STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#147-470

RICHARD E. ZACH,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

MEMORANDUM

DECISION

Decision No. 13809-B

On August 6, 1976, I reversed a WERC decision that no unfair labor practice occurred in connection with a fair-share agreement referendum conducted by the WERC at Petitioner's workplace. Sec. 111.84, Stats. I also remanded the matter for a Commission determination of "a remedy appropriately within the Commission's discretion under sec. 111.07(4)." On June 23, 1977, Commissioners Slavney and Torosian ordered that the State Department of Administration cease and desist from furnishing to the WERC incomplete lists of eligible employee voters and from failing to respond to employee inquiries as to eligibility. The WERC also ordered the DOA to take certain affirmative action (i.e., furnish the WERC with an accurate list of the employees in the bargaining unit involved, furnish each agency with an employee list and require the agency to post such list with a request for corrections, respond to any state employee inquiry regarding eligibility and notify the WERC of such inquiries). The union involved, the State Highway Engineers Association was ordered to provide accurate lists in future elections.

No petition for review of the order on remand was filed within thirty days as required by sec. 227.16, Stats.

In October, 1977, Petitioner Zach[1] brought a motion "for an order that the Respondents are guilty of contempt of court" because the WERC order on remand was not appropriate considering the merits of the case as decided on review under Ch. 227. The parties agreed at hearing that the motion be treated as a verified petition under sec. 295.03(1), Stats. I treat the petition as seeking a finding of civil rather than criminal contempt on the part of the signators to the order on remand, Commissioners Slavney and Torosian, and not the Attorney General, the Commission itself, or Commissioner Hoornstra (who took no part in the proceedings on remand). Although the caption lists only the WERC as Respondent, Slavney and Torosian were served with the motion papers which pursuant to stipulation are treated as satisfying the contempt statute's proceedings.

This is not a review under Ch. 227 in which I would determine if the order was within the Commission's discretion and has a reasonable tendency to effectuate the purposes of the Act. Wisconsin Employment Relations Board v. Algoma P & V Co., 252 Wis. 549 (1948). However, the question of the appropriateness of the relief is close to the issue here: whether this court should, by issuance of an order to show cause, initiate contempt proceedings because Commissioners Slavney and Torosian disobeyed this court's order to fashion an appropriate remedy within the Commission's statutory authority. Sec. 295.01, Stats.

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[1] Although the caption indicates that more than one named petitioner is involved, I find only Petitioner Zach's signature on any pleadings before the Commission or this court. See also: R. 7-8 (Nov. 5, 1974).

Under sec. 295.03(1), Stats. (1975), the court may take jurisdiction of contempt proceedings upon the filing of a verified petition. The current statute continues to give the court discretion as to initiating such proceedings.[2] Because the power to punish for contempt is extraordinary, it should be exercised only in drastic situations. Appeal of Chichon, 227 Wis. 62, 278 N.W. 1 (1938); In re Adam's Rib, Inc., 39 Wis. 2d 741, 159 N.W. 2d 643 (1968). The burden is on the petitioner to make a prima facie showing of violation of a court order. Sec. 295.03(2), Stats. (1975): Joint School District No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Education Association, 70 Wis. 2d 292, 234 N.W. 2d 289 (1975). Since my earlier decision remanded for a relief order "appropriate" under sec. 111.07, Petitioner Zach bears the burden of proof on the inappropriateness of the remedy ordered by Commissioners Slavney and Torosian.

The remedy as ordered is clearly within the WERC's scope of authority. My remand did not require the setting aside of the election results; neither is that remedy required as a matter of state law whenever a ULP is committed in an election context. City of Milwaukee v. WERC, 71 Wis. 2d 709, 239 N.W. 2d 63 (1976).[3]

Thus Petitioner Zach's argument must be that even given the WERC's discretion, the only appropriate remedy on the facts of this case would be to set aside the results of the fair-share referendum. I disagree. There is substantial record evidence which supports the Commission determination that voiding the referendum results would not best effectuate the purposes of the State Employment Labor Relations Act. In their memorandum accompanying the order of remedy, Commissioners Slavney and Torosian stated, at page 4:

> "The fact the Respondents committed an act of interference does not in itself require the setting aside of the referendum results in order to effectuate the purposes of the Act. . . The declared policy of the State Employment Labor Relations Act recognizes that there are three major interests involved: That of the public; that of the state employes; and that of the State as an employer. Section 111.80(1) further states the following:
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> "'It is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.'
>
> "Accordingly, the Commission, in fashioning a remedy, must weigh and balance the rights of the 16 employes who did not receive ballots, and consequently did not vote, with the rights of 811 employes who, in fact, cast valid ballots, resulting in requiring the State to enter into a fair-share agreement with the State Highway Engineers Association. The stability of the referendum process and procedure and the parties' labor relations relationship is an interest which must also be considered.
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> "Complainants argue that the appropriate remedy requires the Commission to set aside the results of the referendum and direct a new referendum. We do not agree. We are persuaded by the following: (1) the conduct of the referendum itself was untainted; (2) neither the State nor the Association intentionally caused the names of the 16 employes to be omitted from the list of eligible employes; (3) the ballots of the 16 employes would not have affected the results of the referendum even had said employes voted against implementation of a fair-share agreement; and (4) Complainants' position to set aside the results, logically extended, would require the

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[2] Sec. 295.04, Stats. (1973) permitted the court to initiate contempt proceedings "upon being satisfied by affidavit of the commission of the misconduct" (or "in its discretion" in certain types of cases not relevant here). Of course, in non-statutory contempt proceedings, the court would decide whether to exercise its inherent power to protect its own orders.

[3] The parties proceeded below as if this referendum were governed by the same rules applied to representation elections.

Commission in future cases to set aside the results of an election or referendum where only one employe was inadvertently omitted from the list of eligibles, regardless of the results of the balloting."

Of course, there may be situations where interference with even one employee's rights would necessitate setting aside an election; a different motive and indirect discouragement of other employees would be relevant considerations. The Commission also found that Zach knew of the election from the union newsletter, prior to the last day for voting. While this informal notice does not obviate the necessity of providing accurate voter lists, actual notice does rebut Zach's argument that he was deprived of an opportunity to lobby against the fair-share agreement. This is implicit in the Commission's statement that the conducting of the referendum was not tainted by the inadvertent omission. Given the findings that no impermissible motive was involved and that the omitted votes could not have been outcome determinative,[4] the relief given on remand cannot be read as disregarding my earlier order to fashion an "appropriate" remedy. Cf. Telonic Instruments, 173 NLRB No. 87, 69 LRRM 1398 (1968).

The contempt power enables courts to ensure fair and orderly administration and maintain dignity and discipline. Bihlmire v. Hahn, 31 Wis. 2d 537, cert. denied, 387 U.S. 905 (1966). Petitioner has not made a prima facie showing that those goals are threatened by the Commissioners' action here or that the action on remand disregards my earlier order. I am not satisfied that this is an appropriate case to take jurisdiction under sec. 295.03(1). No further relevant facts could be presented at a hearing or by affidavit. Accordingly, no order to show cause will issue and the petition is dismissed.

So ordered.

Dated: March 22, 1978.

BY THE COURT:

P. Charles Jones /s/
P. CHARLES JONES, CIRCUIT JUDGE
DANE COUNTY CIRCUIT COURT NO. 3

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[4] Even assuming that the other 15 employees who were negligently omitted from the Excelsior list would have voted against the fair-share agreement, the necessary two-thirds approval, sec. 111.81(13), would have been obtained.