

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XLIV
No. 22247 ME-1492
Decision No. 16096-B

Mr. Howard Goldberg, Attorney at Law, appearing on behalf of the County.
Mr. James L. Koch, Representative, on behalf of AFSCME, AFL-CIO, appearing on behalf of the Union.

Pursuant to a Direction of Election previously issued in the above entitled matter, the Wisconsin Employment Relations Commission conducted an election on February 7, 1978 among certain employees of Fond du Lac County to determine whether said employees desired to be represented by the American Federation of State, County & Municipal Employees, AFL-CIO, Wisconsin Council 40, for the purpose of collective bargaining. The Union thereafter filed timely objections to the conduct of the election. A hearing on said matter was held on March 14, 1978, at Fond du Lac, Wisconsin, before Examiner Ellen J. Henningsen, a member of the Commission's staff. The County and Union thereafter filed briefs by May 20, 1978. The Commission, being fully advised in the premises and having considered the objections, the record, and the arguments and briefs of the parties, hereby issues the following Findings of Fact, Conclusions of Law and Order Overruling Objections to Conduct of Election.

4. During the month of October, 1977, certain employees of the County, heretofore unrepresented, began organizing with the assistance of agents of AFSCME, for the purpose of collective bargaining with the County. The first organizational meeting occurred on November 5 and the County Courthouse was leafleted on November 17. A petition for election executed on November 16 was filed by AFSCME with the Commission on November 17. A hearing on the petition was scheduled, then postponed, and the parties thereafter stipulated on January 30, 1978 to an election date of

Tuesday, February 7, 1978, as well as to a list of eligible voters. The parties further stipulated to the following description of the bargaining unit:

"All regular full-time and regular part-time employees (regular part-time employees defined as those employees regularly scheduled to work less than thirty-seven and one-half (37 1/2) to forty (40) hours per week, but not less than twenty (20) hours per week) employed by Fond du Lac County in its Courthouse, County Administrative Center Annex and Safety Building and all regular full-time and regular part-time clerical and stenographic employees (regular part-time employees defined as those employees regularly scheduled to work less than thirty-seven and one-half (37 1/2) to forty (40) hours per week but not less than twenty (20) hours per week) employed at the Fond du Lac County Mental Health Center, Rolling Meadows Nursing Home, Fond du Lac County Landfill, University of Wisconsin Center - Fond du Lac, Soil Conservation Office, and the Fond du Lac County Highway Department but excluding elected officials, judges, court reporters, court commissioners, attorneys, bailiffs, matrons, department heads, supervisory and confidential employees, C.E.T.A. employees hired only to complete special projects, and all employees presently represented in other certified bargaining units."

5. The election results were as follows:

| | |
|--|-----|
| 1. Total number of employees eligible to vote..... | 112 |
| 2. Total number ballots cast..... | 100 |
| 3. Ballots challenged..... | 0 |
| 4. Votes for representation by AFSCME..... | 47 |
| 5. Votes against representation..... | 53 |

6. It has been the customary past practice of the County to grant annual raises to unrepresented employees effective on January 1st each of the last nine years. In five of the last nine years (1970, 1971, 1973, 1976 and 1978), the raise was determined prior to the January 1st implementation date. In the other four years, the raise was determined after January 1, but was nevertheless implemented retroactively to January 1. Prior to 1978, the raise had never been determined earlier than December 16; however, the increase effective on January 1, 1978, was determined by the County Board on November 15, 1977, two days prior to the filing of the petition for election.

7. In 1971, 1972 and 1975 the unrepresented employees received notice of their raise only after increases to the organized employees were agreed upon. However, in 1973 and 1976 the unrepresented employees were the first to receive notice of their increase. In the remaining years as in 1977 the unrepresented employees received notice of their increase before some, but not all, of the represented units reached agreement with the County.

8. In the past, the County has determined the amount of the raise for unrepresented employees in light of settlements, as well as anticipated settlements, for the organized employees. The practice has been to initiate review of salary raises in the October prior to the effective date of the increase. Consistent with that practice, the County Board, in October, 1977, began its investigation of the proposed wage increases to be effective on January 1, 1978.

9. In October, 1977, the Fond du Lac County Finance, Taxation & Personnel Committee requested that Richard J. Brzozowski, Personnel Officer, conduct a survey of area employers so as to determine whether the County's unrepresented employees were compensated at a level comparable to that of other area employees. As a result of this survey, Brzozowski and the Committee concluded that Fond du Lac's unrepresented employees were inadequately remunerated. Subsequent to this decision the Committee met twice in early November. Its recommendations were typed on November 8, 1977, and in substance suggested a 7% raise for some of the unrepresented employees and a 9% raise for the rest. This recommendation was submitted to the County Board for its upcoming meeting on November 11, whereupon, the County Board ratified the proposed wage and fringe package for the unrepresented employees on November 15, 1977. At the time of such action the County was aware of the organizational activities of AFSCME.

10. Regarding the raise effective January 1, 1978, the increases for various units of employees, all of which are organized except in (d) below, were approved on the following dates:

- (a) County Social Services - October 7, 1977.
- (b) County Traffic Department - October 19, 1977.
- (c) Sheriff's Department - November 2, 1977.
- (d) Unrepresented Employees - November 15, 1977.
- (e) Institutions - November 21, 1977.
- (f) Radio Operators - January 31, 1978.
- (g) Highway Department - February 9, 1978.

11. The raise received by the unrepresented employees was either approximately the same as or only slightly higher than that received by the represented employees. Specifically, Resolution No. 53-4e entitled "Resolution Adopting the Fond du Lac Classification and Compensation Plan for Non-Represented Positions for 1978" indicates that approximately two-thirds of the total number of unrepresented employees were within the class grades 5 - 9, and thus entitled to 9% increase if they were on the top step of the salary schedule. The remaining one-third which were within class grades 10 - 24 would presumably have received a 7% wage increase if they were on the top step of the salary range. The total package reflected approximately an 8% increase in wages. The employees within the County's Traffic Department received approximately a 7.77% raise on the basis of salary increases and, in light of a reduced working year, an 8.99% raise in total economic improvement. The Sheriff's Department received an 8.4% salary raise and also successfully negotiated a shorter working year. The organized employees within the County's institutions received an 8.16% raise.

12. On December 5, 1977, Donald Flanders, County Administrator, at a meeting of department heads called by Flanders, stated that department heads were to discourage the employees from joining the union. Flanders suggested that the employees could "lose benefits" as a result of unionization. When questioned by a department head as to what such a loss could be, Richard Celichowski, Administrative Assistant, rather than Flanders, responded that the present informality of personnel relations could be lost. Neither Flanders nor Celichowski advised the department heads as to how they were to discourage unionization and there is no evidence of any consequent supervisory threats or promises.

13. On February 1, Celichowski and Brzozowski drafted a letter to be mailed to the employees eligible to vote which contained the following excerpts:

". . . It is extremely important that you understand the significance of your vote on February 7th. The fact that you may have given support to the Union in the past, or even signed a union card, does not, in any way, compel you to vote for the Union.

We would just like to point out to you that your present wages and fringe benefits were received without paying any 'union dues.' These wages and fringe benefits are comparable to or better than many wages and fringe benefits paid by others in this area (union and nonunion). Check and see for yourself.

Job security has been made an issue by some who support the Union. The fact is, job security depends on you. Conscientious, dependable, and dedicated employees do not lose their jobs. At times, unfortunately, budgetary restraints may necessitate layoffs, but unions do not establish budgets, nor do they determine what services are to be provided. In any event, unions cannot eliminate layoffs if they are deemed necessary by the County. . . ."

The letter was presented to the Finance, Taxation and Personnel Committee for the Committee members' signature. It was dated February 1, 1978, postmarked February 3, and received by the employees on dates ranging from February 4 to February 7, the day of the election.

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

CONCLUSIONS OF LAW

1. The County, by ratifying wage and fringe increases to be effective on January 1, 1978 to the employees in the bargaining unit involved herein, in conformity with its past practice, did not interfere with the free choice of such employees in the representation election conducted on February 7, 1978.

2. The County, by its Administrator Donald Flanders, did not interfere with the conduct of the election by holding the meeting of the department heads on December 5, 1977, described in Finding 12, above, since neither Flanders nor any other agent of the County engaged in any coercive conduct as a result of said meeting.

3. The County's preparation and mailing of its February 1, 1978 letter, received by employees during the period February 4 - February 7, did not interfere with the free choice of the employees in the representation election conducted on February 7, 1978.

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

ORDER

IT IS ORDERED that the objections to the conduct of the election filed in the instant matter be, and the same hereby are, overruled. 1/

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

1/ The Commission is also today issuing its certification of the results of the election.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OVERRULING OBJECTIONS TO CONDUCT OF ELECTION

AFSCME has alleged that the County engaged in election misconduct by granting the employees a benefit during the pendency of the election; by holding a meeting of department heads at which they were told to discourage unionism; and by the substance and timing of a campaign letter sent to employees eligible to vote in the election.

Pursuant to Secs. 111.70(4)(d)3 and (6), the Commission has refused to certify election results where it is established in a post-election objections proceeding that the employees were unable to freely express their choice through a secret ballot as a result of either employer or union misconduct. 2/

While at the outset of the hearing AFSCME's initial arguments sounded in prohibited practice terminology, its spokesperson made clear to the Examiner that it wished to proceed in the manner of an objections proceeding rather than a prohibited practice proceeding.

1. The Alleged Grant of Benefit During Pendency of the Election Proceeding.

In order to constitute conduct sufficient to warrant setting aside election results, the offending conduct must be sufficient to render it improbable that a voter will be able to freely cast a ballot either for or against a union. In some circumstances an employer grant of benefits during the pendency of an election proceeding will be sufficient to overturn the result of the election. However, we have previously noted that "where there has been a clear Employer commitment to grant a wage increase prior to the Union organizational activity or where it reflects a practice of effectuating a customary increase, we have found that implementation of such a wage increase did not impinge on the employee's freedom of choice for or against the Union." 3/

There is substantial evidence in the record to establish that the timing of the determination on November 15, to grant the employees a wage increase, to be effective on January 1, 1978, was generally in accordance with past practice. In the previous eight years the employees always received a pay increase effective on January 1. In four of these years the increase was ratified by the County Board prior to its effective date. In 1977 the unrepresented employees of Fond du Lac County learned on November 15, 1977 that they would receive a pay raise of either 7% or 9% on January 1, 1978. The objection in this case is based on the timing of the announcement and the amount of the raise.

While the pay increase granted for 1978 was determined approximately a month earlier than in any previous years, the County established a neutral basis for the relatively early grant. In the first place Mr. Brzozowski had surveyed the area's private sector employers and several other municipal employers in order to establish the comparable labor costs of employers similar to the County. These results were available in late October and early November. Moreover, three of the represented units had settled with the County before November 15. The range of settlement for the County's represented units had then been established and, consistent with past practice, the decision on the amount of the raise for the unrepresented employees was made without further delay.

2/ See e.g., Shady Lawn Nursing Home, 7516-B (8/66); L & M Corporation d/b/a Cardinal Hotel, 9374-B (3/70); and Picasso Plaza, Ltd., 8608-E (4/69).

3/ Washington County, 7694-C (9/67).

3 - 2

The amount of the raise corresponds closely to that received by the represented employees. Testimony at the hearing established that in the past the unrepresented employees received a raise roughly equivalent to that of the organized units. Hence, this raise may be deemed a customary increase, one which the employees ought to have expected as a result of past personnel practices, and hence it was not intended to be, nor was it reasonable for it to have been perceived to be an attempt by the County to influence their vote concerning union representation.

2. Employer Statements at Department Heads Meeting.

The December 5 meeting at issue was one held by County Administrator Flanders and other staff members with some 25 department heads or their designees. The meeting took some one and one-half hours and addressed many subjects, only one of which was the on-going organizational campaign. With the exception of Florian Erspamer, an employee attending as an acting department head, all attending the meeting were supervisory or managerial personnel. Flanders' remarks during that meeting included a request that those in attendance attempt to persuade the employees under their supervision not to organize a union. Flanders explained that the employees could "lose benefits" as a result of unionization. Flanders did not, however, urge or suggest specific means of discouragement such as threats or promises of benefits. Moreover, when Flanders was asked what the employees stood to lose as a result of unionization, the reply, by Celichowski (speaking for Flanders), was that the present informality of personnel relations could be lost. Such a statement, clarified in that manner, even if communicated to the employees by a supervisor, would not constitute a threat or a statement likely to unduly influence the prospective voter's free choice.

Significantly, no supervisory threats, promises or other coercive conduct flowed from the meeting. The only direct impact the meeting appears to have had on employees occurred when Erspamer, himself an employee active in union organizing activities, reported Flanders' remarks to the employees in his department. The record indicates, however, that Erspamer did so in "a joking manner", so that, in context, his report cannot be found to have unduly influenced the free choice of those employees who heard it. 4/

3. Campaign Propaganda as a Basis for Upsetting Election Results.

The letter in question, dated February 1, was prepared by the County and mailed to all eligible to vote in the election. Because

4/ See, Whitefish Bay Cleaners & Tailors, 5335-B (2/60), wherein we stated:

"Where the validity of an election or referendum conducted by this [Commission] is challenged by grounds other than direct interference or irregularities in the voting process, there is a strong presumption that the ballots cast in secrecy, under the safeguards provided by our procedure, reflect the true wishes of the employees participating. We will set aside an election or referendum if it appears that the eligible employees were precluded from exercising a free choice by methods which were coercive in character and which were so related to the election or referendum as to have a probable effect on the employees' free choice at the polls. The question which the [Commission] must determine is whether or not the statement made by the employer was of such character so as to interfere with the free choice of the employees voting."

at least some of the eligibles received that letter within the 24 hour period preceding the election, AFSCME contends that the Commission's "24-hour rule" should apply so as to provide grounds for setting aside the election. That rule, however, does not apply to written communications; rather, its application is limited to employer "captive audience" meetings with employees during the 24 hours preceding the election. 5/

With regard to the contents of the letter, the repeated position of this Commission has been that campaign propaganda will not be reviewed unless it is either a statement which is so misleading as to prevent a free choice by the employees or one which contains a promise of benefit or a threat. 6/ Clearly the letter contains no promise of benefit or threat of reprisal. Moreover, the Union admits that the County made no misrepresentation either by explaining that a signature on a union authorization card does not bind the signor to a pro-union vote, or by stating that the unrepresented employees were already receiving wages and benefits comparable to or better than many wages and fringe benefits paid by others in the area (union and nonunion). Therefore, neither the time of receipt nor the contents nor any other aspect of the mailing are grounds for setting aside the election results herein.

Upon a full review of all the evidence, arguments and briefs in this case, and based upon the reasons set out above, we are today issuing an Order overruling the objections to the conduct of the election and are certifying the results of the election conducted on February 7, 1978.

Dated at Madison, Wisconsin this 26th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

5/ Mt. Carmel Nursing Home, 6552 (5/63); St. Mary's Hospital, 6779-C (1/65); Deaconess Hospital, 7008-D (10/65); Doyle Litho & Printing, 8126-C (5/68).

6/ Manitowoc County, 10899-D (8/72); Two Rivers Municipal Hospital, 11513-E (4/73).