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#161-289

AFSCME, COUNCIL 24, WISCONSIN  
STATE EMPLOYEES UNION, AFL-CIO,  
and its appropriately affiliated  
LOCAL NO. 1,

Petitioners,

-vs-

WISCONSIN EMPLOYMENT RELATIONS  
COMMISSION,

Respondent.

MEMORANDUMOPINIONDecision No. 15261-A

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The respondent has moved to limit the issues in the petitioner's petition that can be reviewed. It is that motion to limit review that is before the Court.

The petitioners filed a complaint dated April 14, 1975, with the respondent Wisconsin Employment Relations Commission (Commission). In that complaint the petitioners alleged that the Department of Administration and its employee relations section committed unfair labor practices within the meaning of sec. 111.84(1)(a), (b), and (c). A hearing was conducted on June 23, 1975 before the entire Commission. On January 13, 1978 the Commission unanimously decided that no violations had occurred and ordered the complaint dismissed. The Commission issued Findings of Fact and Conclusions of Law and a detailed Memorandum Accompanying Findings of Fact, Conclusions of Law and Order.

In a petition dated January 19, 1978 the petitioners moved for a rehearing pursuant to sec. 227.12, Stats. That petition reads in part as follows:

"Pursuant to Section 227.12, Wis. Stats., . . . [Petitioner] moves for rehearing and/or reconsideration on the following issue not addressed by the Commission in its Findings of Fact, Conclusions of Law and Order dated January 13, 1978:

"Does the assault and battery committed on the duly designated representative of State employees and in their presence by officers or agents of the State of Wisconsin constitute a violation of Section 111.84(1)(a), Wis. Stats.?"

On January 30, 1978 the Commission denied the motion for rehearing.

On February 13, 1978 the petitioners filed a petition for judicial review under sec. 111.07(8) and Chapter 227. That petition requests review of the Commission's January 13, 1978 Findings of Fact and Conclusions of Law. The Commission filed a Notice of Appearance and Statement of Position on February 22, 1978 and on June 5, 1978 filed the present motion to limit judicial review.

The respondent's motion is based upon sec. 227.12(7), Stats., which states as follows:

"(7) If an application for rehearing is filed under this section, the person filing the application may not initiate a proceeding in a reviewing court based on any ground not set forth in an application for rehearing, unless good cause is shown to the court for failure to present the ground to the agency in the petition for rehearing."

Pursuant to this section the respondent requests that the Court limit review of the petition in this case to the issue set forth in the January 19, 1978 petition for rehearing.

Petitioners' first position is that sec. 227.12(7) Stats., does not apply. They put forth two arguments in support of that position.

The first argument is that sec. 227.12(7) does not apply because it was enacted after the original complaint was filed with the Commission. That complaint was filed on April 14, 1975 and sec. 227.12(7) was not effective until September 24, 1976. (Laws of 1975, Chapter 414, Section 14, published June 24, 1976). There is no merit to this argument.

Section 227.12(7) is a procedural statute and as such is not susceptible to the presumption against retroactive application.

"Procedural statutes are ordinarily accorded a retrospective construction in the sense that they will be applied to pending actions and proceedings, as well as to future actions, but will not be so applied as to defeat procedural steps completed before their enactment." 82 C.J.S., Statutes, §422, p. 998.

Section 227.12(7), therefore, is applicable to this action because although the complaint was pending at the time it was enacted the petitioners had not yet filed a petition for rehearing. The petition for rehearing was not filed until approximately 1 1/2 years after the statute became effective.

This Court notes an additional problem with the petitioners' argument due to the fact that they filed their petition for rehearing pursuant to sec. 227.12. It is difficult to see how the petitioners can first apply that section for their benefit and then argue that it does not apply when the respondent raises it.

The petitioners next argue that sec. 227.12(7) does not apply because when sec. 111.07(8), Stats., received its present form in 1943, Chapter 227 contained no language whatsoever regarding reconsideration or rehearing or limiting the scope of review. (Section 111.07(8) says that orders of the Commission shall be subject to review in the manner provided in ch. 227). Petitioners assert that because sec. 111.07(8) has remained unchanged since 1943, the review procedures found in ch. 227 in 1943 are the ones that sec. 111.07(8) adopts and are therefore the ones that should be followed today.

The Court finds no merit to that argument. When a statute refers to a general body of law that statute thereafter adopts and incorporates all of the amendments to that body of law. Layton School of Art & Design v. WERC (1978), 82 Wis. 2d 324, 338 n.9. Section 111.07(8) therefore incorporates the amendments to Chapter 227 and sec. 227.12(7) applies in this case.

The petitioners' next position is that if sec. 227.12(7) is applicable it does not restrict review. They argue that since the respondent filed an appearance and a statement of position it has waived being able to limit review under sec. 227.12(7).

That argument fails because jurisdiction for judicial review of findings and orders of administrative agencies is entirely statutory and cannot be waived. Cudahy v. Dept. of Revenue (1974), 66 Wis. 2d 253, 260. It is not within the respondent's power to waive the requirements of sec. 227.12(7). The petitioners' argument of estoppel also fails for the same reasons.

The petitioners' final argument is that sec. 227.12(7) does not limit review to the matters asserted in the petition for rehearing because they fall within the "good cause" exception of that section. They state that the reason they did not request that all of the issues be reheard is that they felt that the Commission had previously disposed of all of the other issues in a complete and exhaustive fashion. They felt it would only be repetitive and a waste of time to ask the Commission to rehear all of the issues.

This Court does not find that the petitioners' argument constitutes "good cause" within the meaning of sec. 227.12(7). The petitioners' position simply ignores the statutory language; it does not offer a reason for their noncompliance. The petitioners may feel that the requirement of sec. 227.12(7) does not make any sense but they are still obliged to comply with it until it is legislatively changed.

For the reasons stated herein the respondent's motion to limit review to the issue set forth in the petition for rehearing is granted. Counsel for the respondent may prepare the appropriate order, submitting the same to opposing counsel ten days before presenting it to the Court for signature.

Dated: February 16, 1979.

BY THE COURT:

P. Charles Jones /s/  
P. CHARLES JONES, CIRCUIT JUDGE  
DANE COUNTY CIRCUIT COURT III