STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DAVID A. KATZ,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

NOTICE OF ENTRY OF JUDGMENT
Case No. 79-CV-3326

Decision No. 15725-B

TO: Richard V. Graylow
Attorney at Law
Lawton & Cates
110 East Main Street
Madison, Wisconsin 53703

Attorney for Petitioner

PLEASE TAKE NOTICE that a final judgment of which a true and correct copy is hereto annexed, was duly entered in the above action in the Circuit Court for Dane County, Wisconsin, on the 23rd day of June, 1980.

Dated at Madison, Wisconsin, this 26th day of June, 1980.

BRONSON C. LA FOLLETTE
Attorney General

JOHN D. NIEMISTO
Assistant Attorney General

Attorneys for Respondent,
Wisconsin Employment Relations Commission

By: Gordon Samuelsen /s/
Gordon Samuelsen
Assistant Attorney General

P. O. Address:

114 East, State Capitol
Madison, Wisconsin 53702
Telephone: (608) 266-0278

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

* *

DAVID A. KATZ,

Petitioner,

Case No. 79-CV-3326

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

JUDGMENT

Decision No. 15725-B

Respondent.

* *

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

* *

The above entitled review proceeding having been heard by the Court on the 9th day of June, 1980, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Richard V. Graylow of the law firm of Lawton & Cates; and the respondent Commission having appeared by Assistant Attorney General John D. Niemisto; and the Court having had the benefit of the argument and briefs of counsel, and having files its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Order of respondent Wisconsin Employment Relations Commission dated June 8, 1979, entered in the matter of David A. Katz, Complainant, vs. City of Madison, Respondent, Decision No. 15725-B, be, and the same hereby is, affirmed.

Dated this 23rd day of June, 1980.

By the Court:

George R. Currie /s/
Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

* *

DAVID A. KATZ,

Petitioner,

Case No. 79-CV-3326

vs.

MEMORANDUM DECISION

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 15725-B

Respondent.

* *

BEFORE: Hon. GEORGE R. CURRIE, Reserve Circuit Judge

* *

This is a proceeding by petitioner Katz pursuant to sec. 111.07(8) and ch. 227, Stats., to review an order of respondent Wisconsin Employment Relations Commission (hereafter the Commission) dated June 8, 1979, which affirmed the findings of fact of the examiner, modified the examiner's conclusion of law, and affirmed the examiner's order dismissing petitioner's complaint which he had filed with the Commission.

STATEMENT OF FACTS

The facts herein stated were those found by the examiner in his findings of fact which were affirmed by the Commission.

Petitioner Katz is employed by the city of Madison in its water utility department and is a member of Local 60, AFSCME, AFL-CIO. Local 60 and the city are parties to a collective bargaining agreement covering wages, hours and conditions of employment of employees in the water utility department. The collective bargaining agreement contains a grievance and arbitration procedure for resolving disputes involving the interpretation, application or enforcement of the terms of the agreement. The final step in the grievance arbitration procedure is final and binding arbitration.

Petitioner was hired on June 5, 1973, and was classified as a Public Works Maintenance Worker I. On July 8, 1975, he requested training as a Water Works Operator. Subsequently, he was assigned as a trainee to learn Water Works Operator I duties, which training commenced January 26, 1976.

On July 20, 1976, petitioner filed a grievance alleging that he did not receive "action out of class" pay in violation of the collective bargaining agreement. That grievance was resolved at step three of the grievance procedure on July 26, 1976.

On July 22, 1976, petitioner was given verbal instructions that his training assignment as Water Works Operator I would be terminated effective July 27, 1976. On July 27, 1976, petitioner began working at the main office of the water utility in the capacity of a Public Works Maintenance Worker I and was paid at that corresponding pay rate.

On August 3, 1976, petitioner filed a grievance which incorporated allegations of discrimination as well as alleged violations of various articles in the collective bargaining agreement. That grievance was denied through step three of the grievance procedure and subsequently was withdrawn prior to arbitration.

On July 28, 1977, petitioner filed a prohibited practices complaint with the Wisconsin Employment Relations Commission alleging various violations of the Municipal Employment Relations Act (hereafter MERA), together with alleged violations of the collective bargaining agreement. The alleged statutory violations occurred when the transfer took place on July 27, 1976.

THE COMMISSION'S CONCLUSION OF LAW

The Commission's conclusion of law reads:

> "That since the alleged prohibited practices occurred on a date more than one year preceding the date on which the complaint was filed, Sections 111.70(4)(a) and 111.07(14), Wis. Stats., precludes the Wisconsin Employment Relations Commission from exercising its jurisdiction over the merits of said complaint."

THE ISSUE

The issue to be resolved is whether the Commission committed error in dismissing the petitioner's complaint on the ground set forth in its conclusion of law.

THE STATUTES INVOLVED

Section 111.70(4)(a), Stats., provides:

> Prevention of prohibited practices. Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in section 111.07, the term "prohibited practices" shall be substituted.

Section 111.07(14), Stats., provides:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

Section 990.01(49), Stats., provides:

> (49) YEAR. "Year" means a calendar year, unless otherwise expressed; "year" alone means "year of our lord."

Section 990.001(4)(d), Stats., provides:

> (d) Regardless of whether the time limited in any statute for the taking of any proceeding or the doing of an act is measured from an event or from the date or day on which such event occurs, the date on which such event took place shall be excluded in the computation of such time.

THE COURT'S DECISION

Before addressing itself to the legal issues of statutory interpretation, the Court will first consider a factual issue raised by petitioner. Petitioner contends that the specific act of unfair labor practice alleged in its complaint, viz., his transfer from a Water Works Operator I to that of a Public Works Maintenance Worker I, occurred on July 28, 1976, and not July 27, 1976.

This contention is grounded on the fact that the answer to the complaint filed by the City of Madison states that the assignment of petitioner to the job of Maintenance Worker I was "effective as of July 28, 1976". However, in finding of fact No. 4 it was expressly found this took place on July 27, 1976, which finding was grounded on testimony adduced at the hearing before the examiner. Neither the petitioner's brief nor the petition for review to this court raises any issue that this finding of fact was not supported by substantial evidence. This in the opinion of the court precludes petitioner from now contending that his transfer to the maintenance job was effectuated on July 28, 1976. The one year period specified in sec. 111.07(14) was not enacted as a statute of limitations for the protection of employers, but its obvious objectives are to benefit the Commission so that it does not have to decide the merits of stale claims and to discourage filing of such claims.

With respect to the issues of statutory interpretation, the petitioner advances these contentions:

> (1) Section 111.70(4)(a) does not adopt the provisions of sec. 111.07(14).
>
> (2) Even though the alleged prohibited practice of transferring petitioner to the maintenance position may have occurred July 27, 1976, a year had not elapsed therefrom when petitioner filed its complaint with the Commission.

Before discussing these specific issues the Court deems it advisable to first discuss the general principles applicable to court review of statutory interpretations made by the Commission.

Although this court is not bound by the Commission's conclusions of law, Milwaukee v. WERC, 71 Wis. 2d 709, 714, 239 N.W. 2d 63 (1976), where:

> "The WERC's determination is neither without reason nor inconsistent with the purposes of the statute, [and] since that is the ultimate test . . . the determination of the WERC will be affirmed."

Milwaukee v. Wisconsin Employment Relations Comm., 43 Wis. 2d 596, 602, 168 N.W. 2d 809 (1969). In Glendale Prof. Policemen's Asso. v. Glendale, 83 Wis. 2d 90, 264 N.W. 2d 594 (1978), the court characterized the rule regarding the standard of review for rulings by the Commission as "whether that ruling constitutes a rational interpretation of MERA." 83 Wis. 2d at 100, citing Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 242 N.W. 2d 231 (1975) and City of Milwaukee v. WERC, 71 Wis. 2d 709, 239 N.W. 2d 63 (1976).

Moreover, the court must accord due weight to the "expertise, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Sec. 227.20(10), Stats.; Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W. 2d 617 (1967).

An agency's longstanding and consistent application of a statute is to be distinguished from cases of first impression involving either the interpretation of a statute or the application of that statute to a particular set of facts. In such cases the court is not bound by the Commission's interpretation of the statute where the Commission has limited experience with the issues involved even though such interpretation would have "great bearing" and would be accorded "due weight" in the court's determination as to what the appropriate interpretation should be. Beloit Education Assoc. v. WERC, 73 Wis. 2d 43, 67-68, 242 N.W. 2d 731 (1976); Unified S.D. No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 93, 259 N.W. 2d 724 (1977). Compare City of Brookfield v. WERC, 87 Wis. 2d 819, 275 N.W. 2d 723 (1979).

The Commission's interpretation of sec. 111.70(4)(a), that it incorporated the provisions of sec. 111.07(14), was not in this case one of first impression. Counsel for the Commission have filed with this Court copies of two 1977 decisions of the Commission in cases arising under MERA in which the Commission interpreted sec. 111.70(4)(a) as adopting sec. 111.07(14). These decisions are Carol F. Roso, Helen Hoekstra, Complainants, vs. School District of Kettle Moraine, Respondent, Decision No. 15188-B, dated March 29, 1977; and Northwest United Educators and Norris Rawhouser, Complainants, vs. Cooperative Educational Service Agency No. 4, et al., Respondents, Decision No. 13100-E, dated December 29, 1977. This establishes the long standing and consistent interpretation of the Commission.

Even if it were a rational interpretation that the one year period limitation of sec. 111.07(14) is not a matter of procedure, the Court holds that it was a rational interpretation, and one which was consistent with the purposes of the statute, for the Commission to conclude that it is, and therefore the provision of sec. 111.07(14) is made applicable to MERA cases by sec. 111.70(4)(a). The Court accords such interpretation great weight and approves the same.

The Court turns now to the other issue of whether July 28, 1977, was within the one year period that commenced to run from July 27, 1976, when petitioner was transferred to the maintenance position. In computing the year period of sec. 111.07(14) the date of July 27, 1976, is excluded, and the computation of the year commences with July 28, 1976, and ends with July 27, 1977. If, as contended by petitioner, it included July 28, 1977, the period would contain two July 28ths and, therefore, would not be a year, but a year plus one day. As no "leap year" is involved in this computation, the period contended for by petitioner would contain 366 days, not 365 days. Clearly, the Commission properly determined that petitioner's complaint was not timely filed.

Let judgment be entered affirming the Commission's order of June 8, 1979, which is the subject of this review.

Dated this 23rd day of June, 1980.

By the Court:

George R. Currie /s/
Reserve Circuit Judge