STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CIVIL DIVISION
BRANCH 26

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PHYLLIS ANN BROWNE, et al,

Petitioners,

-vs- Case No. 750-002

WISCONSIM EMPLOYMENT RELATIONS COMMISSION, Decision No. 18408-H

Respondent.



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THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, et al,

Petitioners,

-vs- Case No. 749-856

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Decision No. 19545-H

Respondent.

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**DECISION**

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The consolidated petitions for review request this Court to overturn certain conclusions of law rendered by the Wisconsin Employment Relations Commission (WERC). The instant petitions represent the culmination of extensive litigation involving statutory and constitutional challenges to the application and operation of the Wisconsin Municipal Employ-

ment Relations Act (MERC), section 111.70, concerning fair-share agreements in the public sector.

In Case No. 750-002, the petitioning nonunion employees of Milwaukee County and the Milwaukee Board of School Directors seek judicial review of the WERC's determination that certain chargeable union activities and procedural safeguards concerning fair-share fee deductions are constitutionally and statutorily sound. In Case No. 749-856, the petitioning unions challenge the WERC's determination that certain procedural requirements be complied with in accordance with those set forth in Chicago Teachers Union, Local No. 1 v. Hudson, 475U.S. 292 (1986). Because I conclude that the commission was within its authority in applying the applicable law in these cases, the decision of the WERC is affirmed and the consolidated cases are dismissed.

In the early 1970's, local unions entered into fair-share agreements with the Milwaukee Board of School Directors and Milwaukee County. The agreements provided that all nonmember union employees would be required to make a monthly payment to the unions for the cost of collective bargaining and contract administration. This "fair-share" fee was equal to the regular dues paid by union members. Subsequently, nonunion employees filed two separate actions in Milwaukee County Circuit Court challenging the constitutionality of sections 111.70(1)(f) and (2) which permit the collection of

fair-share fees from nonmembers. Browne v. Milwaukee Board of School Directors, No. 410584; Johnson v. County of Milwaukee, No. 411578.

In 1978, the Wisconsin Supreme Court held that 111.70 was constitutional on its face because it authorized fair-share deductions from two permissible categories of union activities -- collective bargaining and contract administration. Brown v. Milwaukee Board of School Directors, 83Wis.2d316 (1978). The Supreme Court referred both cases to the WERC to make findings of fact and conclusions of law regarding the rights and responsibilities of the parties under the fair-share statute, 111.70(1)(f) and 111.70(2).

In April, 1986, the complainants in both actions requested the WERC to review the fair-share agreements in light of the United States Supreme Court's decision in Hudson. (In Hudson, the Supreme Court set forth procedural requirements for the collection of fair-share fees which provided constitutional safeguards.) After the WERC consolidated Johnson and Browne, a full hearing was held before the commission. The WERC determined, among other things, that the unions committed prohibited practices within the meaning of section 111.70(3)(b) by providing some, but not all, of the procedural safeguards set forth in Hudson. The commission ordered the unions to rectify the deficiencies in their notice and fair-share procedures to comply with Hudson. In

July, 1987, the subject petitions for review were filed by the employees and unions.

The facts are not in dispute. Therefore, the issue is whether the WERC erred in applying the law. Although the commission's conclusions of law are not binding, the reviewing court must sustain them if they are reasonable. Nigbon v. DILHR, 115Wis.2d606, 611 (Ct. App. 1983). This is true even if an alternative view exists which is equally reasonable. Id. Further, the reviewing court will defer to the administrative agency's special expertise in the construction and interpretation of a given law. Jenks v. DILHR, 107Wis.2d714, 720 (Ct. App. 1982).

In Case No. 750-002, petitioners first argue that this Court should review their petition de novo because it presents constitutional issues of first impression. However, the Wisconsin Supreme Court in Browne held that the "constitutional issues have been resolved and factual issues predominate." 83Wis.2d at 335. Further, the reviewing court will defer to an agency's legal determinations even if the questions raised are of issues of first impression. Milwaukee v. WERC, 43Wis.2d596 (1968); Berns v. WERC, 99Wis.2d252 (1980). Therefore, petitioners' request for a de novo review is denied.

Petitioners argue that the WERC erroneously concluded that certain categories of union activities may be included in calculating fair-share fees. The challenged categories include

public advertising, organizing and serving as the exclusive bargaining representative in bargaining units in which non-members are not employed, lobbying and litigation.

Regarding public advertising, the WERC concluded that only activities relating to the collective bargaining process and contract administration would be chargeable to nonunion employees. In light of Browne and 111.70(1)(f), the WERC's conclusion is not unreasonable.

The WERC also concluded that union organizing and representation in bargaining units in which petitioners are not employed increases the union's overall size and therefore, enhances the union's ability to be more effective and provide better services on behalf of all employees. Petitioners' legal authority, Ellis v. Railway Clerks, 466U.S.435 (1984), can be distinguished from the present case since neither a federal statute nor Congress' authority is at issue here. Further, none of the cases cited by petitioners define what union expenditures are proper or improper, or prohibit such activities in the municipal employment context. Therefore, the WERC's conclusions are reasonable.

The WERC also concluded that litigation relating to concerted activity and collective bargaining is a chargeable expense. However, such activity must relate to collective bargaining or contract administration. The WERC's conclusion is reasonable given the Browne decision and 111.70(1)(f).

Finally, the WERC concluded that lobbying activity relating to collective bargaining regulations and legislation is a chargeable expense based upon the unique nature of a "public employer" as discussed in Abood v. Detroit Board of Education, 431U.S.209 (1977). In Abood, the Supreme Court distinguished a public employer from a private one in that a union involved in the collective bargaining process in the public sector may require approval from "other public authorities." In light of Abood, union lobbying activity is a chargeable expenditure and the WERC's conclusion is not unreasonable.

Next, the petitioners argue that the WERC erroneously concluded that the fair-share statute permits the collection of full union dues from nonobjecting employees. Sec. 111.70 (f) provides that nonmembers are required to pay their "proportionate share" measured by the "amount of dues uniformly required of all members." Neither 111.70 nor Browne restrict the fair-share fee deduction to an amount less than full union dues. Further, the legislature did not place a limitation on the amount of fees a union could collect from a fair-share payor, absent an objection, when it passed the final version of AB-198. Finally, Hudson and Abood require that objecting nonmember employees make their dissent known regarding the propriety of the union's fee. Therefore, the WERC's conclusion that fair-share fees may be collected from nonobjecting employees

equal to the amount of full union dues is reasonable.

Petitioners argue that the WERC erroneously concluded that certain union procedures for exacting fair-share fees provide the constitutional safeguards set forth in Hudson. First, petitioners argue tht the union's advance disclosure procedures are inadequate because they do not require verification by an auditor or provide a sufficient explanation of the fee.

Regarding verification by an independent auditor, the WERC concluded that by depositing 100% of the disputed fee in escrow, the "independent auditor" requirement was satisfied. In a substantially similar case, a federal court interpreted the Hudson auditor "requirement" as merely ensuring that the usual function of an auditor be fulfilled. Andrews v. Education Association of Cheshire, 829F.2d335 (2nd Cir. 1987). Hudson expressly provides that an escrow "less than the entire amount" must be independently audited. 106S.Ct. at 1078, footnote 23. Thus, the WERC's conclusion is not unreasonable.

With respect to the union's explanation of the fee, the WERC concluded that it provided employees with sufficient information in accordance with Hudson. All that is constitutionally required under Hudson is an "adequate explanation" of the basis for the fee. 106S.Ct. at 1078. A detailed or exhaustive list of the expenditures is not required. Here, the union's information included a list of expenditures

collected from all employees, a detailed financial statement and cost breakdowns. Therefore, the WERC's conclusion is reasonable.

Petitioners argue that the objection procedures are too burdensome and that the WERC erred in concluding that the union's procedures do not present unwarranted obstacles under Hudson. It is undisputed that Hudson requires objecting employees to make their dissent known in a reasonable time and manner. However, administrative inconvenience and cost alone are not sufficient to challenge the constitutional validity of the WERC's determination. Cleveland Board of Education v. La Fleur, 414U.S.632 (1973). Further, Hudson does not address the issue of time limits for objections or annual submissions of the same. Therefore, the conclusion of the WERC is reasonable.

Petitioners also argue that the WERC erroneously concluded that an arbitrator's decision regarding the propriety of a fair-share fee only applies to objecting nonmember employees in contrast to all nonmembers. As discussed earlier, a nonmember employee must affirmatively make his dissent known to the union in order to object to the fair-share fee. Abood; Hudson. Thus, only challenges to a fair-share fee will be subject to review by an impartial decisionmaker. The WERC's conclusion is not unreasonable.

Petitioners argue that the WERC erroneously concluded

that Hudson does not require that fair-share fees be returned pending the arbitrator's decision. In Hudson, the Supreme Court held that to require unions to return fair-share fees "would deprive a union of acce ss to funds it's entitled to." 106S.Ct. at 1077-78. Further, Hudson requires that the "amounts reasonably in dispute" be placed in escrow pending the arbitrator's final decision. Id. at 1078. Therefore, the WERC's conclusion is not unreasonable.

Next, petitioners argue that the WERC erroneously concluded that employers could lawfully deduct fair-share fees without providing the necessary procedures themselves or requiring the unions to set forth such procedures in its agreement. However, the WERC did not make any factual findings or conclusions of law as to whether the employers committed prohibited labor practices because no evidence or argument was advanced by petitioners that the employers took action other than to comply with the collective bargaining agreement. Accordingly, the WERC's conclusion that the employers could deduct fair-share fees and turn them over to the unions is reasonable.

Next, petitioners contend that the WERC erred when it ordered that all unlawfully collected fees be placed in escrow pending the establishment and approval of necessary fair-share and notice procedures. Hudson requires that fair-share fees be escrowed pending an arbitrator's determination of the propriety of challenged deductions. 106S.Ct. at 1078.

Further, the cease-and-desist order suggested by petitioners is not an appropriate remedy. Jordi v. Sauk Prairie School Board, 651 F.Supp.1566, 1581 (W.D. Wis. 1987); Railway Clerks Allen, 373U.S.113, 119 (1963). Accordingly, the WERC's remedial order is reasonable and appropriate.

Finally, petitioners argue that the WERC erred in applying a one-year limitations period under sec. 111.07(14) to the 111.70 claims filed by employees who were later denied class status in Johnson. Sec. 111.07(14) provides a one-year statute of limitations for 111.07 claims concerning unfair labor practices. However, sec. 111.70(4)(a) makes the one-year period applicable to sec. 111.70 claims. Further, the Court in Jordi held that sec. 111.07(14) applies to 111.70 claims before the WERC, as here. 651F. Supp. at 1574. Therefore, the WERC's conclusion is reasonable.

In Case No. 749-856, the petitioning unions first argue that the WERC erred in concluding that Hudson applies retroactively to the present actions, particularly with respect to their notice procedures. A decision will be applied prospectively if three criteria are satisfied: (1) a new principle of law is established by the reversal of clear past precedent or by the determination of an issue of first impression; (2) when weighing the merits of the case, the prior history, purpose and effect of the rule in question, retroactive application would retard its operation;

and (3) retroactive application would cause substantial inequitable results. Chevron Oil Co. v. Hudson, 404U.S.97 (1971).

Hudson rests on long-recognized first amendment principles set forth in prior decisions, including Abood, Ellis, Allen and Machinists v. Street, 367U.S.740 (1960). In effect, Hudson constitutes an extension of the doctrines initially developed in Street. Accordingly, Hudson neither overruled past precedent nor decided an issue of just impression. Since the first criterion of Chevron was not satisfied, the WERC's retroative application of Hudson is reasonable.

Next, petitioners contend that the WERC erroneously concluded that certain procedural safeguards imposed by the commission were proper under Hudson. First, petitioners argue that the WERC acted beyond its jurisdiction when it ordered class-wide relief for nonmembers who were not parties to the present proceedings. It is a longstanding rule of agency law that an administrative agency is not bound by judicial rules of procedure. Wisconsin P & L. Co. v. Public Service Commission, 231Wis.390; Layton School of Art and Design v. WERC, 82Wis.2d324, 367 (1977). The legislature intended that the WERC have substantial powers to effectuate the purpose of 111.70. WERC v. Evansville, 69Wis.2d140, 158 (1974). Further, remedial orders will be sustained by the reviewing court unless they have "no tendancy" to effectuate the purposes

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of the statute in question. Libby, McNeill & Libby v. WERC, 48Wis.2d272 (1970). Thus, the WERC acted in a reasonable manner.

The petitioners also argue that the WERC's order vacating an impartial arbitration award is contrary to the law. The WERC concluded that the union's notice and fair-share procedures were constitutionally deficient. As a result, the commission ordered a new arbitration period once the procedures were rectified. In light of Evansville, Layton School and Libby, the WERC's remedial order is reasonable and appropriate.

The petitioners also contend that the WERC erroneously concluded that the disclosure of financial information must be verified by an auditor. Further, petitioners argue that this requirement is unduly burdensome for small locals. Neither cost nor inconvenience constitute valid challenges to the constitutionality of a procedure. Cleveland Board of Education, 414U.S. at 647. Furthermore, the WERC specifically concluded that if the union escrows 100% of the fees collected from objecting employees, no verification by an independent auditor is required under Hudson. Therefore, the WERC's conclusion is not unreasonable.

Finally, petitioners challenge the WERC's factual findings and conclusions of law in determining that the union's

master account for depositing fair-share fees is not a "true" escrow. Specifically, petitioners dispute the commission's finding that AFSCME District Council 48 established the escrow account under its control. Petitioners do not challenge the evidence in support of WERC's finding. Instead, petitioners argue that the WERC failed to make any findings that the local union was a "subterfuge" for AFSCME's use. However, the WERC's specific finding that the escrow account was established and controlled by the union is not in dispute.

The term "escrow" engenders property in the control of a neutral third party. Although Hudson does not address the issue of whether an escrow account be in the control of a neutral party, the Supreme Court held that an arbitrator must be selected by an entity other than the union. Similarly, the WERC could conclude that the union's escrow account be under the control of a third party. Therefore, the commission's conclusion of law is not unreasonbale.

The decision of the commission is upheld and these cases are ordered dismissed. In accordance with this decision, the WERC's counter-petition is also affirmed.

Michael P. Sullivan

HON. MICHAEL P. SULLIVAN
Circuit Court Judge, Branch 26
Dated this 16 day of March, 1989,
at Milwaukee, Wisconsin.