STATE OF WISCONSIN | CIRCUIT COURT Branch #2 Civil Division | MILWAUKEE COUNTY

LAYTON SCHOOL OF ART AND DESIGN and NEIL LIEBERMAN,

Petitioners,

-v-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Case No. 432-298

Respondent,

Decision No. 12231-B

and

WISCONSIN FEDERATION OF TEACHERS LOCAL 2149, WFT, AFT, AFL-CIO and ROLAND POSKA, GUIDO BRINK, FRANK LUKASAVITZ, TOM HALL, JACK WHITE, PAUL NELSON, JOSHUA NADEL and MURRAY WEISS,

Intervenors.

MEMORANDUM DECISION

This proceeding commenced on June 12, 1975, under Chapter 227, Wis. Stats., to review a decision and order of the Wisconsin Employment Relations Commission (Commission) dated May 13, 1975. The Commission's findings of fact, conclusions of law and order held that the petitioner, Neil Lieberman, had committed the crime of perjury within the meaning of Section 946.31 of the Wisconsin Criminal Code and that said perjury was a crime committed in connection with an employment relations controversy and thereby an unfair labor practice within the purview of Section 111.06(1)(a) and (1) of the Wisconsin Employment Peace Act. This review is only concerned with those matters relative to the subject of perjury.

Layton School of Art and Design (Employer or School) at all times material, was an Employer engaged in the operation of an institution of higher education. Lieberman, at all times material to this controversy, was president of the School. In February, 1973, Lieberman terminated seven teachers for incompetency. The matter was submitted to arbitration pursuant to a collective-bargaining agreement between the School and Local 2149, Wisconsin Federation of Teachers. The single issue submitted to the arbitrator was whether the discharges were for incompetency or for other reasons. Whether the teachers were competent was not arbitrable under the agreement. The arbitrator upheld the teachers' position, finding that the reason for the termination was not incompetence and ordered that the teachers be re-instated.

During the arbitration hearing, Lieberman testified on behalf of the School relative to its position regarding the teachers' incompetency. Lieberman indicated that he based part of his opinion on his first-hand observations of the teachers in their classes. It is this testimony which is the substance of this review. On the basis of the arbitration record, and live testimony before the Commission, the Commission found that Lieberman had given perjurious testimony before the arbitrator.

In reviewing the decisions of administrative agencies under Chapter 227, Wis. Stats, there are several general rules that this Court must follow. First of all, findings of fact made by the agents are conclusive if supported by substantial evidence in view of the entire record. Chicago, M., St. P. & P. R.R. Co. -v- ILHR Dept., 62 Wis. (2d) 392 (1974).

Secondly, conclusions of law are subject to independent review by the Circuit Court unless it is in an area in which the agency has particular competence or expertise. Pabst -v- Department of Taxation, 19 Wis. (2d) 313 (1973).

The threshhold question to be answered by this Court is whether the W.E.R.C. has jurisdiction under the Wisconsin Employment Peace Act, with particular reference to Sections 111.06(1)(1) and 111.07, Wis. Stats., to determine whether a crime has been committed in connection with an employment relations controversy. Section 111.06(1)(1) provides:

> "(1) It shall be an unfair labor practice for an employer individually or in concert with others. . ."
>
> "(1) To commit any crime or misdemeanor in connection with any controversy as to employment relations." (Emphasis ours.)

The question that we must answer is whether the term "to commit any crime" means that there must be a formal adjudication of guilt by a court of competent jurisdiction before the Commission can inquire if there has been an unfair labor practice, or whether the Commission can, ab initio, determine if a crime has been committed incidental to a hearing on the unfair labor practice charge. The statute clearly uses the term commit. There can be no question that one may commit a crime and yet not be convicted of it. Section 111.07, Wis. Stats., provides in part:

> "(1) Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.
>
> "(2)(a) Upon the filing with the commission by any party in interest of a complaint . . . charging any person with having engaged in any specific unfair labor practice, it shall . . . fix a time for hearing such complaint, . . .
>
> "(4) 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, and its order, which shall state its determination as to the rights of the parties . . ."

It seems clear to us that these statutes give the Commission plenary power to make an administrative determination of whether a crime has been committed "in connection with any controversy as to employment relations".

The next question is whether this statute is constitutionally offensive as being an unlawful legislative delegation of a judicial function. Although our Supreme Court has not been faced with this problem, an analogous case was decided by the Utah Supreme Court. Citizens Club -v- Welling, 27 P. (2d) 23 (1933). A Utah statute provided that the Secretary of State shall revoke the corporate charter of a social club that "was or is actually used for gambling or performing other acts in violation of law or ordinance". The statute further provided that the Secretary of State shall make the determination of whether a law was violated. The Court first pointed out that in order to be within the constitution, the statute must provide a method or procedure to determine whether the company has violated the law. Addressing itself to the question of whether the act was an unlawful delegation of judicial power, the Utah Supreme Court in the Citizens Club, supra, at page 25 said:

> "That while the term 'judicial power' embraces all suits and actions whether public or private, it does not necessarily include the power to hear and determine matters not necessarily in the nature of a suit or action between the parties; that the term does not apply to those cases where the judgment is exercised or is to be exercised as a mere incident to the execution of a ministerial power or duty; that power to hear and determine matters more or less affecting public and private rights may be conferred upon and exercised by administrative and executive officers without offending Constitutional provisions relating to the judical power vested in courts; that in such particulars, there are various boards and commissions which under legislative branch of the government, and in doing so such officers frequently are required to construe the law, ascertain facts, and make decisions which more or less call for the exercise of a judicial or quasi judicial function or power, but which do not infringe constitutional provisions such as here drawn in question. . ."

This rationale is consistent with Wisconsin law. See the dissenting opinion of Justice Fowler in Holland -v- Cedar Grove, 230 Wis. 177 (1939), cited with approval in International Union -v- Wisconsin E.R. Board, 258 Wis. 481 (1951) wherein it was stated:

> "But there is a clear and distinguishable difference between the judicial power exercised by boards and commissioners and that exercised by the courts. Courts proceed to hear, try, and determine all sorts of cases at law and equity that are brought before them. The administrative boards and commissions, however, are limited in their exercise of judicial power to the exercise of such as is incidental to their administration of the particular statutes the legislature has given them to administer. The public service commission can exercise such judicial power as it is necessary for it to exercise in order to enable it to administer the statutes, administration of which has been conferred upon it. So of all commissions and boards. But for them to exercise judicial power the statutes must given them a statute to administer, and their exercise of such power is limited to what is incidental and reasonably necessary to the proper and efficient administration of the statutes that are committed to them for administration."

In International Union, supra, the Court found that the interpretation of a collective-bargaining agreement, normally interpreted by an arbitrator to be entirely incidental to the administration of the Unfair Labor Practice Statute, and to be without other purpose or effect.

Also consistent with the Utah case is General Drivers and Helpers Union, Local 662 -v- WERB, 21 Wis. (2d) 242 (1963). That case addressed itself to the question of whether the WERB's award of money damages was a judicial function reserved for the courts. Holding that the power was not reserved to the courts, the Supreme Court stated:

> "In any event the existence or non-existence of the right of individuals to sue in the courts does not preclude the WERB from taking such affirmative action as it believes is necessary to effectuate the policies of the act . . .
>
> "Since unfair labor practice litigation described in ch. 111 Stats., was not in existence at the time that the Wisconsin Constitution came into being, there is no constitutional obligation to afford a jury trial in such proceedings."

We therefore conclude that the Commission may make determinations under Wisconsin Statute 111.06(1)(1) and in so doing may administratively determine whether petitioner's conduct was tantamount to the commission of a crime, incidental to their determination whether an unfair labor practice was committed. However, it should be noted that the Commission may not adjudicate that a person is guilty of perjury and proceed to impose any criminal sanctions. This clearly would violate due process and would be a clear usurpation of judicial power.

Within the framework of our initial finding, there still remains the determination of Mr. Lieberman's testimony was of such a character as to be labled perjurious. Section 946.46(1), Wis. Stats., provides in part:

> "Perjury. (1) Whoever under oath or affirmation orally makes a false material statement which he does not believe to be true, in any matter, cause, action or proceeding, before any of the following, whether de jure or de facto, may be fined not more than $5,000 or imprisoned not more than 5 years or both: . . .
>
> "(d) An administrative agency or arbitrator authorized by statute to determine issues of fact; . . ."

The essential legal elements necessary to establish the crime of perjury are: (1) That the statement was made under oath or affirmation; (2) That the statement was false and the witness believed it to be false; (3) That the statement was material to the issue to be resolved in a proceeding, and (4) That the statement be made before one of the officials lised in the statute. The Commission's second conclusion of law demonstrates that it applied these elements.

There can be no dispute as to the first element that the statements at issue were, in fact, made under oath.

The second requirement that the statement was false and the witness believed it to be false is disputed. Lieberman testified that he visited the classrooms of Messrs. Nelson and White as part of his assessment of their competence. The Commission found that such visits to Messrs. Nelson's and White's classroom never took place. (WERC Dec. 12-13). The Commission also found that the "alleged observations of the other dischargees were substantially and materially more brief than Respondent Lieberman's testimony states". (WERC Dec. 12-13).

Petitioner claims that these findings are not supported by the evidence in the record because both Nelson and White testified that they saw Lieberman observe their classrooms. Lieberman testified that he visited Nelson's classes approximately six times, some of his visits for a duration of more than 30 minutes. (Jt. Ex. 488). A reading of the testimony that Petitioner relies upon in this regard Nelson does state that Lieberman never visited his class, but that on one occasion he was in his classroom for a few minutes during a departmental critique and that this critique was not a "classroom activity". We conclude from this that the clear import of Nelson's testimony was that Lieberman never observed one of his classes which was directly contrary to Lieberman's contentions.

It was clearly within the Commission's province to find the true facts by determining the weight and credibility of conflicting testimony. Hilboldt -v- Wisconsin R.E. Brokers' Board, 28 Wis. (2d) 474 (1965).

We are of the opinion that the testimony of both Nelson and several students (See Jt. Ex. 539-563) furnishes a sound and substantial factual basis to support the finding that the Commission made. Regarding Mr. White, the conclusion is much the same. Lieberman testified that he made at least six observations of White's classes within the two semester period, some observations for over 15 minutes in duration, and that he based his finding that White was incompetent upon those first-hand observations. Conversely, White testified that "he (Lieberman) never came into the classroom except that once he stood in the doorway and saw I was busy and did not come in". (Rec. 39). Petitioner argues that this one instance suggests the Commission's finding is not supported by substantial evidence. We do not agree. We do not consider that this minor concession by White that Lieberman, on one occasion stood in a doorway, is of sufficient significance to destroy the probative value of all other testimony in the record directly contrary to the number of observations that Lieberman claims to have made of White's classroom activities. Examining the record as a whole, we find that there is substantial evidence to support a finding that Lieberman's claimed observations of White's teaching were de minimis, at best, both as to number of times and duration.

We reach the same conclusion in regard to the other five teachers who were terminated; that is to say there is substantial evidence to support a finding that Lieberman's testimony about his observations of their classes was not factual and untruthful. For example, Lieberman testified that he visited Nadel's class approximately six times, some of which were for longer than three to five minutes. (Jt. Ex. 489-491). Nadel, on the other hand, testified that there were only two or three visits and that all Lieberman was doing was "showing someone around and he just walked through the studio and left . . . no pause to watch anything or anything like that". (Rec. 94-95).

Nadel's testimony was supported by the testimony of two students, Scmitz (Jt. Ex. 539) and Barudi (Jt. Ex. 563). As to Weiss, Lieberman testified he observed at least six classes, at least half of which were for 15 minutes or longer. (Jt. Ex. 491-493). Weiss categorically testified that Lieberman only visited his class once, and that was only to ask him a question and then immediately leave, the whole matter taking about five minutes. (Rec. 92-93). Weiss's testimony was substantially supported by one of his students, Schuller. (Jt. Ex. 554).

Lieberman further testified that he visited Hall's classes approximately four or five times and that some of these visits was for more than 15 minutes. This testimony was countered by Hall's version that Lieberman only visited his class once and that was just to walk through. (Jt. Ex. 596). Lieberman also testified that he visited Brink's classes on four or five occasions, approximately half of which were over 15 minutes in duration. (Jt. Ex. 496). Brink testified that he never saw Lieberman in his class at all. (Jt. Ex. 549-548 and Rec. 23). Brink's testimony was fully supported by Bowen (Jt. Ex. 549), Schuller (Jt. Ex. 553), Homrich (Rec. 108), all or whom are Brink's students.

Aside from disputing the fact that there is substantial evidence to support the Commission's finding that Lieberman testified falsely at the arbitration hearing, Petitioners raise two additional contentions in their brief: (1) That Lieberman's testimony is not sufficiently precise to substantiate the findings of falsity, and (2) That there was no wilful intent to mislead the trier of fact. We do not agree that the testimony was so ambiguous or of such a character that it could not be characterized as perjurious.

Lieberman's testimony was extremely detailed and specific. His testimony went not only to the approximate number of observations of each teacher, but he also proceeded to particularize the exact number of observations of the different subjects taught by each teacher. Furthermore, he testified as to the approximate duration of his visits. Petitioner's argument would be much more persuasive if his testimony was more general and vague as to number and duration. His own preciseness, in the Court's opinion, answers his argument. As to his contention there was no wilful intent to mislead the trier of fact, Petitioner apparently is contending that intent to mislead cannot be inferred from the circumstances. If this were true, the only means of proving perjury would be to first obtain an admission from the witness that he intended to mislead the trier of fact. This clearly is not the law.

The facts of this case are clearly distinguishable from Bronston -v- United States, 409 U.S. 352 (1973) relied on by Petitioner where intent to mislead was sought to be inferred from unresponsive answers. We are satisfied that there is substantial evidence in this record to support a finding that Lieberman testified falsely to having made substantially more and longer observations of the teachers than were actually made by him and that he did so with the calculated purpose to convince the trier of fact that he did have a sound basis for his determination that these discharged teachers were incompetent when, in fact, there was no such basis.

The third element of perjury is that the false statement must be material to the issue to be resolved in a proceeding. We have little reluctance, on the basis of the entire record, in concluding that the testimony concerning the observations of the teachers was material to the question of whether the teachers were terminated because of incompetency. It is fundamental that one person could not find another person incompetent unless he had some knowledge about how that other person performed his duties. Thus, a showing that first-hand observations were made by Lieberman is clearly material to the question of whether a determination of competency was made.

The fact is that Lieberman admitted that his first-hand observations were the only basis for his finding of incompetency. We quote from the record:

Mr. Lindner: "Just your evaluation -- you are making your evaluation based upon your class room observation only, Mr. Lieberman."

Lieberman: "Based upon that, I found that the teaching was lacking totally."

Arbitrator: "Just so that the record is clear on this point, you are saying that total lacking in the teaching was the result of your first-hand observance?"

Lieberman: "Yes". (Jt. Ex. 470).

The final element of the crime of perjury, under the criminal statute, is that the false statement must be made before an official listed in the statute. The collective-bargaining agreement between the Employer and the Union provided that an arbitrator would be elected by the parties from a panel. Chapter 111 gives the Commission the power to name such a panel, providing "the Commission shall appoint as arbitrators only impartial and disinterested persons". Each of the arbitrators in this panel was appointed by the Commission pursuant to the authority granted by the Commission by Section 111.10, Wis. Stats.

We conclude from this that the arbitrator before whom Lieberman testified was one authorized by statute to determine issues of fact contemplated in Section 946.31(1)(d), Wis. Stats.

Having thus concluded that the Commission's conclusion of law, relating to Lieberman's testimony, was proper and warranted by the record before it, it is necessary to finally determine whether Lieberman's perjurious testimony was an unfair labor practice within the meaning of Section 111.06(1)(1) which prescribes that the commission of a crime in connection with an employment relations controversy is an unfair labor practice. Whether an unfair labor practice was committed is within the particular competence or expertise of the Commission. The Commission's conclusions of law will be affirmed if it is not without reason nor inconsistent with the purposes of the law.

The Commission found that the alleged crime ocurred during a grievance arbitration hearing, that "such proceedings are at the terminal end of disputes over the administration of collective-bargaining agreements, and such contract administration is essential to employment relations". Based on this finding, the Commission concluded as a matter of law that the Petitioner Lieberman had committed an unfair labor practice by the commission of a crime in connection with an employment relations controversy. This conclusion is neither without reason nor contrary to the salutary purposes of the Wisconsin Employment Peace Act. We conclude, therefore, that the Commission's findings, conclusions and order relative to Petitioner's perjurious testimony should be affirmed.

BY THE COURT

G. H. Burns /s/
CIRCUIT JUDGE

Dated at Milwaukee, Wisconsin,
this 29th day of January, 1976.