STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUWATOSA BOARD OF EDUCATION Involving Employes of WAUWATOSA BOARD OF EDUCATION	Case IX No. 11699 ME-339 Decision No. 8300-AB

ORDER DENYING MOTIONS FOR REHEARING

The Wisconsin Employment Relations Commission having, on February 28, 1968, issued an order dismissing a petition filed by the Wauwatosa Board of Education requesting that an election be conducted among certain of its employes; and said Municipal Employer, pursuant to Section 111.70, Wisconsin Statutes, on March 6, 1968, having moved for a rehearing in the matter; and on March 13, 1968, Local 1561, District Council 48, AFSCME, AFL-CIO, the Labor Organization involved, having moved to open the proceeding for the purpose of admitting further evidence; and the Commission having reviewed said motions and being fully advised in the premises, and being satisfied that said motions should be denied;

NOW, THEREFORE, it is

ORDERED

That the motion filed by the Wauwatosa Board of Education for rehearing and the motion filed by Local 1561, District Council 48, AFSCME, AFL-CIO, to open the proceeding be, and the same hereby are, denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of March, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
William R. Wilberg, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUWATOSA BOARD OF EDUCATION Involving Employes of WAUWATOSA BOARD OF EDUCATION	Case IX No. 11699 ME-339 Decision No. 8300-~~A~~B

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS FOR REHEARING

The instant proceeding was initiated by the filing of a petition by the Wauwatosa Board of Education, hereinafter referred to as the School Board, requesting the Commission to conduct an election pursuant to Section 111.70, Wisconsin Statutes, among certain non-professional employes in its employ, to determine whether its employes employed in the claimed appropriate collective bargaining unit, consisting of all custodial and maintenance employes, desired to be represented for the purposes of conferences and negotiations by Local 1561, District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union. The School Board contended that a question of representation presently existed among said employes for the reason that (1) the existing certified collective bargaining unit was inappropriate, (2) the employes employed by the School Board in the cafeterias constituted a separate department, and, therefore, should be given the opportunity to determine whether they desire to constitute a separate unit, and in that regard, regular part-time cafeteria employes who had been excluded from the certified bargaining unit, by agreement, should have been included in that unit, (3) the Union had distinguished between members and non-members in carrying out its representative action, and (4) the School Board had a good-faith doubt as to whether a majority of the employes presently desired to be represented by the Union.

Following hearing, and after reviewing the evidence, arguments and briefs of counsel, the Commission, upon being satisfied that no question of representation existed among the employes involved, dismissed the School Board's petition. In its memorandum accompanying the Order of Dismissal the Commission changed and initiated certain of its policies with respect to the processing of election petitions with respect to showing of interest requirements and with respect to the time in which such petitions should be filed.

On March 8, 1968, the School Board filed a Motion for Rehearing requesting the Commission to set hearing for arguments on the matter and for reconsideration of its order dismissing the petition. The School Board based its motion on the grounds that the Commission:

> "I. In several pertinent and crucial areas, concluded that no question concerning representation exists was arrived at by the adoption of general policies for the first time made applicable to such areas; and
>
> "II. Exceeded its authority in the policies it attempts to establish; and
>
> "III. Failed to give appropriate consideration to Petitioner's objective considerations because of the Commission's position taken with respect to I and II above."

The School Board's primary objection to the original holding of the Commission is that it was based on "the adoption of general policies for the first time made applicable to questions of representation. It is contended that the decision adopted policies which, in fact, amounted to new rules, and that the policies, therefore, are not made effective until the Commission meets the statutory requirement that rules must be filed in the Office of the Secretary of State and in the Office of the Revisor of Statutes,[1/] and published in the Wisconsin Administrative Code or Register.[2/]

On March 13, 1968, the Union, in a brief filed by it, opposed the School Board's Motion for Rehearing and on the same date filed a Motion to Reopen the Hearing for the purpose of admitting evidence relative to the conduct of the School Board toward negotiations with it and to accept as true certain facts contained in an affidavit accompanying said motion.

The syllogistic argument employed by the School Board is that:

1. The policies adopted by the Commission in its original decision are "rules";

2. Rules to be effective must be filed in the Office of the Secretary of State, filed in the Office of the Revisor of Statutes and published in the Wisconsin Administrative Register;

3. The policies adopted by the Commission were neither filed in the appropriate offices nor published in the Wisconsin Administrative Register;

4. Therefore, said policies are not in effect.

1/ Section 227.023(1), Wisconsin Statutes.

2/ Section 227.025, Wisconsin Statutes.

It is our conclusion, however, that the policies adopted in the original decision of the Commission are not rules, and the above argument, therefore, collapses because of the defect in its major premise.

In support of its position that the policy statements set forth in our original decision are "rules" and must, therefore, meet the statutory requirements for filing and publishing, the School Board quotes the statutory definition of "rule",[3/] and the first sentence of subsection 4 of Section 227.01, Wisconsin Statutes, which states:

> "Every statement of general policy and every interpretation of a statute specifically adopted by an agency to govern its enforcement or administration of legislation shall be issued by it and filed as a rule."

However, the second sentence of subsection 4, not quoted by Counsel for the School Board, is the sentence which we believe to be dispositive of this case. It provides:

> "The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same a rule within sub. (3) or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in this subsection."

We believe it is clear that the statements of policy contained in our original decision were statements made in the adjudicatory rather than the rule-making function of the Commission and as such were, to use the statutory language, "made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts". The statute clearly contemplates a distinction between (1) statements of policy set forth by an administrative agency in a decision applying to a particular matter and a particular set of facts (adjudicatory action), and (2) statements of policy laid down by an agency as guide lines and regulations to be used in future situations but which are not set forth in decisions involving named persons and particularized facts (rule-making capacity). According to our statutory scheme, statements of policy adopted in adjudicatory situations with named persons and particularized facts

---

3/ Section 227.01(3) "Rule" means a regulation, standard, statement of policy or general order (including the amendment or repeal of any of the foregoing), of general application and having the effect of law, issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency.

are not "rules". 42 op. Atty. Gen. 245 (1953). Therefore, such policies, in order to become effective, need not be filed in the Office of the Secretary of State or in the Office of the Revisor of Statutes, nor need they be published in the Wisconsin Administrative Register.

A further contention of the School Board is that the Commission in its original decision exceeded its authority "by providing for the filing of a petition...for termination of representation status" by municipal employes as well as by municipal employers and labor organizations. The School Board argues that the Commission may permit only municipal employers or labor unions to petition for termination of representation status because Section 111.70(4)(d)[4/] makes no provision for the filing of a petition by an employe or employes, as contrasted to Section 111.05(4)[5/] where "employes" in the private sphere are specifically included as persons who may raise questions of representation.

4/ 111.70(4) POWERS OF THE BOARD. The board shall be governed by the following provisions relating to bargaining in municipal employment:

. . .

(d) Collective bargaining units. Whenever a question arises between a municipal employer and a labor union as to whether the union represents the employes of the employer, either the union or the municipality may petition the board to conduct an election among said employes to determine whether they desire to be represented by a labor organization. Proceedings in representation cases shall be in accordance with ss. 111.02(6) and 111.05 insofar as applicable, except that where the board finds that a proposed unit includes a craft the board shall exclude such craft from the unit. The board shall not order an election among employes in a craft unit except on separate petition initiating representation proceedings in such craft unit.

5/ 111.05(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists.

We believe the School Board errs in contending that Chapter 111.70 permits the filing of petitions in representation cases only by a municipal employer and a labor organization.[6/] Section 111.70(4)(d) states that a municipal employer or a labor union may petition the Commission to conduct an election when a representation question exists "between a municipal employer and a labor union," but the Statute makes no specific provision for the situation where a question of representation exists between individual employes and their union or between individual employes and their municipal employer. It is our view that in such situations the second sentence of 111.70(4)(d), which provides that "proceedings in representation cases shall be in accordance with Section 111.05 insofar as applicable," comes into effect. We believe that this provision makes Section 111.05(4) applicable in situations where a question of representation is raised between individual employes and their municipal employer or their certified labor organization. In such situations "any employe" may, by petition, raise questions concerning representation of employes.

In accordance with the original decision on this matter, of course, any employe or employes seeking to terminate the representative status of an incumbent labor organization also has the burden of demonstrating that at least 30 per cent of the employes in the requested bargaining unit desire to terminate the representative status of the union.

The Statute does not specifically provide for a showing of interest to initiate an election proceeding. However, Section 111.05(4), which also regulates election procedures in municipal employment, permits the Commission to conduct subsequent elections among employes to determine their wishes concerning representation "provided that it appears to the Board (Commission) that sufficient reason therefor exists." Our policy enunciated herein with respect to showing of interest is in harmony with such statutory provision and has been adopted to facilitate the Commission's determination as to whether sufficient reason exists for the conduct of an election where there is presently a recognized or certified bargaining representative. In addition, during the course of the hearing on the petition, the School Board introduced evidence in an attempt to establish objective considerations for the filing of the petition. The Commission, as indicated

---

6/ It should also be noted that, in any event, the School Board is not affected adversely by the Commission's references in the original decision to the filing of petitions by employes since, in this case, the petition was filed by a municipal employer rather than an employe.

in our original memorandum, determined, in that regard, that the School Board had not established a good-faith doubt that any of its employes desired to change their bargaining representative.

Because of these reasons, and since the School Board filed comprehensive briefs in support of its motion, its Motion for Rehearing is denied.

We feel a comment is necessary with regard to the Union's brief which was filed in opposition to the School Board's motion. In opposing the motion the Union argued that the motion was frivolous and designed solely to use the Commission as a device to void the School Board's duty to bargain with the Union. In its brief supporting its position the Union would have the Commission overrule its decision issued in City of New Berlin, Decision No. 7293, wherein the Commission found that the refusal to bargain in good faith in municipal employment is not a prohibited practice. We believe that our decision in the City of New Berlin is correct, and such belief was substantiated by our Supreme Court.7/

Dated at Madison, Wisconsin, this 22nd day of March, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
William R. Wilberg, Commissioner

7/ Joint School District No. 8, City of Madison, et al, vs. Wisconsin Employment Relations Board and Madison Teachers, Inc., August Term 1966, 37 Wis. 2d 483, 488-90 (1967)