STATE OF WISCONSIN | CIRCUIT COURT | BARRON COUNTY

Northwest United Educators,

Petitioner,

-vs-

DECISION

Wisconsin Employment Relations Commission and The School District of Shell Lake,

Case No. 84 CV 238

Respondent.

Decision No. 20024-B

NATURE OF THE CASE

This is a Circuit Court review of an Administrative Decision of the W.E.R.C. under Chapter 227, Wis. Stats. The W.E.R.C. examiner found that Petitioner's client, a school teacher employed by the Shell Lake School District, Washburn County, Wisconsin, propositioned a 12 year old student during a phone conversation. Petitioner appealed the examiner's findings and the District School Board's decision to terminate the teacher. The W.E.R.C. reviewed the examiner's findings, conclusions and judgment and affirmed.

ISSUES

I

Was Petitioner denied "due process by the School Board" because the Board conducted its proceedings while criminal charges, ostensibly arising out of the same factual backdrop were pending?

Decided "no" by the examiner and commissioner. Answered "No" by the Court.

II

Was the examiner's/commission's finding that Petitioner propositioned the student supported by substantial evidence?

Decided "yes" by examiner/commission. Answered "Yes" by the Court.

FACTS

The Petitioner made a phone call to C.S., a 12 year old student/neighbor on 2/12/82 at about 5:45 p.m. C.S. claimed that during the call (which lasted 40 to 60 minutes), Petitioner asked her two separate times to go to bed with him. Petitioner denies asking C.S. to go to bed with him. He admits calling C.S. and asking her for her babysitting services. His position is that she misunderstood his statements and drew an incorrect inferrence, namely that she was being propositioned.

The School District conducted a hearing on the allegation made by C.S. The attorney for the School District (who is also the District Counsel before this Court) presented the evidence and served as a legal advisor at that hearing.

At the time of the hearing, criminal charges were pending against the school teacher. Ostensibly, on the advice of his lawyer, the teacher declined to testify at the Board proceeding on Fifth Amendment grounds. The gist of his version of events was introduced, however, through the testimony of the District Superintendent.

The Board adopted the child's version of events and terminated the teacher. Any and all other allegations against him were dropped.

The Petitioner appealed on behalf of the teacher to W.E.R.C. for review. The hearing examiner, Lionel Crowley, conducted the hearing, at which time the child re-testified. Although criminal proceedings were still pending, the teacher chose to testify before the examiner. He was represented at the hearing by the Northwest United Educators.

The examiner entered a written set of Findings, Conclusions and Judgment and memorandum decision which determied:

A) The Board did not violate the teacher's due process rights;

B) Adopted the child's version of events;

C) Affirmed the District's termination order.

Petitioner obtained full W.E.R.C. review of the examiner's decision and the Commission analyzed the examiner's determination and upheld it in every respect.

RATIONALE

Petitioner concedes that if the teacher made the remarks as described by the student, just cause exists for the discharge.

I - DUE PROCESS CLAIM

The Petitioner claims the District violated the just cause provision of the collective bargaining agreement by conducting a hearing on the teacher's discharge and incidentally, actually discharging him while criminal charges were pending. Petitioner does not cite any United States or Wisconsin constitutional rights in support of his proposition, but rather, generally claims implicit due process inherent in the just clause provision of the District/Teacher contract.

The Commission is correct that as a matter of constitutional law, the Board or District may proceed with the administrative hearing during the pendency of criminal charges so long as no discharge results merely from the employee's invocation of Fifth Amendment rights; Diebold v. Civil Service Commission, 611 F2d, 697 (Eighth Cir. 1979); Hoover v. Knight, 678 F2d, 578, (Fifth Cir. 1982).

Here, the teacher was not forced to testify. As a matter of fact, his version of events came into the record through the testimony of the District Superintendent (despite the fact it was pure hearsay).

Moreover, the hearing examiner apparently afforded no weight whatever to either the Board's factual determination nor to the teacher's election to remain silent at the Board's proceeding. The examiner conducted an entirely de novo hearing on this case, at which time criminal proceedings were still pending and at which time, the teacher elected to testify. As a strictly legal matter, nothing had changed.[1]

The teacher's testimony was not confined or configured by the Fifth Amendment. He said before the Examiner what he wanted to say without apparent reservation. He was cross-examined without apparent constraint. As a practical matter, the Court sees no evidence at all that the District's conduct unfairly implicated the Fifth Amendment, Fourteenth Amendment or any other constitutional rights or privileges.[2]

Additionally, the Petitioner offers no plausible practical alternative to what the District did. That is, conducting the proceeding with the dispatch that it chose. The Petitioner implies that the District should have waited until the Fifth Amendment privilege became moot. This overlooks the fact that the criminal justice system moves, at times, with alarming torpor. The District, to satisfy Petitioner's implied request, would have had to wait until the Defendant had been tried on a criminal charge, and if convicted, had completed his appeal on the criminal charge, and if necessary, wait for a new trial or further appeal. The Fifth Amendment would have obtained at all times. As long as any proceeding, including an appeal were pending, the teacher would have been at liberty to invoke the Amendment privilege.

In short, the Petitioner asked the impossible. The teacher could have testified before the Board. His attorney apparently advised against it; he could have overruled his attorney and effectively did that in testifying while under criminal process before the Commission. This objection is totally without merit.

II - DOES SUBSTANTIAL EVIDENCE SUPPORT THE EXAMINER'S/COMMISSIONER'S FINDING

Section 227.20(6) requires the Circuit Court to defer to Commission findings of fact. The Commission adopted the Examiner's finding that the child accurately depicted the fateful phone message.

Petitioner invites the Court to substitute its experience in cases of this type for the examiner's. I reject the notion I have such a right.

Frankly, having repeatedly read this record of transcripts, briefs, findings and decision, I must say that this Examiner conducted his hearing and his decision making with a dispassion and fine attention to detail as any I have seen in any 227 proceeding. I can find utterly no fault with the Examiner's reading of the witnesses nor of his reading of the law. His reasoning is clearly set forth, his thought process is explained carefully and his conclusion supported by his record.

The Petitioner is correct to urge this Court to carefully consider the "actual record". I have done so, and have found none of the inconsistencies that Petitioner apparenty found. See p.3 f.2, Petitioner's brief.

Petitioner is right to be concerned with the unhappy outcome of this very painful case. But there is no hint in this record that the

Examiner or the Commission was moved in the slightest by "political considerations", see Petitioner's brief p.15. I find absolutely nothing in the Commission's handling of this matter which could at all detract from its integrity.

What I do find is the sort of one to one confrontation between witnesses which is the stuff of a classic and sharply divided law suit. The child said her teacher asked her to go to bed with him two times during the phone call. He had the ability to deny the allegations and did so. The Examiner believed the child and did not believe the teacher. He observed the carriage, bearing, demeanor, tenor and tone of the witnesses. He evaluated surrounding circumstances, i.e. the length of the call, the teacher's reaction when accosted by the girl's father, the absence of any record of animus between child and teacher,[3] the straightforward and consistent nature of the child's testimony.

Petitioner is right to be skeptical of allegations of uncharacteristic, aberational behavior. The fact that the examiner required proof by clear, satisfactory preponderance of the evidence, is indicative that he held that legal skepticism. However, the Petitioner's implication that an outstanding technical record, and total absence of similar allegations in the past should somehow nullify the child's testimony, is without merit. Petitioner is looking for sense in an aberational act. No one would have believed a President capable of the conduct evidenced by the Watergate events, no one would have believed that persons in high governmental office would have sold out their Country the way Albert B. Fall and others did during the Teapot Dome incident.

In sum, the District did not have to prove that the teacher was the sort who could have done it. They only had to prove that he did it. And they did so to the satisfaction of the Hearing Examiner and the Commission. There is substantial evidence in support of the Commission's finding. The Commission's Order is affirmed.

III

I have found the Commission's decision to withstand close and severe judicial scrutiny. I have ruled against the Petitioner. The District now suggests I should sanction the Petitioner for bringing this matter before the Court on the basis that the Petitioner's conduct was frivolous. I expressly refuse to do so.

This is a serious, solemn bit of jurisprudential and human business. This is the first time that a lawyer has fought this teacher's fight. This case is entitled to judicial review and I do not find that the cause was frivolously brought, maintained or argued. Chapter 227 provides the vehicle by which the Petitioner could obtain judicial review. It was right to do so, it was justified in doing so. I will not find otherwise.

Counsel for the Commission is directed to prepare the Judgment in accordance with the above.

Dated this 6 day of February, 1985.

BY THE COURT:

James C. Eaton

JAMES C. EATON
Circuit Judge

FOOTNOTES

1. It is interesting to note that a plea negotiation had apparently been formulated by that time, the upshot of which was, the charges would be dropped and the teacher would obtain some sort of alcohol or other counseling. Nonetheless, the record does not reveal any agreement by the State to dismiss any or all charges which may be the subject of the teacher's testimony before the Examiner.

2. In its brief, Petitioner implies that the District counsel may well have called the teacher's failure to testify before the Board to the Board members' attention, thusly inviting the inferece that they could find his silence militated in favor of the child's testimony. First, this is not supported in the record; second, a long series of Wisconsin Supreme Court decisions support that very proposition. Namely, in a civil case which this assuredly is, invocation of the Fifth Amendment permits an inference against the interest of the witness. See Grognet v. Fox Valley Trucking Service, 45 W2d 235; and Malloy v. Malloy, 46 W2d, 682.

3. Although the Petitioner professes an inability to see how "prior animosity between the two" acts in support of the girl's story, Petitioner overlooks the simple inference to be drawn. Namely, she had no predisposition, motive, or inclination to fabricate this allegation.