STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	
MARGARET M. THOMAS	Case 108 No. 35897 ME-2523
Involving Certain Employes of	Decision No. 23286
MARATHON COUNTY (COURTHOUSE)	

Appearances:

Ms. Margaret M. Thomas, Petitioner, Route 3, Box 166, Antigo, Wisconsin 54409, appearing on her own behalf.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, 408 Third Street, P. O. Box 1004, Wausau, Wisconsin 54401-1004, appearing on behalf of the County.

Messrs. Daniel J. Barrington and Jack S. Bernfeld, Staff Representatives, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR ELECTION

Margaret M. Thomas having, on October 25, 1985, filed a petition requesting the Wisconsin Employment Relations Commission to conduct an election pursuant to Sec. 111.70(4)(d), Stats., to determine whether certain employes of Marathon County wish to continue to be represented for the purposes of collective bargaining by Marathon County Courthouse and Affiliated Departments Non-Professional Employees, Local 2492-E, AFSCME, AFL-CIO; and the Commission having, by letter dated November 11, 1985, notified the parties that the petition had been accompanied by a sufficient showing of interest; and Marathon County having, on November 18, 1985, filed a motion to dismiss a May 23, 1985 petition for mediation-arbitration filed by Local 2492-E regarding the terms of a successor to the 1984 contract governing the wages, hours and conditions of employment of the employes covered by the instant election petition; and pursuant to a Notice of Hearing and Formal Investigation issued by the Commission on November 27, 1985, the election petition and the motion to dismiss were consolidated for the purposes of hearing; and hearing having been held in Wausau, Wisconsin, on December 19, 1985, before Robert M. McCormick, a member of the Commission's staff; and a stenographic transcript of the hearing having been prepared; and the County and Local 2492-E having filed written argument, the last of which was received on January 7, 1986; and the Commission, having considered the record and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Marathon County, herein the County, is a municipal employer maintaining its principal offices at the Marathon County Courthouse, Forest Street, Wausau, Wisconsin 54401.

2. That on October 31, 1983, Wisconsin Council of County and Municipal Employees, #40, AFSCME, AFL-CIO, herein AFSCME, was certified by the Wisconsin Employment Relations Commission as the collective bargaining representative of:

> All regular full-time and regular part-time employes in the employ of Marathon County, excluding "blue collar" employes employed in the Highway and Parks Departments; employes employed in the Handicapped Childrens Education Board, professional employes employed in the Health Department, and employes employed in the Department of Social Services; all employes in the CETA Program Office; law enforcement personnel in the Sheriff's Department; investigator in the office of the District Attorney; and also excluding other professional employes, confidential, supervisory and managerial employes.

3. That Margaret M. Thomas, herein the Petitioner, is an employe in the collective bargaining unit referenced in Finding of Fact 2, and her address is Route 3, P. O. Box 166, Antigo, Wisconsin 54409.

4. That the County and Marathon County Courthouse and Affiliated Departments Non-Professional Employees, Local 2492-E, AFSCME, AFL-CIO, were parties to a collective bargaining agreement with a stated term of January 1, 1984 through December 31, 1984, establishing the wages, hours and conditions of employment of the employes in the bargaining unit referenced in Finding of Fact 2.

5. That on May 22, 1985, the Commission received a petition for mediation-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., regarding the bargaining unit referenced in Finding of Fact 2 from Daniel J. Barrington who identified himself therein as the principal representative of Marathon County Courthouse Non-Professional Employees, Local 2492-E, AFSCME, AFL-CIO; and that Robert M. McCormick, member of the Commission's staff, was assigned to investigate the petition and attempt to settle the dispute pursuant to Sec. 111.70(4)(cm)6, Stats.

6. That on October 25, 1985, the Commission received a petition for election from the Petitioner seeking to decertify AFSCME as the collective bargaining representative of the employes in the collective bargaining unit referenced in Finding of Fact 2; that as of October 25, 1985, the County and Local 2492-E were in the process of exchanging offers in an effort to reach agreement on a successor agreement under the auspices of Investigator McCormick.

7. That on November 18, 1985, the Commission received a motion from the County seeking dismissal of the mediation-arbitration petition referenced in Finding of Fact 5 asserting inter alia that good faith doubt exists as to AFSCME's continuing majority support as representative and that, under such circumstances, no impasse can be deemed to exist.

8. That on or about December 17, 1985, the County and Local 2492-E reached agreement on a contract covering calendar years 1985 and 1986; and that based upon said agreement, the County withdrew its motion to dismiss the mediation-arbitration petition on January 7, 1986.

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

CONCLUSIONS OF LAW

1. That the election petition of Margaret M. Thomas was not timely filed.

2. That as the election petition was not timely filed, there does not presently exist a question of representation within the meaning of Sec. 111.70(4)(d), Stats., among the employes in the bargaining unit set forth in Finding of Fact 2.

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

ORDER 1/

That the election petition is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of February, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

1/ See footnote on Page 3

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR ELECTION

POSITIONS OF THE PARTIES:

AFSCME contends that the Thomas petition was untimely filed and should be dismissed. It argues that where, as here, an election petition is filed after the normal expiration of a contract but also after a mediation-arbitration petition has been filed, it has generally been found to be untimely. Dunn County, Dec. No. 17861 (WERC, 6/80); Milwaukee County, Dec. No. 18847 (WERC, 7/81); City of Franklin, Dec. No. 19538 (WERC, 4/82). AFSCME asserts that the exception to this general rule--that an election petition is timely filed if the collective bargaining agreement pending before an interest arbitrator has already expired irrespective of the final offer selected by the arbitrator--is inapplicable here because the final offers and stipulated agreements of AFSCME and the County contemplated the two year contract ultimately voluntarily agreed upon by the parties. Oconto County, Dec. No. 21887 (WERC, 7/84); Marinette County, Dec. No. 22102 (WERC, 11/84). AFSCME further alleges that the Thomas petition would be untimely even if the parties had only agreed upon a one year 1985 contract because the petition was filed during what would have been the term of the one year contract. AFSCME concludes by arguing that any future timely petition filed during the sixty day period prior to the reopener date in the parties' 1985-1986 contract must be supported by a new showing of interest.

The County asserts that the Commission should expeditiously process the Thomas petition so that the existing uncertainty as to who represents the employes can be resolved. It argues that there can be no stability in the employer/employe relationship when the County receives conflicting communication as to whether the employes wish to continue to be represented by any labor organization and, if they desire representation, whether it is Local 2492-E's officers or Wisconsin Council 40 who represents the employes.

The County submits that any impact that the mediation-arbitration petition had upon the timeliness of the petition has been negated by the recently agreed-upon 1985-1986 contract. The County therefore urges the Commission to reject the timeliness analysis proffered by AFSCME and instead to focus upon the best means of resolving the uncertainty confronting the County. The County asserts that there is precedent for such an approach, citing Village of Fox Point, Dec. No. 20019 (WERC, 10/82), wherein the Commission chose to depart from a contract bar analysis and directed an election even though, as here, almost a year remains before the existing contract expires.

Lastly, the County notes that dismissal of this petition will not prevent the filing of a new petition in the near future and urges that the Commission avoid a repetitious proceeding and bring resolution to the existing uncertainty by directing an election now.

Petitioner did not file any written argument but reaffirmed her interest in an election during the December 19 hearing.

DISCUSSION:

In Dunn County, supra, the Commission stated:

> As a general rule the Commission will not process an election petition filed after the normal expiration of a collective bargaining agreement where such petition is filed on a date subsequent to the filing of a petition for mediation-arbitration involving the same collective bargaining unit.

In City of Prescott, Dec. No. 18471 (WERC, 6/81), the Commission reaffirmed the continuing validity of this general rule and commented:

To permit employes or a competing union to oust, or attempt to oust, the incumbent bargaining representative during the pendency of an interest arbitration proceeding would discourage collective bargaining and would not create or maintain the type of stability desirable in the collective bargaining relationship.

In our view this general rule governs this case and mandates a conclusion that the petition was untimely filed as it was received on a date subsequent to the filing of a petition for mediation-arbitration involving the same collective bargaining unit.

We would emphasize that our decision that the instant election petition was untimely filed is not based on developments occurring after the filing of the election petition or on the nature of the parties' proposals during bargaining or during the investigation.

Unlike the Oconto County and Marinette County cases, supra, the instant petition was not filed at a time when certified final offers pending in mediation-arbitration would have produced an agreement which would already have expired. Underlying our decisions in those cases was our unwillingness to permit a med-arb bar or any other to eliminate entirely the employes' opportunity to test the incumbent's majority status, which opportunity is ordinarily protected by the window period concept established in the modified Wauwatosa rule cases such as City of Milwaukee. 2/ The instant case presents no similar threat to the employes' opportunity to timely petition for an election during the conventional window period during the term of the collective bargaining agreement involved herein. For, Petitioner will be free to file during the conventional 60 day window period in advance of the reopening date for successor agreement negotiations provided for in the 1985-86 agreement. Therefore, while we will not allow a med-arb bar or any other to deprive a group of employes the above-noted opportunity to test the incumbent representative's majority status, no exception or other provision for a special compensating window period after the conclusion of the med-arb proceedings is needed to achieve that end in this case.

We reject the County's assertion that our Fox Point decision supports a different result. In that case, the Commission concluded that an existing contract should not bar a rival organization's petition for election because the incumbent had notified the employer that it was abandoning its interest in representing the employes upon expiration of the agreement involved. The incumbent's statement of intent to abandon negated the purpose of maintaining stable collective bargaining relationships that underlies the contract bar rules. The instant situation is materially different than those unusual circumstances. The instant incumbent representative has not notified the employer of its intent to abandon its representative status at the end of the parties' 1985-86 agreement, and no other circumstances exist which would negate the purposes served by the contract bar rules even if we treated the instant petition as filed after the conclusion of the med-arb proceedings at issue herein. Accordingly, the Fox Point case is inapposite.

Given our holding herein, the Petitioner remains free to file a new petition with a fresh showing of interest seeking an election during the sixty day period prior to the reopening date contained in the 1985-1986 contract.

Dated at Madison, Wisconsin this 12th day of February, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

2/ Wauwatosa Board of Education, Dec. No. 8300-A (WERC, 2/68); City of Milwaukee, Dec. No. 8622 (WERC, 7/68).