STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LA CROSSE COUNTY (HILLVIEW NURSING HOME),

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 78 CV 492

Decision No. 14704-B

The petitioner, La Crosse County, seeks review of an order of the Wisconsin Employment Relations Commission, (WERC), which found that the County had violated secs. 111.70(3)(a) 1 and 3, Stats., (prohibited practices under the Municipal Employment Relations Act). Sec. 111.70(3)(a) 1, Stats., states that it is a prohibited practice for an employer "to interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed by sub. (2)" (the right to unionize, etc.). Sec. 111.70(3)(a) 3, Stats., provides that it is a prohibited practice for the employer to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. The WERC found violations of both statutes based on its findings that the employer, La Crosse County, suspended and discharged the employee, Peter Mohm, partially because of animus toward his union activities, and that the county's actions discouraged membership in the union. The WERC ordered the county to reinstate the employee, Mohm, with back pay, and to cease and desist from discriminating against any employees because of their union activities. The WERC has filed a counter-petition pursuant to sec. 111.07(7), Stats., seeking to have this court confirm and enforce its order.

Peter Mohm was employed as an orderly at La Crosse County's Hillview Nursing Home from October, 1974, until his discharge on May 27, 1976. He was not disciplined or reprimanded by his superiors prior to his election as union steward on October 28, 1975. After that date, several critical notes were placed in his personnel file, and he was frequently reprimanded for conduct which he previously had exhibited without reprimand, and for which no other employees were disciplined. Mohm was suspended from work in May, 1976, for insubordination and disruption. During his suspension he was not allowed to enter the Hillview Home to pursue union activities without prior permission of the administration. On and about May 27, 1976, Mohm experienced difficulty in obtaining permission to enter the building to pursue a fellow employee's grievance. He finally got into the building and proceeded to discuss the grievance with Nurse Hickey. Shortly thereafter, Mohm was discharged by the administrator of the home, who announced over the public address system that Mohm was discharged for entering the home while on suspension. He also announced that Mohm was no longer union steward and that employees should no longer contact him concerning grievances.

After his discharge, Mohm filed a complaint with the WERC. An examiner was appointed and hearings were held in July, 1976. The examiner found that Mohm's suspension and discharge were due, in part, to animus toward Mohm because of his union activities. The examiner also found that Mohm had not carried his burden of proving that the employer's action discouraged union membership. The WERC substantially affirmed the examiner's decision, although it found that the county's actions did discourage union membership. It based this latter finding on the inference that the inherent and foreseeable effect of the county's action in discharging an employee because of union activities was to discourage union membership.

The county seeks reversal of the Commission's order on the following grounds: (1) that the findings of fact are not supported by substantial evidence in the record; (2) that the order is based on an erroneous interpretation of law; (3) that the WERC order exceeded the agency's discretion and legal authority; and (4) that it is unconscionable to order back pay for a period of two years when sec. 111.07(5), Stats., requires the Commission to act within 45 days.

Sec. 111.07, Stats., governs the procedure in all cases involving prohibited practices under the Municipal Employment Relations Act. See sec. 111.70(4)(a), Stats. Orders of the WERC are subject to review under ch. 227, Stats., as well as under sec. 111.07(7), Stats., which provides for review and enforcement of the Commission's order by the court. See sec. 111.07(8), Stats.

Sec. 227.20(6), Stats., provides as follows:

> "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record."

The principal findings of fact which the county here challenges are those in which the WERC found that Mohm's suspension and discharge were based in part on his union activities. In Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540, 151 N.W.2d 617 (1967), the court held that an employee may not be fired when one of the motivating factors is union activity, no matter how many other valid reasons exist for firing him. A discharge which is motivated even in part by the employee's union activities violates secs. 111.70(3)(a) 1 and 3, Stats. Id., at pp. 552, 557-8.

The Commission's findings as to the specific actions of the employer and the employee are properly labeled findings of fact. However, the finding that the employer's action was based, in part, on animus toward Mohm's union activities is an inference based on the evidence and testimony. The drawing of inferences from facts of record, and the weight to be given those facts and inferences, are functions of the Commission, and such findings may not be disturbed unless unsupported by substantial evidence. St. Joseph's Hospital v. WERB, 264 Wis. 396, 59 N.W.2d 448 (1953). The Commission is the judge of the credibility of the witnesses and the weight of the evidence, and the court is not to substitute its judgment for that of the Commission. Muskego-Norway, supra., at p. 563.

The question of whether union activity is a motivating factor in a discharge was held to be a finding of fact, or a finding of ultimate fact, in Muskego-Norway, supra., St. Joseph's Hospital, supra., and in Kenosha Teacher's Union v. WERC, 39 Wis.2d 196, 158 N.W.2d 914 (1968). Whether viewed as a finding of fact or an ultimate finding based upon inferences from the facts, the Commission's findings in this regard are supported by substantial evidence in the record. The lack of reprimands or complaints concerning Mohm's work prior to his election as union steward, and the steady increase in harassment and complaints after his election, support the Commission's finding that Mohm was suspended and discharged because of his union activities. The testimony of his supervisors as to his "agitation" and disruptive activities at the home after becoming a union steward further supports these findings.

The Commission was similarly justified in concluding that the employer's actions discouraged union membership. This finding was based on a logical inference; that is, that the discharge of an employee because of his union activities would naturally and foreseeably discourage union membership. While the testimony on this point is conflicting, there is substantial evidence in the record to support the Commission's finding in this regard. Since these findings are supported by substantial evidence, and the logical inferences therefrom, they will not be disturbed.

The county also argues that the order is based on an erroneous interpretation of law. This contention is without merit. Muskego-Norway, supra., clearly establishes that an employee may not be discharged for union activities, and that such a discharge constitutes a prohibited practice under sec. 111.70(3)(a), Stats. Such a discharge clearly interferes with and restrains employees in the exercise of their collective bargaining rights, and should not be allowed. I conclude that the WERC's order is based upon a correct interpretation of the law.

The county next contends that the WERC exceeded its discretion and statutory authority in ordering the employer to reinstate Mohm with back pay. Sec. 227.20(8), Stats., provides as follows:

> "The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion."

Sec. 111.07(4), Stats., provides that the Commission may:

> ". . .require the person complained of to cease and desist from the (prohibited practices) found to have been committed. . .and require him to take such affirmative action, including reinstatement of employes with or without pay, as the commission deems proper."

In WERC v. Evansville, 69 Wis.2d 140, 230 N.W.2d 688 (1975), the court stated that such "affirmative action" is limited to that which is considered as reasonably necessary to effectuate the policies of the municipal employment statutes. The court stated:

> "It is the obligation of the court to defer to the commission in its selection of a remedial order. Where, as in this case, it cannot be said that the. . .order is a patent attempt to achieve ends other than those contemplated by the Municipal Employment Relations Act, and it is otherwise within the legal authority of the commission, and the findings upon which it is based are supported by sufficient evidence, it will not be set aside by this court." Id. at pp. 166-7.

In WERB v. Algoma P. & V. Co., 252 Wis. 549, 561, 32 N.W.2d 417 (1948), aff'd. 336 U.S. 301 (1949), the court said:

> "We deal here with a matter commited by statute to the discretion of the. . .(Commission). . .and in order to reverse we must find that the order had no reasonable tendency to effectuate the purposes of the act."

The affirmative action ordered here appears to effectuate the purpose of the act to encourage voluntary settlement through collective bargaining and to give municipal employees the right to affiliate with a labor organization of their choosing. Sec. 111.70(6), Stats. If the county were allowed to discharge Mohm for union activities with impunity, other employees would be discouraged in their own collective bargaining efforts. Since the order is consistent with the purposes of the act, this court will not substitute its judgment for that of the Commission on this discretionary matter.

The final argument made by the county is that the back pay order is unconscionable because of the delay between the employer's petition to the WERC and the WERC's final order. Sec. 111.07(5), Stats., provides that the Commission

shall affirm, reverse, set aside or modify the order of the examiner within 45 days after the filing of the petition to review with the Commission. Here the petition was filed with the WERC on July 11, 1977, and the final order was released July 31, 1978.

In Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 32 Wis.2d 478, 151 N.W.2d 84 (1967), the court (on rehearing) discussed the requirement that the Board make findings within 60 days after hearing the testimony, and held that such a time requirement was directory, and not mandatory. The court stated that the purpose of ch. 111 was the promotion of industrial peace through the maintenance of friendly employment relations, accompanied by the maintenance of suitable machinery for the adjustment of controversies, and found that this policy was not served by making the 60-day requirement mandatory. Accordingly, the court held that a 9-month delay did not deprive the WERB of jurisdiction.

In Neu's Supply Line, Inc. v. Wisconsin Department of Revenue, 52 Wis.2d 386, 395, 190 N.W.2d 213 (1971), the court stated:

> "Absent a mandatory statutory requirement, however, delay in issuing a decision does not constitute reversible error."

In Chicago & N.W. RR. v. LIRC, 91 Wis.2d 462, 283 N.W.2d 603 (Ct. App. 1979), the court held that a delay of almost two years between the hearing date and the decision of the examiner did not deny the employer due process, even though the delay resulted in a large back pay award, stating that:

> ". . .even if the NLRB violated its duty of prompt action in making a back pay order, wronged employees were at least as much injured by the delay as was the wrongdoing employer. The Supreme Court refused to require the NLRB 'to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrong-doing employers.'" [citing NLRB v. Rutter-Rix Mfg. Co., 396 U.S. 258 (1979)]

While the delay here should not be condoned as a continuing practice, it does not appear to be unconscionable to require the employer to pay Mohm from the date of his suspension to the date of the offer of reinstatement. Again, the type of affirmative action ordered by the Commission is a matter of discretion and this court should not substitute its judgment for that of the Commission. Sec. 227.20(8), Stats.

The WERC has counter-petitioned for confirmation and enforcement of its order pursuant to sec. 111.07(7), Stats. That section provides that:

> "The findings of fact made by the commission, if supported by credible and competent evidence in the record, shall be conclusive."

In WERB v. Milk & Ice Cream Drivers Union, 238 Wis. 379, 299 N.W. 31 (1941), cert. denied 316 U.S. 668 (1942), the court stated that under sec. 111.07(7), Stats., the findings of the board must be sustained if there is any credible, competent evidence to support them. In WERC v. Evansville, supra., the court restated the standard of review as the same as that under the Workmen's Compensation Act:

> ". . .there must be some evidence tending to support the finding 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. . ." Id. at p. 150.

Whether applying this standard or the "substantial evidence" test, the findings in this case, being supported by credible, competent and substantial evidence in the record, are sufficient.

The final issue to be addressed is whether the court should enforce the WERC order. As stated above, the order should be enforced unless it has no reasonable tendency to effectuate the purposes of the act. WERB v. Algoma P. & V. Co., supra. Moreover, the court should defer to the WERC in its selection of a remedial order, and should not substitute its judgment for that of the WERC on an issue of discretion. WERC v. Evansville, supra., sec. 227.20(8), Stats. Since I have already decided that the order effectuates the purposes of the act, it should be confirmed and enforced. Counsel for the respondent may prepare an appropriate order for my signature.

Dated at Madison, Wisconsin, this 28 day of February, 1980.

BY THE COURT:

William Eich /s/
WILLIAM EICH
CIRCUIT JUDGE

cc: John D. Niemisto
Ray A. Sundet