

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
MILWAUKEE DISTRICT COUNCIL 48 AND ITS	:	
AFFILIATED LOCAL 1954, AFSCME, AFL-CIO	:	Case I
	:	No. 19638 L-2901
For Determination of Bargaining	:	Decision No. 14198-B
Representatives for Certain Employes of	:	
WISCONSIN HUMAN SOCIETY	:	

Appearances.

Fodell and Ugent, Attorneys at Law, by Mr. Alvin R. Ugent,
 appearing on behalf of the Union.
 Foley and Gardner, Attorneys at Law, by Mr. Michael I. Paulson,
 appearing on behalf of the Employer.

ORDER DENYING CHALLENGES TO BALLOTS AND SUSTAINING
 IN PART AND OVERRULING IN PART OBJECTIONS TO THE CONDUCT OF ELECTION

The Wisconsin Employment Relations Commission, pursuant to a direction issued by it, having heretofore and on January 23, 1970, conducted an election among certain employes of the above-named Employer to determine whether they desire to be represented by the above-named Union for the purposes of collective bargaining; the result of the election was reflected in the tally as follows:

1.	Total claimed eligible to vote	26
2.	Ballots cast	27
3.	Ballots challenged	4
4.	Ballots void	1 <u>a/</u>
5.	Valid ballots counted	22
6.	Ballots cast in favor of representation by Milwaukee District Council 48 and its Affiliated Local 1954, AFSCME, AFL-CIO	12
7.	Ballots cast against such representation	10

and the Employer having timely filed objections to the conduct of the election; and hearing having been conducted with respect to said challenges and objections on February 17, 1970, at Milwaukee, Wisconsin, hearing Officer Marshall E. Gratz appearing on behalf of the Commission; and the Commission having considered the evidence, arguments and briefs, and being fully advised in the premises; b/

NOW, THEREFORE, it is

a/ The Commission's agent deemed the ballot void. Since the validity of the ballot was in issue, it should have been included in the tally as a challenged ballot.

b/ The parties have waived, in writing, the preparation of a transcript and the provisions of Section 227.12 of the Wisconsin Statutes with respect to all hearings conducted in the matter.

ORDERED

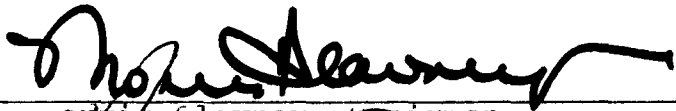
1. That the Employer's challenges to the ballots of Bob Czaplewski, Richard Jones, Charles Krieger and Len Martin shall be, and the same hereby are, denied; that said ballots shall be opened at 9:30 a.m. on July 8, 1976, at the Milwaukee Office of the Wisconsin Employment Relations Commission, Room 560, 819 North Sixth Street, Milwaukee, Wisconsin; that said ballots shall be counted at that time and shall thereupon be included in the final tally of ballots; and that the parties may have representatives present when said ballots are counted at the time and place noted above.

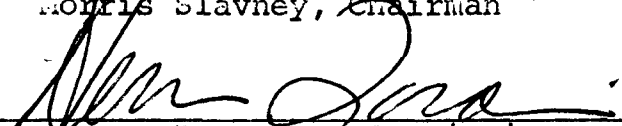
2. That the Employer's objection to the election, asserting that the mail ballot of Gordon Stahl was improperly not included in the tally of ballots shall be, and the same hereby is, overruled; and that said ballot shall remain sealed and shall not be included in the final tally of ballots.

3. That the Employer's objection asserting that a ballot was improperly declared void shall be, and the same hereby is, sustained, and that the ballot involved shall be included in the final tally of ballots as a vote against representation.

Given under our hands and seal at the
City of Madison, Wisconsin this 2nd
day of July, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION


-Y Morris Slavney, Chairman


Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING CHALLENGES TO BALLOTS
AND SUSTAINING IN PART AND OVERRULING IN PART OBJECTIONS
TO THE CONDUCT OF ELECTION

Background

On October 1, 1975, the Union petitioned for a representation election among certain employees of the Employer. During the November 3 and 4 hearing held pursuant to said petition, evidence was taken regarding the disputed status and eligibility of certain individuals including those occupying positions federally-funded under CETA, the Comprehensive Employment Training Act. The Employer's position, contrary to the Union's, was that the CETA positions should be excluded from the bargaining unit such that the holders of those positions would be ineligible to vote in any election directed.

Prior to the preparation of transcript and the submission of briefs, the parties executed and filed with the Commission a Stipulation for Election in a unit expressly excluding the CETA-funded positions. Without further communication with the parties and based upon the evidence adduced at the November 3 and 4 hearing, the Commission, on December 23, 1975, issued a Direction of Election c/ rejecting the unit description set forth in the Stipulation and directed an election in a unit expressly including the CETA-funded positions, as described in the preface to the Commission's Order herein.

The election was conducted on January 23, 1976. d/ During the conduct of the election, the Employer challenged four ballots tendered by holders of CETA positions. e/

On January 28, 1976, the Employer filed timely objections to the conduct of the election based on the following grounds:

- "1. A clearly marked ballot was improperly declared void by the Commission's agent.
2. A mail ballot, delivered to Mr. Gordon Stahl, was mailed to the Commission's agent prior to the election; however, it was improperly not included in the tally of ballots."

As indicated, the results of the balloting requires a determination of the challenges and objections. In addition, the Employer requested a hearing concerning the challenges and objections, asserting that its ". . . rights to due process of law and . . . under Wis. Stat. Sec. 227.12 . . .", would otherwise be violated by the mode of the Commission's Direction of Election in a unit other than that contained in the parties' Stipulation.

c/ (14198), 12/23/75.

d/ It should be noted that neither party, nor their counsel, all who received copies of the Direction, prior to the election directed any "protest" to the Commission with respect to the inclusion of the CETA-funded employees in the unit.

e/ A fifth CETA-funded-position-holder voted without challenge. The Employer requests herein that a new election be held if the outcome of the January balloting would be affected by the vote of that inadvertently unchallenged voter.

Hearing was held with respect to the objections and challenges on February 17, 1976, pursuant to Commission Order. During the course of that hearing, the parties waived in writing both ". . . a transcript of the record made at any hearing in the above-captioned matter, as well as compliance with Section 227.12, Wisconsin Statutes, with respect to the above-captioned matter." The parties did so with the oral understanding that by said waiver the Employer was not waiving any rights it had to challenge, certain factual assertions contained in the Commission's Memorandum Accompanying Direction of Election, or to obtain a transcript of the instant proceeding in the event of a judicial appeal in this matter. The waiver was also based on the parties' further oral understanding that the Employer would be given the opportunity to present written argument to the Commission with respect to its objections and challenges.

Evidence was taken with respect to both the objections and the challenges, the latter over the objections of Union Counsel. The parties filed sequential briefs initiated by the Employer with the Employer's reply brief being received on March 19, 1976.

Ballot Voided at Polling Place

Despite the instruction to "MARK 'X' IN ONE SQUARE ONLY" and the reference to "THE 'X' YOU HAVE MADE", the voter instead of placing an "X" in the "NO" box on the ballot made a series of heavy, closely bunched, nearly horizontal lines covering most of the "NO" square and some areas immediately below and to the left and right of the "NO" square. No other markings appear on the ballot. Contrary to Union Counsel's submitted observations at the hearing, we do not find any indications on the ballot that the markings described above were superimposed upon a previously marked "X".

The Employer, contrary to the Union, contends that the Commission election agent improperly voided and excluded the ballot from the number of valid ballots cast.

The Commission has previously held that it will not declare a ballot void so long as the clear and unequivocal intent of the voter can be determined by the Commission from the manner in which the voter marked the ballot. f/ While the instant voter did not follow instructions concerning the precise mode of expressing his choice, the intent expressed on the ballot in question is, nonetheless, clearly and unequivocally against representation. Therefore, the ballot is held valid and shall be included in the tally of ballots.

Mail Ballot Received by Commission Agent After Election

A ballot and notice of the election were mailed to Gordon Stahl by the Commission on January 16, 1976 because he was to be confined to a hospital on and before January 23, the date on which the election was conducted. Enclosed with the ballot were "INSTRUCTIONS TO VOTERS" providing, inter alia, as follows.

"If you desire to vote, will you please do so promptly. Your ballot must be received by the Commission's agent in Milwaukee on or before January 23, 1976 at 12:00 Noon, or it will not be counted." g/

Stahl received the ballot and instructions at the hospital on January 19. That same day, Stahl marked his ballot, placed it in the return envelope, caused it to be sealed, and gave it to his son for mailing to the Commission agent in Milwaukee. The record does not reliably establish

f/ City of Milwaukee, (6253-B) 4/63, (Aff'd 23 Wis. 2d 303, 1964).

g/ The vote was conducted from 2:00 p.m. to 5:00 p.m. on the Employer's premises.

exactly when the younger Stahl mailed the letter. Stahl could only indicate that his son did so ". . . on or before the evening of January 22, 1976." In any event, the envelope from Stahl was received in the mail by the Commission's election agent in Milwaukee on January 24, one day after the manual balloting was conducted.

The Employer contends that the ballot should be opened and counted because it was effectively cast prior to the election, Stahl having done everything he could to insure the ballot's prompt delivery under the circumstances. The Union takes an opposite view for the reason that the ballot was received the day following the election and the execution of the tally of ballots.

The required time for receipt of the ballot and the consequences of noncompliance therewith were clearly expressed in the "INSTRUCTIONS TO VOTERS", received by Stahl. The policy underlying those instructions is sound and no reasons sufficient to change same, or to except the instant situation from its application have been presented herein. Stahl failed to comply with the deadline for the valid receipt of his ballot. For that reason, it will not be opened or counted.

Challenged Ballots Cast by Individuals Occupying CETA-Funded Positions

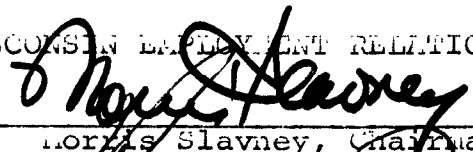
The Union contends that the propriety of the Commission's conclusion in the unit of individuals occupying CETA-funded positions cannot properly be the subject of a challenged ballot proceeding. It should be noted that the instant proceeding was initiated by a petition filed by the Union, and hearing thereon was conducted during November, 1975. During the course of the hearing an issue arose as to whether said individuals should be included in the unit, the Employer contending that they should be excluded from the eligibles because they were occupying CETA-funded positions. ^{n/} Following the close of the hearing, and prior to any further action by the Commission, the parties on December 11, 1975, filed a stipulation with the Commission requesting an election in a unit which excluded the CETA-funded positions. In its Direction issued on December 23, 1975, the Commission acknowledged the receipt of the stipulation and the agreed-upon bargaining unit, and specifically stated, in the preface to the Direction "and the Commission having reviewed the stipulation and the evidence presented at the hearing, and being satisfied that the stipulation with respect to the eligibles is not acceptable to the Commission." Further, in its Memorandum accompanying the Direction, the Commission set forth its rationale in rejecting that portion of the stipulation which excluded the CETA-funded positions, concluding that said positions should be included in the bargaining unit.

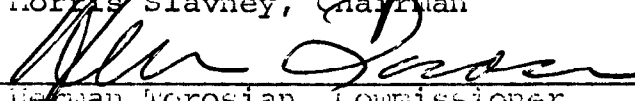
We have considered the evidence adduced at the subsequent hearing, as well as the arguments and briefs, concerning the Employer's challenges to the ballots cast by four individuals occupying the CETA-funded positions, and we conclude that our original determination that said individuals were, and are, properly included in the bargaining unit.

Dated at Madison, Wisconsin this 2nd day of July, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner

^{n/} During the initial hearing evidence was adduced with respect to said position.