination and scheduled further hearings. The University then filed a motion for summary judgment, which was denied by the examiner. The University requested review of the examiner's ruling by the full Commission; the Commission considered the matter and affirmed the examiner. The University next petitioned the Circuit Court for Dane County for review of the Commission's decision. The court granted the Commission's motion to dismiss, the decision was appealed to the Supreme Court and that court affirmed the Commission. State v. Wisconsin Employment Relations Commission, 65 Wis.2d 624, 223 N.W.2d 543 (1974). The case ultimately was returned to the Commission and further hearings were held in March of 1975.

On December 23, 1975, the hearing examiner issued a decision favorable to Guthrie with respect to both claims. The union and the University petitioned the Commission for review of the examiner's decision. On December 16, 1977, the Commission issued revised findings of fact, amended conclusions of law and an amended order, ruling that the Union had violated sec. 111.84, Stats., but that the employer had "just cause" to terminate Guthrie's employment.

No. 11457-F

Guthrie and the Union pursued separate petitions for judicial review of the Commission's decision pursuant to ch. 227, Stats. Upon stipulation of the parties, the cases were consolidated.

Guthrie's petition and briefs raise a troubling preliminary question of alleged procedural irregularities occasioned by the participation of then-Commissioner Charles Hoornstra in the proceedings. Hoornstra, an assistant attorney general prior to his appointment to the Commission, had appeared in the case, representing the University in the proceedings before the Supreme Court. Subsequently, after taking office as a commissioner, he participated in (and drafted) the Commission's decision on the merits.

While ch. 227, Stats., contemplates a judicial review limited to the record made before the agency, the court may consider facts outside the record in cases of alleged irregularities in procedure under sec. 227.20(1), Stats. See Wisconsin's Environmental Decade v. PSC, 79 Wis.2d 161, 170, 255 N.W.2d 917 (1977). Consequently, on July 2, 1980, this court held a hearing for the purpose of making a record as to the nature and scope of Hoornstra's participation in the controversy. The record adduced at that hearing reveals that Hoornstra was an assistant attorney general for the State of Wisconsin from 1972 until 1976. On July 2, 1976, he accepted appointment as a commissioner on the Wisconsin Employment Relations Commission. During May, 1977, Mr. Hoornstra met with certain officials of the attorney general's office and began negotiations for his return to that agency. At least two more such meetings took place, one in December, 1977, and the second in January, 1978. Mr. Hoornstra ultimately rejoined the attorney general's office in February, 1978.

Mr. Hoornstra's testimony indicated that as an assistant attorney general he represented both the Commission and the University of Wisconsin. More specifically, Hoornstra actively participated in the present litigation as the attorney of record for the Commission in the University's 1974 appeal to the Supreme Court. His co-counsel in this collateral effort were the Union's counsel and counsel for petition Guthrie. Hoornstra apparently drafted the appellate brief in the matter and argued orally before the court. Aside from his participation in this capacity, Hoornstra later acted as the decision-maker (one of two commissioners participating) on the merits of Guthrie's case while a commissioner on WERC. Moreover, this participation in the Commission's decision came during a period where he was negotiating with the attorney general to return to that office, apparently to resume his role as counsel for the University (and other agencies).

Guthrie argues that Hoornstra's conduct violated his due process right to have his case before the Commission determined by an impartial decision-maker. Goldberg v. Kelly, 397 U.W. 254, 271 (1970). The Commission argues that absent a showing of bias or pecuniary interest in the outcome, a decision-maker will not be disqualified. Goodman v. Wisconsin Electric Power Co., 248 Wis. 52, 20 N.W.2d 553 (1945).

The court is satisfied that there is no factual record to sustain the inference that Hoornstra stood to profit in any way from his decision in the Guthrie case. Nevertheless, three troubling facts remain: 1) Hoornstra participated as counsel for the Commission in litigation concerning the instant controversy and also sat as a member of the Commission when it ultimately decided the case on the merits; 2) both before and after his tenure as commissioner, Hoornstra represented the University in labor-related cases in the course of his employment with the attorney general; and 3) Hoornstra was actively negotiating his return to those duties at the time of the Commission's decision, a decision adverse to Guthrie and favorable to his former and future client. While it may be said that each of these factors standing alone would be insufficient to overcome the presumption of procedural regularity, when taken together they create an impression, if not an inference, of impropriety.

It is well settled that the principles of "fair play" apply to contested agency proceedings under ch. 227, Stats. See Ashwanbenon v. State Highway Commission, 17 Wis.2d 120, 115 N.W.2d 498 (1962); cf Margoles v. State Board of Medical Examiners, 47 Wis.2d 499, 177 N.W.2d 353 (1976). As the court pointed out in Goldberg, supra, not only does due process or "fair play" include the opportunity to be heard in a

meaningful manner and time, but an impartial decision-maker is essential. Id. at 271. The obvious purpose of "fair play" principles is to preserve the integrity of the judicial (or quasi-judicial) process. Such integrity not only fosters (one hopes) wise decision-making, but also forms the basis for public confidence in an institution designed to secure social harmony by providing an impartial tribunal for the resolution of labor disputes. While the law as administered by courts and administrative agencies does not value form over substance, there are instances when outward appearances, whether perceived by individual litigants or the public generally, assume an importance which transcends the de facto operations of the institution or agency. This is so, in part at least, because the continued effectiveness of judicial and quasi-judicial organizations rests upon the confidence of the public in their ability to act as instrumentalities of justice. It probably is true, as Lord Herschell remarked: "Important as it is that people should get justice, it is even more important that they be made to feel and see that they are getting it."

In the instant case, there is no evidence that Hoornstra's participation in the litigation (which admittedly concerned procedural, as opposed to underlying, issues) actually, or even inferentially, tainted the Commission's decision; indeed Mr. Hoornstra's many appearances in this court have led me to place the highest respect and confidence in his integrity as a lawyer and administrator. But more is demanded, I feel, from all of us who participate as decision-makers in the legal/administrative process. The choices frequently are neither easy nor obvious, but unless we undertake our responsibilities with the recognition that in instances such as this the suggestion of impropriety* is on a par with actual impropriety, the confidence of the litigants and the general public in the process will falter, and, in the long run, the effectiveness of the agency and the system itself will be diminished.

For these reasons, the matter will be remanded to the Commission for further consideration pursuant to sec. 227.20(4), Wis. Stats. Counsel for the petitioner may prepare the appropriate order for the court's signature.

Dated at Madison, Wisconsin, this 23 day of December, 1980.

BY THE COURT:

William Eich /s/
WILLIAM EICH
CIRCUIT JUDGE

*The word is unfortunate, for there is, as indicated, no suggestion that Mr. Hoornstra's activities were "improper" in the pejorative sense. All that is said here is that, in retrospect, he should have refrained from participating in the Commission's decision; and the "Monday morning" nature of any determination such as is made here underscores the need for a cautious, even overstrict, approach to possible appearances of conflict.

cc: John D. Niemisto
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