10-1975

# Hortonville Joint School District No. 1 v. Hortonville Education Association

Lewis F. Powell Jr

Greg - I'd like to see papers when I return from Utah.

Dissent (A "grant" on merits - Dissent finality issue)

74-1606

School Bd (Rehr. in 74-1606 - memo attached) discharged teachers after an illegal strike.

Were S/Ct held teachers were entitled to D/P hearing; that S/Board was not impartial; & that teachers therefore were entitled to de novo trial in state court.

This is a far reaching - & I think erroneous - decision on merits.

Preliminary Memo

Summer List 9, Sheet 2

No. 74-1606

No. ~~74-1638~~

See back

HORTONVILLE EDUCATION ASSOCIATION, et al.

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.

No. 74-1638

See back

Conditional Cross-Petition for Cert to Wisc. SC (Beilfuss, ____, ____, ____; (Hanson, concurring; Hanley, conc. & diss.) State Civil

Drey

It would be a sure Grant (I'd think) were it not for a serious "finality" issue in the sense that the discharge of teachers may be upheld by state court. But even if teachers lose

Timely

Please see memo for No. 74-1606, Hortonville Joint School District No. 1, et al. v. Hortonville Education Association, et al. (Summer List 9, Sheet 2).

8/14/75

Lipsett

Opinions in cross-petition

ME

on ~~no~~ discharge issue, the decision in ~~this~~ case will remain law in Wisc. It is certainly final in this sense

Preliminary Memo

Summer List 9, Sheet 2

No. 74-1606

| | | |
|---|---|---|
| HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al. | | Timely |
| v. | Cert to Wisc. SC (Beilfuss, ____, ____, ____, ____; Hanson, concurring; Hanley, conc. & diss.) State/Civil | |
| HORTONVILLE EDUCATION ASSOCIATION, et al. | | |

No. 74-1638

| | | |
|---|---|---|
| HORTONVILLE EDUCATION ASSOCIATION, et al. | | Timely |
| v. | Contitional Cross-Petition for Cert to Wisc. SC (Beilfuss, ____, ____, ____, ____; Hanson, concurring; Hanley, conc. & diss.) State/Civil | |
| HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al. | | |

1. SUMMARY: Petr school board negotiated to a deadlock with resp teachers over a contract. The teachers struck. After notice and an opportunity for a hearing, the school board fired the teachers for illegally striking. The Wisconsin SC (Beilfuss) held that in these circumstances due process principles required the imposition of a de novo review of the school board's decision to fire the teachers, because the school board lacked the impartiality necessary to make a final discharge decision, and held that resps could have a de novo review of the school board decision in state court. The school board's petition for certiorari questions the soundness of this due process conclusion. On a cross-petition for cert conditioned upon granting of the school board's petition, the teachers question the constitutional propriety of discharge effective before de novo review is exercised, an issue not discussed by the Wisconsin SC, and claim entitlement to immediate reinstatement and back pay. There is an additional issue of the finality of the Wisconsin SC decree.

2. FACTS: In January 1974, petitioners, school and school board officials in the Hortonville Joint School District were engaged in contract negotiations with respondents, teachers, in the Hortonville schools and their bargaining agent, the Hortonville Education Association. The negotiations fell through, and a substantial number of the teachers later struck. After the initiation of the strike, the school superintendent, at the direction of the Board, sent letters to the teachers inviting

their return to work. A second letter, further advising that strikes by public employees were illegal and that the Board would not condone illegality by its employees, was sent a few days later. Approximately a week later, following a Board decision to conduct individual discharge hearings, notices of the hearings were sent to the striking teachers. The teachers appeared mostly together before the Board (with their counsel), indicating their preference to be treated as a group, and raising objections to their notice, and the impartiality of the Board as a decision-maker. Substantively, they asserted that the Board had provoked the strike; but they were denied any opportunity to examine the Board members to establish their substantive point. At a subsequent special meeting, the Board determined to terminate the contracts of the striking teachers on the ground that the teachers had breached their contracts and engaged in a strike in violation of Wisconsin law. The teachers were so notified. The Board afterward began to hire replacement teachers.

The respondent teachers then brought this class action in the state circuit court alleging, inter alia, [1/] that the circumstances of their hearing and discharge deprived them of property without due process and violated the state open meeting law. They prayed for a declaration that the Board's action was null and void, an order that the discharge of the teachers be

---

1/ See note 3, infra.

set aside, an injunction against hiring additional replacements, and that the replacements' contracts be rescinded, and an order requiring the parties to select an impartial decision-maker to review whether there was just cause for the discharge, and such other relief as would be appropriate.

The Wisconsin Circuit Court (Deehr) held that the meeting law was not violated, and that while the respondents were entitled to due process, they had received it, and entered summary judgment for petrs.

In an expedited appeal, the Wisconsin SC permitted the teachers to raise all constitutional issues, whether presented below or not. The Wisconsin SC held that the teachers' strike was unlawful under state law and that the Board did have the power to dismiss the teachers. It held further that the dismissed teachers were not denied equal protection through selective enforcement of the Board's right to discharge them in response to their strike. It further held that there was no denial of equal protection in the legislature's denial of the right to strike to municipal employees because (1) the private marketplace pressures of competition involved in ordinary collective bargaining are absent in the governmental sphere, rendering a governmental employer particularly vulnerable to strikes; (2) public employees have legislative recourse; and (3) the strike ban protects public health, safety and welfare. Answering the

related argument that teachers were illegally discriminated against vis a vis firemen and policemen who were granted other benefits, such as binding arbitration in exchange for denial of the right to strike, the Wisconsin SC reasoned:

> "It is not difficult to find a rational basis for the legislation. If police or firemen go on strike the imminent and immediate danger to the community is so great that every reasonable measure must be taken to get them back on the job as soon as possible, or to prevent them from striking in the first instance. The classification is not unreasonable and is a legitimate exercise of the legislative function." (Emphasis added.)

Respondents contended that their dismissal hearing failed to comport with due process for the sole reason that they were denied an impartial decision-maker. Relying on Board of Regents v. Roth, 408 U.S. 564; and Perry v. Sinderman, 408 U.S. 593, the Wisconsin SC located a property right in the teacher's employment contracts for the current year and offers or contracts of employment for the next term. The Board argued that by going on strike the teachers abandoned their property interest in continued employment. The Wisconsin SC disagreed with the analysis on three bases, however. First, the due process hearing would ordinarily be necessary to determine whether, on the facts, the strike had occurred. Second, while it said that it need not reach the merits of the question, because of its first answer, the Wisconsin SC observed that dismissal on account of a strike was not automatic under

This may be critical. It may serve to distinguish Wisconsin from other states.

Wisconsin law, rather other courses of action were open to the Board, which may have been more reasonable in the circumstances, and, relying on Morrissey v. Brewer's requirement that issues in mitigation be heard at a parole revocation hearing, 408 U.S. 471, 487, held that:

> "it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decision-maker be charged with the responsibility of determining what action shall be taken on the basis of those facts."

Third, the Wisconsin SC rejected the plurality approach in Arnett v. Kennedy, 416 U.S. 134, as expressly tied to the Lloyd-LaFollette Act, and not "analogous." Finally, the Wisconsin SC also identified a Roth reputation-based liberty interest of the teachers which could be infringed by termination on grounds of breach of contract and unlawful striking.

Turning to the merits of respondents' argument that the Board's negotiating role deprived it of impartiality in making the discharge decision, the Wisconsin SC relied upon pecuniary interest cases, e.g., Gibson v. Berryhill, 411 U.S. 564; Ward v. Village of Monroeville, 409 U.S. 57; and other cases involving the impartiality of an administrative decision-maker, e.g., Morrissey v. Brewer, Goldberg v. Kelly, 397 U.S. 254, to hold the Board incompetent as a final decision-maker here:

> "It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted

> activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the board was not an impartial decision-maker in a constitutional sense and that the appellants were denied due process of law."

The Wisconsin SC then rejected existing and available post-termination review procedures [2/] as sufficient to remedy the due process insufficiency of a hearing before the Board, because

> "[n]either of the alternatives provided for review to determine when another course of action . . . would have been a more reasonable response on the part of the decision-maker. In light of that fact, it is difficult to see how either review can replace an impartial decision-maker in the first instance."

Recognizing the need for swift action on the part of the school board in staffing the schools with teachers (so as not to lose state aid), and that under state law nobody other than the Board was authorized to hire or fire teachers, the Wisconsin SC held that the School Board "should make the

---

2/ They are (1) review by common-law writ of certiorari; (2) review by the Wisconsin Employment Relations Commission.

initial determination as to the hiring or firing [upon notice and hearing] of one or many teachers." The Wisconsin SC then provided that in those situations where a final decision by the Board does not in itself provide due process, because of the Board's "adversary position," a dissatisfied teacher could "obtain a de novo determination of all issues in any court of record in the county. . . . The court shall resolve any factual disputes and provide for a reasonable disposition." Although recognizing that its remedy was "not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body," the Wisconsin SC found its remedy required until the legislature fashioned some alternative. Pursuant to this conclusion, the Wisconsin SC reversed the summary judgment below in favor of the Board, and remanded the case with permission for the parties to amend their pleadings so as to frame the necessary issues.

Finally, the Wisconsin SC held the Wisconsin open meeting law not violated.

Justices Hanson (concurring and joining Hanley) and Hanley (concurring in part and dissenting in part) filed separate opinions considering the case solely as a contractural dispute under state law, without any discussion of the due process issues

Cross petitions for rehearing were denied.

3. No. 74-1616 -- School Board Petition for Cert.

A. Jurisdiction. The question is whether there is a final order from the Wisconsin SC, since the case remains to be tried by the Wisconsin courts, determin ing de novo whether the discharge was reasonable. Neither side cites Cox Broadcasting Corp. v. Cohn, ___ U.S. ___, 43 USLW 4343. Without extended discussion, except to argue that a reversal on the due process issue here will avoid a long complex and pointless trial, the petrs rely upon Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386, 389 n. 4; Construction Laborers Local v. Curry, 371 U.S. 540; and Mercantile National Bank v. Langdeau. Vigorously arguing that there is no final decree, resps distinguish the case from Curry, on the ground that Curry involved a jurisdictional question. Resps also point out that petrs may yet win at trial by proof under state law of the propriety of its discharge decision. 3/

True

---

3/ Resps do not mention in this argument that they originally alleged two causes of action not ruled upon by the Wisconsin SC: (1) an unelaborated equal protection claim based on the alleged difference in treatment accorded teachers depending upon whether they were or were not represented by the Hortonville Education Association; and (2) an unspecified claim regarding hiring replacement teachers. These are only mentioned in the statement of the case in the conditional cross-petition. These two other causes of action were demurred to, and the demurrers were sustained. But, according to the statement of the case, they have been re-pled and now pend before the state trial court. It is not evident whether these claims are enmeshed in the due process contentions or request the same relief as the due process cause of action.

Of the four categories of exceptions to the finality rule's general requirement of awaiting the completion of additional proceedings anticipated in the lower state courts, the case here most closely relates to the fourth:

> "Where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issues by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come."

But the Cox Broadcasting Court's opinion only recognizes this exception as existing in cases where:

> "a refusal immediately to review the state court decision might seriously erode federal policy."

The three cases relied upon by petrs are all found to come within both requirements of category four. But the present case does not satisfy the second criterion, in the sense that the federal constitutional claim was vindicated in the Wisconsin SC opinion. This case is essentially the obverse; petitioners here complain that the erosion of state policy (in having political decisions unreviewed) by the arguably erroneous decision which no federal policy supports. Analogously to Cox Broadcasting itself, they might argue that the shadow of the

Wisconsin SC decision would remain even if they succeeded at trial. Moreover, it might be argued that the interest in minimizing state-federal friction would in fact be enhanced by immediate review in this case, to relieve the state of unwarranted federal bindings, especially where no independent state law question could resolve the case in favor of the petitioners here. That is, this is not a case where at trial petrs may cumulate state and federal law defenses, and may yet win on the state points which improperly denied a federal defense; rather this is a case where the affirmative existence of the plaintiffs' case rests upon an assertedly erroneous view of federal law. While Cox Broadcasting does not rule out the existence of other pragmatic categories of cases in which a judgment directing a trial will nevertheless be considered final, it does not recognize cases of this sort to be finally adjudged. Moreover, such a rule as would admit this case to finality would inevitably invite an additional throng, in some of which the precise compass of the federal basis of the plaintiff's action, as held by the state court, may not be confidently measurable until it is seen in operation upon remand.

It is difficult to conceive of an exception narrow enough to admit this case w/o admitting a host of others. — — — — On the other hand, there is a rather important state interest here. Yes

B. Contentions on Merits. Petrs contend that their action afforded all process due respondents under Withrow v. Larkin, ___ U.S. ___, 43 USLW 4459; and Arnett v. Kennedy, 416 U.S. 134. They stress that the Wisconsin SC conclusion was not based on any demonstration of actual bias, and that the fact of

a strike's existence was uncontested. Relying on Arnett, they stress the public interest in having the school board make the discharge decision -- that, it is said, is precisely their function in reconciling economic and educational goals. In this regard, they note that Morrissey v. Brewer, 408 U.S. 471, did not require that a parole revocation decision-maker be a judicial officer or lawyer. The Board analogizes to Withrow, arguing that the only basis for alleging bias is that the Board must take into account its non-judicatory statutory obligations. They contend that under the holding here a top-level decision-maker is denied the rights of a private employer to discharge on the basis of cause which involves the decision-maker. They also argue that for due process purposes a striker in these circumstances should be regarded as having abandoned his property interest. 4/

Respondents contend that the Wisconsin SC decision is fully consistent with the requirements of uninvolved decision-maker review in Goldberg v. Kelly, 397 U.S. 254, and Morrissey v. Brewer, 408 U.S. 471. They stress that the Wisconsin SC held as a state law matter that discharge was not an automatic response to a strike, and generally rely on the opinion below and cases in

---

4/ Resps also argue conflict with, e.g., Bullock v. Munford, CA D.C. 1974, 509 F.2d 384; Shirck v. Thomas, CA 7, 1971, 447 F.2d 1025, 1028; Sanford v. Rockefeller, 1974, ___ N.Y. ___, 88 LRRM 2189, appeal DFWSFQ, ___ U.S. ___, 89 LRRM 2300, but there is none.

this Court recognizing the psychological threats to impartial decision-making necessarily in question when the decision-maker's own adversary experience is involved in the case. See generally Morrissey v. Brewer; Pickering v. Board of Education, 391 U.S. 563, 578 n. 2; In re Murchison, 349 U.S. 133. See also Mayberry v. Pennsylvania, 400 U.S. 455. Analogizing to Withrow, they argue that the School Board would have had to have taken psychologically self-contradictory action if it had in effect accepted partial "blame" for the strike by administering less than the strongest "punishment" -- discharge -- against the striking teachers. Following the Wisconsin SC, they distinguish Arnett v. Kennedy as based upon the Lloyd-LaFollette Act's limited grant of a property right -- as compared with the property right unconditioned by procedural review provisions as found by the Wisconsin SC here as a matter of state law -- and because of the post-termination hearing afforded in Arnett. Respondents also argue that the Wisconsin SC's "insights into local laws and local realities" in this case should be respected.

C. Discussion of Merits. Taking as uncontested the fact of the strike, if dismissal were automatic, it seems difficult to accept the argument that the Board was incompetent to finally deny respondents of their property and liberty through discharge. But accepting the Wisconsin SC's conclusion that discipline through dismissal was not automatic, the argument has considerable thrust. The central problem faced here, of institutional bias in circumstances where further administrative or

Was dismissal automatic?

executive review is unavailable under state law, has not been resolved by this Court in Arnett or elsewhere. See generally Arnett, 416 U.S. 134, 155 n. 21 (REHNQUIST, J.); 170 n. 5 (POWELL, J., concurring in part); 196 (WHITE, J., concurring and dissenting); 205 (DOUGLAS, J., dissenting); 217 (MARSHALL, J., dissenting). The Wisconsin SC result renders top-level negotiation and decision-making seriously threatened. Essentially the thrust of the Wisconsin SC decision is to appoint a new decision-maker who must ratify any discharge decision under these circumstances. Significantly, the only new decision-maker available is a court: in a case like this the legislature will not have set up a fall-back agency in advance. Left hanging are questions like what would happen if another court in the position of the Wisconsin SC had no authority to invest the equivalent of the lower Wisconsin courts with responsibility for these matters, or how the body in the position of the Wisconsin courts are to develop a law of reasonableness in exercising their de novo review. The petition for cert should be granted, if jurisdiction exists. Petrs rely strongly on Withrow v. Larkin, but respondents do as well, and it is unlikely that a summary remand for its consideration would resolve this case.

Still, might want to give the Wis. S-Ct. a 1st try. although I think they would come out the same)

4. No. 74-1638 -- Teachers' Conditional Cross-Petition for Cert.

A. Equal Protection Claims, Contentions & Discussion. Resps -- conditional cross-petrs -- say that they are denied equal protection by Wisconsin statutes which prohibit their

striking, and which while providing that policemen and firemen (like teachers) may not strike, also provide that policemen and firemen (unlike teachers) are entitled to binding arbitration and de novo judicial review of the reasonableness of disciplinary proceedings against them. In response, the Board relies upon the Wisconsin SC opinion; Dandridge v. Williams, 397 U.S. 471; and Williamson v. Lee Optical Co., 348 U.S. 483. There is nothing certworthy here.

B. Due Process Claim, Contentions & Discussion. Cross petrs say they are immediately entitled to resinstatement with back pay pending de novo review of their dismissal, because they were entitled a full due process hearing before a non-biased decision-maker prior to any effective termination. They rely generally on Anti-Fascist Comm. v. McGrath, 341 U.S. 123; Bell v. Burson, 402 U.S. 535; Board of Regents v. Roth, 408 U.S. 564; Morrissey v. Brewer, 408 U.S. 471; Goss v. Lopez, ___ U.S. ___, 43 USLW 4181; North Georgia Finishing, Inc. v. Di Chem, Inc. ___ U.S. ___ 43 USLW 4192. They assert that no Board interest in expedition militates to the contrary because if in need of swift resumption of school classes, the Board could have sought injunctive relief against the strike. Somewhat unclearly they assert that a redetermination of the propriety of discharge as ordered by the Wisconsin SC could be truly de novo only if they were in office pending that determination.

In response, the Board repeats its argument that Wisconsin SC was initially wrong in relying on Morrissey v. Brewer to

require a de novo determination of the reasonableness of discharge. The Board asserts that the cross petrs' argument is inconsistent with the Wisconsin SC holding's recognition of some initial discharge decision-making role for the Board. They further argue that on the facts the teachers were not being paid because they were on strike, and that they "were not terminated after they returned to work" or discharged for punishment. They also argue that on the facts there were no mitigating circumstances here, such as were envisioned in Morrissey v. Brewer. The Board repeats the assertion that the discharge decision is a particularly political one, and that Board members alone are subject to reelection. Finally, it contends that a balance struck beteen the need for quick action in providing classroom teachers outweighs any striking teachers' rights to immediate protection of their property interests. 5/

It is not clear whether this issue was adequately preserved, though the Board does not make any argument on this. The Wisconsin courts never mentioned back pay; and cross petrs do not recite any pleading or argument of the issues in the trial court. Cross petrs may argue that the likelihood of Board error in its initial decision is high, given its bias, so that even if a full hearing might be postponed until following a necessarily fast termination decision, initial / determination by the Board is insufficient as a preliminary stage. Neither of these questio

The cross-petition at p. 9 does assert that the reinstatement and back pay issues were "timely and properly raised" before the Wisconsin S.Ct. on appeal + motion for rehearing. P. 3, supra, indicates the Wis. S. Ct. allowed all constitutional issues to be raised, whether or not they were 1st claimed in the trial court.

5/ The Board cites Rockwell v. Bd. of Education of School District of Crestwood, 1975, 393 Mich 616, holding post-termination hearings for school teachers discharged for striking to be sufficient due process under Arnett.

has been resolved in Arnett or elsewhere. See, e.g., opinion of MR. JUSTICE REHNQUIST, 416 U.S., at 155 n. 21. While Sanford v. Rockefeller, ___ N.Y. ___, 88 LRRM 2189, raising the due process sufficiency of a post-penalty full hearing was DFWSFQ, ___ U.S. ___, 43 USLW 3613 (DOUGLAS, WHITE & MARSHALL, JJ., dissenting), that case involved neither a bias claim on the part of the pre-hearing decision order nor actual discharge (only probationary status). Cf. also Morrissey v. Brewer, 408 U.S., at 486, 488 (impartial decision order required at preliminary stage even though the Court did not require attention to or arguments in investigation at that stage). In this case, the delay before a de novo hearing is quite long owing to the fact that there was no de novo hearing until the Wisconsin SC said so, but that uniqueness itself discourages certiorari review, and in future cases under the Wisconsin SC holding the initiative will be with the teacher. Most significantly, however, the mesh of this issue with the due process analysis of the whole case counsels in favor of granting the conditional cross petition, limited to the back pay and reinstatement issue, if the Board's petition is granted. Similar issues are raised in Nos. 74-204, Weinberger v. Eldridge, and 74-205, Weinberger v. Williams (pre-oral hearing termination of disability benefits); and see Nos. 74-858, Carey v. Sugar; 74-859, Curtis Publ. Co. v. Sugar; 73-1808, Laing v. United States; 74-75, United States v. Hall (raising Fuentes/Mitchell/North Georgia Finishing issues), in all of which cert has been granted.

C. Jurisdiction. Cross petrs contend that jurisdiction to entertain their conditional cross petition under § 1257(3) exists if jurisdiction to entertain the Board's petition exists. They cite Farmers Reservoir & Irrigation Co. v. McComb, 335 U.S. 809, 337 U.S. 755, in support of the propriety of a cross petition conditioned upon the granting of the adversary's petition. The case report notes only that cross petitions were granted; thus Stern & Gressman, at 311 n. 78, revealing that the cross petition was explicitly conditional, is evidently the real authority. Neither contention is disputed by cross respondent. The conditional corss petn seems unobjectionable. Finality of the judgment on the lack of immediate reinstatement and back pay is established by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541. Jurisdiction to entertain the equal protection claim on the conditional cross petition would follow from an assertion of jurisdiction over the Board's petition, if only because a decision in favor of the Board on the due process claim renders the state judgment against equal protection claims clearly final.

There is a response to each petition.

8/14/75 Lipsett

Opinions in Petn. & conditional cross-petition

74-1606

There is an obvious danger that should cert. be denied because of the final judgment problem, the State may not get to free itself of the burden imposed here until some later case develops -- as in Cox even if the State wins at the de novo trial they still have "lost" the right to be free of judicial proceedings on these matters. On the other hand, should the Court add yet another exception to the final judgment rule to cover this case, the substance of that rule would be sharply eroded.

On the merits, it is hard to disagree with the conclusions of the S-Ct. regarding the impartiality of the board given its role as negotiator of the contracts. To be sure the board members no doubt would attempt to act impartially; but it would still be difficult for them to regard the striking teachers' acts w/o same anger or frustration. In any case, the result here presumably does not affect the ability of the Board to fire teachers in other contexts, where their negotiation function has not been implicated. [Also, "due process" would appear flexible enough to permit a Board to separate out a sub-committee to deal with contracts and another group within the Board to conduct termination proceedings, cf Goldberg v. Kelley (another officer in the Welfare dept. conducted the hearing), -- of course, this would require a change in state law]. ( see back prior

~~Of the Robertson boundary the issue here.~~

Anyway, given the "finality" questions, a denial of cert. may be ~~the~~ most preferable alternative here.

---

No. 74-1638

Should 74-1666 be granted, then so should this.

Await views of J. Rehnquist (Inclined to Grant or remand to determine whether there was independent state ground)

DISCUSS

Supplemental Memo

Summer List 9, Sheet 2

No. 74-1606 + 74-1638

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.

v.

HORTONVILLE EDUCATION ASSOCIATION, et al.

Timely

Cert to Wisc. SC (Beilfuss, ____, ____, ____, ____; Hanson, concurring; Hanley, conc. & diss.)

State/Civil

This doesn't affect my prior recommendations except it does open the way for the alternative of remanding to make absolutely sure there was no adequate state ground. But from my reading of the opinion Justice Rehnquist's interpretation seems correct

MR. JUSTICE REHNQUIST's denial of a stay requested by the School Board in this case, Hortonville Joint School District No. 1 v. Hortonville Education Association, No. A-133, raises the additional question of whether the decision of the Wisconsin SC was based also upon a construction of the due

NLP

process clause of the Wisconsin Constitution. While the analysis of the Wisconsin SC explicitly depends upon this Court's interpretation of the Fourteenth Amendment, [1] the respondents did argue that they were denied due process under Wisc. Const. § 1, App., at 6, and the Wisconsin SC did cite two Wisconsin cases for the general proposition that fair play is a factor in due process, App., at 23. [2] Moreover, the Wisconsin SC explicitly relies upon Wisc. Const. Art. 1, § 13, [3] as its authority in providing the respondents the remedy it fashioned. App., at 27.

---

1/ The opinion of the Wisconsin SC also recites that the Fourteenth Amendment only proscribes state action denying due process, and states that "[b]efore it can be determined whether the appellants were denied due process, it must be established that they were entitled to due process of law in that they were deprived of their property or liberty by state action." (Emphasis added.) App., at 16.

2/ One of these cases relies in turn upon state as well as federal notions of due process.

3/

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

MR. JUSTICE REHNQUIST's opinion in denying the stay states that he would conclude that the judgment of the Wisconsin SC was based solely on the Federal Constitution.

8/18/75 Lipsett

ME

# SUPREME COURT OF THE UNITED STATES

No. A–133 (74–1606)

Hortonville Joint School District No. 1 et al., Petitioners, *v.* Hortonville Education Association et al. } On Application for Stay.

[August 18, 1975]

MR. JUSTICE REHNQUIST, Circuit Justice.

If the judgment of the Supreme Court of Wisconsin were plainly a "final judgment" for purposes of 28 U. S. C. § 1257, and if it plainly rested solely upon a construction of the Fourteenth Amendment to the United States Constitution, I would be inclined to grant the stay requested by the applicant School Board. I think that none of our cases require the conclusion, reached by the Wisconsin court, that a school board may not be allowed to dismiss teachers which it employs because it is not the sort of impartial decisionmaker required by due process of law. If this matter were before me on the petition for certiorari where I would be casting my vote as a Member of the Court, I would conclude that the judgment of the Supreme Court of Wisconsin did rest solely upon the Fourteenth Amendment. But in my capacity as Circuit Justice, where I act "as a surrogate for the entire Court," *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1313 (1973) (MARSHALL, J., in chambers), doubts as to whether the judgment may not rest also upon a construction of the Wisconsin Constitution, and as to the finality of the judgment, lead me to deny the application.

Conference 9-29-75

Court Wisc. Supreme Ct.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 74-163
(Vide 74-1606

HORTONVILLE EDUCATION ASSOCIATION, ET AL., Petitioners

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, ET AL.

6/26/75 Cert. filed.
Hold for 74-1606

Hold for Hortonville 74-1606

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | | |
| ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Rehnquist, J. | ✓ | | | | | | | | | | | | | |
| Powell, J. | | ✓ | | | | | | | | | | | | |
| Blackmun, J. | ✓ | | | | | | | | | | | | | |
| Marshall, J. | ✓ | | | | | | | | | | | | | |
| White, J. | ✓ | | | | | | | | | | | | | |
| Stewart, J. | | ✓ | | | | | | | | | | | | |
| Brennan, J. | ✓ | | | | | | | | | | | | | |
| Douglas, J. | | ✓ | | | | | | | | | | | | |
| Burger, Ch. J. | ✓ | | | | | | | | | | | | | |

Conference 9-29-75

Court Wisc. Supreme Ct.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 74-160
(Vide 74-1638

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, ET AL., Petitioners

vs.

HORTONVILLE EDUCATION ASSOCIATION, ET AL.

6/19/75 Cert. filed.

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | | |
| Rehnquist, J. | | ✓ | | | | | | | | | | | | |
| Powell, J. | | ✓ | | | | | | | | | | | | |
| Blackmun, J. | | | ✓ | | | | | | | | | | | |
| Marshall, J. | | | ✓ | | | | | | | | | | | |
| White, J. | | ✓ | | | | | | | | | | | | |
| Stewart, J. | | | ✓ | | | | | | | | | | | |
| Brennan, J. | | | ✓ | | | | | | | | | | | |
| Douglas, J. | | ✓ | | | | | | | | | | | | |
| Burger, Ch. J. | | JS | | | | | | | | | | | | |

FRIEBERT & FINERTY
ATTORNEYS AT LAW
710 NORTH PLANKINTON AVENUE
MILWAUKEE, WISCONSIN 53203

TELEPHONE (414) 271-0130

ROBERT H. FRIEBERT
JOHN D. FINERTY
ALLEN L. SAMSON
COURT COMMISSIONER
THOMAS W. ST. JOHN
D. JEFFREY HIRSCHBERG
CHARLES D. CLAUSEN

OF COUNSEL
HARRY E. SAMSON
HAROLD NASH
COURT COMMISSIONER

January 16, 1976

Mr. Michael Rodak, Jr.
Clerk
United States Supreme Court
One First Street, N.E.
Washington, D. C. 20543

Re: Hortonville Joint School District No. 1, et al
v. Hortonville Education Association, et al
October Term, 1975
Case No. 74-1606

Dear Mr. Rodak:

When the Brief for respondents was filed in the above captioned case, reference was made to two Wisconsin decisions which were in slip sheet form at that time. Since then, those cases have been printed in both official and unofficial reports. The cases and the citations are as follows:

Kenosha Unified School District No. 1 v. Kenosha Education Association, 70 Wis. 2d 325, 234 N.W. 2d 311 (1975)

Joint School District No. 1, City of Wisconsin Rapids, et al v. Wisconsin Rapids Education Association, et al 70 Wis. 2d 292, 234 N.W. 2d 289 (1975)

This information is submitted for the convenience of the Court and opposing counsel.

Very truly yours,

FRIEBERT & FINERTY

Thomas W. St. John

TWS:jln

cc: Jack Walker
Robert M. Weinberg

BOEHM AND WEINSTEIN
CHARTERED
ATTORNEYS AND COUNSELORS

BURTON I. WEINSTEIN
ROBERT I. BOEHM
LOREN B. SIEGEL

SUITE 2700
33 NORTH LA SALLE STREET
CHICAGO, ILLINOIS 60602
(312) 782-8420

January 17, 1976

The Chief Justice and Associate
Justices of the Supreme Court
of the United States
Supreme Court Building
Washington, D.C. 20543

Re: Lawrence Cantor d/b/a Selden Drugs Company, individually and on behalf of all other retail sellers of light bulbs similarly situated, Petitioner v. The Detroit Edison Company, a New York corporation, Respondent No. 75-122

My Dear Chief Justice and Associate Justices:

At the conclusion of my rebuttal argument on Wednesday, January 14, 1976, the Court inquired as to whether there is any record evidence that there are other electric utilities in Michigan which had a light bulb program similar to that used by The Detroit Edison Company. I answered the question "no". I may have misconstrued the Court's question. Regardless, there is evidence in the record that, with the exception of a municipally owned utility in Lansing, Michigan, no other utility in Michigan or the United States has such a program. Appendix 162A.

Very truly yours,

Burton I. Weinstein

Burton I. Weinstein

BIW/hrw

cc: Mr. Howard J. Trienens
Mr. Paul Rodgers
Mr. Robert H. Bork
Mr. George D. Reycraft
Mr. Leon S. Cohan

2/23/76 gp/ss

BOBTAIL MEMORANDUM

TO: Mr. Justice Powell DATE: February 23, 1976

FROM: Greg Palm

No. 74-1606 Hortonville Joint School District No. 1. v. Hortonville Education Association

I recommend that the decision below be affirmed. This recommendation turns in significant part on my understanding of Wisconsin law in the area of public teacher bargaining rights.

It is my current understanding that under Wisdonsin law although a teacher may be fired for engaging in a strike, this must be the most reasonable course of action under all the circumstances. Significantly, one of the circumstances that must be considered in making that assessment is whether the school board has engaged in good faith bargaining. If this understanding is correct then I do not believe that the board constitutes a sufficiently "neutral" decisionmaker so as not to require de novo review by some other State authority. The board realistically cannot be expected to consider its own bargaining efforts as other than in good faith. Moreover, although the school board members do not possess any personal pecuniary interest in the outcome of the decision, compare Gibson v. Berryhill, 411 U.S. 564 (1974), they obviously do have a direct interest in the financial integrity of the school district.* Beyond their interest in increased salaries

This claim can be made always, and at least create the issue — then disqualify the Board

public responsibility

* Can be said of most Govt. agencies.

apparently one of the teacher demands that led to the impasse in the contract negotiations here was a demand by teachers for reduced class size, an outcome that would result in an increased financial burden on the district. The principle underlying this Court's decision in Ward v. Village of Monroeville, 409 U.S. 57 (1972) is supportive of the view that this type of financial interest makes the board an unacceptable decisionmaker, in the context of the strike/action decision. In Ward the Court concluded the town mayor was unacceptable as the adjudicator of guilt and assessor of fines in the local court because of the town's need for the revenues derived from such fines. Ward is not controlling here, however, since (1) the linkage between the fines and the revenues is more direct than that between the veiled threat of being fired and the strengthening of the board's bargaining position; (2) there was some personal pecuniary interest in Ward since the mayor's salary presumably was at least indirectly tied to the fines levied (it is in part dependent on the financial well being of the community); and (3) there is an arguable difference between adjudications of guilt or innocence even in the case of minor traffic offenses, and the situation here - the individual's interest in the former situation is greater* than in the latter, and this is an important factor in determining what process is due (including the degree of neutrality of the decisionmaker). Still, even though Ward may not be controlling, I do think that the financial interest here

But certainly not controlling

Yes

* This point is debatable, however, since many would believe loss of a job is more serious than being found guilty of a traffic violation. Moreover, there is a "liberty" interest here to the extent "firing for striking" clouds the teacher's reputation (since strikes are illegal)

Possibly

coupled with the fact that the board must weigh its own conduct (as well as that of the teachers) in assessing which alternative sanction - i.e. firing, suspension, fines - is most appropriate makes the board insufficiently neutral for purpose of due process. See Ward, supra, at 60 ("Possible temptation to average man").

At oral argument I think that it is very important that questions be directed to both parties as to Wisconsin law concerning the right to fire in the strike situation. The opinion of the Wisconsin Supreme Court is not clear on this. Respondents' brief asserts rather clearly that state law is that firing is not automatic, but can only occur if it is the most reasonable course of action under the circumstances. Respondents do not, however, cite any cases that directly and clearly support their assertions. For their part the petitioners never really challenge the truth of respondents' assertions on this score making me suspect that the assertions must in significant measure be true. (There is some language in the Wisconsin Supreme Court opinion that might lead one to believe that the court derived the reasonable course of action requirement from the due process clause.* See Petition for Certiorari A 24. This is not clear, however, and the opinion does cite some State cases at that point, which may/may not (cases not currently in library) themselves turn on "federal" due process principles.)

* if this is so, then reversal is appropriate; see what Conference says about this issue.

I have no doubt that the Court will split heatedly on this issue and that a majority of Justices (including yourself) are likely leaning toward reversal. (There are not many cases in the area and the judgment as to who constitutes a sufficiently neutral decisionmaker for purposes of a particular decision is in significant part subjective). Moreover, I am not unsympathetic to the view that most decisions regarding educational affairs should be left in the hands of the school administrators, as the elected or appointed spokesmen of the people. But I do not believe that a carefully written opinion in this case will in any way affect the ability of school boards (or state administrators in other contexts) to make decisions regarding the fate of individual employees.* Given the peculiar (I think) state of Wisconsin law, it may also be possible to limit the opinion so as not to control similar cases arising in states where firing is the automatic penalty for striking (this will require effort, however, since it is not entirely easy to articulate precisely why the relative simplicity of that determination should affect the need for a different decisionmaker).**

G.P.

ss

*For example, nothing that is said in this opinion should affect the ability of the school board to make decisions regarding the retention/firing of a particular teacher because of their view regarding his fitness for the position. He would, of course, have the right to challenge the action if based on improper grounds.

** An alternative disposition here would be to state a "rule" and remand (for clarification of Wisconsin law)

Cert to S/Ct Wisc.

74-1606 HORTONVILLE v. HORTONVILLE Argued 2/23/76

There is a Q of juris - or absence of final decision (see p 8 of cert memo)

School teachers struck, & after notice & hearing (which teachers attended w/counsel) S/Board discharged teachers.

Wisc S/Ct held:

1. Wisc. statute barring strike by pub. employees was valid
2. This strike was therefore invalid.
3. S/Bd had authority to discharge teachers
4. No denial of E/P by selective discharge of some - not all teachers.
5. But S/Bd was not impartial body & thus there was a denial of D/P.
6. A dismissed teacher may have a D/P hearing on his discharge before the Circuit Court.

Walker (for Pelt School Bd)

No personal bias claimed as to any member of Bd - merely an institutional bias.

Teachers could have sued for breach of two: two different alternatives, both de novo.

Wisc. Ct. said none of avenues of review comported with D/P.

In addition to suits for breach of ctt & breach of collective bargaining agt., teachers could have had State Labor Bd (what is name?) review de novo the S/B decision.

As to available avenues of review see p 29 of Pelton Br:

all de novo
1. On Cert. to Wisc S/Ct (29)
2. Suit for breach of ctt (30)
3. By filing a Complaint with the WERC (State Labor Bd) - (Same powers as NLRB)

~~~ Wisc Municipal Employment Rel Bd (WERC) - 30
~~~

Froebel (for Resp. Teachers)

No. _____, Reverse - 8 - 1

74-1606 Hortonville v. Hortonville Conf. 2/25/76

The Chief Justice Reverse

There was notice & opp. to be heard. Resps declined opp. to a hearing - individually & collectively.

Bd also offered to rehire all Resps.

xxxxxxxxx Stevens, J. Reverse

Brennan, J. Reverse

We limited issue to whether D/P clause requires conclusion that S/Bd was not an unbiased body.

W/Sup Ct. found no individual bias, but found Bd was not impartial as an institution.

Can't agree with this

Stewart, J. Affirm

Agree with Brennan as to Q.

Can't understand S/Ct of Wisc, but he believes that Ct. held that - unlike other states - law in Wisc is that [redacted] dismissing teachers is not available unless strike was unreasonable; i.e. that S/Bd can't fairly judge the reasonableness of the collective bargaining.

There is a final judg.

White, J.

Reverse

W. S/Ct based its decision on fed D/P grounds. It could have relied solely on state grounds, but did not do so.

Not a denial of D/P for Board to resolve this case

Marshall, J.

Reverse (??)

Extremely close case - inclined to agree with Byron.

Blackmun, J. Reverse

No factual issue left. Have a Q of finality.

Larkin is relevant.

Teachers want to strike & keep jobs — which would frustrate state

Powell, J. Reverse

Agree largely with what Brennan said.

Rehnquist, J. Reverse

The holding is final

Larkin does shed light.

Grey

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 13 1976

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

Reversed

No. 74–1606

| | |
|---|---|
| Hortonville Joint School District No. 1 et al., Petitioners, *v.* Hortonville Education Association et al. | On Writ of Certiorari to the Supreme Court of Wisconsin. |

[May —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether school board members, vested by state law with the power to employ and dismiss teachers, could, consistent with the Due Process Clause of the Fourteenth Amendment, dismiss teachers engaged in a strike prohibited by state law.

I

The petitioners are a Wisconsin school district, the seven members of its school board, and three administrative employees of the district. Respondents are teachers suing on behalf of all teachers in the district and the Hortonville Education Association (HEA), the collective-bargaining agent for the district's teachers.

During the 1972–1973 school year Hortonville teachers worked under a master collective-bargaining agreement; negotiations were conducted for renewal of the contract, but no agreement was reached for the 1973–1974 school year. The teachers continued to work while negotiations proceeded during the year without reaching agreement.

On March 18, 1974, the members of the teachers' union went on strike, in direct violation of Wisconsin law. On March 20, the district superintendent sent all teachers a letter inviting them to return to work; a few did so. On March 23, he sent another letter, asking the 86 teachers still on strike to return, and reminding them that strikes by public employees were illegal; none of these teachers returned to work. After conducting classes with substitute teachers on March 26 and 27, the Board decided to conduct disciplinary hearings for each of the teachers on strike. Individual notices were sent to each teacher setting hearings for April 1, 2, and 3.

On April 1, most of the striking teachers appeared before the Board with counsel. Their attorney indicated that the striking teachers did not want individual hearings, but preferred to be treated as a group. Although counsel agreed that the teachers were on strike, he raised several procedural objections to the hearings. He also argued that the Board was not sufficiently impartial to exercise discipline over the striking teachers and that the Due Process Clause of the Fourteenth Amendment required an independent, unbiased decisionmaker. An offer of proof was tendered to demonstrate that the strike had been provoked by the Board's failure to meet teachers' demands, and petitioner's counsel asked to cross-examine Board members individually. The Board rejected the request, but permitted counsel to make the offer of proof, aimed at showing that the Board's contract offers were unsatisfactory, that the Board used coercive and illegal bargaining tactics, and that teachers in the district had been locked out by the Board.

On April 2 the Board voted to terminate the employment of striking teachers, and advised them by letter to that effect. However, the same letter invited all teachers on strike to reapply for teaching positions. One teacher

accepted the invitation and returned to work; the Board hired replacements to fill the remaining positions.

Respondents then filed suit against petitioners in state court, alleging, among other things, that the notice and hearing provided them by the Board were inadequate to comply with due process requirements. The trial court sustained the Board's demurrer and granted the Board's motion for summary judgment on the due process claim. The court found that the teachers, although on strike, were still employees of the Board under Wisconsin law and that they retained a property interest in their positions under this Court's decisions in *Perry* v. *Sindermann,* 408 U. S. 593 (1972), and *Board of Regents* v. *Roth,* 408 U. S. 564 (1972). The court concluded that the only question before the Board on April 1 and 2 was whether the teachers were on strike in violation of state law, and that no evidence in mitigation was relevant. It rejected their claim that they were denied due process, since the teachers admitted they were on strike after receiving adequate notice and a hearing, including the warning that they were in violation of Wisconsin law

On appeal, the Wisconsin Supreme Court reversed. *Hortonville Education Assn.* v. *Hortonville Joint School District No. 1,* 66 Wis. 2d 469, 225 N. W. 2d 658 (1975). Some of the issues decided are not raised in this Court, including the Wisconsin Supreme Court's conclusion that the striking teachers had a liberty and property interest sufficient to invoke the Due Process Clause. The single issue now presented is the holding that the Due Process Clause of the Fourteenth Amendment to the Federal Constitution required that the teachers' conduct and the Board's response be evaluated by an impartial decisionmaker other than the Board. The rationale of the Wisconsin Supreme Court appears to be that although the

teachers had admitted being on strike, and although the strike violated Wisconsin law, the Board had available other remedies than dismissal, including an injunction prohibiting the strike, a call for mediation, or continued bargaining. Relying on our holding in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), the Wisconsin court then held "it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." 66 Wis. 2d, at 493. The court held that the Board was not sufficiently impartial to make this choice: "The background giving rise to the ultimate facts in this case reveals a situation not at all conductive to detachment and impartiality on the part of the school board." 66 Wis. 2d, at 493–494. In reaching its conclusion, the court acknowledged that the Board's decision could be reviewed in other forums; but no reviewing body would give the teachers an opportunity to demonstrate that "another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decision maker." 66 Wis. 2d, at 496.

Since it concluded that state law provided no adequate remedy, the Wisconsin Supreme Court fashioned one it thought necessary to comply with federal due process principles. To leave with the Board "[a]s much control as possible . . . to set policy and manage the school," the court held that the Board should after notice and hearing make the decision to fire in the first instance. A teacher dissatisfied with the Board's decision could petition any court of record in the country for a *de novo* hearing on *all* issues; the trial court would "resolve any factual disputes and provide the reasonable disposition." 66 Wis. 2d, at 498 The Wisconsin Supreme Court recognized that this

remedy was "not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body." *Ibid.* But it would suffice "until such time and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process." *Ibid.*

We granted certiorari as to the state court's reliance on federal due process. 423 U. S. 821 (1975). We reverse.

## II

The Hortonville School District is a common school district under Wisconsin law, financed by local property taxes and state school aid and governed by an elected seven-member school board. Wis. Stat. Ann. §§ 120.01, 120.03, 120.06. The Board has broad power over "the possession, care, control and management of the property and affairs of the school district." *Id.*, § 120.12 (1); see also §§ 120.08, 120.10 120.15–120.17. The Board negotiates terms of employment with teachers under the Wisconsin Municipal Employment Relations Act, *id.*, § 111.70 *et seq.*, and contracts with individual teachers on behalf of the district. The Board is the only body vested by statute with the power to employ and dismiss teachers. *Id.*, § 118.22 (2).[1]

The sole issue in this case is whether the Due Process Clause of the Fourteenth Amendment prohibits the school board from making the decision to dismiss teachers admittedly engaged in a strike and persistently refusing to return to their duties.[2] The Wisconsin Su-

[1] The National School Boards Association informs us that 45 States lodge the power to dismiss teachers in local school boards. Brief of National School Boards Association, *amicus curiae*, n. 4, at 9.

[2] This case presents no issue whether the Due Process Clause protects the teachers' interest in continued employment. The Wisconsin Supreme Court held that the discharge of the teachers during

preme Court held that state law prohibited the strike and that termination of the striking teachers' employment was a permissible response by the Board within its statutory authority. 66 Wis. 2d, at 479–481. We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State. *Groppi* v. *Wisconsin,* 400 U. S. 505, 507 (1971); *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959). The only decision remaining for the Board therefore involved the exercise of its discretion as to what should be done to carry out the duties the law placed on the Board.

A

Respondents argue, and the Wisconsin Supreme Court held, that the choice presented for the Board's decision is analogous to that involved in revocation of parole in *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), that the decision could be made only by an impartial decisionmaker, and that the Board was not impartial. In *Mor-*

---

their 1973–1974 individual contracts, and the revocation of the Board's individual offers of employment for the 1974–1975 school year, deprived them of property. 66 Wis. 2d, at 489. "Property interests . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." *Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972). We do not challenge the Wisconsin Supreme Court's conclusion that state law gave these teachers a "legitimate claim of entitlement to job tenure." *Perry* v. *Sindermann,* 408 U. S. 593, 602 (1972).

Nor are we required to determine whether the notice and hearing afforded by the Board, as matters separate from the Board's ability fairly to decide the issue before it, were adequate to afford respondents due process. Respondents do not suggest here that the notice they received was constitutionally inadequate, and they refused to treat the dismissals on a case-by-case basis.

*rissey* the Court considered a challenge to state procedures employed in revoking the parole of state prisoners. There we noted that the parole revocation decision involved two steps: first an inquiry whether the parolee had in fact violated the conditions of his parole; second, determining whether violations found were serious enough to justify revocation of parole and the consequent deprivation of the parolee's conditional liberty. With respect to the second step, the Court observed:

> "The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary." 408 U. S., at 480.

Nothing in this case is analogous to the first step in *Morrissey*, since the teachers admitted to being on strike. But respondents argue that the School Board's decision in this case is, for constitutional purposes, the same as the second aspect of the decision to revoke parole. The Board cannot make a "reasonable" decision on this issue, the Wisconsin Supreme Court held and respondents argue, because its members are biased in some fashion that the due process guarantees of the Fourteenth Amendment prohibit.[3]

---

[3] Respondents argue that the requirement that the Board's decision be "reasonable" is in fact a requirement of state law. From that premise and from the premise that the "reasonableness" determina-

*Morrissey* arose in a materially different context. We recognized there that a parole violation could occur at a place distant from where the parole revocation decision would finally be made; we also recognized the risk of factual error, such as misidentification. To minimize this risk, we held "due process requires that after the arrest [for parole violation], the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." 408 U. S., at 485. But this holding must be read against our earlier discussion in *Morrissey* of the parole officer's role

---

tion requires an evaluation of the Board's negotiating stance, they argue that nothing but decision and review *de novo* by an "uninvolved" party will secure their right to a "reasonable" decision. See *Withrow* v. *Larkin*, 421 U. S. 35, n. 25, at 58–59 (1975). It is clear, however, that the Wisconsin Supreme Court held that the Board's decision must be "reasonable," not by virtue of state law, but because of its reading of the Due Process Clause of the Fourteenth Amendment. First, the Wisconsin court relied largely upon cases interpreting the Federal Constitution in this aspect of its holding. See 66 Wis. 2d, at 493. Second, the only state case the Wisconsin Supreme Court cited for more than a general statement of federal requirements was *Durkin* v. *Board of Police & Fire Commissioners*, 48 Wis. 2d 112, 180 N. W. 2d 1 (1970). There the Wisconsin Supreme Court interpreted a state statute that gave firemen and policemen the right to appeal a decision of the Board of Police and Fire Commissioners to a state court; the statute expressly provided that the court was to determine whether "upon the evidence the order of the Board was reasonable." 180 N. W. 2d, at 3. See Wis. Stat. Ann. § 62.13 (5) (i). There is no comparable statutory provision giving teachers the right to review by this standard. Finally, to impose a "reasonableness" requirement, or any other test that looks to evaluation by another entity, makes semantic sense only where review is contemplated by the statute. Review, and the standard for review, are concepts that go hand in hand. The Wisconsin Supreme Court concluded both that review of the Board's decision was necessary and that a "reasonableness" standard was appropriate as a result of its reading of the Due Process Clause of the Fourteenth Amendment

as counselor and confidant to the parolee; it is this same officer who, on the basis of preliminary information, decides to arrest the parolee. A school board is not to be equated with the parole officer as an arresting officer; the school board is more like the parole board, with the ultimate plenary authority to make its decisions derived from the state legislature. General language about due process in a holding concerning revocation of parole is not a reliable basis for dealing with the school board's power as an employer to dismiss teachers for cause. We must focus more clearly on first, the nature of the bias respondents attribute to the Board, and second, the nature of the interests at stake in this case.

B

Respondents' argument rests in part on doctrines that have no application to this case. They seem to argue the Board members had some personal or official stake in the decision whether the teachers should be dismissed, comparable to the stake the Court saw in *Tumey* v. *Ohio,* 273 U. S. 510 (1972), or *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972); see also *Gibson* v. *Berryhill,* 411 U. S. 564 (1973), and that the Board has manifested some personal bitterness toward the teachers, aroused by teacher criticism of the Board during the strike, see, *e. g., Taylor* v. *Hayes,* 418 U. S. 488 (1974); *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). But the teachers did not even try to show, and the Wisconsin courts did not find, that the Board members had the kind of personal or financial stake in the decision that has sometimes been thought to create a conflict of interest, and there is nothing in the record to support charges of personal animosity. The Wisconsin Supreme Court was careful "not to suggest . . . that the board members were anything but dedicated public servants, trying to pro-

vide the district with quality education . . . within its limited budget." 66 Wis. 2d, at 494. That court's analysis would seem to be confirmed by the Board's repeated invitations for striking teachers to return to work, the final invitation being contained in the letter that notified them of their discharge.[4]

The only other factor suggested to support the claim of bias is that the School Board was involved in the negotiations that preceded and precipitated the striking teachers' discharge. Participation in those negotiations was a statutory duty of the Board. The Wisconsin Supreme Court held that this involvement, without more, disqualified the Board from ~~declining~~ deciding whether the teachers should be dismissed:

> "The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members

[4] Respondents alleged before the Board, and argue here, that the Board's decision to dismiss them was motivated by antiunion animus in addition to personal vindictiveness, and that their illegal strike should be excused because the Board provoked it. The Wisconsin Supreme Court suggested that the Board's "decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop." 66 Wis. 2d, at 494. Given that Wisconsin statutes permitted the Board to dismiss striking teachers, and assuming, as did the Wisconsin court, that the Board's decision was in other respects proper under state labor law, we do not agree that federal due process prevented the Board from pursuing a course of action that was within its explicit statutory authority and which, in ~~the~~ its judgment, would serve the best interests of the school system. That the result may also have been desirable for other reasons is irrelevant to the due process issue on which the Wisconsin Supreme Court's decision turned, and if the other reasons are invalid under state law, respondents can resort to whatever forum the State provides.

> when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. . . . They were . . . not uninvolved in the events which precipitated decisions they were required to make." 66 Wis. 2d, at 493–494.

Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. *Withrow* v. *Larkin,* 421 U. S. 35, 47 (1975); *Federal Trade Commission* v. *Cement Institute,* 33 U. S. 683, 700–703 (1948). Nor is a decisionmaker automatically disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *United States* v. *Morgan,* 313 U. S. 409, 421 (1941); see also *FTC* v. *Cement Institute, supra,* 701.

Respondents' claim and the Wisconsin Supreme Court's holding reduce to the argument that the Board was biased because it negotiated with the teachers on behalf of the school district without reaching agreement and learned about the reasons for the strike in the course of negotiating. From those premises the Wisconsin Court concluded that the Board somehow lost its statutory power to judge that the strike and persistent refusal to terminate it amounted to conduct serious enough to warrant discharge of the strikers. Wisconsin statutes vest in the Board the power to discharge its employees, a power of every employer, whether it has negotiated with the employees before discharge or not. The Fourteenth Amendment permits a court to strip the Board of the otherwise unremarkable power the Wisconsin Legislature has given it only if the Board's prior involvement in negotiating with the teachers means that it cannot act consistent with due process.

C

Due process, as this Court has repeatedly held, is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeterial Workers* v. *McElroy,* 367 U. S. 886, 895 (1961). Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it. See *Mathews* v. *Eldridge,* —— U. S. —— (1976); *Arnett* v. *Kennedy,* 416 U. S. 134, 168 (1974) (POWELL, J., concurring); *id.,* at 188 (WHITE, J., concurring and dissenting); *Goldberg* v. *Kelly,* 397 U. S. 254, 263–266 (1970). Our assessment of the interests of the parties in this case leads to the conclusion that this is a very different case from *Morrissey* v. *Brewer, supra,* and that the Board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law should be discharged.

The teachers' interest in these proceedings is, of course, self-evident: they wished to avoid termination of their employment, obviously an important interest, but one that must be examined in light of several factors. Since the teachers admitted that they were engaged in a work stoppage, there was no possibility of an erroneous factual determination on this critical threshold issue. Moreover, what the teachers claim as a property right was the expectation that the jobs they had left to go and remain on strike in violation of law would remain open to them. The Wisconsin court appears to have accepted at least the essence of that claim in defining the property right under state law, and we do not quarrel with its conclusion. But we note that both "the risk of an erroneous deprivation" and "the degree of potential deprivation" differ in both a

qualitative sense and in degree from those in *Morrissey*. *Mathews* v. *Eldridge, supra,* —— U. S. ——, at ——.

The governmental interests at stake in this case also differ significantly from the interests at stake in *Morrissey*. The Board's decision whether to dismiss striking teachers involves broad considerations, and does not in the main turn on the Board's view of the "seriousness" of the teachers' conduct or the factors they urge mitigated their violation of state law. The Board had an obligation to make a decision based on its own answer to an important question of policy: what choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it? The Board's decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well. See Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L. J. 1156 (1974).

State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike to the students; by virtue of electing them the constitutents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as a part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly

changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[5]

## III

Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the "presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). Accordingly, we hold that the Due Process Clause of the Fourteenth Amendment did not guarantee respondents that the decision to terminate their employment would

---

[5] Respondents argue that the School Board is free to defend its action in the *de novo* hearing authorized by the Wisconsin Supreme Court by attempting to demonstrate that policy considerations dictated its decision to dismiss the striking teachers. Policymaking is a process of prudential judgment, and we are not prepared to say that a judge can generally make a better policy judgment or, in this case, as good a judgment as the School Board, which is intimately familiar with all the needs of the school district, or that a school board must, at the risk of suspending school operations, wend its way through judicial processes not mandated by the legislature. More important, no matter what arguments the Board may make to the *de novo* trial judge, as we noted earlier it will be the School Board that will have to cope with the consequences of the decision and be responsible to the electorate for it. The privilege of oral argument to a judge is no substitute for the power to employ and dismiss vested by statute exclusively in the Board.

be made or reviewed by a body other than the School Board.

The judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 14, 1976

Re: No. 74-1606 - Hortonville School District v. Hortonville Education Association

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 15, 1976

Re: No. 74-1606 - Hortonville Joint School District No. 1 v. Hortonville Education Assn

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

May 17, 1976

No. 74-1606 Hortonville Joint School District
v. Hortonville Education Association

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 18, 1976

Re: 74-1606 - Hortonville Joint School District No. 1
v. Hortonville Education Association

Dear Chief:

Please join me.

Sincerely,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1976

Re: No. 74-1606 - Hortonville Joint School District v. Hortonville Education Association

Dear Chief:

Please join me.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1976

Re: No. 74-1606 -- Hortonville Joint School District v. Hortonville Education Association

Dear Potter:

Please join me.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1976

RE: No. 74-1606 Hortonville Joint School District No. 1, et al. v. Hortonville Education Assn.

Dear Potter:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Conference 6-24-76

*Court* .....
*Argued* ....., 19...
*Submitted* ....., 19...

*Voted on* ....., 19...
*Assigned* ....., 19...
*Announced* ....., 19...

No. 74-163

Hortonville Education Assn.

vs.

Hortonville Joint School Dist. No 1

| | HOLD FOR | CERT. G | CERT. D | JURISDICTIONAL STATEMENT N | JURISDICTIONAL STATEMENT POST | JURISDICTIONAL STATEMENT DIS | JURISDICTIONAL STATEMENT AFF | MERITS REV | MERITS AFF | MOTION G | MOTION D | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Stevens, J. | | | ✓ | | | | | | | | | | |
| Rehnquist, J. | | | ✓ | | | | | | | | | | |
| Powell, J. | | | ✓ | | | | | | | | | | |
| Blackmun, J. | | | ✓ | | | | | | | | | | |
| Marshall, J. | | ✓ | | | | | | | | | | | |
| White, J. | | | ✓ | | | | | | | | | | |
| Stewart, J. | | | ✓ | | | | | | | | | | |
| Brennan, J. | | ✓ | | | | | | | | | | | |
| Burger, Ch. J. | | | ✓ | | | | | | | | | | |

JPS

| THE C. J. | ~~W. O. D.~~ | W. J. B. | P. S. | B. R. W. | T. M. | H. A. B. | L. F. P. | W. H. R. |
|---|---|---|---|---|---|---|---|---|
| 3/8/76 | | | dissent | | | | | |
| 1st draft 5/13/76<br>2nd draft 5/19/76 | join CJ 5/18/76 | join PS 6/14/76 | 1st draft 6/11/76<br>3rd draft 6/14/76 | join CJ 5/17/76 | join PS 6/11/76 | join CJ 5/31/76 | join CJ 5/17/76 | join CJ 5/17/76 |
| 3rd draft 6/14/76 | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | 74-1606 Hortonville v. Hortonville | | | |