

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
Branch 20

Milwaukee Board of School Directors,
Petitioner,

vs.

Wisconsin Employment Relations Commission,
Respondent,

Case No. 89 CV 005 - 185
Decision No. 24748-A

MEMORANDUM DECISION

This proceeding began when the Milwaukee Board of School Directors (Board) filed a petition under Chapter 227, Wis. Stats., for the court to review the decision of the Wisconsin Employment Relations Commission (WERC). In a declaratory ruling, WERC determined that a contractual lay-off provision between the Board and the Milwaukee Teachers' Education Association (MTEA) was unconstitutional. The Clause in question provided that lay-offs should be based on inverse seniority "provided that the racial balance of the schools is not disturbed." (Emphasis added)

WERC and MTEA contend that WERC properly found the contractual provision was unconstitutional under the Fourteenth Amendment and the United States Supreme Court decision in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). The Board, however, submits that WERC erred in making its ruling since the issue was not ripe for determination and because WERC violated the separation of powers doctrine in making a judicial decision on the constitutionality of the contract clause. In deciding whether WERC acted properly, this court must inquire into the two issues presented by the Board.

In State ex. rel. Lynch V. Conta, 71 Wis.2d 662, 669, 239 N.W.2d 313 (1976), the Wisconsin Supreme Court set forth four requirements that must be met in order to issue a declaratory judgment. The first requirement states, "There must exist a justiciable controversy, that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it." And the fourth requirement states, "the issue involved in their controversy must be ripe for determination." As a result, the court must determine whether WERC's declaratory ruling on the constitutionality of the lay-off provision was ripe for determination, since declaratory judgment is unavailable unless the issue is ripe for determination. City of Janesville v. Rock County, 107 Wis.2d 187, 202, 319 N.W.2d 891 (1982).

In adopting the U.S. Supreme Court's decision on ripeness made in Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507 (1967), the Wisconsin Supreme Court stated: "The basic rationale of the ripeness doctrine is to prevent courts, through avoidance of premature adjudication,

from entangling themselves in abstract disagreements ... Lister v. Board of Regents, 72 Wis.2d 282, 309, 420 N.W.2d 610 (1976). The Abbott decision indicated that ripeness turns on the fitness of the issues and the hardship to the parties if the court withholds a determination. Abbott, at 149. A further requirement of ripeness is an actual injury. "A substantial number of ripeness cases ask whether the plaintiff has suffered harm or threat of harm that is 'direct and immediate' rather than conjectural, hypothetical, or remote." Nichol, Ripeness and the Constitution, 54 U. Chi. L. Rev. 153, 170 (1987).

In the case at hand, there were no pending plans for a lay-off in either the near or the distant future. In fact, there has not been a teacher lay-off in the 140 year history of the Milwaukee Public Schools. However, WERC and MTEA argue that the issue was ripe under sec. 111.70(4)(b), Stats., which states: "Whenever a dispute arises between a municipal employer and a union of its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling."

It is not sufficient to simply cite the statute that confers the authority upon WERC to make a declaratory ruling on any subject. This in itself does not mean that the issue was ripe for determination. WERC's authority under sec. 111.70(4)(b), Stats., is only conferred when the issue is ripe. City of Janesville, at 202. As stated earlier, the standard for ripeness required fitness of issues, hardship to the parties, and actual injury.

First, the determination of the constitutionality of the layoff provision should not be decided upon by an administrative body. Such issues are solely within the province of the judiciary. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.ED. 60 (1803). As a result, the fitness question actually goes to the Board's separation of powers argument which will be discussed below. However, if WERC does not have the jurisdiction to decide upon the issue, it certainly would not meet the fitness requirement. Second, there has been no hardship to the parties. Since there has been no lay-off and there are no plans for one in the future, neither the Board nor MTEA have been affected by the provision. This leads to the third requirement, actual injury. While it is not necessary for a lay-off to have occurred, someone must be actually affected by the provision.

Since the provision has never been implemented, it cannot be said exactly how it will work. The provision simply states that the racial balance of the teachers at the schools must not be disturbed. It does not state that white teachers must be laid off before black teachers. Such a provision would actually affect the job security of the white teachers and an actual injury would result. However, without an actual or pending lay-off, it would be pure conjecture to say who would be injured by the provision.

It is the composition of the faculty that determines how the provision works. Today, there may be more white teachers than minority teachers. However, this may not always be the case. The ratio of white to minority teachers is not static. The make-up of the faculty at the point in time of a lay-off establishes which parties would be affected under the provision. As a result, there has been no actual injury to anyone without a lay-off or threat of lay-off. The second issue presented by the Board is whether WERC violated the separation of powers doctrine in making a decision upon the constitutionality of the contract clause. WERC contends that the issue falls within its jurisdiction since it is primarily a matter of collective bargaining. Pursuant to that power, WERC states that it

simply applied the Wygant decision.

It is true that WERC has been given wide latitude in deciding matters regarding collective bargaining. WERC v. Evansville, 69 Wis.2d 140, 158 N.W.2d 688 (1975). However, the matter in the case at hand is not within WERC's collective bargaining powers. Section 111.70(1)(d), Stats., defines collective bargaining as "the performance of mutual obligation ... to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment In their briefs, WERC and MTEA do not address the lay-off clause as such a matter. Instead, they simply state the precedent cases that recognize WERC's expertise in matters of collective bargaining. They do not attempt to show how the lay-off provision affects wages, hours, or working conditions. Instead, their main argument in regard to the provision treats the matter as a constitutional matter.

Also, it was not simply a matter of applying the Wygant decision. In order to apply the decision, WERC had to form an interpretation. Since Wygant is not clear on its face, it cannot be simply applied as WERC asserts. This is evidenced by the fact that both the petitioner and the respondent each submitted briefs with very different interpretations of the Wygant decision. As a result, it is clear that different interpretations can be made. And, it cannot be applied to the case at hand without some branch of government interpreting the case. Therefore, it is not simply an issue of collective bargaining. The real issue is whether an administrative agency has the authority to interpret a U. S. Supreme court decision without violating the separation of powers doctrine.

In Glendale Prof. Policeman's Assoc. v. Glendale, 83 Wis.2d 90, 100, 264 N.W. 594 (1978), the Wisconsin Supreme Court looked at WERC's ability to decide upon the relationship between two Wisconsin statutes. The court stated that this issue was "within the special competence of the courts rather than the Commission (WERC), and therefore this court need not give great weight to the arbitrator's determination of the issue." *Id.* at 101. The court also stated the WERC is "primarily charged with administering secs. 111.70-77, Wis. Stats." *Id.* at 100. In a similar situation in City of Brookfield v. WERC, 87 Wis.2d 819, 827, 275 N.W.2d 723 (1978), the court stated, "WERC should not be accorded the authority to interpret the appropriate statutory construction " It can be inferred from these two cases that if WERC does not have the authority to interpret statutory construction beyond its expertise in administering secs. 111.70-77, Stats., it cannot interpret U.S. Supreme Court decisions and the U.S. Constitution either.

WERC simply lacks the power to make determinations on constitutional issues. "Administrative boards and commissions have no common law power. Their powers are limited by the statute conferring such powers expressly or by fair implication." Nekoosa Edwards v. Public Serv. Comm., 8 Wis.2d 582, 593, 99 N.W.2d 821 (1959). WERC has not either expressly or impliedly been granted the authority to decide upon constitutional issues. In fact, our system of government has not delegated the authority to administrative agencies to decide upon matters of constitutional importance... Greene v. McElroy, 360 U.S. 474, 507, 79 S.Ct. 1400 (1959).

In one of WERC's own decisions, WERC recognized its inability to issue a declaratory ruling-upon the constitutionality of barring supervisors from joining unions. It stated, "There are judicial forums available which are better suited to determine such constitutional questions." In the Matter of the Joint Petition of City of Cudahy and International Association of Firefighters, AFL-CIO,

Local 1801, WERC Dec. No. 9381.

Furthermore, A Florida court found that separation of powers "stands as a permanent bar to administrative determination of fourteenth amendment problems." Carrollwood State Bank v. Lewis, 362 So.2d 110, 114 (Fla. Dist. Ct. App. 1978). The court went on to say that constitutional issues cannot be delegated to administrative bodies for determination. *Id.* While the Florida and Wisconsin Constitutions are not identical, they both divide governmental powers into three branches: executive, legislative and judicial. As a result, it is reasonable to conclude that separation of powers in Wisconsin would work in a similar manner in light of the argument stated above.

In conclusion, the court holds the WERC did not act within its powers in issuing this declaratory ruling. The issue was not ripe for determination, and it was not within WERC's authority to interpret matters of constitutional importance. Accordingly, WERC's decision is vacated and reversed, in its entirety, pursuant to sec. 227.57, Stats. Counsel for the petitioner, Milwaukee Board of School Directors, shall draw the appropriate order and submit it under the five day rule.

Dated this _____ day of September, 1990 at Milwaukee, Wisconsin.

BY THE COURT:

Honorable William J. Shaughnessy
Circuit Court Judge