STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO Involving Employes of WASHINGTON COUNTY, EMPLOYED IN THE WASHINGTON COUNTY HOSPITAL AND HOME	Case II No. 10950 ME-260 Decision No. 7694-C

ORDER OVERRULING OBJECTIONS TO CONDUCT OF ELECTION

Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, having filed objections and amended objections to the conduct of an election conducted by tne Wisconsin Employment Relations Commission on August 4, 1966, in the above entitled matter, wherein said Labor Organization, in said objections and amended objections, contended that prior to the election, tne above named Municipal Employer engaged in conduct affecting the results thereof; and a nearing on said objections and amended objections having been conducted at West Bend, Wisconsin, on November 10, 1966, by Robert M. McCormick, Examiner; and the Commission having considered the evidence, arguments and briefs of Counsel and being satisfied that the objections and amended objections are without merit;

NOW, THEREFORE, it is

ORDERED

That the objections and amended objections filed by said Labor Organization be, and the same hereby are, denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of September, 1967.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Arvid Anderson, Commissioner

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Zel S. Rice II, Commissioner

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MEMORANDUM ACCOMPANYING ORDER OVERRULING OBJECTIONS TO CONDUCT OF ELECTION

The tally of ballots containing the results of the election which was held on September 14, 1966, disclosed that of 78 employes eligible to vote, 52 cast ballots, two of which were challenged, one was declared void, and of the 49 valid ballots counted, 13 voted in favor of representation by the Union, while the remaining 36 employes voted against such representation. On September 19, 1966, the Union filed timely objections to the election, contending that the Municipal Employer:

> "did willfully interfere with, restrain, and coerce its employees in their right to seek representation; that the employer did intimidate and discourage employees from membership in the union. Further, that the employer willfully committed acts clearly designed to influence the outcome of the election that are contrary to the intent and interpretation of statutes covering these matters."

The objections were filed by Walter Klopp, the Union Representative, and his signature thereon was attested to by a notary. The Commission, being satisfied that the objections did not comply with the rules of the Commission in that they did not contain a description of the acts alleged, nor the time and place of occurrences thereof, nor the names of the persons involved, issued an order on September 23, 1966, requiring the Union to make the objections more definite and certain. Pursuant to that Order and on September 29, 1966, the Union, over the signature of Klopp, which was not attested by a notary, filed amended objections in which it was alleged that "(1) the daughter of the superintendent tape recorded in a concealed manner afternoon and

evening meetings conducted by the Union, (2) the assistant superintende 'reviled' a named employe over an extended period of time because said employe was a Union supporter, (3) the assistant superintendent openly ridiculed the Union and stated employes would lose rights if the Union was selected as the bargaining representative, (4) supervisory personne and officers of the Municipal Employer conducted a meeting on or about June 23, 1966, with a group of employes where promises of wage increase were made if the Union was not selected as the bargaining representativ and a 'rump election' was held among the employes to determine their representation wishes, (5) during the third week in July 1966, the Municipal Employer reduced the probationary period from six to two months and increased starting rates for nurses aids by $20 per month, all occurring after the Union had filed its petition for the election, (6) in the third week of July 1966, following the filing of the petitio the Municipal Employer revised its work schedule granting employes every other weekend off, (7) on September 1, 1966, the superintendent promised a wage increase to a named employe who had received an increas in July and that the superintendent advised said employe that wage requests were to be resubmitted to the County Board in order to provide the employes with a $20 increase on January 1, 1967, and (8) the voting list used on the day of the election contained names of those ineligible to vote and that such status was unknown to the Union on the day of the balloting."

The objections also contained other matters which were in the form of conclusions or matters which occurred after the conduct of the balloting.

Despite the details alleged in amended objections, for some reason or other, at the hearing, the Union limited its evidence to two matters one involving the allegation of the use of the tape recorder, the Union contending that the use thereof created the impression of a surveillance of the Union's organizational activities by the Municipal Employer, and the second having to do with the refusal to implement a wage increase for which a committment had allegedly been made prior to the organizational activities.

SUFFICIENCY OF PLEADINGS

of the election as required in ERB 11.10 and therefore in effect the objections have no standing before the Commission. It argues that since the initial objections did not comply with the above cited rule in that it did not contain a previous statement of facts upon which the objections were based but rather general conclusions, the original objection has no standing. It further argues that since the amended objections contained no jurat and since the amended objections were not timely filed as required by the rules of the Commission, the amended objections are not proper. Furthermore, the Municipal Employer contends that the objection referring to the previous wage increase committment cannot properly be considered by the Commission since it was not alleged in the original or amended objections, but rather was first advanced at the hearing.

The Union contends that the filing of the original objections with a jurat subscribed constituted substantial compliance with ERB 11.10, and that the subsequent amended objections resulted from the Commission's order to make the original objections more definite and certain and that the oatn having been made on the original objection, it is not necessary on the second document, and that in any event the objections substantially comply with the Commission's rules. The Union further argues that the Municipal Employer suffered no prejudice with respect to the objection raised for the first time during the course of the hearing.

A hearing on objections to the conduct of an election is technically a non-adversary proceeding. The purpose of filing of objections with the Commission, within a certain specified time, is to preclude the Commission from automatically issuing a certification of the results of the election. The timely filing of objections puts the Commission on notice not to issue its certification. Upon receiving such notification, and upon the filing of objections which, on its face, contains allegations, if proven, would establish improper pre-election conduct, the Commission sets a hearing in the matter, as an investigation to solicit facts to determine whether or not the pre-election conduct affected the employes' free choice.[1/]

1/ Deaconess Hospital, Dec. No. 7008-D, 10/65.

The filing of the initial objections properly with jurat, while somewhat defective in its allegations, constituted sufficient notice to the Commission not to issue its certification without at least considering the objections filed by the Union. Being satisfied that not only the Municipal Employer but the Commission desired more specific allegations with respect to the objections, the order to make more definite and certain was issued. While the amended objections contain no jurat, we conclude that the amended objections substantially comply with the Commission's order to make more definite and certain and with its rules.[2/] The second procedural objection raised by the Municipal Employer goes to the fact that evidence was adduced with regard to alleged activity with respect to a wage increase promise and a revocation of same, which was not pleaded in the objection or amendment thereto. An election to determine bargaining representatives implements the public policy with respect to collective bargaining and any conduct, either by an employer, employe or labor organization which may interfere with an election conducted by the Commission must stand the scrutiny of the Commission, which has the duty to conduct elections in an atmosphere where employes may cast a free choice. Therefore the Commission will examine any pertinent evidence which is claimed to interfere with that choice. The reason for denying the receipt of evidence with respect to matters not alleged in either of the objections would be due to a possible denial of due process to the party who was alleged to have committed the objectionable conduct. In the proceeding at hand, there was no such claim made by the Municipal Employer and as a matter of fact there was no request for an adjournment to meet any of the evidence produced by the Union.

BACKGROUND

For the past several years it has been the policy of the Municipal Employer to grant step increases to its employes on January 1 of each year in accordance with its pay plan. While the employes received an increase in their gross monthly pay on January 1, 1966, they experienced a reduction in their take home pay as a result

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2/ ERB 10.01 provides "These rules shall be liberally construed to effectuate the purposes and provisions of Subchapter IV of Chapter 111 Wis. Stats."

of additional retirement and tax deductions. Sometime between January 1 and March 1, 1966, Superintendent Korth indicated to an unnamed employe that he would request the County Board to provide supplemental wage increases for employes above the step increases implemented on January 1, 1966.

On or about March 1, 1966, Klopp, on behalf of the Union, commenced organizational activity among the employes, and in that regard conducted several meetings where non-professional employes were invited. Two of the meetings were held on April 14, 1966, at 12:30 p.m. and 7:30 p.m. respectively. Notifications of said meetings were mailed by the Union to the employes. Marceda Steiner, a non-supervisory employe, attended the earlier meeting and recorded the remarks made therein by a tape recorder which was placed in a large purse in her possession. Later that day Steiner replayed the tape at the Home to other employes. Prior to the commencement of the evening meeting on April 14, Margaret Korth, daughter of Superintendent Korth, brought the same tape recorder to the meeting site. She was accompanied by her friend, Susan Stautz, both employed on a part time basis. Margaret Stautz, also an employe and the mother of Susan, observed the recorder in the possession of Miss Korth and she advised Miss Korth to remove the recorder from the premises. Miss Korth followed said advice and placed the recorder in an automobile before returning to the meeting. Klopp did not learn of the presence of the tape recorder incident on April 14 until on or about April 21, 1966.

Sometime in June 1966, a trustee of the Municipal Employer advised employes that the Municipal Employer could not grant any wage increases until the matter of Union representation was resolved. On July 12, 1966, the Union filed its petition for an election. The hearing was noticed for August 4, 1966, and prior to the commencement of the hearing on that date, in the presence of the hearing examiner, representatives of the Union and the Municipal Employer executed a stipulation for an election, which stipulation included a list of employes, whom the parties agreed were eligible to participate in the election.

At the hearing on the objections the Union presented the testimony of five employes including testimony of Klopp. The witnesses were cross-examined by the attorney for the Municipal Employer, who called no witnesses on behalf of the Municipal Employer.

DISCUSSION

The activity which the Union contends affected the free choice of the employes occurred prior to the filing of the petition, July 12, 1966, and of course prior to the date upon which the Union and Municipal Employer executed the stipulation for election, August 4, 1966. We are satisfied that Representative Klopp was aware of such activity prior to the execution of the stipulation for election. Normally objections to the conduct of an election will not be considere by the Commission unless the objections concern activity which occurrec after the initiation of the election proceeding. However, Counsel for the Municipal Employer did not raise any procedural defense in this regard and therefore since the allegations in the objections were fully litigated before the Commission, the Commission will determine th merits of the objections. The Union could have, if it so desired, filed a complaint of unfair labor practices with respect to the activi alleged in the objections as long as the activity occurred within one year of the filing of the complaint. The record discloses that both Steiner and the younger Korth received a general invitation from the Union to attend the meetings just as did other nonsupervisory employes Steiner, who, the Union agrees, is nonsupervisory, recorded the aftern meeting and then played the recording for other employes on the Employ premises. There is no direct evidence that the Employer knew of, or acquiesced in, Steiner's acts. The record discloses that the younger Korth brought the recorder as far as the upstairs-tavern area, above the meeting room, whereupon Mrs. Stautz urged Korth to return the machine to the auto. The younger Korth followed Stautz's advice and took the machine from the building.

The Union would have the Commission conclude that Superintendent Korth and his wife acquiesced in their daughter's actions of attending two Union meetings and the bringing of a tape recorder to the night meeting, and that because they chose not to testify, that a presumptio is raised that the Korth's could not truthfully testify that the daughter attended those meetings without their tacit assent. We are [illegible] that the rule of the cases cited by the Union requires

We conclude that there is no evidence in the record to support a finding that Superintendent Korth and/or his wife commissioned either their daughter or Steiner to conduct a surveillance. To apply the presumption as advocated by the Union would in effect result in our concluding that the Superintendent commissioned one or both to conduct a surveillance; or at least gave "tacit assent" to a surveillance by the younger Korth, thereby creating the impression of surveillance. The Commission by such a finding would be drawing an unreasonable inference from the record by making an inference upon an inference.3/

The only other evidence of a possible Employer attempt to create an impression of surveillance is Mrs. Konwent's testimony regarding Mrs. Korth's avowed knowledge of what transpired at the April 15th union meeting, to wit:

> T.20 "She (Mrs. Korth) said she knows everything that was going on at the meeting and that her daughter has just as much right in the meeting as anybody else has." (emphasis supplied)

The declaration of Mrs. Korth to Konwent about her knowledge of what transpired at the meeting is not by itself, nor as a part of the totality of the Employer's conduct, deemed to constitute a surveillance or creating the impression of same. The record discloses that at the April 15 meeting, the Union Organizer, Walter Klopp, was confronted with questioning by some persistent, if not troublesome, invitees who propounded questions that indicated that they were opposed to union organization. Though the Union suggested on the record that this was unusual, and evinced a concerted effort to frustrate its organizational efforts, there is no evidence of any employer authorship of such conduct. The evidence indicated that the details of the afternoon meeting were freely discussed at the Home to the extent of Steiner's orientation class conducted on the Employer's premises by playing the tape of one meeting for employes unable to attend either meeting. Again it is a matter of conjecture whether her motivation for doing so was grounded solely in her desire to inform fellow employes,

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3/ St. Francis Hospital v. Wisconsin Employment Relations Board(1959) 8 Wis. (2d) 308, 98 N. W. 2d 909; Pearce L. Roberts et al., Dec. No. 3978, 5/55.

but there is no evidence of Employer sponsorship or tacit approval of her act. The record shows that there were other meetings conducted by the Organizer with no evidence of any special concern shown by any employer representative over what transpired at other meetings.

The Union also contends that the Municipal Employer had a history of general wage improvements effective the first of every calendar year; that prior to the union activity on or about January 1, 1966, the Employer granted such a routine increase which however proved to generate less take home pay for the employes because of certain tax and retirement deductions; that subsequently representatives of the Hospital and Home informed employes that attempts would be made to secure additional increases from the County Board; that thereafter on or about March, 1966, the Union activity commenced among employes of the Municipal Employer; that subsequent to the commencement of concerted activity, representatives of the Municipal Employer informed various employes that the Employer could not give the employes a raise so long as the question of union representation was not resolved. The Union contends that this Employer representation is borne out by the testimony of Margaret Stautz to wit:

> "Yes, a trustee said we cannot give you any wage increase until the matter with the union is settled." (emphasis supplied)

The Union argues that it is not illegal per se for an employer to give wage increases during the course of a union organizational campaign where the grant of same reflected a long standing policy of giving wage increases and in effect would constitute an employer commitment to do so prior to the commencement of organizational efforts. The Union further contends that once the commitment by the employer was made to grant a wage increase, to withdraw same and blame the withdrawal on the presence of the Union would constitute interference with the employes free and rational choice in the election.

The Employer argues that there is no evidence in the record to support the contention that the Employer told the employes that a wage increase could not be given because of the Union's organizing campaign. The most that could be adduced from the testimony of the Union witnesses with regard to this contention is that there were rumors afloat to that effect among employes. In the alternative the Employer argues that even if the Commission concludes that the Employer was responsible for such statements concerning a wage increase such conduct should not be

grounds for setting aside the election. Relying upon the same leading case cited by the Union, which it argues establishes the general rule that the law looks with disfavor upon wage increases granted in the course of a union organizational campaign where such increases are given for the purposes of influencing the election,[4] the Employer further argues that the Union's position throws the Municipal Employer on the horns of dilemma, in that if the Employer had granted an increase after January 1, 1966, subsequent to the commencement of union activity, such an increase would have been a special increase requiring special action by the County Board which, if given, would certainly have prompted Union objections that it was granted for the pruposes of influencing the vote and that now, because no such wage increase was given, the Union seeks to have the election set aside because the Employer failed to implement some non-existing commitment. The Employer points out that the evidence is clear that the only policy of the County Board with respect to granting wage increases is reflected in those increases effective at the first of each calendar year, effectuated at that time by the County Board so as to conform with its budgetary deadline and statutory responsibility. The Employer argues that there is no evidence to support a finding that there is any similar practice with respect to special increases to be effective at a time other than at the beginning of the calendar year. Therefore, the Employer argues there was no employer conduct which could be deemed to constitute interference with the employes' right of free choice at the election and therefore, the objections should be denied.

In the leading case involving "promise of benefit" by an employer during a period of union organization, the U. S. Supreme Court, in upholding the decision of the NLRB, stated:

> "The danger inherent in well timed increases in benefits is the suggestion of a fist inside the velvet glove. Employes are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and may dry up if it is not obliged."[5]

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[4] NLRB v. Exchange Parts, 375 U. S. 405, 84 Sup. Ct. 457 (1964) 55 LRRM 2098.

[5] Ibid 13., 55 LRRM 2098, 2100.

However, not every employer grant of a wage increase contemporaneous with union pre-election activity has been construed by the courts to be violative of an employe's free choice in an election under the LMRA. Where there has been a clear employer commitment to grant a wage increase prior to union organizational activity or where it reflects a practice of effectuating a customary increase, the courts have found that the implementation of such a wage increase did not impinge on the employe's freedom of choice for or against a union.[6/]

At first blush the Union's argument here may seem to be strengthened by the Court's statement in Imco Container, to wit:

> "Additionally, holding customary wage betterments in abeyance preceding an election might seem to be hanging a favor or threat over the voter's head."

But this Commission concludes that if the act of suspending or withdrawing such increases is to be found violative of the Section 111.70, the wage increase so withdrawn must befound to be a customary increment flowing from the Employer's policy and practice.

The testimony of Merceda Steiner indicates that she never heard anyone from management mention the subject of a supplemental wage increase to follow the January 1, 1966, increase, though she recalled hearing rumors circulated by employes on the subject. The Union requests that her testimony be discredited and relies upon the testimony of Margaret Stautz as to the existence of an Employer commitment to grant an additional wage increase. The only evidence of an employer commitment to grant such a wage increase is found in Margaret Stautz's testimony as follows:

> Q. (By Union Counsel) "They said, 'Well we are going to go back and get another increase over and above the steps,' and there were some discussions they had had back in the County. Isn't that right?"
>
> A. "That's right." (Emphasis supplied)

The Commission chooses to credit the testimony of both Steiner and Stautz and concludes that the record at most indicates that prior to Union activity, Superintendent Korth said he would attempt to secure an additional increase.

6/ Imco Container Co. v. NLRB, 346 F 2d 178 (CA-4 1965) 59 LRRM 2255.

It is clear from the record that after the commencement of Union activity the Union organizer sent a letter to the employes of the Hospital which contained a reference to certain predictable conduct, namely, the possibility that the Employer may offer the employes a wage increase. Stautz testified that the letter alluded to the motivation underlying such a possible employer offer, to wit:

> "You would be offered an increase because of the Union wanting to come in."

Stautz further testified that in June she went to a meeting of the Trustees of the Hospital and Home, and remembered a trustee saying in effect:

> "We can't give you any increases until the matter with the Union is settled."

To a further question by Union Counsel, Stautz indicated she understood that statement to mean "until it (the question of unionization) was voted upon one way or the other".

There is no evidence that the Employer, prior to the vote, promised a raise if the Union was defeated, and no evidence of any Employer threats to withdraw benefits if unionization carried.

There is no evidence to support a finding that the Employer made an unequivocal commitment, prior to the Union's organizational efforts, to pass on an additional wage increase. There is no evidence that the Employer withdrew a customary or automatic wage increase because of the presence of Union activity. If an increase had been granted by the County Board between March and September, 1966, after commencement of union activity, it would have been a special increase, not automatic in nature, and which may very well have been found to be violative as the "fist inside the velvet glove".

For the foregoing reasons the Union's objections have been overruled and Certification of Representatives is being issued.

Dated at the City of Madison, Wisconsin, this 5th day of September, 1967.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Arvid Anderson, Commissioner

Zel S. Rice II, Commissioner