

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK  
PROCESSORS, CANNERY, DAIRY EMPLOYEES  
AND HELPERS UNION LOCAL NO. 695,  
affiliated with the INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF AMERICA

Case VI  
No. 24273 ME-1645  
Decision No. 16967-B

Involving Certain Employees of

CITY OF COLUMBUS (POLICE DEPARTMENT)

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Appearances:

Goldberg, Previant & Uelmen, S.C., Attorneys at Law, by Ms. Marianne Goldstein, on behalf of the Union.  
Mr. Lloyd J. Paust, Attorney at Law, on behalf of the City.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER  
DISMISSING OBJECTIONS TO CONDUCT OF ELECTION

Pursuant to a Direction of Election previously issued in the above-entitled matter, the Wisconsin Employment Relations Commission conducted an election on April 30, 1979 among certain law enforcement personnel of the City of Columbus to determine whether said employees desired to be represented by Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, for the purpose of collective bargaining. The City thereafter filed timely objections to the conduct of the election. A hearing on said matter was held at Columbus, Wisconsin on May 30, 1979 before Examiner Ellen J. Henningsen, a member of the Commission's staff. A transcript of the hearing was received on June 8, 1979 and briefs were received by June 25, 1979. The Commission, having considered the objections, the record and the arguments and briefs of the parties, hereby issues the following Findings of Fact, Conclusion of Law and Order Dismissing Objections to Conduct of Election.

FINDINGS OF FACT

1. That Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, referred to as the Union, is a labor organization and has its offices at Madison, Wisconsin.

2. That the City of Columbus, referred to as the City, is a municipal employer which, among its several governmental functions, operates a police department.

3. That on March 12, 1979 the Union filed a petition with the Commission requesting the Commission to conduct an election pursuant to section 111.70(4)(d) of the Municipal Employment Relations Act (MERA) among certain law enforcement employees of the City; that in April, 1979, the Union and the City stipulated to a representation election, stipulated to the list of eligible voters and further stipulated to the following description of the bargaining unit:

All employees of the Columbus Police Department who have the power of arrest, but excluding the Police Chief, the Assistant Chief and the CETA employees;

that Patrolman Fred Smith was included on the list of eligible voters; that said stipulation made no provision for voting by absentee ballot.

4. That based on said stipulation the Commission issued a notice of election which was posted on the City's public bulletin boards on Monday, April 23, 1979; that said notice did not contain any reference to a procedure for casting absentee ballots; that Patrolman Smith read the notice of election prior to the date of the election.

5. That the election was held as scheduled on Monday, April 30, 1979 in the City Hall from 10:00 a.m. to 10:30 a.m. and that said election was supervised by an agent of the Commission; that the election results were as follows:

1. Total number of employees eligible to vote . . . . . 6
2. Total number ballots cast . . . . . 5
3. Ballots challenged .. . . . 0
4. Votes for representation by Union . . . . . 3
5. Votes against representation . . . . . 2

6. That Patrolman Fred Smith, although eligible to vote, did not vote in person during the election because he was hospitalized with pneumonia from Friday, April 27, 1979 to Friday, May 4, 1979; that Smith knew in the early afternoon of Thursday, April 26, 1979 that he would be hospitalized the next day although he did not know the exact duration of his stay; that he informed the Chief of Police in the morning of Friday, April 27, 1979 that he was hospitalized; that Smith learned on the morning of Sunday, April 29 that he would be hospitalized for that week; that Smith did not make a request to an agent of the Commission, the Union or the City to vote by absentee ballot; that Smith did not know that any procedure existed for voting by absentee ballot; that prior to the election no one acting on Smith's behalf asked for an absentee ballot.

7. That neither the City Clerk nor the Chief of Police knew that a procedure existed for voting by absentee ballot; that the Commission's agent supervising the election was informed during the course of the election that Smith was hospitalized; that the agent was asked something to the effect of whether there was some way that Smith could vote and that the agent responded to the effect that it was too late to make arrangements for Smith to vote; that Smith did not cast an absentee ballot; that Smith testified that he would have cast an absentee ballot, had he been able to, and that Smith's vote could have affected the outcome of the election.

8. That the Commission has a policy of permitting absentee ballots under the following circumstances:

#### POLICY ON ABSENTEE BALLOTS

Absent agreement between the parties, mail ballots will not be provided, except on the basis of an affidavit executed by the individual employee, establishing that a mail ballot is justified, e.g., the employee is ill, on vacation outside the community, or is otherwise absent from the community. Such affidavit must be filed sufficiently in advance in order that the Commission will have time to forward a mail ballot and receive same in its offices, or in care of the local Postmaster, in order for the Commission's agent to obtain same prior to the opening of the polls.

that the Commission or its agents provide information about this policy upon request; that even if Patrolman Smith or anyone acting on his behalf had asked for an absentee ballot at any time after learning of Smith's inability to attend the election but prior to the election, there was not enough time for an absentee ballot to be supplied which would assure that Smith could freely express his choice through a secret ballot; that the agent's denial of the request made during the election for a ballot for Smith was proper as the issuance of an absentee ballot at that time would not have guaranteed that Smith would have been able to freely express his choice through a secret ballot.

Based upon the above Findings of Fact, the Commission issues the following

CONCLUSION OF LAW

That the City's objections to the conduct of the election are without merit for the reasons set forth in Finding of Fact 8.

Based upon the above Findings of Fact and Conclusion of Law, the Commission issues the following

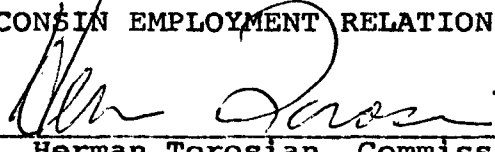
ORDER

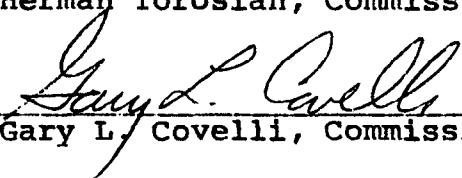
IT IS HEREBY ORDERED that the objection to the conduct of the election filed in the instant matter be, and the same hereby is, dismissed. 1/

Given under our hands and seal at the  
City of Madison, Wisconsin this 30th  
day of July, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSION OF  
LAW AND ORDER DISMISSING OBJECTIONS TO CONDUCT OF ELECTION

The City argues that Patrolman Smith and the two employees who voted against union representation have been denied due process guaranteed them by the 14th Amendment of the United States Constitution and Article I, Section I of Wisconsin Constitution by the Commission's failure to include in the notice of election notification of the opportunity to vote by absentee ballot. The City notes that Section 6.85, Stats., establishes that otherwise qualified electors in governmental elections have the right to vote by absentee ballot and further that Section 10.01(2)(e), Stats., requires that notice of the right to vote by absentee ballot be given to electors. Because of the lack of notice, neither Smith, the City Clerk nor the Chief of Police knew that Smith could have cast an absentee ballot. Had the availability of an absentee ballot been known, Smith would have cast an absentee ballot which might have affected the outcome of the election. The City asks that the election be set aside, that a new election be directed and that the Commission include in all future notices of election notification of the availability of absentee ballots.

The Union argues that the election should not be set aside. Provision of absentee ballots falls within the Commission's discretionary authority and is not a matter of right. 2/ The Commission did not abuse its discretion by failing to provide an absentee ballot for Smith as there was no request for an absentee ballot until the election had begun. This is not a case where the City or Smith wished to secure an absentee ballot but were thwarted by denial of due process. Rather, it is a case where no one thought of or cared about absentee ballots until the election had begun. Not only does the City's position place in doubt the finality of the April 30th election, but it also places in doubt the integrity of any future election. In its written objections, the City disclosed how Smith would have voted and this information precludes Smith from freely exercising his choice in a future election. The Union asks that the objections be denied.

DISCUSSION:

The Commission will entertain timely filed objections to the conduct of the election which assert either that union or employer misconduct has interfered with the right of employees to freely express their choice through a secret ballot or that the manner in which the election was conducted interfered with those rights. 3/ Thus, even though no allegation of union or employer misconduct is made, the Commission might well decide to set aside a representation election where the manner in which the election was conducted interfered, intentionally or unintentionally, with employees' voting rights.

In this case, the City is essentially arguing that the manner in which the election was conducted interfered with employees' rights to freely express their choice through a secret ballot. In particular, the City alleges that the election should be rerun because the notice of election did not notify participants of the opportunity to cast an absentee ballot. Because of the particular facts of this case, the Commission need not decide whether this omission requires that the election be rerun. Even if the notice of election had contained the requested information, it is highly improbable that Patrolman Smith

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2/ City of Milwaukee (13099-D) 3/75.

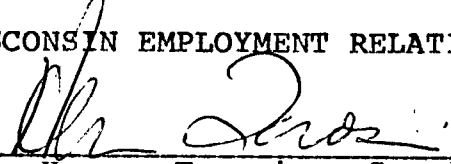
3/ Town of Weston (Water Utility) (16499-B) 2/79; Dollhausen Enterprises, Inc. d/b/a Gargano's Restaurant (16382-B); City of Milwaukee, above.

could have cast an absentee ballot in such a manner as to have guaranteed that his ballot would have been freely cast in secret. Had the Commission been notified as soon as Smith knew that he would in all likelihood be unable to attend the election, 4/ it is extremely unlikely that all aspects of the absentee ballot procedure 5/ could have been complied with prior to the opening of the polls at 10:00 a.m. on Monday, April 30, 1979. The Commission deems it necessary to insist on its aforementioned procedure 6/ in order to guarantee that an employee requiring an absentee ballot is indeed unable to come to the polls and that said employee can cast his or her ballot in a manner which will not enable their votes to be identified. Similarly, had the agent supervising the election granted the request made during the election for a ballot for Smith and thus permitted someone to take a ballot to Smith in the hospital, said action would have been contrary to the Commission's aforementioned policy and would have had the effect of not allowing Smith to cast a truly secret ballot. In addition, the Commission will not postpone an election or adjourn its conduct in order to permit an absent employee to comply with the absentee ballot procedure. To do so would inject uncertainty and instability into representation elections. For these reasons, the Commission concludes that the election will not be set aside because of the inability of Smith to cast an absentee ballot.

Dated at Madison, Wisconsin this 30th day of July, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

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- 4/ The earliest Smith would have known was during the early afternoon of Thursday, April 26, 1979.
- 5/ See Finding of Fact 8.
- 6/ Even the statutes cited by the City concerning the right to vote by absentee ballot in public elections do not provide an unqualified right to vote by absentee ballot. Sections 6.86 and 6.87, Stats., provide that an elector must apply for an absentee ballot by executing an appropriate affidavit which must be received by a date and time certain and that the absentee ballot must be returned by a specified time in order to be counted.

No. 16967-B