

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XLIX  
No. 18276 PP(S)-22  
Decision No. 13809

Jenswold, Studd, Hanson, Clark & Kaufmann, Attorneys at Law,  
by Mr. Bruce K. Kaufmann, for the Complainants.  
Mr. Gene Vernon, Attorney at Law, Department of Administration,  
for Respondent State of Wisconsin.  
Mr. Robert J. Mueller, Attorney at Law, for Respondent State  
Highway Engineers Association.

A complaint alleging unfair labor practices under the State Employment Labor Relations Act (SELRA) having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and a hearing in the matter having been conducted by Chairman Morris Slavney and Commissioner Howard S. Bellman on November 5, 1974, at Madison, Wisconsin; and the Commission, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

5. That, on February 1, 1974, the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, issued a Direction of Referendum providing that a mail ballot referendum be conducted among all eligible employees in the statutory bargaining unit consisting of "professional - engineering", to determine whether the required number of

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said employes favored the implementation of a fair-share agreement between the Respondent Employer and Respondent Association.

6. That in early February 1974, Respondent Employer supplied the Commission with a computerized list of those employes eligible to participate in said fair-share referendum; that Respondent Employer inadvertently failed to include the Complainant, as well as the following 15 employes, in said computerized list:

Charles R. Ames	-- Architect 3
Lawrence J. Conlon	-- Architect 3
Robert M. Engelke	-- Electrical Engineer 3
Robert G. Franz	-- Architect 3
Kyle V. Green	-- Electrical Engineer 5
Floyd L. Hall	-- Engineering Technician 5
Thomas C. Linwood	-- Engineering Technician 5
George L. Ott	-- Electrical Engineer 2
John A. Paulson	-- Architect 5
Lee A. Powell	-- Electrical Engineer 2
Ronald L. Ripley	-- Civil Engineer 2
Francis V. Schadauer	-- Electrical Engineer 2
Robert L. Seiling	-- Mechanical Engineer 5
James E. Shepard	-- Engineering Technician 5
Leon F. Siverling	-- Engineering Technician 4

7. That Respondent Association inadvertently failed to observe that the names of the above 16 eligible employes had been omitted from the computerized list of eligibles, and that as a result said 16 eligible employes failed to receive their mail ballots.

8. That in early February 1974, prior to the termination of the mail balloting, Complainant became aware of the referendum through the receipt of Respondent Association's February 1, 1974 newsletter, and shortly thereafter received a second newsletter, which indicated that the mail ballots had been distributed and would be tallied in the near future; that the February 1, 1974 newsletter contained the following reference to the referendum:

"FAIR-SHARE REFERENDUM SET

At a hearing held February 1 before Chairman Morris Slavney of the Wisconsin Employment Relations Commission (WERC), details of the forthcoming fair-share referendum for the engineering employes' bargaining unit were worked out.

The referendum requested by SHEA members will be conducted among approximately 930 eligible employes who were actively employed since January 19, 1974. The roster of eligible employes includes engineers, architects and technicians located in nine different state departments.

Balloting will be conducted under the direction of WERC according to the following planned schedule. Ballots will be mailed to those on the roster by February 15. They must be returned to WERC by March 4; and the votes will be counted on March 6.

Through the secret ballots eligible employes will be asked whether SHEA and the State of Wisconsin should enter into a fair-share agreement. For a fair-share agreement to be effective, at least two-thirds of the eligible employes voting in the referendum must vote in favor of the agreement."

9. That thereafter the Complainant attempted to ascertain from the Respondent Employer and the Commission's election staff whether he was eligible to participate in the fair-share referendum; and according to the Complainant, he was not given any specific answer to his inquiry.

10. That on March 6, 1974, the mail ballots were opened and tallied, the results of which tally indicated that of 933 claimed eligible to vote, 811 cast ballots, 552 of the employees voted in favor of implementation of the fair-share agreement, while the remaining 259 employees voted against such implementation; that thereafter the Commission was advised that some employees had been inadvertently omitted from the computerized list of eligible employees, and upon further inquiry the Commission discovered that 16 employees had been so inadvertently omitted; that the Commission on April 29, 1974, issued an Order setting aside the results of the referendum, being under the impression that, had the 16 employees received their ballots, said ballots could have very well affected the result of the referendum; that after the issuance of said Order, the Respondent Association filed a motion with the Commission alleging that had the aforesaid 16 employees voted against the implementation of the fair-share agreement, their ballots would not have affected the results of the referendum since, by adding the 16 ballots as being cast against the implementation of the fair-share agreement, the computation of such results would indicate that 66.74727 percent of the employees voting in favor of a fair-share agreement would have constituted more than two-thirds of the employees voting; and that the Commission, being satisfied that the computation of Respondent Association was accurate and that the Commission had made a mathematical error resulting in the Order setting aside the referendum, on June 5, 1974, set aside its Order of April 29, 1974, and in the same document, issued a certification indicating that the required number of employees in the collective bargaining unit had directed the Respondent Employer and the Respondent Association to enter into a fair-share agreement.

11. That a fair-share agreement was subsequently implemented by Respondent Employer and Respondent Association; and that commencing on June 18, 1974, fair-share deductions were made by the Respondent Employer from the pay of all employees in the bargaining unit involved.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

#### CONCLUSIONS OF LAW

1. That by inadvertently omitting 16 employees from the voting eligibility list for the fair-share referendum of March 1974, as described above, Respondent State of Wisconsin did not commit an unfair labor practice within the meaning of Section 111.84(1)(a) of the State Employment Labor Relations Act.

2. That by failing to correct Respondent State of Wisconsin's omission of 16 eligible employees from the voting eligibility list for the fair-share referendum of March 1974, Respondent State Highway Engineers Association did not commit an unfair labor practice within the meaning of Section 111.84(2)(a) of the State Employment Labor Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

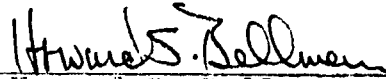
IT IS ORDERED that the complaint filed in the instant matter be,  
and the same hereby is, dismissed.

Given under our hands and seal at the  
City of Madison, Wisconsin this 21<sup>st</sup>  
day of July, 1975.


WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman



Howard S. Bellman, Commissioner



Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

The Pleadings

In his complaint, filed September 3, 1974, the Complainant alleged that Respondents State of Wisconsin and State Highway Engineers Association committed unfair labor practices in violation of Sections 111.84(1)(a) and (2)(a) of the State Employment Labor Relations Act. Complainant requested that the Commission suspend implementation of the Respondents' fair-share agreement pending the resolution of the complaint, find the Respondents guilty of the alleged statutory violations, set aside the March 6, 1974, fair-share referendum and order Respondent Association to refund all fair-share payments already made pursuant to the Respondents' fair-share agreement.

In its oral answer on November 5, 1974, Respondent State of Wisconsin denied Complainant's allegations and requested dismissal of the complaint. Respondent State Highway Engineers Association, by its answer of October 1, 1974, similarly denied Complainant's allegations and requested that the Commission dismiss the complaint.

Pursuant to notice, a hearing was held November 5, 1974.

DISCUSSION

The Complainant alleges that the Respondents' omission of his name and those of 15 other eligible employees from the eligibility list and the resultant inability of said employees to participate in the fair-share referendum constituted illegal interference with said individuals' statutory rights under Section 111.82 of SELRA. Complainant has premised his allegations upon the claim that the omission not only denied the employees their right to vote in the referendum, but also affected their ability to campaign with regard to the outcome of said referendum.

Section 111.82 of SELRA establishes an eligible employee's right to vote in a fair-share referendum. Respondents' failure to supply the Commission with a complete list of eligible voters, albeit inadvertent, would constitute interference with this protected right but for the notice which the omitted employees received regarding the existence of the referendum. Thus, the Commission concludes that neither the Respondent Employer nor the Respondent Association illegally interfered with the rights of the omitted employees.

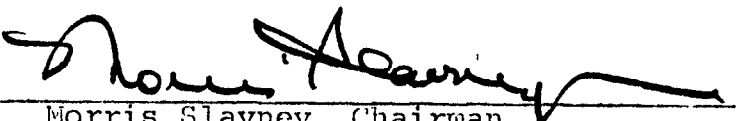
This Commission has held and hereby reaffirms that the Employer and the Association have a duty to furnish the Commission with an accurate eligibility list for a fair-share referendum. However the employees, when aware of an impending or ongoing referendum and of their failure to receive a ballot, have a concomitant duty to make all reasonable efforts to assure that they will be able to exercise their voting rights. While the record indicates that Complainant made some effort to investigate his failure to receive a ballot, it is concluded that the failure of his effort does not necessitate a finding of interference. Indeed it is noted that the Complainant ignored the services of Respondent Association in his informational quest and that proper inquiry through this channel might well have produced success.

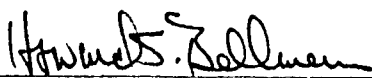
There being no evidence that the remaining 15 employees lacked notice of the impending referendum or that they made any effort to obtain a ballot, it is similarly concluded that their inadvertent omission does not constitute interference.

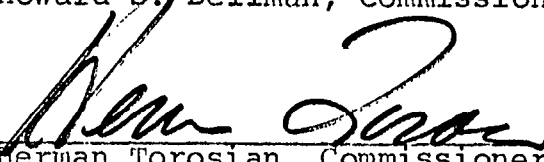
With regard to an employee's right to campaign in the context of a mail referendum, the receipt of a ballot and accompanying notice of the referendum is sufficient to afford the employee an opportunity to influence the votes of his fellow employees. When no such ballot and notice are received due to respondent's omission of the employee from the eligibility list and the employee can establish that he had no knowledge that a referendum was being conducted, it must be concluded that there has been interference with the employee's rights within the meaning of Section 111.84(1)(a) of SELRA. However, the record indicates that Complainant did receive newsletters alerting him to the existence of the referendum which gave him ample opportunity to influence the votes of his co-workers. Given the receipt of the newsletters, the Complainant's failure to receive a ballot in no way impinged upon the availability of that opportunity. As the record also indicates that the remaining 15 omitted employees were mailed the same newsletters received by Complainant and there is no evidence that said newsletters were not received, the Commission also concludes that these employees also had ample opportunity to campaign.

Dated at Madison, Wisconsin this 25<sup>th</sup> day of July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Morris Slavney, Chairman

  
Howard S. Bellman, Commissioner

  
Herman Torosian, Commissioner