

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case I  
No. 22881 E-2959  
Decision No. 16454-B

Frankel, Langhammer & Pines, Attorneys at Law, by Mr. Lester A. Pines, Esq., and Ms. Mary Lynn Donoghue, Business Representative, on behalf of the Union.  
Mr. Albert J. McGinnis, Attorney at Law, on behalf of the Employer.

Pursuant to a Direction of Election previously issued in the above entitled matter, the Wisconsin Employment Relations Commission, herein the Commission, on July 24, 1978, conducted an election, pursuant to Section 111.05 of the Wisconsin Employment Peace Act, among certain employees of Simehow, Inc., d/b/a Dos Bandidos, herein the Employer, to determine whether said employees desire to be represented for the purposes of collective bargaining by Madison Independent Workers Union, hereinafter the Union. During the course of said election, the Employer filed challenges to the ballots cast by Rosemarie Scullion and Lisa Burdulis. Hearing on said matter was held in Madison, Wisconsin on August 1, 1978, before Hearing Examiner Amedeo Greco. The parties have not filed post hearing briefs. Having considered the evidence and the arguments of the parties, and being fully advised in the premises, the Commission hereby issues the following Findings of Fact, Conclusion of Law and Order Dismissing Challenges.

1. The Union, on April 10, 1978, filed a petition which requested the Commission to conduct an election among certain employees of the Employer to determine whether said employees desire to be represented by the Union for the purposes of collective bargaining. A hearing on said petition was conducted on May 1, 1978. On July 6, 1978, the Commission issued Findings of Fact, Conclusions of Law and Direction of Election wherein it directed an election in the following appropriate unit:

No. 16454-B

2. Thereafter, on July 24, 1978, the Commission conducted an election among the employees in the above-described unit. During the course of the election, the Employer challenged the ballots cast by waitresses Rosemarie Scullion and Lisa Burdulis on the ground that each has notified the Employer of their intention to resign. At the conclusion of the election, the tally of ballots showed that there were fourteen employees eligible to vote. There were a total of thirteen ballots cast, five of which were cast for the Union, and six in favor of no representation. The two remaining ballots were cast by Scullion and Burdulis. Those challenged ballots are sufficient to affect the results of the election.

3. Both Burdulis and Scullion have been employed by the Employer as waitresses throughout the period of the processing of the instant election petition, through the eligibility date, through the date of the election and through the present. Although each has spoken in conversations with supervisory personnel about plans to leave the employ of the Employer, neither has communicated a specific date on which such a resignation would become effective, and neither is presently certain that they will terminate their employment with the Employer in the near future.

4. Neither Burdulis nor Scullion have quit their employment with the Employer.

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

#### CONCLUSION OF LAW

Lisa Burdulis and Rosemarie Scullion were employees of the Employer, within the meaning of Sec. 111.02(3) of the Wisconsin Employment Peace Act as of the date of the election herein, and they are eligible to vote in said election.

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

#### ORDER

1. The Employer's challenges to the ballots of Burdulis and Scullion shall be, and hereby are, dismissed.

2. The ballots of said two employees shall be opened and included in the final tally of ballots, at 1:30 p.m. on August 24, 1978, at the Commission's offices, 30 West Mifflin Street, Room 910, Madison, Wisconsin. The Employer and the Union are requested to have observers present at such time.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER DISMISSING CHALLENGES

The Employer has challenged the ballots cast by Burdulis and Scullion on the ground that both have communicated to supervisory personnel that they intend to terminate their employment with the Employer in the near future. The Employer therefore argues that they are ineligible to vote and that their ballots should not be counted.

The Union, on the other hand, contends in effect that while both employees have spoken about leaving, they have done so in general terms and that neither employee in fact has any specific plans for leaving in the near future. The Union therefore maintains that since both employees' plans are speculative, and as both employees were employed by the Employer on both the eligibility date and on the date of the election, they were eligible to vote in the election and that, as a result, their ballots should be counted.

With respect to Burdulis, the record shows that she is employed by the Employer as a waitress. On or about May 26, 1978, Burdulis had a conversation with George Pease, who is the son of one of the Employer's principal owners. At that time, Pease approached Burdulis and asked whether he could sit down with her during the time that Burdulis was eating her lunch. Thereafter, Burdulis and Pease engaged in a conversation which covered a variety of topics. Burdulis there stated, inter alia, that she was serious about her position as a waitress; that the only thing keeping her in Madison was the upcoming representation election; that but for the election she would be in San Francisco; and that she was only staying to fulfill her obligations to her friends and thereafter would leave this "mess" and go to California. It is undisputed that Burdulis then never gave a specific date on which she planned to leave. Following this conversation, the Employer made no attempt to secure a replacement for Burdulis. As of the date of the instant hearing, Burdulis did not have any immediate plans to leave her employment.

Scullion has been employed by the Employer as a waitress since approximately December 1977. At the time of her hire, Scullion advised Supervisor Lillian Patterson that she planned on quitting her employment in September 1978, at which time she hoped to go to Paris, France for study. Since that time, Scullion has repeated to others that she hoped to leave in September 1978. At the hearing, however, Scullion testified that she lacks sufficient funds to go to France and that it is very uncertain as to whether she will be able to go, as planned. She also testified that although she has an airline reservation for September 12, 1978, for a Paris flight, she has not yet paid for her ticket because of her financial situation.

In reviewing the above, it is undisputed that both Burdulis and Scullion were employed by the Employer on July 6, 1978, the eligibility date established by the Commission in the Direction of Election, wherein the Commission stated that employees who were employed on said date were eligible to vote, unless such employees thereafter quit their employment or became discharged for cause prior to the conduct of the election. Since neither Burdulis nor Scullion has been discharged for cause, they are therefore eligible to vote if they have not quit their employment as of the date of the election.

In resolving the question of whether employees intend to quit their employment, the Commission relies on various objective criteria to determine whether the employee has manifested a clear intent to

leave on a date certain. Thus, in our prior Findings of Fact, Conclusions of Law and Direction of Election in the above-entitled matter, the Commission found that Theresa Spaude was ineligible to vote by virtue of the fact that she clearly advised the Employer that she would leave at a specified time. In announcing her intent to leave, Spaude did not express any reservations to the effect that her plans might not crystalize. As a result of Spaude's expression of a definite intention to quit at a specified time, the Employer thereafter hired a replacement for her.

By the same token, the Commission in other cases has found other employees were ineligible to vote because the evidence therein clearly established that their employment relationship would definitely terminate in the near future. In City of Middleton 1/ for example, an employee was declared ineligible to vote because of his clear intent to resign his full time position so that he could resume his education. Along the same line, the Commission in Casey Lincoln & Mercury 2/ ruled that an employee was ineligible to vote where he had notified his employer that he would be quitting, where he had purchased his own tools and equipment, and where he had also attempted to solicit his own business and to rent a building for his business.

The above situations, however, are all distinguishable from the instant situation in that the record herein fails to establish that Scullion or Burdulis have definite plans to terminate their employment. Thus, Burdulis has never stated that she would leave at a particular time and Scullion has indicated that while she would like to leave in September 1978, her plans at the present time are uncertain because of her financial situation. Moreover, the Employer has not yet attempted to secure replacements for them, as it did for Spaude. In addition, it should be noted that although Scullion advised the Employer as early as December 1977 that she hoped to go to France in September 1978, the Employer failed to raise this issue in the prior May 1, 1978 hearing in this matter, something it surely would have done had it then thought that Scullion would definitely be leaving. Accordingly, the facts herein are materially different from those which surrounded Spaude. By the same token, since Scullion's plans are so uncertain, her situation is different from those in City of Middleton, supra, in that the employee there definitely planned on resuming his education. In addition, Casey Lincoln & Mercury, supra, is distinguishable in that the employees here have not taken any steps whatsoever to evidence a clear break in their employment relationship.

The facts reveal, then, nothing more than the subjective feelings of two employees to the general effect that, while they may terminate their employment at some future date, they have no concrete plans for doing so as of the date of the hearing on objections. Since there is no clear evidence that either Scullion or Burdulis have no definite plans to quit their employment, and as the Employer here has not sought to replace them, and since the Commission also finds said employees are otherwise eligible to vote, they should not be deprived

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1/ (10381) 6/71.

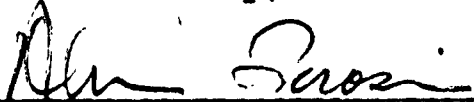
2/ (4538) 5/57.

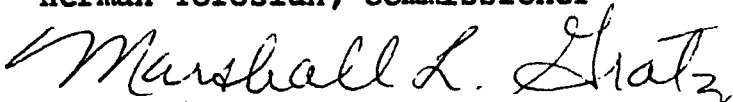
in the instant circumstances of that statutorily protected right.  
Hence, we have dismissed the challenges to their ballots and we will  
open said ballots on the date noted above.

Dated at Madison, Wisconsin this 17th day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Marshall L. Gratz, Commissioner