

#147-470

RICHARD E. ZACH, et al.,

Petitioners,

MEMORANDUM

-vs-

DECISION

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

Respondent.

Decision No. 13809

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BEFORE: HON. P. CHARLES JONES, ACTING CIRCUIT JUDGE.

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The petitioner Robert Zach seeks this judicial review of a July 21, 1975, Wisconsin Employment Relations Commission order that dismissed his unfair labor practices complaint against the State of Wisconsin (employer) and the State Highway Engineers Association (union).

On February 15, 1975, the Commission conducted a referendum to determine whether the State and the Association would implement a fair-share agreement by which the State, as the employer, deducts union dues from each union member's paycheck. The names of voters to whom the Commission was to mail ballots came from a list submitted by the State and checked by the Association. Sixteen individuals eligible to vote in the election were inadvertently omitted from the list given to the Commission and consequently did not receive ballots.

The issue presented is for review of the Commission's conclusion that the inadvertent omission of sixteen individuals' names from the list of eligible voters submitted to the Commission by the Employer and the union did not constitute an unfair labor practice.

In its memorandum accompanying the Findings of Fact and Conclusions of Law the Commission states:

"Section 111.82 of SELRA establishes an eligible employee's right to vote in a fair-share referendum. Respondents' failure to supply the Commission with a complete list of eligible voters, albeit inadvertent, would constitute interference with this protected right but for the notice which the omitted employees received regarding the existence of the referendum. Thus, the Commission concludes that neither the Respondent Employer nor the Respondent Association illegally interfered with the rights of the omitted employees."

The Commission's initial conclusion is correct: "failure to supply the Commission with a complete list of eligible voters, albeit inadvertent, would constitute interference with this protected right . . ."

The statutes upon which the Commission relies provide:

"111.84 Unfair labor practices. (1) It is an unfair labor practice for an employer individually or in concert with others:

"(a) To interfere with, restrain or coerce state employees in the exercise of their rights guaranteed in s. 111.82.

" . . .

"(2) It is an unfair practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed under s. 111.82.  
" . . .

"111.82 Rights of state employes. State employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employes shall also have the right to refrain from any or all of such activities."

Notably absent from the statutory powers of the Commission is the authority to recognize "but for" defenses for a violation of unfair labor practices. Both the memorandum accompanying the Commission's order and the Commission's earlier order of April 29, 1974, setting aside the election (subsequently reversed by the order dated July 21, 1975, from which this appeal is taken) indicate the Commission did in fact find an unfair labor practice.

The Commission's utilization of a "but for" test to absolve culpable parties to an unfair labor practice is beyond the statutory authority of the Commission. Cf. International Union, etc. v. Wis. E. R. Board (1944), 245 Wis. 417, 435. While the Commission does have authority to impose requirements within its province of conducting elections, those requirements must be uniformly applicable to all eligible voters.

Furthermore, the Commission has no statutory authority to impose an affirmative burden on the eligible voters to procure a ballot in a fair-share referendum when the Commission conducts the election by mailed ballot.

The Commission's erroneous conclusion of law that the Respondents did not commit an unfair labor practice is reversed. The case is remanded to the Commission for a remedy appropriately within the Commission's discretion under sec. 111.07(4).

Dated: August 5, 1976.

BY THE COURT:

P. Charles Jones /s/  
P. CHARLES JONES,  
ACTING CIRCUIT JUDGE