

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

No. 11281-C
11282-C

being fully advised in the premises, being satisfied that the
Objections are without merit and should be denied;

NOW, THEREFORE, it is

ORDERED

That the Objections to the Conduct of Elections conducted in
the instant matters be, and the same hereby are, denied.

Given under our hands and seal at the
City of Madison, Wisconsin, this 24th
day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Layney, Chairman


Zel S. Rice II, Commissioner

UNITED COMMUNITY SERVICES OF GREATER MILWAUKEE, INC., I, II,
Decision No. 11281-C, 11282-C

MEMORANDUM ACCOMPANYING
ORDER DENYING OBJECTIONS TO ELECTIONS

On November 14, 1972 Donald J. Ballinger, the Petitioner in Case II, filed objections to the elections, the results of which had been certified by the Commission on November 9, 1972. The results of the balloting as to whether "the clerical and technical employees", and the "professional employees" desired to constitute separate bargaining units were as follows:

Clerical and Technical Employees

| | |
|--|----|
| 1. Total number eligible to vote..... | 31 |
| 2. Total ballots cast..... | 28 |
| 3. Total valid ballots counted..... | 28 |
| 4. Ballots cast in favor of a separate unit..... | 4 |
| 5. Ballots cast against a separate unit..... | 24 |

Professional Employees

| | |
|--|----|
| 1. Total number eligible to vote..... | 22 |
| 2. Total ballots cast..... | 19 |
| 3. Total valid ballots counted..... | 19 |
| 4. Ballots cast in favor of a separate unit..... | 10 |
| 5. Ballots cast against a separate unit..... | 9 |

Since the employees in both of the voting groups rejected separate units, the employees in both voting groups constituted a single appropriate bargaining unit, and therefore the representation ballots cast by the employees in both voting groups were combined to determine whether the employees in said single unit desired to be represented by AFSCME. The results of the representation election was as follows:

| | |
|--|----|
| 1. Total number eligible to vote..... | 53 |
| 2. Total ballots cast..... | 47 |
| 3. Total valid ballots counted..... | 47 |
| 4. Ballots cast in favor of the Union..... | 36 |
| 5. Ballots cast against the Union..... | 11 |

Commission rule ERB 3.05 provides that objections to elections must be filed within five days of the receipt of a copy of the tally sheet by any party to the elections. The Commission, not having received any objections within such time period, on November 9, 1972, issued its Certification of Results of Elections. After the receipt of a copy of said Certification, Ballinger filed "Objections to Elections" on the following grounds:

- "1. Certain individuals were promised absentee ballots in time to be able to vote, but did not receive them as promised.
2. Sufficient notices of election were not posted at a reasonable number of work stations for a reasonable period of time preceeding (sic) the election.
3. The commission erred and exceeded its legal authority by construing the statute to require a majority of

professional employees, rather than a majority of those professional employees who voted, to vote for separate representation as a pre-condition of separate representation.

Wherefore, I hereby request that the results of the election referred to above be set aside and a new one directed."

The Commission, on November 15, 1972 directed a letter to Ballinger, wherein Ballinger was advised that his Objections were not filed within the time limits set forth in ERB 3.05, and further wherein the Commission advised, in effect that the Objections appeared to be without merit, since (a) absentee ballots were sent to two employes for whom mail ballots were requested; (b) that since 19 of 22 employes cast ballots, the objection with regard to the posting of notices of the election appeared frivolous; and (c) that Sec. 111.02(6) of the Wisconsin Employment Peace Act requires that a majority of the employes eligible in the proposed unit must vote in favor of establishing a separate unit. The Commission concluded its letter by indicating that it would dismiss the objections unless Ballinger had "anything further to add to your objections".

On November 20, 1972 AFSCME, by its Counsel, filed an Opposition to the objections, contending that they were untimely filed, and that the statutory requirement for the establishing a separate unit of professional employes had not been met, and that therefore the objections should be dismissed.

On November 24, 1972 Ballinger, by Counsel, filed a Memorandum in support of the objections, wherein Ballinger, alleged in effect that upon the execution of the Tally of Ballots, the Commission agent who had conducted the balloting advised both Ballinger and the representative of AFSCME, that two separate units were established and that Ballinger relied on such a conclusion by the Commission's agent, and further that Ballinger first became aware that the Commission had certified the elections as resulting in, not two, but one unit for the purpose of collective bargaining upon receipt of the Certification.

With respect to the objections involving the absentee ballots, Ballinger, in his Memorandum, alleged that on October 23, 1972 Ballinger requested that an absentee ballot be mailed that day to Peter D'Agostino, who was scheduled to leave for vacation on October 25th. 1/ Ballinger alleged that the ballot to D'Agostino was not placed in the mail on October 23rd, and that D'Agostino did not receive his ballot prior to leaving for vacation, and therefore did not cast a ballot. Further it was alleged that Joyce Reiss did not vote, although there was no request for a mail ballot for Reiss, since Ballinger was unaware until October 24th that Reiss would be absent from work, and therefore Ballinger deemed it too late to request a mail ballot for Reiss. Ballinger alleged that the Commission should have known about the scheduled vacations and it was incumbent upon the Employer to so inform the Commission. Ballinger contends that the Commission should set aside the results of the elections since said two employes did not vote for the reasons noted above, and cites in support thereof the Commission's action in Industrial Fuel Co, Inc. (6348-A) 7/63, in setting aside the results of a referendum and directed a new referendum, where two of five employes were on vacation on the date of the balloting.

1/ Mistakenly set forth in the Memorandum as October 15th.

Further Ballinger alleges that the Employer failed to post a copy of the Notice of Elections at one of its facilities, Washington Park, where one employee was employed, and that such employee "did not even know that an election was being scheduled until the day she was leaving for vacation". It was further alleged that no notices were posted at the Performing Arts Center, where a substantial number of employees were assigned to work between October 16th and 27th, and that of said group of employees several of them never appeared at the Employer's main office while the notices were posted at the latter location. Ballinger also contended that the notices at the main office were defaced and the information thereon was changed, which "could only confuse the voters".

In addition, Ballinger argues that the standard of "majority of those eligible" to establish a separate unit is arbitrary and discriminatory, and unconstitutional since it denies equal protection to the professional employees in seeking a separate unit, and Ballinger concludes that, in order to avoid an unconstitutional result, that the standard of a "majority of those voting" should only be required to establish a separate unit.

Hearing on the objections was conducted on February 21, 1973, consolidated with a hearing on separate complaints filed by Ballinger alleging that AFSCME and the Employer had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act just prior to the conduct of the elections herein. 2/. At the outset of the hearing AFSCME orally moved that the objections should be dismissed since Ballinger had no standing to object to the results of the representation elections, and further, that the objections were not timely filed. The Employer joined in such motion. Ruling on said motion was reserved. In July, 1973 Counsel for the parties advised that they did not intend to file briefs, although at the conclusion of the hearing, arrangements were made for the filing of briefs following the receipt of the transcript.

Ballinger's Standing to File the Objections

Ballinger, as an individual, filed a petition seeking an election involving the professional employees in the employ of the Employer. As a party to the elections conducted by the Commission, he is a "party to the proceeding" within the meaning of the Commission's Rule ERB 3.05, and therefore has the standing to file objections to the elections conducted in the instant proceedings.

The Timeliness of the Objections

The Employer and AFSCME submit that the objections to the election are untimely, and therefore should be dismissed: Ballinger, the objecting party, counters that his failure to file objections within five (5) days from receipt of tally was due to the misleading information furnished by the Commission's Election Clerk. In announcing the election results, the Clerk advised the observers that the elections resulted in the establishment of two units. The Election Clerk made an erroneous announcement, since Section 111.02(6) provides in material part as follows:

2/ The Commission is today issuing its decision with respect to said complaints.

"The term collective bargaining unit shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05(2) to constitute such group a separate bargaining unit they shall be so considered. . ."

The Commission has considered "professional" employees to fall within the meaning of term "craft" in the application of the above provision. 3/ Both Ballinger and AFSCME originally relied on the Elections Clerk's mis-statement as to the effect of the unit votes, and as a result neither realized that the results of the unit votes failed to establish two separate units until the receipt of the Certification issued by the Commission. Under such circumstances, and since Ballinger's objections were filed within five days of the receipt of the Certification, we deem the objections to be timely filed.

The Objection with Regard to the Election Notices

The Commission prepared notices of the elections, setting forth the date, the time and place and details with regard to the conduct thereof, which notices were submitted to the Employer. The notices were posted by Robert Anthony, a representative of the Employer. At least three such notices were posted at the principal place of employment of the Employer, namely at 606 East Wisconsin Avenue. No such notices were posted at the Washington Park facility of the Employer, where one professional and one nonprofessional employee were employed. Anthony hand delivered the notices on or about October 24, to employees assigned to the Milwaukee Performing Arts Center. These employees were so assigned at this location on a special basis for a limited period of time in order to pursue a special event undertaken by the Employer. The employees were so assigned during the week of October 24 through October 30. The original form of such notices were posted on or before October 20, 1972. On October 23, 1972, pursuant to instructions given by the Commission, to Attorney Croysdale, representing the Employer, Anthony in writing altered such election notices so as to change the date of the balloting from October 27 to October 30 and to limit the site of the balloting to the Employer's premises at 606 East Wisconsin Avenue, and increasing the time permitted for the elections by one half hour from 9:00 a.m. through 10:00 a.m., as opposed to the previous time allowed which was 9:00 a.m. to 9:30 a.m.

There was no evidence adduced at the hearing that the notices were "defaced" or contained any information which confused the employees. The date, time and place of the elections were merely changed on the face of the notices since there was insufficient time for the Commission to prepare, and mail and for the Employer to post, new notices. While no notice was posted at the Washington Park facility, Joyce Reiss, the only professional employee working at said site, and who did not vote, testified that she was aware of the date, time and place of the balloting prior to the conduct of the elections. Reiss testified that she was on vacation on said date and that she had not requested a mail ballot.

The Commission concludes that the objection to the alleged altered notices and the failure to post the notices at Washington Park is without merit and therefore is denied.

3/ Bellin Memorial Hospital (8518) 1/68; St. Michael's Hospital (10771) 2/72.

The Objection with Regard to D'Agostino's Absentee Ballot

Pursuant to the request of Ballinger, the Commission sent mail ballots to Peter D'Agostino and Thomas Dooley. (However Dooley appeared at the polls and cast a ballot). It should be noted that Ballinger requested said mail ballots by telephone on October 23rd. D'Agostino testified that he left his home at 8:30 a.m. on October 25th, prior to the hour on which the mail is ordinarily received at his home. Although Ballinger claims that the Commission's Election Clerk, Mrs. Sorenson, did not mail said ballot on the 23rd 4/ even if it had positively established in the record that the ballot had been mailed on said date, it is doubtful that D'Agostino would have received his ballot during the ordinary course of mailing prior to his vacation departure. In addition, D'Agostino did not wait for the mail delivery on that date. He chose to proceed to his planned vacation, rather than to exercise his right to vote. In that regard Ballinger's objection should be directed toward D'Agostino rather than to the Commission.

Further in response to Ballinger's contention that the Commission should prior to the balloting conducted by it, have been made aware by the Employer that certain employees would be on vacation on the date of the balloting. An Employer cannot interfere with the right of employees to vote or their right not to cast a ballot. The primary responsibility to request absentee ballots lies upon the employees involved and to make their requests known to either their representative or the Employer.

Ballinger cites the Commission's decision in Industrial Fuel Co., Inc., as a precedent for setting aside the results of a referendum where some eligible employees were on vacation and, as a result, did not vote. The Commission conducted a second referendum in that proceeding only after both the Employer and Union involved jointly requested the Commission to do so. No such joint request was made herein.

The objection with regard to D'Agostino's mail ballot is also denied.

The Objection with Regard to the Voting Standard to Establish Separate Unit

With regard to the voting standard required to establish a separate unit, Ballinger alleges that the requirement should be a majority of employees voting, rather than a majority of the employees employed in the voting group. Sec. 111.02(6), cited above is quite clear in that a "majority of such employees engaged in a single craft . . . should have voted . . . to constitute such group a separate bargaining unit."

The Commission, over the past, has applied said standard. 5/ With respect to Ballinger's argument that the statutory standard of a "majority of those engaged", which equates to a "majority of those eligible" is arbitrary, capricious and unconstitutional, the legislature set standard, and the Commission must apply same. We do not deem that the Commission is the proper forum to litigate and resolve the constitutionality of a statute which it must administer. Therefore such objection is denied.

4/ Mrs. Sorenson has advised the Commission to the contrary.

5/ Normington Laundry Dry Cleaning (3864-A) 1/55.

Since we have denied the objections, the Certification of Results of Elections, issued by the Commission on November 9, 1972 stands and is deemed in full force and effect.

Dated at Madison, Wisconsin, this 24th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slayton, Chairman


Earl S. Rice II, Commissioner