

Town of Mercer,

Petitioner,

vs.

Wisconsin Employment
Relations Commission,

Respondent,

and

Chauffeurs, Teamsters,
Warehousemen and Helpers
Local Union No. 446,

Intervenor.

Case No. 2069

MEMORANDUM OPINION

Decision No. 14783-B

A complaint was filed by the intervenor union with the respondent alleging that the petitioner had committed a prohibited practice within the meaning of §111.70, Wisconsin Statutes. A hearing was conducted by an examiner of the respondent who issued his findings of fact and conclusions of law and a determination and order which was subsequently affirmed by Commission decision. The petitioner then petitioned the Circuit Court for review pursuant to Chapter 227 of the Wisconsin Statutes and the respondent counterpetitioned for enforcement of its order under §111.07 (7) of the Wisconsin Statutes. The provision for review by the Circuit Court of the administrative determination of the respondent is found in §111.07 (8), Wisconsin Statutes.

Under §111.07 (8), the review to be conducted by the Court is that as set forth in Chapter 227 of the Wisconsin Statutes which provides in §227.20 (6) 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."

In Stacy vs. Ashland County Department of Public Welfare, 39 Wis. 2d 595, 159 N.W. 2d 630 (1968), at page 602, the Supreme Court said:

"In Ashland v. State Highway Comm. (1963), 17 Wis. 2d 120, 131, 115 N.W. 2d 498, we stated the substantial evidence rule of this section [227.20 (1) (d)] was whether reasonable minds could arrive at the same conclusion reached by the commission. This concept of reasonableness was said to be implied in the statutory words 'substantial evidence.' In Copland v. Department of Taxation (1962), 16 Wis. 2d 543, 114 N.W. 2d 858, and in the earlier case of Gateway City Transfer Co. v. Public Service Comm. (1948), 253 Wis. 397, 34 N.W. 2d 238, we said in effect that substantial evidence was 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'

"Of course, in applying the substantial evidence test this court does not pass on credibility or assay the evidence to determine which view preponderates or what evidence supporting a theory is of the greater weight. This court, however, must evaluate the evidence, which has been determined to be credible and accepted by the trier of the fact to see if its sufficiency reaches that degree of substantiality in terms of burden of proof to support a finding or of convincing power that reasonable men acting reasonably might reach the decision the administrative agency did."

The provision for review under §111.07 (7) provides that "[t]he findings of fact made by the commission, if supported by credible and competent evidence in the record, shall be conclusive." This standard of review is explained in Wisconsin Employment Relations Commission vs. City of Evansville, 69 Wis. 2d 140, 230 N.W. 2d 688 (1975) wherein it is said, page 149:

"The standard of review, however, which we think appropriate appears in St. Francis Hospital v. Wisconsin Employment Relations Board (1959), 8 Wis. 2d 308, 311, 98 N.W. 2d 909, wherein we said, quoting an earlier case:

""The findings of fact made by the board, if supported by credible and competent evidence, are conclusive. Sec. 111.07 (7), Stats. The extent of the review by the courts is the same as that under the Workmen's Compensation Act, that is, 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. . . . The drawing of inferences from the facts is a function of the board and not of the courts. . . .""

Thus, it appears the standard of review under Chapter 227 provides for a more substantial burden on the Commission to sustain its findings than under Chapter 111.07 (7) to enforce the orders of the Commission.

In this matter, it appears to make little difference which standard of review is used. The evidence is uncontroverted that the employees were laid off after they commenced union activities and after the petitioner Town was aware of the activities. The testimony shows that after an initial short lay off, but before there could be bargaining, the two employees involved were sent a letter which stated that their "employment with the Town of Mercer is hereby terminated as of this date." Exhibit 5. This termination was approximately five weeks after the two employees had signed applications for membership in the intervenor union and less than two months after the annual town meeting had approved the budget for the up-coming fiscal year which budget did not appear to provide for any change in the number of employees of the Town, it being substantially the same as the previous year's budget.

The petitioner Town presented testimony to the effect that it was no longer economical to do its own work on the roads in the Town and that it was getting more and more expensive to repair the equipment and pay the employees. Representatives of the Town testified that they felt it would be less expensive to have the work contracted but stated that they had made no definitive studies of this and were unaware of any specific cost savings even as late as the hearing before the examiner which took place two and-a-half months after the termination of the employees here involved.

The bases of the claim by the intervenors here, complainant before the Commission, was that the petitioner here, respondent before the Commission, had committed a prohibited practice within the meaning of §111.70 of the Wisconsin Statutes in that the Town had declined and refused to recognize the complainant before the Commission as the agent of the employees and had improperly discharged the employees because of their labor activities and had increased the wages of an employee other than the dismissed employees to get him not to sign with the bargaining unit.

Regardless of which standard of review is employed, that as found in §227.20 (6) or that as found in §111.07 (7), of the Wisconsin Statutes, the findings made by the examiner and approved by the Commission are supported by credible and competent evidence and by substantial evidence in view of the entire record as submitted. The Court, in review, cannot substitute its determinations on credibility for that of the examiner inasmuch as the examiner had the opportunity to view the witnesses as they testified.

Concluding that there is both sufficient evidence to support the finding of the respondent here and that there is further substantial evidence justifying the findings, the findings of the examiner as affirmed by the Commission are herewith affirmed by the Court, and enforcement of the Commission determination is ordered.

The attorney for the respondent Wisconsin Employment Relations Commission shall prepare the necessary order for signing by the undersigned, submit it to the undersigned contemporaneously with the sending of copies of it to the attorney for the petitioner and attorneys for the intervenors. I will hold it for approximately five days to give such representatives the opportunity to object to the form of the order, if they have any such objections, and if none are forthcoming, will sign the order as presented and return it to the representative of the respondent for appropriate action.

Dated this 24th day of April, 1978.

BY THE COURT:

W. PATRICK DONLIN
W. Patrick Donlin, Circuit Judge

Clerk of the Courts
Honorable Alex J. Raineri
Mr. John D. Niemisto
Mr. Alan M. Levy