

HOWARD AEH & ASSOCIATES OF
FOND DU LAC, INCORPORATED,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

MEMORANDUM DECISION

AND ORDER

Case No. 23147

Decision Nos. 11945-A and
11955-A

The matter before the court is an appeal from the Findings of Fact, Conclusions of Law and Order filed with the Wisconsin Employment Relations Commission the 25th day of October, 1974. The Petitioner appears by Attorney Eli Block; the Respondent appears by Charles D. Hoornstra, Assistant Attorney General.

In early April, 1973, employees of Dr. Lynas Moore, President of Howard Aeh and Associates of Fond du Lac, Incorporated, contacted Retail Store Employees' Union Local No. 214 with the intention of asking the union to represent them in negotiations with the Petitioner. Through April, five employees, a majority of Dr. Moore's staff, signed union authorization cards. On April 27, at a meeting with union representatives, Dr. Moore signed an agreement recognizing the union as the sole bargaining agent for his unionized employees. At the same April 27th meeting, a written contract proposal was submitted to Dr. Moore by the union. Dr. Moore requested time to review the agreement and the union assented.

At a meeting between Dr. Moore and the union representative on May 9th, Dr. Moore presented the contract to the union with his inked in changes. The union agreed to the alterations, but Dr. Moore had further reservations, apparently about violation of President Nixon's Phase II Program. In the evening of May 11th, Dr. Moore informally met with members of his staff after working hours. This meeting culminated in an emotional discussion concerning the employees' reasons for joining the union. Earlier on May 11th one employee had terminated employment due to pregnancy. On May 21st the union held a meeting to ratify the contract with Dr. Moore. Only one member of Dr. Moore's staff attended the meeting, but the contract was then ratified. Also, on May 21st, Dr. Moore had petitioned the Wisconsin Employment Relations Commission for an election to determine the representative status of the union. On May 23rd and 24th three more members of Dr. Moore's staff decided to withdraw from the union. The requested election was postponed pending a hearing that occurred on July 19th, 1973, and the result was that on October 25th, 1974, the Commission issued a decision dismissing the election petition citing the petitioner for unfair labor practices (as a result of a complaint filed by the union June 5th, 1973), and ordering Dr. Moore to sign the contract submitted by the union with the agreed upon changes.

The standards for affirmation or reversal of a decision by the Wisconsin Employment Relations Commission have been adequately examined in a variety of cases. The findings of the Commission must be affirmed if they are supported by substantial evidence based on the record as a whole. The Commission's conclusions may not be the result of conjecture, but if the findings are logical inferences drawn from established facts, the reviewing court cannot overturn the Commission's decision even if the evidence in favor of the decision does not seem to preponderate.

"The rule in the industrial commission cases, therefore, is that if in any reasonable view of the evidence it will support the conclusion arrived at, the conclusion may not be disturbed upon the ground that it is unsupported by evidence. . . The requirement is that there must be some evidence tending to support the findings of the board, and, if this is discovered, the court may not weigh the evidence to ascertain whether it preponderates in favor of the finding." Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228, Wis., 473, 493, 494 (1938)

Therefore, if on the basis of the record as a whole the reviewing court can determine that the Commission's decision was based on logical inferences drawn from established facts and not based on conjecture, the court must affirm the decision without weighing the evidence to determine its preponderance.

This court affirms the Commission's findings of fact and conclusions of law that Dr. Moore engaged in unfair labor practices. Petitioner presented his version of the contract to union representatives at the May 9th meeting, and the representatives agreed to the contract as so presented. Two days later, Dr. Moore approached three of his employees and questioned them as to their reasons for joining the union. He inquired as to what he had done to make them want to join a union (Tr. 71, 72). At the time, he knew one of the employees he was speaking to was emotionally distraught (Tr. 96). Dr. Moore returned a number of times to the issue of the employees' reasons for joining the union (Tr. 98). On April 27th, Dr. Moore had recognized the majority status of the union. He was aware that union authorization cards had been signed by a majority of his employees. The National Labor Relations Board in Strucksnes Construction Co. 165 N.L.R.B. No. 102 (1967) the N.L.R.B. enumerated guidelines used to evaluate an employer's conversation with an employee relative to union representation:

- (1) the purpose of the conversation must be to establish the accuracy of a claim of majority status;
- (2) that purpose must be made known to the employee;
- (3) assurances against reprisal must be given;
- (4) the employer must not create a coercive atmosphere;
- (5) the employees must be quizzed secretly.

Since Dr. Moore was already aware of the majority status of the union and he violated all the other guidelines, under the circumstances his questioning could only illegitimately erode the resolve of his employees. The conversation as a whole is much the same as one held coercive in N.L.R.B. v. Larry Faul Oldsmobile Co. 316 F. 2d 595 (1963), and as such is an unfair labor practice. The result of the conversation was desertion from the union by the employees (Tr. 66, 85).

The Commission found that Dr. Moore violated Sec. 111.01 (3) Stats. by reason of his failure to bargain with the union. Dr. Moore, in the May 11th meeting, went directly to his employees to discuss conditions of employment (Tr. 71, 72, 96, 97, 98). This had the effect of subtle coercion and as such constituted a violation of Sec. 111.01 (3) Stats. It was an attempt to discuss working conditions directly with the employees, and, by doing so, evaded the proper bargaining representatives.

On the evidence presented the Commission could and did legitimately find that Dr. Moore refused to execute an employment agreement with the union. There was competent evidence (Tr. 9-15) that the union agreed to Dr. Moore's alterations in their proposed contract. The employer can refuse to make an agreement as to the substance of a contract, but once agreement is reached failure to execute a writing embodying the agreement is an unfair labor practice. H. J. Heinz Co. v. N.L.R.B. 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1941). The union agreed with all of the alterations in the contract proposed by Dr. Moore at the meeting on May 9th. The coercion at the meeting on May 11th, coupled with Dr. Moore's subsequent failure to sign the contract, provided sufficient credible and competent evidence for the Commission to decide that the Doctor's failure to execute the contract was an unfair labor practice.

In summary, the record as a whole provides credible and competent evidence from which the Commission could logically infer that the petitioner perpetrated coercive and unfair labor practices.

The Commission's order dismissing the election petition must be affirmed. This court has found that prior to May 11th, 1973, Dr. Moore was aware of the majority status held by the union among his employees. He had signed the recognition agreement on April 27th, 1973, and he was aware of the authorization cards executed by his employees. On May 11th, the petitioner engaged in unfair labor practices at a meeting with some employees. Following this meeting there was a defection from the union that gave Dr. Moore reason to doubt the continued status of the union, and he filed a petition for an election.

There could have been no good faith basis for Dr. Moore's doubt as to the union's majority status. It is a logical inference supported by competent evidence that the petitioner's unfair practices contributed to the employees' defection from the union. To have approved the election petition would have been unjust. The wrongdoer would profit from his illegal activity, having destroyed the majority status through his illicit doings and shifting any burden of proof from his own shoulders onto those of another. A pre-election hearing, as was held in this case, is most preservative of the rights of all parties. The Commission properly dismissed the petition for election filed by Dr. Moore. Under Sec. 111.07 (4) Stats. the Commission, in its order, may suspend the rights of a party found guilty of unfair labor practices. Since Dr. Moore has been found to have engaged in such prohibited activities, the Commission could properly suspend his right to an election under the circumstances.

Sec. 111.07 (4) Stats., states that:

"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 . . ."

The hearing in the case at bar was held on July 19th, 1973, and the final order was not entered until October 25th, 1974. Petitioner contends that the word "shall" in the statute makes such an order mandatory within the specified period, and if the order is not entered in that time it is void.

In Muskego-Norway C.S.J.S.D. No. 9 v. Wisconsin Employment Relations Board, 32 Wis. 2d. 478 (1966), the Supreme Court held that an eleven-month delay in entering a final order did not deprive the Wisconsin Employment Relations Board of jurisdiction. The Court decided that the 60-day time limit is directory and not mandatory. While in the case at bar there was a fifteen-month delay, the petitioner was not deprived of any substantive or procedural due process. "Moreover, there is no substantial reason why the decision rendered cannot be made after the sixty-day limitation as well as before." Muskego-Norway, supra at 485. The Commission's delay in rendering its final order was not such an impairment of the petitioner's rights so as to render the order inoperative.

Many of the issues presented in the above-captioned case were also presented to the Wisconsin Supreme Court in WERC v. City of Evansville (Nos. 209, 210 and 211, August Term, 1974).

It is accordingly the Order of this Court that the Order of the Wisconsin Employment Relations Commission dated October 25th, 1974, be, and the same is hereby, affirmed.

Dated: September 29, 1975.

BY THE COURT:

Jerold E. Murphy /s/

Circuit Judge