
TOWN OF SHEBOYGAN,
Plaintiff,

DECISION

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,
Defendant.

Case No. 08 CV 1401

Decision No. 32616-A

Background

There is no dispute regarding the facts in this case. AFSCME Local 1749 (Union) was certified as the bargaining unit for the Town of Sheboygan (Town) Department of Public Works employees on February 2, 2002. During the time that is relevant to this controversy, the Union and the Town were parties to a collective bargaining agreement (CBA) that is to expire on December 31, 2009. The CBA provides that parties wishing to amend the agreement must notify the other party before September 1, 2009.

Prior to May 30, 2008, the Union bargaining unit consisted of three employees. On that date, the Union filed a petition to clarify the bargaining unit by adding four employees. On July 24, 2008, the Town stipulated that the four employees would be added to the bargaining unit. This required the Town to bargain over the wages, hours and conditions of employment for the four employees who were new to the bargaining unit.

On September 8, 2008 the Town requested that the Wisconsin Employment Relations Commission (WERC) hold an election among all employees of the bargaining unit to determine whether they wanted to be represented by the Union. The Union

opposed the Town's petition for an election on the grounds that the petition was untimely.

WERC sided with the Union, and dismissed the Town's petition on November 20, 2008. The dismissal relied on the rationale stated in a prior decision entitled, MUKWONAGO SCHOOLS, Dec. No. 24600 (WERC, 6/87).

In MUKWONOGO SCHOOLS, WERC stated that election requests regarding representation are only timely if filed within the sixty day period prior to the reopening date specified in a contract. Because the CBA in the case at bar required that notice to amend the agreement be filed by September 1, 2009, WERC reasoned that the Town couldn't petition for a new election regarding representation by the Union until July 1, 2009.

The Town filed a petition for judicial review on December 17, 2008. The petition alleges that WERC erroneously interpreted the sixty day rule, which is also known as the contract bar rule. As a result, it is alleged that WERC's decision was arbitrary and capricious, and deprived the Town's employees of the right to make a timely determination as to whether they wanted to be represented by the Union.

A scheduling conference was conducted on March 12, 2009. All parties complied with the schedule in a timely fashion. It was determined that the Court would render its decision without oral argument.

Alleged Errors

The Town sets forth three arguments as to why WERC's decision is erroneous. The first is that the bargaining unit employees will be disenfranchised by being required to wait approximately ten months to file an election petition (Town Brief at 4); second,

WERC erred in determining that the addition of employees to the bargaining unit during the term of the existing CBA was not the equivalent of reopening the CBA (Town Brief at 4); and third, WERC's decision that the election petition was not timely wasn't "grounded in particularized fact" (Town Brief at 6).

Standard of Review

There is a dispute as to what level of deference the Court should give to WERC's decision. The Town argues that application of the contract bar rule by WERC hasn't previously been subject to appellate review, therefore that portion of their decision which applies the contract bar rule is entitled to no deference, and that a de novo standard of review should be applied (Town Brief at 7). However, the Town concedes that great weight deference should be applied to that portion of WERC's decision which determined that the addition of new employees to the bargaining unit was not a demand to reopen to the CBA (Town Brief at 4).

Both WERC and the Union argue that the great weight standard of review is appropriate (WERC Brief at 6-8; Union Brief at 11).

The requirements for application of the great weight standard were discussed in *Margoles v. LIRC*, 221 Wis. 2d 260, 585 N.W. 2d 596 (Ct. App. 1998). To apply the great weight standard, all of the following four criteria must be met: (1) the agency in question must be charged by the legislature with the duty of administering a particular statute; (2) the agency's interpretation of the statute is of long standing; (3) the agency employed its expertise and knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Margoles* 221 Wis. 2d at 265.

There appears to be no disagreement that the statute which WERC is authorized to interpret is the Municipal Employment Relations Act (MERA), s. 111.70 Wis. Stats.. The provision most applicable to the case at bar is s. 111.70(4)(d) Wis. Stats.. It is entitled, *Selection of representatives and determination of appropriate units for collective bargaining*.

There also appears to be no disagreement regarding the third and fourth criteria for using the great weight standard. These latter criteria are the agency's expertise in interpretation of the statute, and promotion of uniformity in the application of the statute.

Only the second criteria, whether the statutory interpretation is of long standing seems to be disputed.

The Town's argument that WERC's decision should be granted no deference because the application of the contract bar rule hasn't previously been subjected to appellate review is not persuasive. The key is not whether the issue in dispute has been before a reviewing court, but whether the issue has been before the agency. In *Barron Electric Cooperative v. PSC*, 212 Wis. 2d 752, 569 N.W. 2d 752 (Ct. App. 1997), the Court stated, "We employ a *de novo* review only 'when the issue before the agency is clearly one of first impression or when the agency's position on the issue has been so inconsistent as to provide no real guidance.' *UFE*, 201 Wis. 2d at 285." *Barron*, 212 Wis. 2d at 763.

The Court went on to address the importance of the agency's experience in administering a statute, as opposed to its experience in reviewing a particular fact situation. It stated, "Rather, the cases tell us that the key in determining what, if any, deference courts are to pay to an administrative agency's interpretation of a statute is

the agency's experience in administering the particular statutory scheme-and that experience must necessarily derive from consideration of a variety of factual situations and circumstances. Indeed we have recognized in a series of cases that an agency's experience and expertise need not have been exercised on the precise- or even substantially similar- facts in order for its decisions to be entitled to judicial deference." *Id* at 764.

In the case at bar there is no allegation that WERC has inconsistently applied the contract bar rule, or that the application of the contract bar rule is one of first impression. In fact, the town has conceded that the contract bar rule has been routinely applied by WERC (Town Brief at 7). Additionally, a review of Lois Law reveals numerous published appellate cases that involved the review of MERA by WERC.

I find that the decision by WERC in the case at bar is entitled to great weight deference. As such, their decision will be upheld as long as it is a reasonable interpretation of the statute. A different interpretation of the statute that is more reasonable will not permit the Court to reverse WERC's decision under the great weight standard of review. *City of Marshfield v. Wisconsin Employment Relations Commission*, 252 Wis. 2d 656, 663, 643 N.W. 2d 122 (Ct. App. 2002)

Review of WERC Decision

The first alleged error is that application of the contract bar rule is inappropriate if town employees will not be heard for a ten month period on the issue of whether they will be represented by the Union.

This allegation calls into play the rationale behind the contract bar rule. The parties have discussed this rule in their briefs. The Court will synopsize the rule by

stating that its purpose is to balance the public's interest in stable labor relationships with the employees' interest in choosing their bargaining representatives. Therefore, since the case of *Wauwatosa Board of Education*, Dec. 8300-A, February 1968, WERC has processed petitions seeking election if the petitions are filed within a sixty day period preceding the date established for reopening the agreement.

In its decision in the case at bar, WERC recognized that it would be destabilizing to conduct an election with a year remaining on the existing CBA between the Union and the Town. It also recognized that the petition for election could be filed within ten months after the date of the WERC decision.

Section 111.70(4)(d)5. Wis. Stats. grants to WERC discretion as to whether a representation election should be conducted if it is alleged there is a necessity for a new election. In the case at bar, WERC exercised its discretion by utilizing the contract bar rule as it has since the *Wauwatosa Board* decision in 1968. WERC balanced the interests of the parties and dismissed the Town's petition for election. This was a reasonable interpretation of the statute. Given the great weight to which the interpretation is entitled, there was no error committed by WERC.

The second alleged error is that WERC failed to recognize that the CBA was reopened when the four employees were added to the bargaining unit, thus opening a sixty day period to petition for election.

WERC's analysis of this argument was that the addition of new members to the bargaining unit did not affect the rights of the employees who were already bound by the CBA. Therefore, as to the existing members of the bargaining unit, nothing was reopened. As to the new members of the bargaining unit, nothing was reopened either

because the issues of wages, hours, and conditions of employment had yet to be negotiated. The decision by WERC that the CBA was not reopened by the addition of new employees to the bargaining is entitled to great weight. This was a reasonable exercise of discretion by WERC and is not erroneous.

The final allegation of error is that WERC abused its discretion by rendering its decision in a mechanical fashion that was not grounded in particularized fact.

In *Galang v. Medical Examining Board*, 168 Wis. 2d 695, 484 N.W. 2d 375 (1992), the Court of Appeals stated, "A court – or in this case, an administrative agency – exercises discretion when it considers the facts of record and reasons its way to a rational legally sound conclusion." *Galang* 168 Wis. 2d at 700. In the case at bar, there was sufficient fact finding by WERC to satisfy the Court that WERC did exercise reason in dismissing the Town's petition for an election, and that WERC did not impose its will in an arbitrary and capricious manner.

In its decision, WERC did make findings of fact to establish that the Union and the Town were parties to a CBA; that the CBA would expire on a particular day; and that notice to amend the CBA had to be provided by a particular day.

WERC's memorandum discussed the application of the contract bar rule to this particular case. It weighed the interests in the stability of the CBA against the interests of the employees to file an election petition and pointed out that it was aware that approximately ten months must pass before a timely petition could be filed.

Some facts may not have been specifically discussed in the memorandum, but reasonable inferences could certainly be drawn regarding these facts. For example, there is no hint in the memorandum that the Town exercised bad faith in filing the

petition for election, therefore the reasonable inference is that the Town filed its petition in good faith. Also, it is a reasonable premise that people need to rely on the terms of the contracts they enter into. If those contracts can be terminated prior to the expiration date, it has a destabilizing effect on those bound by the contract, and would affect the faith that people would have in the strength of future agreements they may enter into. Additionally, it is reasonably inferred from the memorandum that WERC found that the ten month waiting period to file a petition for election was not so onerous as to outweigh the benefits that come from a set expiration date in the CBA.

WERC may not have found every fact that it could have, but it found enough facts to satisfy the Court that its decision was based on reason, and was not erroneous.

Conclusion

The Town's petition to reverse WERC's decision of November 20, 2008 is denied.

Dated this 23rd day of June, 2009.

BY THE COURT,



Terence T. Bourke
Circuit Court Judge