

# WISCONSIN SCHOOL ATTORNEYS ASSOCIATION

November 1, 2018

## WERC-Anything You Need to Know?

By Peter G. Davis-Attorney\*\*

### I. AGENCY INFORMATION

#### Chairman and Staff

Chairman James Daley-appointed and confirmed by the Senate for a term expiring March 1, 2023.

Attorney Peter Davis (1975-present)

Attorney Raleigh Jones (1982-present)

Paralegal Dawn Clark (2013-present)

Office Manager Carol Lynch (2013-present)

#### General Agency Contact Information

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\*\* As always, the speaker's views and remarks are not necessarily those of the WERC.

### II. Workload Stabilizes

The overall WERC workload stabilized during fiscal year 2017-2018, although the traditional labor relations caseload continued to decline.

Excluding the roughly 400 annual recertification elections WERC conducts each year, the WERC case intake for fiscal year 2017-2018 increased to 200 from a total of 193 in fiscal year 2016-2017.

In fiscal year 2017-2018, 93 “traditional” labor relations cases were filed along with 87 State employee civil service appeals (mainly discipline). In fiscal year 2016-2017, 102 “traditional” labor relations cases were filed along with 84 State employee civil service appeals (mainly discipline).

<b>Major Case Type</b>	<b>FY15-16</b>	<b>FY16-17</b>	<b>FY17-18</b>
Grievance Arbitration	48	45	33
Mediation	40	28	25
Initial Elections Petitions	41	14	23
Unfair Labor Practice Complaints	17	13	8
Declaratory Rulings	5	2	3
Independent Hearing Officer Requests	15	3	11
State Employee Civil Service Appeals	136	84	87

### **III. Annual School District and State Employee Certification Elections**

2018 elections set for Noon October 31 thru Noon November 20

261 elections with over 55,000 eligible voters

By toll free phone and online 24/7 using services of the American Arbitration Association.

Each voter has a specific ID based on name and last four digits of SS#

### **IV. Wisconsin Court Decisions**

Is WERC statutorily obligated to conduct an annual certification election even if the incumbent union does not request such an election?

The circuit court and court of appeals said yes. 372 Wis. 2d 347 (2017)

Wisconsin Supreme Court says no in 5-2 decision. 2015AP2224 issued 2/18

Prior to the end of the voting period, does Wisconsin’s open records law require WERC to disclose the names of employees who have already voted in annual certification elections?

The circuit court said yes.

Wisconsin Supreme Court says no in 5-2 decision. 2016AP2214 issued 2/18.

Last chance agreement can constitute an intentional, knowing and explicit waiver of the statutory police/fire commission procedures for discharging an employee. *Beck v City of Fond du Lac*, 217AP969 by Court of Appeals, District II in 7/18. Unpublished.

## V. Election Issues

WERC cites interests in finality when rejecting employer/union request for new election after election had been conducted and results certified (no objection was timely filed). **Village of Waterford**, Dec. No. 37416-B (WERC, 6/18); **Village of Footville**, Dec. No. 37343-B (WERC, 6/18).

Employee who leaves the bargaining unit prior to the election no longer eligible to vote. **School District of LaCrosse**, Dec. No. 37107-A (WERC, 12/17).

Absent claim that posting of election notice was inadequate as means of advising employees how and when they could vote, WERC rejects claim that new election should be conducted because employer allegedly did not also email notice to employees. **School District of LaCrosse**, Dec. No. 37107-A (WERC, 12/17).

Pending unit clarification petition will not delay the election. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14).

Pending prohibited practice complaint will not delay the election. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14).

Union must file for and win a certification election to remain the collective bargaining representative even where it won a “regular” election to obtain certified status only months before. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14).

Employer refusal to provide home addresses of employees was not improper. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14), **State of Wisconsin**, Dec. No. 31271-B (WERC, 8/06).

Employer blocking union emails to voters could impact election. **State of Wisconsin**, Dec. No. 34481-A (WERC, 7/14)

Employee who leaves the bargaining unit between eligibility date and date of election is not eligible. **Elmbrook Schools**, Dec. No. 34304-A (WERC, 3/14).

Employee failure to vote due to difficulty with phone voting procedure is not a basis for conducting a new election. **Herman Schools**, Dec. No. 34318-A (WERC, 4/14), **Fontana Joint 8 School District**, 36503-A (WERC, 1/17)

Employees forgetting to vote is not a basis for conducting a new election. **Town of Woodruff**, Dec. No. 34944-A (WERC, 5/14), **Village of Salem Lakes**, Dec No. 36878-B (WERC, 5/17)

Employer total failure to post election information is a basis for conducting a new election.

**Town of Manitowish Waters**

Failure to provide requested affidavits is valid basis for concluding election objections had been abandoned. **State of Wisconsin**, Dec. No. 34479-A (WERC, 5/14)

Substantial errors in the voter eligibility list (primarily omission of many eligible voters) is a basis for conducting new election. **Milwaukee Schools**, Dec. No. 34373-A (WERC, 5/14)

## **VI. WERC Labor Decisions**

**City of Waukesha**, Dec. No. 37481 (WERC, 8/18). Applying “new” applicable statutory provisions, WERC concludes the balancing test continues to be the appropriate analytical tool when resolving mandatory/permissive subject of bargaining disputes. WERC determines that contract provision that prevents City from reassigning already scheduled qualified employees to different work location.

**City of Janesville**, Dec. No. 37480 (WERC, 8/18). WERC dismisses declaratory ruling petition seeking ruling as to whether employees have a contractual right to wash personal vehicles on City property under contract provision protecting “personal amenities” that “primarily relate to mandatory subjects of bargaining.” No current duty to bargain dispute under Sec. 111.70(4)(b), Stats. and not appropriate to exercise Sec. 227. 41, Stats. jurisdiction because ruling would not provide state-wide guidance and would denigrate contractual grievance arbitration procedure.

**Village of Palmyra**, Dec. No. 37447 (WERC, 5/18). WERC concludes sergeant in not a supervisor, a managerial employee or a confidential employee.

## **VII. Right to Work Law**

Amended the Wisconsin Employment Peace Act effective March 11, 2015.

Three active cases before the WERC examiner.

All legal challenges under state and federal constitutions have ultimately proven to be unsuccessful except as to the Sec. 111.06(1), Stats. provision that prohibits contractual dues checkoff provisions unless revocable upon 30-day notice. In September 2018, U.S. Seventh Circuit Court of Appeals (No. 17-1178) found that provision to be invalid as preempted by and conflicting with the LMRA provision allowing up to one-year limits on revocation. Petition for rehearing filed by State.

## **VIII. Janus Issues**

None currently pending.