STATE OF WISCONSIN	CIRCUIT COURT	DANE COUNTY
CITY OF MADISON, Plaintiff, vs. COMMUNITY ACTION COMMISSION FOR THE COUNTY OF DANE AND CITY OF MADISON, INC., Defendant.		ORDER FOR SUMMARY JUDGMENT Case No. 161-291

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH # 1

Both parties to this suit are asking for summary judgment, pursuant to sec. 802.08, Stats., on the ground that there is no genuine issue as to any material fact and that each party believes it is entitled to a judgment as a matter of law.

We agree that there is no genuine issue as to any material fact. It is clear from the record that the underlying action began in May of 1975 when Maria Anita C. Sanchez applied for employment at the Neighborhood Youth Corps (NYC), which at that time was administered by the named defendant, the Community Action Commission (CAC) for the County of Dane and the City of Madison, Inc. NYC was seeking to fill six positions as counselors and one position as coordinator in their 1975 summer program. An initial screening process was performed by a committee that was unaware of any data with respect to race or national origin of any of the applicants, due to the fact that the names and all affirmative action data were taped or covered. Ms. Sanchez was not hired. Four of the persons eventually hired to fill the seven available positions (57.1%) were minority persons. Ms. Sanchez filed a complaint with the Madison Equal Opportunities Commission (EOC) on July 25, 1975, alleging employment discrimination by CAC based on national origin.

The EOC investigated Ms. Sanchez' charge and in February 1976 issued an initial determination of probable cause to believe that CAC had discriminated against Sanchez because of her national origin. CAC requested a hearing, and, on September 16 and 17, 1976, a hearing was held before a hearing examiner. Both Sanchez and CAC were represented by counsel, examined and cross-examined witnesses, and presented documentary evidence. The hearing examiner recommended a finding that CAC had discriminated against Sanchez because of her national origin, and recommended that the Commission order CAC to pay Sanchez back wages. CAC filed written exceptions.

The Commission heard legal argument on July 28, 1977 and voted to adopt the examiner's recommended findings and order. CAC was notified of the Commission's action but refused to comply and failed to seek judicial review. Pursuant to sec. 3.23 (10) (c) (4) (a) and (b), Madison General Ordinances, the City has filed this action to compel compliance with the Commission order and to impose a forfeiture of $500 per day until CAC does comply.

Preliminarily, we hold that by failing to seek judicial review CAC has forfeited its opportunity to challenge the merits of the Commission's findings and conclusions. The Commission's order clearly informed CAC of its right to review. Such review could have been either by statute or common law writ of certiorari. The only argument we will consider from defendant is that the order might be unconstitutional; either because the ordinance on which it is based is unconstitutional, or because it was based on procedures which failed to provide constitutional protections for all parties. Also there is the question of whether the Commission lost jurisdiction because of its failure to comply with the ordinance, Sec. 3.23 (10)(c)(2).

Defendant contends that the Commission's order was not a lawful order, and that therefore it would be unconstitutional for the City to enforce it. Defendant's primary argument is that the City does not have the authority, either under the "home rule" statute or any other statute, to order a backpay award. It argues that the broad power granted a municipality under sec. 62.11 (5), Stats., is limited to areas of "public concern" and cannot be extended to include enforcement and collection of backpay awards for individual citizens.

Sec. 3.23 (10) (c) (3) (b), Madison General Ordinances, states, in part:

"If, after hearing, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the respondent as will effectuate the purpose of this ordinance. In regard to discrimination in . . . employment . . . remedies may include, but not limited to, back pay."

Sec. 62.11 (5), Stats., also known as the "home rule" statute, provides, in part:

"Except as elsewhere in the statutes specifically provided, the [City] council shall have the management and control of the city property . . . and shall have the power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

In challenging a legislative enactment on the ground that it is not in keeping with a public purpose, the burden is on the one challenging the constitutionality of the enactment. In Hopper v. City of Madison, 79 Wis. 2d. 120, 256 N.W. 2d 139 (1977), the court stated that what constitutes public purpose is in the first instance a question for the legislature to determine. In examining a legislature's expenditures of public funds, for example, "there is a strong presumption that a legislature's acts are constitutional, and it is the duty of this court, if possible, to construe a legislative enactment so as to find it in harmony with constitutional principles." 79 Wis. 2d 128, citing State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 205 N.W. 2d 784 (1973).

Defendant argues that enforcement of backpay awards for individuals who have suffered from discrimination cannot be for "the good of the City", as required by the "home rule" statute. It is important to determine for what purpose the Madison City Council enacted sec. 3.23, MGO, which is known as the Equal Opportunities Ordinance. The Ordinance's declaration of policy states, in part:

"The practice of providing equal opportunities . . . is a desireable goal of the City of Madison and a matter of legitimate concern to its government. Discrimination against any of Madison's citizens "or visitors endangers the rights and privileges of all. The denial of equal opportunity intensifies group conflict, undermines the foundations of our democratic society, and adversely affects the general welfare of the community. Denial of equal opportunity in employment deprives the community of the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents . . ."

The policy of sec. 3.23, MGO, is clearly to advance the public purpose of eliminating discrimination, and the only question which remains is whether enforcing backpay awards granted to individuals who have been discriminated against is consistent with that public purpose.

An award of backpay is an equitable remedy often granted to employees or applicants for employment who have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice. The power to award backpay in the federal courts was bestowed by Congress in Title VII of the Civil Rights Act of 1964, as amended. As the Supreme Court stated in Albemarle Paper Co. v. Moody, 422 US 405, 10 FEP 1181 (1975), this power was part of a complex legislative design directed at "an historic evil of national proportions." The backpay provisions of Title VII were expressly based on the similar provisions in the National Labor Relations Act. In Phelps Dodge Corp. v. Labor Board, 313 US 177, 8 LRRM 387, the Supreme Court stated that under that Act "(m)aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." 313 U.S. 197.

While a backpay award certainly benefits the individual who receives the award by compensating him for the injury he has suffered, it also serves to further the broader goal of eliminating discrimination altogether. As the court stated in U.S. v. N.L. Industries, 479 F. 2d 354, backpay awards provide the catalyst "which causes employers . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

As the Wisconsin Supreme Court stated in regard to the expenditure of public funds for purposes that incidentally aided private individuals:

"If an appropriation is designed in its principle parts to promote a public purpose so that its accomplishment is a reasonable probability, private benefits which are necessary and reasonable to the main purpose are permissible."

Hopper v. City of Madison, 79 Wis. 2d 120, 129, 256 N.W. 2d 139 (1977). A court should conclude that no public purpose exists only if it is "clear and palpable" that there can be no benefit to the public. State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 56, 205 N.W. 2d 784 (1973). We cannot conclude that the enforcement of backpay awards against employers who have discriminated in violation of sec. 3.23, MGO, serves no public purpose. On the contrary, without some means of penalty and enforcement, the city ordinances would be ineffective to accomplish the stated goal of assuring equal opportunity to all citizens and visitors to the City of Madison. We therefore

conclude that both the Commission's order and the statute authorizing enforcement of that order by the City are constitutional under the authority granted by sec. 62.11 (5), Stats.

The question remains whether, as defendant contends, the order is defective on procedural grounds. It is not contested that defendant had adequate opportunity to be heard. Defendant received timely notice of the complainant's charge in the underlying case. A full hearing was provided before an impartial decisionmaker, at which time defendant had an opportunity to present evidence and to be heard. However, defendant alleges that, the order is procedurally defective in that the Commission failed to process Ms. Sanchez' complaint within two years as provided in Sec. 3.23 (10) (c) (2), MGO. We agree.

Sec. 3.23 (10) (c) (2), MGO, provides:

"The Equal Opportunity Commission shall use the following procedures in acting on complaints of discrimination: . . .

2. All complaints must be processed by the Commission within two (2) years."

There is no dispute that Ms. Sanchez filed her original complaint on July 25, 1975. The Commission's decision on respondent's appeal of the hearing examiner's findings of fact and recommended order was dated July 29, 1977. This was four days beyond the two-year limit on processing complaints established by the ordinance.

Both parties direct the court to Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 263 N.W. 2d 214 (1978). In that case the issue was whether the statutory time period within which a disciplinary hearing on charges against a county civil service employee is to be set is mandatory or directory. The statute provided that the CSC "shall" hold hearing within three weeks of the date charges were filed, sec. 63.10, Stats. The court did state that the word "shall" is presumed mandatory, but that it can be construed as directory if necessary to carry out the legislature's clear intent. However, the court concluded that where a civil service employee was suspended without pay pending a hearing on charges against him, the failure to act within the statutory time limit worked an injury, and therefore, the time limit was held to be mandatory.

The court is aware that there are several cases construing statutory time limits as being merely directory. The general rule followed in the construction of time provisions in statutes has been stated as follows:

"A statute prescribing the time within which public officials are required to perform an official act is merely directory unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation." State v. Industrial Commission, 233 Wis. 461, 466, 289 NW 769, quoted with approval in Muskego Norway C.S.J.D. No 9 v. Wisconsin Employment Relations Board, 32 Wis. 2d 478, 145 NW 2d 680 (1966), and Will v. Department of Health and Social Services, 44 Wis. 2d 507, 171 NW 2d 378 (1969).

There is no provision in the Equal Opportunities Ordinance which specifically prohibits the power of the Commission after the expiration of the two-year limit found in sec. 3.23 (10) (c) (2), MGO. Courts in similar cases have found that the lack of such a provision may be sufficient to indicate a legislative intent that the statute be directory only. Muskego Norway, supra at 32 Wis. 2d 207; Will v. Department of Health and Social Services, supra at 44 Wis. 2d 517; Herro v. Natural Resources Board, 53 Wis. 2d 157, 177, 192 NW 2d 104 (1971).

However, in each of these cases the statutory language stated that the agency or official involved "shall" do a certain official act within a prescribed time limit. In the ordinance involved at bar the operative word is "must". The ordinance provides that all complaints "must" be processed within two years. We conclude that the construction intended by the legislative body is obvious from this language. We know of no way the city council could have been more emphatic in stating its mandate that all complaints must be processed within that time period. As defined in Webster's New Twentieth Century Dictionary, 2d ed., the word "must" means "(a) compulsion, obligation, requirement or necessity." We believe that the use of this word leaves no doubt as to the intent of the council. In any event, any doubt in this regard would be resolved in defendant's favor since the ordinance was drafted by the City, the plaintiff in this action.

Certainly if the defendant is precluded from testing the commission's order on the merits because of its failure to seek timely review, the City may not seek enforcement of an order issued by a body which ignored mandatory time requirements in issuing such order. Elementary fairness requires such a ruling.

We conclude, therefore, that the Equal Opportunity Commission's delay in processing Ms. Sanchez' complaint renders its backpay order void since it lost jurisdiction to make such an award in that case four days before the order was made. Since the order is void, the City, of course, has no authority to enforce it.

Based on its affidavits and pleadings, and upon the reasoning here set forth, summary judgment is granted to defendant. Plaintiff's motion for summary judgment is denied. Counsel for the defendant may prepare a formal judgment dismissing the action without costs. A copy of the proposed judgment should be submitted to counsel for the City before submission to the court for signature.

Dated August 31, 1979.

BY THE COURT:

Richard W. Bardwell
Circuit Judge