STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#144-480

STATE OF WISCONSIN
(Department of Administration)
UNIVERSITY OF WISCONSIN-MADISON,
and MILWAUKEE CHAPTER OF NATIONAL
ORGANIZATION FOR WOMEN,

Petitioners,

MEMORANDUM
OPINION

-vs-

DEPARTMENT OF INDUSTRY, LABOR
AND HUMAN RELATIONS, JOHN T.
PATZER, and MADISON BUILDING
TRADES COUNCIL,

Respondents.

The Wisconsin Department of Administration (DOA) advertised for job applications for the position of Painter at the University of Wisconsin. Pursuant to rule Personnel 27 of the Wisconsin Administrative Code (Pers. 27), the job specifications excluded all white males and permitted applications only by women or members of minority groups.

Testimony showed that no more white males would be recruited for 44 years for the University Maintenance Department until the percentage of women employees in the work force equal the same percentage as women bore to the available working force in the community.

The Wisconsin Department of Industry, Labor and Human Relations (DILHR) held that absolute reverse discrimination was a violation of S. 111.325, Stats., which proscribes discrimination in employment because of age, race, color, handicap, sex, creed, national origin, or ancestry.

The issues presented to this Court are:

1. Was the enactment of Pers. 27, a usurpation of the Legislative power contrary to the Wisconsin Constitution.

2. Is absolute reverse discrimination, contrary to the United States Constitution.

Art. IV Sec. 1, of the Wisconsin Constitution vests the legislative authority in the State Senate and Assembly.

The three branches of state government, Legislative, Executive, and Judiciary, are separate, equal, and co-ordinate and no branch may enter into the province of any other. Each branch of government in the exercise of its constitutional powers is regarded as supreme in its particular field, and no other branch may intervene or interfere into the province of any other branch. Goodland v. Zimmerman (1943), 243 Wis. 459, and as stated on p. 467:

> "While our constitution creates three separate, co-ordinate departments, it does not contain an express prohibition against one department exercising the powers of another, but it is construed in practice as if it did * * *. While the legislature in the exercise of its constitutional powers is supreme in its particular field, it may not exercise the power committed by the constitution to one of the other departments."

The Legislature may not in any way interfere with the discretionary power vested in the Governor by the Constitution.

> "Art. V, Sec. 4, Wisconsin Constitution provides that the Governor 'shall communicate to the legislature at every session, the condition of the state, and recommend such matters to them for their consideration, as he may deem expedient.' Whatever recommendations the Governor chooses to make to the legislature relating to appropriations are constitutionally committed to his discretion. * * * That part of Sec. 234.15(4) which requires the Governor to include in the biennial budget or in his recommendations to the Joint Committee on Finance the amount certified by

> the Chairman of the (Housing) Authority as necessary to restore the capital reserve fund to an amount equal to the capital reserve fund requirement, is declared unconstitutional and void." State ex rel. Warren v. Nusbaum (1973), 59 Wis. 2d 391 at p. 449-450.

The Legislature may not delegate the power to the Judiciary to make determinations as to what political and economic expediency constitute public interest, gauged by criteria such as what is "desirable," "advisable," "ought to be," or "is in the best interest of the public." Delegation to the County Court to determine whether the creation of a metropolitan sewerage commission is the "best" interest of the entire district and the establishment of the boundaries of such district is unconstitutional. In re: City of Fond du Lac (1969), 42 Wis. 2d 323.

In Goodland v. Zimmerman, Supra, it was held that the legislative process was not completed until the law had been published and became law. The Governor attempted by an equity action to prevent the publication of the act creating a unified bar which required membership of all practicing lawyers in Wisconsin.

It was stated at p. 473 of Goodland:

> "The plaintiff as acting governor occupies the chief executive office of the state. He has no more right or authority to intervene in the legislative process in that capacity than has a court. As acting governor the plaintiff is head of the executive department, but that gives him no supervisory power over the other co-ordinate departments."

The Legislature may, however, delegate limited legislative authority to an administrative agency because such administrative agency is an agency of the Legislature, responsive to the Legislature, and not subject to the supervisory control of the Governor.

It was stated at p. 440 of State ex rel Warren v. Nusbaum, supra, as follows:

"In State ex rel. Wisconsin Inspection Bureau v. Whitman (1928), 196 Wis. 472, 505, 220 N. W. 929, the rule was established as follows:

'. . . The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate, -- is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose . . . .' See also: Olson v. State Conservation Comm. (1940), 235 Wis. 473, 293 N. W. 262; Clintonville Transfer Line v. Public Service Comm. (1945), 248 Wis. 59, 21 N. W. 2d 5; United Gas, Coke & Chemical Workers v. Wisconsin Employment Relations Board (1949), 255 Wis. 154, 38 N. W. 2d 692.

"In Milwaukee v. Sewerage Comm. (1954), 268 Wis. 342, 351, 67 N. W. 2d 624, this court stated:

'. . . The true test and distinction whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the statutory law, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made. State ex rel. Adams v. Burdge(1897), 95 Wis. 390, 70 N. W. 347; State ex rel. Buell v. Frear (1911), 146 Wis. 291, 131 N. W. 832. . . .'"

Once the legislature has made a proper delegation to an administrative agency, the administrator's rule-making power may be exercised to carry into effect the general legislative purpose. State ex rel. Wisconsin Inspection Bureau v. Whitman (1928), 196 Wis. 472; Clintonville Transfer Line, Inc. v. Public Service Commission (1945), 248 Wis. 59. However, any administrative rules so adopted must not exceed the bounds of authority granted:

". . . there will remain two checks upon the abuse of power by administrative agencies. In the first place, every such agency must conform precisely to the statute which grants the power; secondly, such delegated powers must be exercised in a spirit of judicial fairness and equity and not oppressively and unreasonably.

"The doors of the Courts of this Country will always stand open to any citizen complaining that he has been deprived of his constitutional rights, no matter under what form of law the deprivation has been worked. The emergence of administrative agencies will not impair or destroy the checks and balances of the constitution." State ex rel. Wisconsin Inspection Bureau v. Whitman, supra, p. 507, 508.

The Governor's Executive Order No. 39 is legislation declaring that there shall be a law and the general purpose and policy to be achieved by the law, and fixes the limits within which the law shall operate. The need for a law is stated: "WHEREAS, there is an awareness of the need to take affirmative steps to assure equal rights for women" in state employment. The Order established an Affirmative Action Unit in the State Bureau of Personnel and ordered each state department to designate a Departmental Affirmative Action Officer to "implement a realistic Affirmative Action program of employing women and minorities within each department and at all employment levels with the goal of attaining numbers of such employees proportionate to their labor force participation * * *."

Such legislative action by the Governor invades and usurps the province of the State Legislature and is therefore unconstitutional. He is not privileged under the Wisconsin Constitution to legislate, either directly or indirectly by ordering administrative agencies, arms of the Legislature, to establish administrative rules and procedures to carry out his stated legislative purpose.

Pers. 27 was adopted by the Bureau of Personnel after and pursuant to the issuance of Governor Lucey's Executive Order No. 39. Pers. 27 sets forth the following Policy Declaration:

"Policy. To enable the state, as employer, to carry out its social, economic and community responsibilities through employment of the occupationally disadvantaged by reason of, but not limited to, sex, ethnic background, or age and the occupationally handicapped by reason of, but not limited to mental or physical disability * * *."

Pers. 27 declares the need, purpose, and scope of a law, thereby invading the exclusive province of the Legislature, and exceeding the limits of the authority delegated to the Bureau of Personnel.

The petitioners urge that Executive Order No. 39 authorizes and directs the Personnel Board to adopt such a rule. Though it is clear that Pers. 27 was adopted following and pursuant to Executive Order No. 39, this argument is without merit in view of the fact that the Governor was entirely without authority to issue such an order. Authority for the adoption of an administrative rule must come from the Legislature.

It is the petitioners' contention that Pers. 27 is authorized by s. 16.08(7). The Court cannot agree with that contention.

S. 16.08(7) provides:

"EXCEPTIONAL EMPLOYMENT SITUATIONS. The director shall provide, by rule, for exceptional methods and kinds of employment to meet the needs of the service during periods of disaster or national emergency, and for other exceptional employment situations such as to employ the mentally handicapped, the physically handicapped and the disadvantaged."

Part of the Legislature's intent in enacting s. 16.08(7) was to authorize the Director of the State Bureau of Personnel to make extraordinary provision by rule for persons with exceptional employment needs. Specifically mentioned are the mentally and physically handicapped, and without further definition, "the disadvantaged." The Legislature has sought to ensure more than equal employment opportunity in State Service for those suffering a form of disability or disadvantage not recognized or protected by traditional concepts of constitutional law. S. 16.08(7) does not attempt to provide additional protection for those whose rights have already been secured elsewhere by Constitutional provision. By not including women and minorities in this section, the Legislature has determined that there is no need to make special provision for the employment of women or minorities under the Civil Service Law.

More recently, the Legislature enacted Ch. 189, Laws of 1975, in part amending sections of Ch. 16 including s. 16.765 which proscribes discrimination in employment by contractors doing business with the State. To the existing proscriptions in s. 16.765 against discrimination on the basis of race, religion, color, and national origin, the Legislature added "age, handicap, and sex." No special provision was made for extraordinary employment of persons "occupationally disadvantaged" or for any other class of persons. The Legislature's action reaffirms its commitment to the principle of nondiscrimination in employment and its intent that no special provision should be made for any class of persons other than that previously expressed in s. 16.08(7).

Nowhere in s. 16.08(7) is there authority for the declaration of policy made in Pers. 27 regarding extraordinary employment of minorities and women in order to correct past evils of discrimination.

Pers. 27.02 provides for exceptional methods for employment of "occupationally disadvantaged" persons. No such provision is authorized by s. 16.08(7), where the term "disadvantaged" is not modified or explained. Pers. 27.02 requires the Director to employ merit system principles "broadly comparable" to those used in standard civil service employment lists. However, this is clearly a departure from the commitment to the merit system principles in s. 16.01(1) and (2) which was re-enacted by Ch. 270, Laws of 1971, which provides in critical part:

> "16.01(2). It is the policy of the state * * * to assure that positions in the classified service are filled through methods which apply the merit principle, with adequate civil service safeguards. * * *."

Chap. 270, Laws of 1971, also amended s. 16.14 as follows:

> "16.14. No question in any form of application or in any examination shall be so framed as to elicit information concerning the <u>partisan</u> political or religious opinions or affiliations of any applicant nor shall any inquiry be made concerning such opinions or

or affiliations of any applicant nor shall any inquiry be made concerning such opinions or affiliations and all disclosures thereof shall be discountenanced except that the director may evaluate the competence and impartiality of applicants for positions such as clinical chaplain in a state institutional program. No discriminations shall be exercised ~~threatened or promised, by any person in the civil service~~ in the recruitment, application, examination or hiring process against or in favor of any ~~applicant, eligible, or employee, in the classified service~~ person because of his political or religious opinions or affiliations or because of his age, sex, handicap, race, color, national origin or ancestry except as otherwise provided."

Chap. 270, Laws of 1971, newly created s. 16.08(7).

The Bureau of Personnel argues that the words "except as otherwise provided" as set forth in s. 16.14 when taken in connection with the undefined word "disadvantaged" in s. 16.08(7) constitutes a delegation of legislative power to the Bureau for the enactment of Pers. 27, which permits absolute reverse discrimination proscribing the employment of male whites for 44 years in order to redress past discriminations as was done in this case. Such a tortured construction of these few words cannot be countenanced, and it must be recognized for what it is, a usurpation of the legislative power.

The Legislature has never declared nor even hinted that there was a need for a law, the purpose of which would be reverse discrimination to correct prior injustices. Quite to the contrary, the Legislature has consistently clearly stated in s. 16.01(3), s. 16.14, and s. 111.325 that there shall be no discrimination either for or against any person on the basis of race, sex, or national origin in the hiring of persons for State service.

The Bureau of Personnel has obviously usurped the legislative powers that have never been given to them by the adoption of Pers. 27 and declaring that there was need for a law to redress past discriminations.

The adoption of Pers. 27 was unconstitutional.

Though the parties have raised the question of the validity of Pers. 27 under the Federal Constitution, the Court's decision based on questions arising under the Wisconsin Constitution makes it unnecessary to consider that issue.

The Findings, Decision, and Order of DILHR must be and are hereby affirmed.

Dated: May 17th 1976.

BY THE COURT:

Norris Maloney

NORRIS MALONEY, CIRCUIT JUDGE