

SAVE

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

* * * * *

DEPARTMENT OF EMPLOYMENT RELATIONS, *
DIVISION OF PERSONNEL, DEPARTMENT *
OF HEALTH AND SOCIAL SERVICES, *
DEPARTMENT OF NATURAL RESOURCES, *
DEPARTMENT OF EMPLOYE TRUST FUNDS, *
DEPARTMENT OF TRANSPORTATION, *
DEPARTMENT OF INDUSTRY, LABOR AND *
HUMAN RELATIONS, DEPARTMENT OF *
AGRICULTURE, TRADE AND CONSUMER *
PROTECTION, DEPARTMENT OF ADMINIS- *
TRATION, and BOARD OF REGENTS OF *
THE UNIVERSITY OF WISCONSIN SYSTEM, *
STATE OF WISCONSIN, *

Plaintiffs, *

MEMORANDUM DECISION

VS. *

Case No. 80 CV 4433

PERSONNEL COMMISSION, STATE OF *
WISCONSIN, *

Defendant, *

and *

WISCONSIN STATE EMPLOYEES UNION, *
AFSCME, AFL-CIO, *

Intervening Defendant. *

* * * * *

Plaintiffs seek declaratory and injunctive relief pursuant to secs. 227.05 and 806.04, Stats., challenging the validity of sec. PC 1.10(4), Wis. Adm. Code, an administrative rule promulgated by the defendant Personnel Commission. The challenged rule requires state agency employers to permit state employee parties and their representatives to prepare for administrative proceedings before the Personnel Commission, to interview witnesses and

parties during regular working hours without loss of pay. For the reasons that follow, I find that the Personnel Commission lacked statutory authority to promulgate sec. PC 1.10(4), Wis. Adm. Code, and therefore enjoin its enforcement.

FACTUAL RECORD

The record establishes the following undisputed facts material to a decision.

This action was instituted by the Department of Employment Relations and its Division of Personnel, acting on their dual responsibility for administering the classified civil service system and the collective bargaining process on behalf of the State of Wisconsin as an employer. The remaining plaintiffs joined in their capacity as state agency employees.

The defendant Personnel Commission acts as the administrative hearing tribunal for appeals of a variety of civil service-related matters, and for the processing of employment discrimination complaints against state agencies as employers. Intervening defendant, Wisconsin State Employers Union (WSEU), AFSCME, AFL-CIO, is the bargaining agent for a number of collective bargaining units of state employees. WSEU employees and agents have appeared in proceedings before the Personnel Commission on behalf of WSEU members who are appellants or complainants in commission proceedings.

The statutory responsibilities of defendant Personnel Commission are set forth in sec. 15.801, Stats.:

The personnel commission shall have the program responsibilities specified for the commission under subch. II of ch. 230 and ss. ... 111.33 (2). ...

Section 111.33(2), Stats. [now renumbered sec. 111.375(2), Stats.], provides:

This subchapter [the Wisconsin Fair Employment Act] applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the agency as an employer shall be filed with and processed by the personnel commission under s. 230.45(1)(b).
...

Section 230.45, Stats., provides.

Powers and duties of personnel commission

(1) The commission shall:

(a) Conduct hearings on appeals under s. 230.44.

(b) Receive and process complaints of discrimination under s. 111.375(2).

(c) Serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure.

(d) Hear appeals under s. 230.36(4).

(e) Hear appeals, when authorized under county merit system rules under s. 49.50, from any interested party.

(f) Review and act on decisions of impartial hearing officers under s. 111.91(3).

(g) Receive and process complaints of discrimination pertaining to occupational safety and health under s. 101.055(8).

* * *

(i) Adopt rules necessary to carry out this section. Notice of the contents of such rules

and amendments thereto shall be given promptly to the administrator and appointing authorities affected thereby.

Section 230.44, Stats., provides:

* * *

(4) Hearing.

* * *

(b) An employe shall attend a hearing under this subsection and testify when requested to do so by the commission. Any person not under the civil service who appears before the commission by order shall receive for his or her attendance the fees and mileage provided for witnesses in civil actions in courts of record under ch. 885.... No witness subpoenaed at the insistence of a party other than the commission is entitled to compensation from the state for attendance or travel, unless the commission certifies that his or her testimony was relevant and material to the matter investigated. (emphasis added).

The Personnel Commission was created by ch. 196, L. 1977, and came into existence on or about July 1, 1978. Under the commission's enabling legislation, the rules of the former Personnel Board regarding the administration of personnel appeals remained in effect until modified or rescinded by the Commission. Chap. 196, sec. 129(4m), L. 1977. In August, 1978, the Personnel Commission commenced the rule-making procedures set forth in chap. 227, Stats., to amend the old Board's rules. On October 11, 1979, the commission adopted the final version of its rules, and they became effective on April 1, 1980. The new rules added, inter alia, subsection (4) to PC 1.10, Wis. Adm. Code, that had not appeared in the old Board's rules.

The Commission's rule, section PC 1.10 Wis. Adm. Code, provides in full:

PC 1.10 Attendance of witnesses and parties.
(1) ~~SUBPOENAS; REQUESTS TO APPEAR.~~ Subpoenas may be issued by the commission at the request of a party or on its own motion, or may be issued by an attorney of record in a commission proceeding in the same manner as provided in s. 805.07, Stats. The commission may, at the request of a party or on its own motion, issue requests for state employes to attend and testify at commission proceedings. [old rule]

(2) PAY STATUS OF STATE EMPLOYE PARTIES. State employes who are requested by the commission to attend prehearing conferences or hearings as parties shall do so without loss of salary and with reimbursement for travel expenses in accordance with the uniform travel expense guidelines. [new rule--no objection]

(3) PAY STATUS OF STATE EMPLOYE WITNESSES. State employes who attend hearings as witnesses shall do so without loss of salary and with the standard reimbursement by the employing agency for travel expense, provided that the commission certifies that the testimony of the witness was or would have been relevant and material to the matters in issue and not unduly repetitive. [new rule--no objection]

(4) PAY STATUS OF STATE EMPLOYE AGENTS AND INTERVIEWEES. A party or party's representative shall be permitted to interview parties and potential witnesses during regular working hours upon reasonable notice and for reasonable periods of time without loss of salary. [new rule--challenged herein]

Now before this court for decision are: (1) plaintiffs' motion for enlargement of time in which to move for summary judgment; and (2) plaintiffs' motion for summary judgment declaring that sec. PC 1.10(4), Wis. Adm. Code is invalid as being beyond the statutory authority of the Personnel Commission and the

result of improper rule-making procedure, and permanently en-
joining the rule's enforcement and application.

ISSUES

(1) Should the court exercise its discretion to enlarge the time set forth in sec. 802.08(1), Stats., and permit the plaintiffs to move for summary judgment?

(2) If the merits of the summary judgment are properly reached, the following questions are presented:

(a) Did the Personnel Commission have the authority to promulgate sec. PC 1.10(4), Wis. Adm. Code?

(b) If it did, did the Commission comply fully with the notice and hearing requirements set forth in chap. 227, Stats., for administrative rulemaking?

(c) If sec. PC 1.10(4), Wis. Adm. Code is otherwise substantively and procedurally valid, is the rule nonetheless inapplicable to state employees covered by collective bargaining agreements?

DECISION

With respect to the threshold issue presented, whether the summary judgment motion should be entertained, I conclude it should be. The instant action was commenced on July 28, 1980, and the motion for summary judgment was not filed until March 26, 1982. Plaintiffs' affidavit of June 29, 1982 establishes, however, that the delay in bringing the summary judgment motion was caused in substantial part by time extensions requested by counsel for intervenor WSEU and granted by plaintiffs. Additional delay was caused by continuing difficulties among the parties in completing discovery. I find that the considerations set forth in plaintiffs' affidavit in support of enlargement of time constitute sufficient grounds for allowing the belated motion.

Moreover, the record herein shows that (despite some discovery still apparently sought to be completed by the Personnel Commission with respect to the factual basis for the rule), all the material facts necessary to a decision in this matter have been established. The challenge to sec. PC 1.10(4), Wis. Adm. Code, can be disposed of solely as a matter of law on the issue of the Commission's statutory authority to promulgate the rule. No useful purpose would be served by delaying a disposition any further. Consequently, the summary judgment motion will be considered. See, e.g., Garchek v. Norton Co., 67 Wis. 2d 125 (1975).

On this issue, it is well-settled that on review of acts which are legislative in their character, judicial inquiry is limited to the question of power, and does not extend to the matter of expediency, the motive of the legislators or the reasons which are spread before them to induce the passage of the rule. See, Peterson v. Natural Resources, 94 Wis. 2d 587, 599 (1980); Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 10 (1904) quoting Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 151 U.S. 1, 18 (1894).

In considering whether an administrative agency exceeds its statutory authority in promulgating a particular rule, the court is guided by the general rule that an administrative agency has only those powers as are expressly conferred upon it or which may be fairly implied from the statutes under which it operates. State v. ILIR Dept., 77 Wis. 2d 126, 136 (1977); Racine Fire and

Police Comm. v. Stanfield, 70 Wis. 2d 395, 399 (1975). As a consequence, it cannot promulgate any rule which is not expressly or impliedly authorized by the legislature. Peterson v. Natural Resources Board, 94 Wis. 2d 587, 592-93 (1980).

In addition, it is fundamental that "any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority."

State v. ILHR Dept., 77 Wis. 2d 126, 136 (1977).

Here, the Personnel Commission clearly lacks express statutory authority to promulgate a rule requiring the use of state-paid time for preparing for hearings conducted before the commission. Thus, the question is whether the authority to establish such a requirement can be fairly implied from the express grant of authority contained in the statutes governing the Personnel Commission's operation.

Section 230.44(4)(b), Stats., authorizes reimbursement to state employees and others under certain limited circumstances, but that statute deals only with travel to and attendance at hearings and appearances before the Personnel Commission. It is silent about use of paid state time for the hearing preparation activities addressed in sec. PC 1.10(4), Wis. Adm. Code.

The Personnel Commission contends, however, that sec. 230.45(1)(i), Stats., which grants the commission authority to "[a]dopt rules necessary to carry out" sec. 230.45(a) Stats. and sec. 23.45(a) which grants the Commission authority to conduct hearings on appeal under sec. 230.44, Stats., are broad

enough to cover the promulgation of sec. PC 1.10(4), Wis. Adm. Code. In support of this contention, the commission cites several cases upholding the validity of administrative rules promulgated under similar language in other statutes authorizing agencies to make rules "necessary" for carrying out their statutory responsibilities. Defendant Personnel Commission's cited authorities are distinguishable in an important respect, however.

Each involves not only a statute authorizing an agency to promulgate "necessary" or "suitable" rules, but also a substantive statute authorizing the administrative agency to regulate the specific subject matter underlying the promulgated administrative rule. See, e.g., Peterson v. Natural Resources Board, 94 Wis. 2d 587, 595-97 (1980) where the department promulgated a rule prohibiting use of nets in areas of Lake Michigan under its power to make such rules as it deems "necessary" to carry out the provisions of the statute empowering it to regulate the "conditions governing the taking of fish." See, secs. 23.09(2) and 29.174, Stats. See also, Brown County v. H & SS Dept., 103 Wis. 2d 37 (1981) where the Department H & SS promulgated a rule prohibiting reimbursement from the State for relief paid to state dependents unless the county adopted written standards of eligibility keyed to AFDC benefit levels under its statutory power to "make suitable rules and regulations governing the administration of temporary assistance . . . including the relief to be provided . . . and other matters necessary to the provision

of relief . . ." and to make state reimbursement for such aid conditional upon observing such rules. See, sec. 49.04(2), Stats.

By contrast, the only statute in this matter that treats the subject of reimbursement is sec. 230.44(4)(b), Stats., and that statute's coverage is limited solely to reimbursement to persons for time spent attending commission hearings. It cannot fairly be read as authorizing the agency to mandate state reimbursement for preparation time by all involved state employee witnesses and parties.

It is noteworthy in this regard that the first three sections of PC 1.10 deal with the mechanics of compelling attendance before the Commission, reimbursement, and compensation of witnesses and parties who attend Commission proceedings. The authority for these three sections is readily and fairly implied by the express language of secs. 230.44(4)(b) and sec. 230.45(1)(a), Stats.

PC 1.10(4), however, departs from the model of reimbursement and compensation for attendance at Commission proceedings which are mandated or authorized by the Commission. There is no certification process under PC 1.10(4) by the Commission for relevancy or materiality of information gathered before compensation or reimbursement is authorized. Rather, the Commission extends mandated with-pay status for employee parties or interviewees during all interviews of parties and potential witnesses occurring during regular working hours upon reasonable notice

and for reasonable periods of times at places other than before the Commission itself.

This is a radical departure from the carefully limited compensation and reimbursement scheme set forth in sec. 230.44 (4)(b), Stats., and in PC 1.10(1)(2) and (3).

The record herein establishes that at the time plaintiffs commenced this action, approximately 1,400 appeals were pending before the Personnel Commission. Plaintiff state agencies were named as parties in at least 1,000 of those appeals. Thus it is likely that under the challenged sec. PC 1.10(4), Wis. Adm. Code, state agency employers will be required to incur significant costs in allowing employees to use state-paid time to investigate the prepare for commission proceedings. "[T]he drastic nature of [the result under the administrative rule] would indicate that had the legislature intended to grant the power for [its] implementation, it would not have done so in such an indefinite manner." State v. DILHR, supra, 77 Wis. 2d at 138. Therefore, significant doubt as to whether the legislature impliedly authorized the challenged rule must be acknowledged. This court is obliged to resolve these doubts against the commission's authority. Id. For these reasons, I conclude that statutory authority to promulgate the challenged rule is absent.

The Personnel Commission also argues, however, that the constitutional rights to due process and equal protection require that employees preparing for commission hearings be given the

opportunity to interview and obtain evidence from potential state employee witnesses on state time.

Even though the subject of PC 1.10, "attendance of witnesses and parties," appears to grow directly out of the hearing provisions of sec. 230.44, Stats., the Personnel Commission argues that PC 1.10(4) is required by the concept of "fair play" and the "necessity" of equalizing access to witnesses on state time as between the employer and employee.

No authority is cited for these propositions, and I can find none.

As the Personnel Commission acknowledges, due process requires only that an individual have notice of, and an opportunity to defend against charges made against him. Personnel Commission's Brief at p. 9. Although access to employee witnesses on state time and continuing to draw regular salary while engaged in preparation would undoubtedly be practical advantages to the employee, the absence of those advantages cannot be said to deny an individual of otherwise adequate notice or of the opportunity to be heard.

An equal protection analysis seems equally not apropos herein. There is no legislative classification permitting state agency employers to prepare for Personnel Commission hearings on state time and prohibiting employees from doing the same. The statutes and administrative rules are silent on the subject. Even if such statutory classifications existed, they would be subject to attack only if no rational basis existed for the

classifications. See, e.g., Wis. Bingo Supp. and Equip. Co. v. Bingo Control Bd., 88 Wis. 2d 293, 307 (1979). Section 227.033 (1), Stats., which requires that "[e]very person affected by a rule shall be entitled to the same benefits and subject to the same obligations as any other person under the same or similar circumstances" (emphasis supplied), requires no more. See 1955 Committee Note to sec. 227.033, Stats.

Here, the practical distinction is that to the extent agency officials (who are state employees themselves) prepare for Personnel Commission hearings on state time, these persons act by definition in a representative capacity. The state employer can act only through its employee-representatives on "state-time." It has no other existence. As the plaintiffs accurately observe:

"[t]he state and its agencies can act or defend themselves in no other way. Such representatives are not pursuing personal claims, but rather are seeking to vindicate the state's interest or their agencies' interests." Reply Brief at p. 4.

Consequently, sec. PC 1.10(4), is not necessary to remedy any constitutional deficiency in the statutes governing the Personnel Commission.

The Commission's due process/equal protection argument really stands for the proposition that the policy created in sec. PC 1.10(4), Wis. Adm. Code, is a desirable one in the opinion of the Commission to "even up the sides" in a state employer-employee personnel dispute. Under this logic, the Commission could take many remedial steps to redress imbalances between the employer

and employee, such as providing state-paid counsel to assist the employee just as the state employer has state-paid counsel available to it before the Personnel Commission. As desirable as that might be in terms of equalizing the relative advantages of the respective parties, it is clearly not either authorized nor fairly implied from existing statutes, nor required under the constitutional doctrines of due process and equal protection.


CONCLUSION AND ORDER

For all the reasons stated above and on the basis of the record herein, I conclude that this action may appropriately be disposed of on the plaintiffs' March 2, 1982 summary judgment motion. I further conclude that the Personnel Commission lacks the statutory authority to promulgate sec. PC 1.10(4), Wis. Adm. Code. Because the challenged rule is therefore null and void, no purpose would be served by considering the issues raised as to whether the commission followed the necessary rulemaking procedures of chap. 227, Stats., or whether the rule is inapplicable to state employees covered by collective bargaining agreements, and I express no opinion on these matters.

Summary judgment is hereby granted to plaintiffs declaring sec. PC 1.10(4), Wis. Adm. Code, invalid and permanently enjoining its enforcement.

Dated this 17th day of December, 1982.

BY THE COURT:


Angela B. Bartell, Judge
Circuit Court Branch 10
Dane County, Wisconsin

cc: ✓ AAG Maureen McGlynn
Atty. Robert C. Raymond