

In the Matter of the Petitions of
OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL
UNION LOCAL NO. 9

WISCONSIN COUNCIL #40,
AFSCME, AFL-CIO

Case 13
No. 34336 ME-2414
Decision No. 22634

Mr. Gene Holt, Business Representative, 6333 West Bluemound Road, Milwaukee, Wisconsin 53213, appearing on behalf of the Office and Professional Employees International Union Local No. 9.

Ms. Helen Isferding, Staff Representative, 2323 North 29th Street, Sheboygan, Wisconsin 53081, and Mr. Richard W. Abelson, Staff Representative, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

Mr. Jonathan T. Swain, Lindner and Marsack, S.C., Attorneys at Law,
700 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf
of Ozaukee County (LaSata Nursing Home).

Wisconsin Council 40, AFSCME, AFL-CIO, having, on December 21, 1984, filed a petition for election involving municipal employees covering certain professional and non-professional employees of Ozaukee County's Lasata Nursing Home; and Office and Professional Employees International Union Local No. 9 having, on January 14, 1985, filed a petition for election involving municipal employees covering the same employees; and hearing on the petitions having been scheduled for February 11 and February 22, 1985, before Examiner Richard B. McLaughlin; and following informal discussions on February 11, a formal hearing having been convened on February 22, 1985, at Cedarburg, Wisconsin; and, during the course of the February 22 hearing, the two petitioning Unions having raised various motions concerning the processing of the petitions and having requested an expedited decision on those motions; and the County having opposed the motions but having not opposed the Unions' request for expedited decision on the motions; and a stenographic transcript of the February 22, 1985, proceedings having been prepared; and the parties having submitted a written brief or a waiver of written brief with the Commission by March 15, 1985; and the Commission, having considered the matter and having concluded that the Unions' motion to amend election petitions without Commission-imposed conditions should be granted and that the motion for the direction of an election subject to challenged ballots prior to the close of evidentiary hearing should be denied;

ORDERED

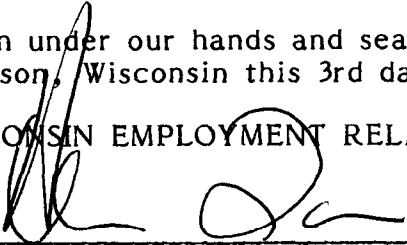
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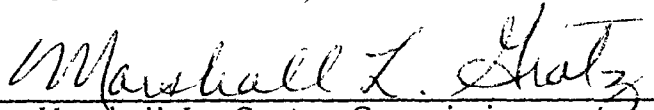
2. That the petitioning Unions' motion for the direction of an election among non-professional employes of Ozaukee County's Lasata Nursing Home, prior to the close of an evidentiary hearing on the County's challenge of the eligibility to vote of six allegedly supervisory licensed practical nurses, is denied.


Given under our hands and seal at the City of
Madison, Wisconsin this 3rd day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

OZAUKEE COUNTY (LASATA NURSING HOME)

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO AMEND ELECTION PETITION
WITHOUT COMMISSION-IMPOSED CONDITIONS, AND DENYING
MOTION FOR DIRECTION OF ELECTION
PRIOR TO CLOSE OF EVIDENTIARY HEARING

BACKGROUND

The present matter involves two petitions for election involving certain employees of Ozaukee County's Lasata Nursing Home. The first petition was filed on December 21, 1984, by Wisconsin Council 40, AFSCME, AFL-CIO and contained the following description of the bargaining units claimed appropriate:

- Unit #1 All regular full-time and regular part-time professional employees of the Ozaukee County Lasata Nursing Home, excluding managerial employees, supervisory employees, and confidential employees.
- Unit #2 All regular full-time and regular part-time employees of the Ozaukee County Lasata Nursing Home, excluding managerial employees, supervisory employees, and confidential employees, and conditionally excluding professional employees eligible to vote in Unit #1 described above.

The second petition was filed on January 14, 1985, by the Office and Professional Employees International Union Local No. 9, and contained the following description of the bargaining unit claimed appropriate:

All professional and non-professional employees of Ozaukee County employed at the Lasata Nursing Home except administrative, supervisory and confidential employees.

February 11, 1985, was the initial date noticed for hearing on the two petitions. After extensive off-the-record discussions on that date, the hearing was adjourned until February 22, 1985, pending the parties' efforts to explore various options for stipulating to an election in one or both of the bargaining units alleged to be appropriate. No such stipulation was ultimately entered into by all parties, and the hearing went on the record on February 22, 1985. At that hearing, the Unions raised a series of motions and requested that the Commission issue an expedited decision resolving these motions. The County did not oppose the request for an expedited decision. Also at that hearing, lists of professional and non-professional employees of the Lasata Nursing Home affected by the two petitions were received into evidence. The list of professional employees establishes that of the twenty-seven professional employees the parties agree are affected by the election petition, twenty employees (all classified as registered nurses) are alleged by the County to be supervisors. The list of non-professional employees establishes that of the one hundred and eighty-four non-professional employees the parties agree are affected by the election petitions, six employees (all classified as licensed practical nurses) are alleged to be supervisors by the County. The disputes concerning alleged supervisory status of the six licensed practical nurses and of the twenty registered nurses represent the only eligibility questions raised by the parties at the time of the motions to be considered in the present matter.

THE MOTIONS

AFSCME and the OPEIU have joined in the following motions which were stated at the February 22, 1985, hearing by Richard Abelson on behalf of AFSCME thus:

Mr. Examiner, at this time AFSCME Council 40, Wisconsin Council 40, would like to enter a motion into the record to amend its petition that was filed on December 20, 1984. Our original petition asked for two units, and the Commission to determine the appropriateness of those two units. Unit 1 was described as all regular full-time and regular part-time professional employees of the Ozaukee County Lasata Nursing

Home, excluding managerial employees, supervisory employees, and confidential employees. We would like to amend our petition to delete the reference to Unit No. 1.

Correspondingly, Unit 2 was described as all regular full-time and regular part-time employees of Ozaukee County Lasata Nursing Home, excluding managerial employees, supervisory employees, and confidential employees, and conditionally excluding professional employees eligible to vote in Unit No. 1 described above. We would like to place a period after the words "confidential employees" and delete the remainder of that sentence; in other words, deleting the reference to the professional employees in Unit No. 1.

We state that we would like to make this motion as a non prejudicial motion with regard to later refiling or seeking representation amongst professional employees, so we would make our motion and ask that it be non prejudicial. Secondly, in the event the Commission determines that it's -- the Union's motion in this case is inappropriate, and that we may not amend our position without prejudice, we would then ask the Commission that we be allowed to withdraw our motion and go forward with an election based on the original petition.

. . .

And secondly, the Union would like to move that if the Commission determines that the Union be allowed to amend its petition to seek an election amongst the non professional employees, that we be allowed to conduct an election, an election be ordered amongst the non professional employees, leaving open the possibility, based on our prior discussion, that there may be a number of LPN's, licensed practical nurses, that may be challenged as to supervisory status by the County at that election. 1/

POSITION OF THE UNIONS

AFSCME urges that the motion to withdraw petitions seeking to represent professional employees "is not an unusual request unheard of in the scope of labor relations," and that the National Labor Relations Board, for example, "has recognized the right of a Union to withdraw a petition without stating any reason" AFSCME argues that "the same spirit of the law in regards to the employees' right to organize at their own pace . . ." must be recognized by the Commission. If the Commission grants AFSCME's motion to amend, it follows, according to AFSCME, that in light of current Commission case law, and in light of the small number of challenged employees, the Commission should immediately direct an election in the non-professional unit subject to the County's challenge of the ballots of the six allegedly supervisory licensed practical nurses. In the event the Commission decides it cannot grant AFSCME's motion without prejudice to AFSCME's right to subsequently seek to represent professional employees, then the Commission must, according to AFSCME, allow AFSCME to proceed on the basis of the original petition. Any other conclusion, in AFSCME's opinion, "denies the employees the right to organize."

OPEIU has rested on the oral arguments and documentation offered at the February 22, 1985, hearing, so that its position is materially the same as AFSCME's noted above.

POSITION OF THE COUNTY

The County states that it has no objections to the Union's proposed amendment if it is granted with some prejudice to the Petitioners' right to subsequently re-petition for the professional employees. It follows, according to the County, that the present matter focuses squarely on the Petitioners' efforts "to obtain a

1/ Tr. at 6-8.

desired result through procedural machinations which may well disenfranchise the professionals employed by the County." The procedural machinations objected to by the County center on the petitioning Unions' attempt to disclaim interest in the professional employees only long enough to secure an election in the non-professional bargaining unit. The County characterizes the alleged disenfranchisement as follows:

. . . if the Commission denies the Unions' motion, non-supervisory professionals will be allowed to decide for themselves whether they desire to be included in a unit with the non-professionals and which Union, if any, they would desire to represent them. If the Unions' motions were granted, the Unions later refiled, and the professionals desired to be included in a unit with the non-professionals, they would be precluded from participating in the choice of representation.

The County asserts that this disenfranchisement is of controlling significance and is undeniable, since "(i)f the Unions were truly disclaiming disinterest in the professionals . . . they would not insist that the amendment to the petition be without prejudice." The County notes that Commission Rule ERB 11.03 provides that petition withdrawals may occur only "with the consent of the Commission under such conditions as the Commission may impose . . ." and further notes that it would not be unprecedented to impose as such a condition a prohibition against refileing for a stated period of time. Citing, Milwaukee Board of School Directors, Dec. No. 8974-C (WERC, 11/78). Any other conclusion would, according to the County, permit the Unions to produce the above-noted disenfranchisement and the destabilizing effect of two organizing drives within a short period of time, for the sole apparent purpose of avoiding a significant supervisory issue which the County was fully prepared to litigate at the hearing.

The County concludes that since the Unions have expressly conditioned their motions on a Commission ruling that the amendments be allowed without prejudice, the motions should be denied.

DISCUSSION

Motion To Withdraw Petitions In Part, Without Prejudice

The Unions' motion to amend their petitions to delete any reference to professional employees is, in effect, a proposed withdrawal of an election petition for those professional employees. The withdrawal of an election petition is governed by ERB 11.03 which provides:

Any petition may be withdrawn with the consent of the commission under such conditions as the commission may impose to effectuate the policies of sec. 111.70, Wis. Stats.

Whether or not to permit the amendment subject to any conditions is, then, a discretionary act by the Commission. The Commission has in the past imposed conditions on the withdrawal of some election petitions, 2/ but those cases were factually distinguishable from the instant situation. The present matter turns on whether the Commission should, on the facts of the present case, impose such conditions.

In our view, the present matter does not warrant imposition of conditions on the withdrawal of the petitions.

What the County has posited as a possible "disenfranchisement" of the professional employees amounts only to the possibility of depriving the professionals of an opportunity to affect the representation of a combined unit of professionals and non-professionals. Granting the withdrawal motion without conditions does not deprive them either of their right to select a representative of their own choosing or of their right to decide whether to be included in a unit with the non-professionals. For, in the event of a subsequent refileing for a professional

2/ See, Milwaukee Board of School Directors, Dec. No. 8974-C (WERC, 11/78) and City of Brillion, Dec. No. 13803 (WERC, 7/75).

unit, the professionals would cast both a representation and a unit determination ballot and the latter would be opened if the professionals have selected as majority representative the same organization (if any) that was selected earlier by the non-professionals. Indeed, in such a scenario, the professionals may enjoy a more informed choice if they cast their ballots with knowledge of the identity of a majority representative previously selected by the non-professionals.

We are not unmindful of the County's concerns that permitting unconditional partial withdrawal of the petitions will permit the Unions to refile for a professional unit after the election results among the non-professionals are certified, thereby prolonging the likely period of time during which a question of representation will exist concerning at least some employees of the Lasata Nursing Home. We also recognize that the County, while it has raised numerous eligibility issues, has been prepared to go forward with a hearing on the merits of all of them at each of the hearing dates noticed in this matter. Nevertheless, since organizational activity is lawful whether a petition is pending or not, a ruling in the County's favor would not guarantee the stability and quietude the County's argument presumes. Moreover, as a practical matter, a labor organization could, in similar cases in the future, file separate election petitions in the professional and non-professional units in a time sequence of its own choosing. Hence, the overall policy significance of Commission imposition of conditions in the instant matter would be minor at best.

For those reasons, we have concluded that the present matter does not represent an appropriate one for the Commission to exercise its discretion to impose conditions on the partial withdrawal of election petitions proposed by the Unions herein.

Motion For Direction Of Election
Prior To Close Of Evidentiary Hearing

The Unions' motion for an expedited election without prior hearing on the alleged supervisory status of six licensed practical nurses is governed by our recent decision in Fond du Lac Schools. 3/ That case involved the conflicting requests of two labor organizations to represent the same bargaining unit. At hearing on the matter, all parties stipulated to the bargaining unit description and differed only on the voting eligibility of one employee out of fifty potential voters. An evidentiary hearing on the matter was convened and concluded after which the Commission ruled upon a request for an expedited election subject to the one challenged ballot as follows:

We have decided to direct the election in this matter without awaiting the parties' briefs and our decision as to the one eligibility matter remaining in dispute in the context of some fifty potential voters.

We reach that result on the basis that the processing of this election case has reached a point where:

- the taking of evidence at hearing has been completed;
- there is no dispute as to appropriate unit or existence of a question of representation; and
- there remains no dispute that would affect the propriety of directing an election in the agreed-upon unit.

. . .

This approach, when imposed after the taking of evidence at hearing is completed, is consistent with our Rules and Statute . . . and it does no violence to fair play or due process. For, in the posture we now find the instant case, the only issue is whether a majority of employees in the agreed-upon bargaining unit favor representation by AFSCME,

3/ Fond du Lac School District, Dec. No. 17638-A, 21767 (WERC, 6/84) at 5-6.

by WEAC or by no representative. The eligibility issue remaining in dispute is so minor relative to the number of undisputed eligibles that the vote of the occupant of the disputed position is unlikely to affect the election outcome. If and when it becomes clear that the election results cannot be certified without counting the vote of the occupant of the disputed position, AFSCME's right to a decision based on the evidence already taken (and the written arguments hereafter to be submitted) will be intact, and the Commission will proceed to decision in the matter.

The potential short and long term advantages to the employees, the parties and the Commission of such an approach (including net savings in time and resources) outweigh the increased potential that some ballots may ultimately have to be opened in circumstances that reduce their secrecy.

Of course, the objectives of such an approach can only be fully achieved with the cooperation of the parties and when combined with the Commission's continuing efforts to streamline and expedite representation election case processing. 4/

Unlike the Fond du Lac Schools situation, the Unions' motions in the present case were raised prior to completion of an evidentiary hearing on the six disputed non-professional positions. We explicitly stated in Fond du Lac Schools that while proceeding with a vote in the above-quoted manner would

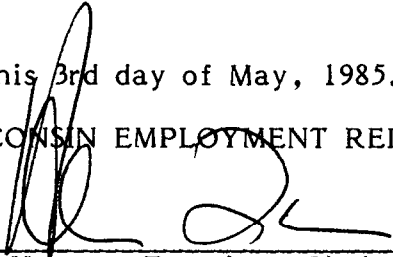
be preferable where it is clear there are no significant issues remaining even before the hearing has been convened or before the taking of evidence has been completed, it appears from our Rules and Statute that an objecting party has a right to a hearing prior to a direction of election or other Commission action on the petition except in emergency circumstances not present, for example, in the instant situation. Specifically, Commission Rule ERB 11.07 authorizes the Commission, "after the close of the hearing" to direct an election "forthwith" where no issue exists as to appropriate unit or as to the existence of a question of representation. However, the Sec. 111.70(4)(d)(5), Stats. authorizes the Commission to "act upon the petition forthwith" only "where it appears by the petition that a situation exists requiring prompt action so as to prevent or terminate an emergency." (emphasis in the original) 5/

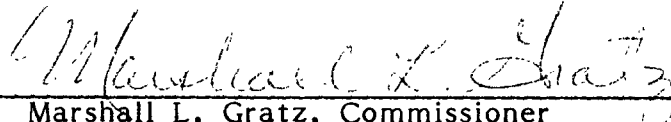
We have therefore denied the Unions' motion for the direction of an election prior to the completion of the evidentiary hearing herein on the non-professional unit eligibility issues.


Dated at Madison, Wisconsin this 3rd day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

4/ Ibid at 6.

5/ Ibid at 5, n.4.