STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,
DEPARTMENT OF EMPLOYMENT
RELATIONS,

Petitioner,

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

DECISION ON REVIEW

Decision No. 18397-B

Case No. 82-CV-3066

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This matter is before the Court for judicial review under ch. 227, Wis. Stats., of a final decision and order of the Wisconsin Employment Relations Commission (Commission or WERC) dated May 18, 1982. The Commission's hearing examiner, Peter G. Davis, had issued his findings of fact, conclusions of law and order on May 17, 1982. Examiner Davis had concluded that the state, through two of its agents, had committed unfair labor practices within the meaning of sec. 111.84)1)(a) and (c), Wis. Stats., by "terminating Hartberg's trainee appointment in part because Hartberg had engaged in protected concerted activity." By operation of sec. 111.07(5), Wis. Stats., the WERC adopted Examiner Davis' findings of fact, conclusions of law and order on May 18, 1982.

At issue on review is whether the WERC's finding that anti-union animus was a factor in the state's decision to terminate Hartberg is supported by substantial evidence. Also at issue, if we find the Commission's finding of fact to be supported by the substantial evidence, is whether the Commission erred in applying the supreme court's decision in Muskego-Norway C.S.J.S.D. v. WERB, 35 Wis. 2d 540, 151 N.W. 2d 617 (1967), to Hartberg's unfair labor practice charge arising under the provisions of the State Employment Labor Relations Act (SELRA), sec.111.80 et seq., Wis. Stats.

DECISION

Judicial Review

The scope of judicial review under ch. 227, Wis. Stats., is confined to the record as sec. 227.20(1), Wis. Stats., provides. Further, the Court must separately consider, as sec. 227.20(3), Wis. Stats., directs, questions of law, fact and procedure. Finally, sec. 227.20(5) and (6), Wis. Stats., define the standards of review to be applied by the court. An agency's factual findings must be supported by "substantial evidence." The Wisconsin supreme court has stated in this regard:

> "An agency determination being reviewed under Chapter 227 will not be overturned because it is against the great weight and clear preponderance of the evidence. Rather, the agency's decision may be set aside by a reveiwing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." (Citations omitted.)

Hamilton v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 611, 617-18, 288 N.W. 2d 857 (1980).

Within the confines of review imposed, we will analyze first whether the WERC's finding of anti-union animus is supported by the substantial evidence and, if necessary, whether Muskego-Norway is applicable to this case.

Anti-Union Animus

Whether an employe's union activity was a motivating factor in a decision to discharge is a question of fact. Kenosha Teachers Union v. WERC, 39 Wis. 2d 196, 201, 158 N.W. 2d 914 (1968). The WERC ultimately found, in Finding of Fact No. 18, that:

> The recommendation of Harrah and Riley that Hartberg's trainee appointment be terminated was based, in part, upon hostility toward Hartberg for having engaged in protected concerted activity.

Hartberg had been discharged from her position as a Public Health Educator-Trainee on October 26, 1980. Hartberg, represented by United Professionals at the time of discharge, had formerly been represented by the Wisconsin State Employee's Union at the same workplace. She had been employed by the Department of Health and Social Services, Division of Health, Bureau of Prevention in the

Epidemiological Surveillance and Assessment Program (VD Program) in the Milwaukee district office. The VD Program is a joint program, staffed by federal, state and municipal employes, with federal employers supervising the other staff.

The record is replete with testimony relating to the tensions and hostility existing in the Milwaukee VD Program since 1978 and the WSEU's involvement in various disputes between supervisors and employes, and federal employes and state employes. The long, problematic history of the VD program will not be repeated here. However, the record clearly supports the fact that Hartberg engaged in protected concerted activities and that there was a history of supervisor antagonism toward employes, including Hartberg, who involved their bargaining representatives in program decisions and workplace disputes. See, e.g. T.11-23, 29-30, 35-36, 129-144.

Consequently, we find the WERC's conclusion that the decision to terminate Hartberg was in part based on anti-union animus to be supported by substantial evidence in the record. Based on the record, we will not disturb the WERC's finding since a reasonable person, acting reasonably, could have reached the decision the WERC reached from the record and its inferences in this case.

Muskego-Norway

Having found that Hartberg's termination was partially motivated by anti-union animus, we now turn to the issue of whether Hartberg's termination constituted an unfair labor practice within the meaning of sec. 111.84(1) of SELRA and whether the WERC appropriately applied the supreme court's holding in Muskego-Norway, supra, to the facts of this case. The State argues that the WERC erred in applying Muskego-Norway to Hartberg's termination and should have instead applied the decision of the National Labor Relations Board (NLRB) in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), enforced as modified, 662 F. 2d 899 (1981). Essentially, the State posits that Muskego-Norway is inapplicable to an employe in Hartberg's position, a probationary

state employe, covered under the SELRA and also the Civil Service Merit System. Section 230.28(5), Wis. Stats., provides that probationary employes may be discharged "at the discretion of the appointing authority."

Muskego-Norway holds "that an employe may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exists for firing him." Muskego-Norway, supra, 35 Wis. 2d at 562; quoted as authority in Kenosha Teachers Union v. WERC, supra, 39 Wis. 2d at 203. Essentially, the state argues that the holding of Muskego-Norway, a decision affecting an employe covered under the Municipal Employment Relations Act (MERA), is not applicable to this case because:

> "...MERA does not have SELRA's special solicitude for the civil service system and whatever may be the value of Muskego-Norway's 'in-part' test to the private sector or MERA, nothing in SELRA suggests that the legislature intended sec. 111.84 Stats. to be interpreted in a manner that requires the State to retain admittedly poor employees contrary to the Civil Service Merit System and sec. 230.28)5), Stats."

Petitioner's Brief (November 17, 1982), p. 30.

The State's argument that Muskego-Norway is not applicable to the facts of this case and that this Court should instead be guided by a private-sector NLRB decision is unpersuasive. First, whether or not state employes enjoy the benefits of bargaining unit representation as a matter of legislative grace is irrelevant. Contrary to the State's argument, a union represented employe, probationaary or not, is protected by SELRA. The Civil Service Merit System gives no right to a state employer to "interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in sec. 111.82." Section 111.84(1)(a), Wis. Stats. In this respect, the provisions of the SELRA and the MERA are identical and there exists no public policy reason on which to base a declaration that Muskego-Norway is inapplicable to SELRA.

To argue, as does the State, that SELRA "gives way" to ch. 230 when it comes to probationary state employes defeats the very legislative purpose of sec. 111.84(1), Wis. Stats., -- that state employes have the right to organize collectively and engage in union activities -- a right which is equally possessed by state

employes whether or not they can be terminated at the discretion of their employer or solely for "just cause." Whether a public sector employe is protected under MERA or SELRA, each has the rights accorded by statute. Probationary status or not, an employe cannot be terminated for an illegal reason, i.e., because of race, sex or age. We hold that an employe may not be discharged for engaging in protected concerted activities since it is a right which is not extinguished by the Civil Service Merit System.

Thus, for the policy reasons announced in Muskego-Norway and affirmed in Kenosha, no rational basis exists on which to distinguish MERA from SELRA. The rights accorded to employes are identical, and the public policies underlying each seek to achieve the same purpose. While the merits of Muskego-Norway's "in part" test may be questionable, it is far more appropriate for the supreme court to reconsider its holding in Muskego-Norway than for this court to ignore the case when no policy reasons support such a course of action. Accordingly we find that the WERC did not error in applying the holding of Muskego-Norway to the facts of this case.

The decision of the WERC is therefore affirmed. Counsel for the WERC shall prepare the judgment of affirmance with a copy to be provided to all other counsel prior to submission to the Court for signature.

Dated: June 9, 1983

BY THE COURT:

Richard W. Bardwell

RICHARD W. BARDWELL
Circuit Judge