

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 PLATTEVILLE COUNCIL OF AUXILIARY :
 PERSONNEL/SOUTH WEST TEACHERS :
 UNITED : Case V
 : No. 32869 ME-2320
 : Decision No. 21645-A
 Involving Certain Employes of :
 :
 SCHOOL DISTRICT OF PLATTEVILLE :
 :

Appearances:

Ms. Melissa Cherney, Staff Attorney, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Association.
 Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Steven Veazie, 131 West Wilson Street, Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of the District.

ORDER DENYING MOTION TO UNCONDITIONALLY
 CONTINUE PROCESSING ELECTION PETITION

Platteville Council of Auxiliary Personnel/South West Teachers United, hereinafter referred to as the Association, having, on January 27, 1984, filed a petition for election among the educational support staff in the employ of the School District of Platteville, hereinafter referred to as the District, to determine whether said employes desire to be represented for the purposes of collective bargaining by the Association; and hearing in the matter having originally been scheduled for March 7, 12 and 16, 1984, before Andrew Roberts, a member of the Commission's staff; and a complaint having been filed on March 6, 1984, by the Association which claimed prohibited practices by the District relating to the election herein; and the District having, on March 6, 1984, objected to the further processing of the petition for election because the related complaint required that the election petition be held in abeyance pending the outcome of the complaint matter; and the Association having indicated it would not waive any claim that the allegations in the complaint would affect the outcome of the election and having requested that the Commission issue a decision on whether a related complaint should block the further processing of the election petition; and hearing on the election petition having been rescheduled to April 24 and 25, 1984; and briefs having been filed by both parties by April 10, 1984, which argued over the issue of whether a related complaint should suspend the processing of an election petition; and on April 20, 1984, both parties were telephonically informed that the Commission had decided to deny the Association's request and that a written decision to that effect would follow; and the Association having thereafter withdrawn its complaint without prejudice to refile; and the election case having thereafter been processed to an April 24, 1984 hearing, May 2, 1984 Direction based on stipulation, May 18, 1984 election, and May 30, 1984 Certification of the Association as representative based on the results of that election; and the Commission having considered the record including the arguments of the parties and being fully advised in the premises, makes and issues the following written confirmation of its previously communicated

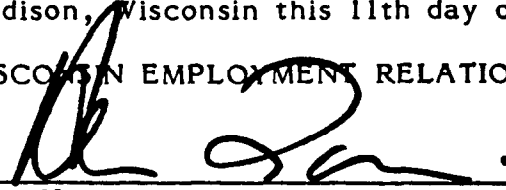
ORDER 1/

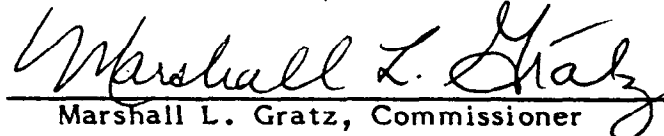
That the Association's request that its petition in the instant matter be unconditionally processed further notwithstanding the pendency of the related complaint in Case VI is denied.

Given under our hands and seal at the City of
Madison, Wisconsin this 11th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO UNCONDITIONALLY
CONTINUE PROCESSING ELECTION PETITION

Background and Positions of the Parties:

This dispute has arisen with respect to the Commission's "blocking complaint" policy pursuant to which the Commission refused to proceed with the processing of the Association's petition for a representation election where a related complaint of prohibited practices was pending and the Association was unwilling to waive the effects of the prohibited practices therein alleged on the outcome of the election sought by the Association.

The Association, contrary to the Employer, contends that the policy is generally inappropriate, particularly inappropriate in the instant circumstances, and in any event ought not foreclose at least the processing of the election petition through completion of the hearing.

More specifically, the Association argues that such a policy unjustifiably interferes with the right of municipal employees to speedy resolution of both complaint and representation disputes; that it inhibits the filing of complaints during organizational activities; that it indirectly encourages employers to commit unfair labor practices as a means of delaying and frustrating the representation election process; that it will not necessarily improve administrative efficiency since election objections can be consolidated for hearing with the complaint itself; and that a better approach would be that available under NLRB practice whereby the charging party may request the agency to proceed with an election without waiving the effects.

The Association contends that the Commission has not had occasion to consider the applicability of the policy to circumstances such as those at issue here because prior applications of the policy have arisen for the most part in cases where the labor organization has not challenged the policy or in decertification contexts in which the complaint allegations were so intertwined with matters raised by the petition that the representation case outcome depended on the complaint case outcome. The Association cites Cedar Lake Home for the Aged 9770 (6/70) for the proposition that the filing of a complaint does not, per se, spoil the laboratory conditions requisite for a fair election. The Association reasons that, if that is so, there is no justification for requiring a waiver of effects as a condition precedent to proceeding with the election hearing and vote (or at least the hearing) without delay.

The District notes that the complaint in question contains an allegation that it has interfered with the selection of a majority representative and an Association request for cease and desist relief from that interference. In the District's view, to have proceeded with the election hearing and vote would have risked a second election hearing and a second vote, depending on the outcome of the complaint case and the first election vote. From the District's perspective, the Commission properly has refused to give the Association the luxury of a first try in the election before the potential effects on the election of the alleged unlawful conduct are resolved either by a waiver or by a decision in the complaint proceeding. The Association's alternative suggestion that the parties endure a full election hearing despite the Association's unwillingness to be bound by the resultant election is similarly flawed since it too presents the risk that a new election hearing and vote might become necessary following the ultimate adjudication (and remediation, if any) in the prohibited practice case.

Discussion:

The Commission has long adhered to the policy of refusing to proceed with the processing of an election petition during the pendency of a related unfair labor practice/prohibited practice complaint absent an express waiver by the complainant

of the effects of the alleged unlawful conduct on the outcome of the election. 2/ Where it has been discussed in Commission cases, the purposes ascribed to the policy have been twofold: (1) insuring that the election environment is free of any coercive effects of alleged unfair labor practices before employe preferences are tested through the election process 3/; and (2) avoiding the known risk that a second election and perhaps a second election hearing could become necessary depending on the outcome in the related complaint proceeding and in the first election. 4/

In our view, that policy remains a viable means of pursuing those objectives and one that is consistent with the underlying purposes of MERA.

Moreover, that policy appears entirely applicable to the circumstances at issue herein. It constitutes an appropriate basis for denying both the request to unconditionally proceed with the election and the alternative request to unconditionally proceed to fully hear the representation issues before holding that matter in abeyance. For, the instant complaint involves an allegedly unlawful threat to subcontract work being performed by employes within the bargaining unit as to which the election was being sought. 5/ Absent a waiver of the effects of the complaint on the election, the resolution of the merits of the complaint could obviously affect the viability of the results of any election conducted before the complaint is heard and any violations cited therein remedied. Moreover, it is by no means certain that our granting the Association's alternative request for unconditional conduct of the representation hearing would produce a record that deals with all or only issues that would need to be decided once the complaint proceeding was finally resolved.

The underlying purposes of MERA are not ill served by the policy. The Association is not foreclosed by the policy from obtaining an undelayed processing of its election petition. It can achieve that end in cases such as this either by not filing a related complaint until after the election or by filing the complaint and waiving the effects of the alleged unlawful conduct on the election outcome. All the policy keeps the Association from doing is from concurrently pursuing a decision and remedy in its complaint proceeding without waiving its effects on the election while its election petition is being processed. Such, on balance, appears to be a modest imposition when balanced against the policy's service of the objectives of uncoerced free choice and avoidance of multiple hearings and/or elections.

2/ Compare Coronet Printing Co., 6799 (7/64) and Cedar Lakes Home for the Aged, supra, with Morris Resnick, Inc., 343 (1/42); Evangelical Deaconness Society, 472 (2/43); S and R Cheese Co., 1338 (6/47); Sheboygan Dairyman's Co-op Assn., 1482 (11/47) and 1482-A (12/47); St. Francis Hospital, 4737 (4/58); and Kress Packing Co., Inc., 5581 (8/60).

3/ See, e.g., Evangelical Deaconness Society, supra, at pp. 3-4. ("Until such unfair labor practice or practices and the effect have been completely eradicated, the freedom of choice essential to the employes' uncoerced expression of their desire for a continuance of or a change in bargaining agent, is not possible.")

4/ Thus, in Cedar Lake Home, supra, it was stated at p. 4, "Part of the justification for subjecting the Petitioner to lengthy delay . . . is to avoid the necessity and expense of conducting multiple hearings involving the same issues and conducting more than one election." The Association's emphasis on statements in that decision, to the effect that the complaint filing alone ought not delay a related election, overlooks the fact that the case was decided in a context wherein the union was willing to waive the effects of the alleged unfair labor practice on the election outcome and it was the employer who was objecting that employe free choice would nonetheless remain intolerably affected until the complaint allegations were fully heard and decided. The decision, however, held that given the Union's waiver, the filing of the complaint, per se, would not warrant delaying the election.

5/ In that regard we take administrative notice of the contents of the complaint filed in Case VI.

It appears that the NLRB practice described by the Association is not uniformly mandated but rather is a matter of administrative discretion. 6/ Moreover, since the NLRB's complaint procedure differs from the unified complaint and hearing procedure before the WERC under Sec. 111.07, Stats., (in that the NLRB's process involves pre-hearing investigation of charge, complaint issuance based on a probable cause determination, and a separate hearing process with the government leading in the prosecution of the complaint), those differences may well explain any differences in the respective agencies' practices as regards the treatment of a representation election matter where a related unfair labor practice has been alleged.

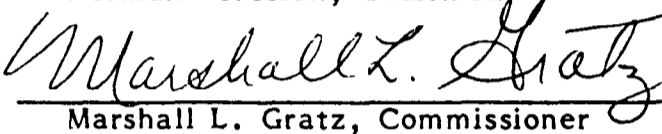
For the foregoing reasons, we have found the above-described policy to continue to have merit and to be applicable to the instant circumstances. We so informed the parties, and, as noted in the preface to this decision, the case has been processed accordingly.

Dated at Madison, Wisconsin this 11th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

6/ Thus, Sec. 11730.4 of the NLRB's Field Manual states:

An R case may be processed notwithstanding the pendency of ULP charges in a related C case (subject to the limitations set forth below), if the party filing the charge requests that the R case proceed." (emphasis added)

Section 11730 generally provides several additional limitations on the applicability of that approach.