
SUPERIOR BOARD OF EDUCATION
JOINT SCHOOL DISTRICT NO. 1
CITY OF SUPERIOR, ET AL.,

Petitioner

-vs-

SUPERIOR BOARD OF EDUCATION
EMPLOYEES LOCAL UNION NO. 1397
AFSCME, AFL-CIO and WISCONSIN
EMPLOYMENT RELATIONS COMMISSION,

Decision No. 12174-E

Respondent.

This is a dispute between the Superior Board of Education and a union of some of its employees, Superior Board of Education Employees Local Union No. 1397, AFSCME, AFL-CIO.

On January 21, 1973 a negotiation session was held between the Board and representatives of the Union. It is the contention of the Union that at such negotiation session the Board agreed that it would file an election with the Department of Industry, Labor and Human Relations, Unemployment Compensation Division, electing to have certain of its employees, the bus drivers and the Class V secretaries, to come under the Workmen's Compensation law for the summer months of 1973 when such employees would not ordinarily be working for the district. The Board denies that it agreed to this and it did not file any election with the Unemployment Compensation Division.

On September 12, 1973 the Union filed a complaint with the Wisconsin Employment Relations Commission alleging that the Board had committed an unfair labor practice by failing to file such election. On October 31, 1973 an examiner for the WERC held a hearing at Superior at which testimony was taken from representatives of both the Board and the Union as to whether there had been such an agreement in regard to unemployment compensation arrived at at the January 21, 1973 hearing. On May 3, 1974 the examiner filed his finding of fact and conclusions of law finding that it was agreed at the January 21, 1973 negotiating session that the Board would notify the Unemployment Compensation people of its election to cover such bus drivers and Class V secretaries under the Unemployment Laws for the summer of 1973. The Board petitioned the committee for a review of the examiners findings and conclusions and on May 21, 1975 the Commission filed its own finding of fact and conclusions of law affirming the findings of its examiner and expanding his order.

It apparently is not definite that the Commission can cover these employees under the Unemployment Compensation Law even if the Board should notify the Commission they want them covered. The Commission took care of this matter by holding that the Board should now notify the Unemployment Compensation Division of its election for these employees to come under the Unemployment Compensation Law, and if the Unemployment Compensation Division rules that it cannot bring these employees under such law, then these employees receive nothing. However, if the Unemployment Division rules that it can bring these employees under such law, then the Board must pay into the division the funds necessary to cover said employees. If the Unemployment Compensation refuses to rule on the matter because of the long delay or for any other reason attributable to the Board, then the Board must pay said employees the sum of money they would have received from the Unemployment Compensation Division for the summer months of 1973 if they had been brought under the law.

All parties were given notice by the Commission of the October 31, 1973 examiner's hearing on September 26, 1973, more than a month before said hearing. Witnesses for both sides were sworn and testified before the examiner. However, one Toby Marcovich, who was a member of the Board and attended the negotiating

sessions on January 21, 1973 was not offered as a witness and did not testify. After the Commission's final determination on May 21, 1975, the Board filed with this Court on June 19, 1975 a petition for review of the Commission's findings, conclusions and order. The Board then brought on a motion returnable September 15, 1975 asking that this Court allow additional testimony to be taken in said matter. The Board's motion is not clear as to who would take such additional testimony if ordered by the Court, but the law seems clear that if the Court did order the taking of additional testimony it would have to remand the matter to the Commission for the taking of such additional testimony.

On this motion the Board is represented by William Hammann, Superior City Attorney, and Douglas Moodie, Superior Attorney, of counsel. The Commission on this hearing is represented by the office of the Attorney General of the State of Wisconsin. It was agreed by all parties that no hearing would be held on September 15th and that the matter would be submitted to the Court on briefs without any oral argument. Mr. Hammann and Mr. Moodie have submitted briefs on behalf of the Board, the Attorney General's Office has submitted a brief on behalf of the Commission, and in addition to that Bruce Ehlke of the Madison law firm of Lawton & Cates, who represented the Union at the January 21, 1973 hearing, has submitted a brief in support of the Commission's position that the Board should not allow any additional testimony to be taken.

As indicated above, all parties were given more than a month's notice of the October 31, 1973 hearing. As far as the record is concerned, no one asked for an adjournment of that hearing and each party offered all the testimony it wanted to offer. At the end of the hearing Examiner Graeco said, "Gentlemen, do you have any other witnesses?" Mr. Ehlke replied "No" on behalf of the Union and Mr. Hammann replied "No" on behalf of the Board. Now we have a motion on behalf of the Board asking that further testimony be taken from Toby Marcovich, a member of the Board that also attended such January 21, 1973 negotiating session. In Support of this motion we have an affidavit from Mr. Marcovich sworn to on August 22, 1975 saying that on November 1, 1973 Mr. Marcovich had five divorces scheduled in Douglas County Court and that he could not attend the meeting on October 31, 1973 because he was occupied all of such day in preparing his divorces scheduled for the next day.

If the Board had attempted to get the October 31, 1973 meeting adjourned to a later date so that Mr. Marcovich could be available, and the examiner had denied such adjournment, or if the Board's attorney on October 31, 1973 had informed the examiner of the necessity of Mr. Marcovich's testimony and asked for an adjournment at that time to take such testimony, and the examiner had refused such adjournment, then we would have an entirely different problem. However, it seems to me that waiting for the decision and then bringing this motion after you lose is an entirely different proposition, especially, so when the examiner came 340 miles to Superior to hold the hearing a few blocks from the office of the reluctant witness.

It seems to me that the situation is quite comparable to what we would have if I spent all day hearing a court case, hearing all witnesses offered, then asked for briefs and read them, and wrote my opinion and judgment determining the case, and the loser went to the Supreme Court and got it to order me to reopen the case, hear some more testimony and do the whole thing over again. If there were no more grounds than in this case, it would probably be enough to make me resign.

Therefore, the motion of the Board to have the matter remanded to the Commission for the taking of further testimony is denied. As no one had to appear in Court to argue the matter, I will not allow any cost on the motion.

Now that the above motion is disposed of I suppose that I have to decide the basic issue, as the Board has petitioned for a review of the Commission's determination. On that issue the Board is hereby given 30 days to file its brief, the Commission and the Union are given 30 days to reply thereto, and the Board may have 10 days thereafter for a rebuttal.

Dated this 31 day of October, 1975.

BY THE COURT:

ALLEN KINNEY
Circuit Judge

P.S. It may be of some interest to note that the hearing at Superior at which the testimony was taken was two years ago today.