

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
AFSCME, COUNCIL 40, AFL-CIO
Involving Certain Employes of
VILLAGE OF JACKSON

Case 1
No. 38733 ME-2692
Decision No. 24595-B

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Robert W. Mulcahy,
815 E. Mason Street, Milwaukee, Wisconsin, 53202-4080, appearing on
behalf of the Village.

Mr. Richard W. Abelson, Staff Representative, Wisconsin Council 40, AFSCME,
AFL-CIO, 2216 Allen Lane, Waukesha, Wisconsin, 53816, appearing on
behalf of AFSCME.

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

The Wisconsin Employment Relations Commission having, on July 27, 1987, conducted an election among certain employes of the Village of Jackson for the purpose of determining whether said employes desired to be represented for the purposes of collective bargaining by AFSCME, Council 40, AFL-CIO; and the Village having timely filed objections to the conduct of the election alleging: (1) that the Commission agent should not have extended the voting period because the parties had not agreed to said extension prior to the commencement of the balloting; (2) that the Commission agent violated Commission election procedures regarding the counting of ballots; and (3) that the presence of an AFSCME staff representative as the Union observer improperly influenced the results of the election; and the parties having agreed to a Stipulation of Facts and having submitted written argument, the last of which was received on September 22, 1987; and the Commission, having considered the record and the arguments of the parties and being fully advised in the premises, makes and issues the following:

STIPULATED FINDINGS OF FACT

1. That on July 27, 1987, an election was scheduled by the WERC at the Village of Jackson from 12:00 p.m. to 1:00 p.m.; and that the WERC Election Specialist, Ms. Cynthia F. Mulholland, arrived at the voting area at approximately 12:10 p.m. because of traffic delays caused by President Reagan's trip to the Hartford and West Bend areas.

2. That prior to the Election Specialist's arrival, no person on the voting eligibility list appeared to cast a ballot; that Mr. Mulcahy, the Village's attorney, was present along with Ms. Susan Emery, Research Associate of Mulcahy & Wherry; Mr. Richard Abelson, AFSCME Representative with Council 40, AFL-CIO; and Mr. Jerome Stautz, the Village Clerk/Treasurer and Building Inspector; that when Ms. Mulholland arrived, the parties briefly discussed whether it would be necessary to keep the polls open past 1:00 p.m. inasmuch as no eligible voter had come in to cast a ballot; and that all parties present agreed that it would not be necessary to keep the polls open past 1:00 p.m.

3. That Mr. Mulcahy and Ms. Emery then left the building and Mr. Stautz remained to observe the election on behalf of the Village and Mr. Abelson remained to observe on behalf of the Union; that Mr. Mulcahy objected prior to leaving to the fact that Mr. Abelson was serving as the Union observer indicating that he did not feel that was proper; and that Ms. Mulholland conducted the election on behalf of the WERC.

4. That the Union observer throughout the election was Mr. Richard Abelson; that the Village observer was Village Clerk/Treasurer and Building Inspector Jerome Stautz; that the voting booth was set up and used by all eligible voters; and that Mr. Abelson did not speak to any of the prospective voters during the voting period.

5. That at approximately 1:00 p.m., Jerry Stautz stated "Gordy Rose didn't come in to vote yet, maybe we should stay open till 1:10 p.m."; that Mr. Stautz's recollection is that Mr. Abelson replied, "Gordy isn't going to come in to vote anyway."; that Mr. Abelson's recollection was that after the polls closed he made such statement; that Mr. Abelson did not object to keeping the polls open until 1:10 p.m.; and that no additional person came into vote.

6. That Mr. Mulcahy and Ms. Emery did return at 1:00 p.m. and they were told that the polls were to remain open until 1:10 p.m.; that they were invited to stay by Ms. Mulholland and Mr. Mulcahy indicated that he thought it would be improper for anyone who was not an observer to be in the voting area during the voting period; and that Mr. Mulcahy and Ms. Emery promptly left the voting area and did not return until approximately 1:10 p.m.

7. That at approximately 1:10 p.m., the WERC Election Specialist opened the ballot box and began counting the ballots; that at this point, the only persons present were Ms. Mulholland, Mr. Stautz and Mr. Abelson; that the single ballot concerning the professional employee voting group was counted first and the tally sheet for the professional group election was prepared by Ms. Mulholland and given to the parties to review and sign; that at this point, Mr. Mulcahy and Ms. Emery arrived at approximately 1:10 p.m. and Mr. Mulcahy remarked that he thought the parties would wait until they returned before counting the ballots; that Mr. Mulcahy observed that the ballots were in the process of being counted when Mr. Stautz was presented with the professional group election tally sheets, and he asked to review the tally sheet; that Mr. Mulcahy also stated that before Mr. Stautz signed anything, Mr. Mulcahy would like an opportunity to review what he was signing and to talk to his client about the conduct of the election; that at this point, Ms. Mulholland became irritated with Mr. Mulcahy; that Ms. Mulholland stated that the Village observer must sign the first tally and that she would not let Mr. Mulcahy see the second tally; that Ms. Mulholland stated that the Village must sign it and that in her eleven years she had never had a situation in which someone refused to sign the tally; that Ms. Mulholland remarked that the Village had already signed the eligibility list; that Mr. Mulcahy then asked Mr. Stautz to step out of the room so that he could confer privately with him and Mr. Stautz, Mr. Mulcahy and Ms. Emery then left the room; that Mr. Mulcahy then directed Ms. Emery to go back into the voting area to make sure to witness what was going on in the voting group; that meanwhile, while the discussions were going on in the other room between Mr. Stautz and Mr. Mulcahy, Ms. Mulholland proceeded to start counting the ballots for the general election group; that Mr. Abelson and Ms. Emery remained in the room with Ms. Mulholland while she was counting the ballots; that by the time Ms. Mulholland completed the counting of the six ballots, Mr. Mulcahy and Mr. Stautz had returned to the room; that at no time did Mr. Mulcahy request that no further ballots be counted until his return from the other room; that until Mr. Mulcahy and Mr. Stautz returned to the room, no person other than Ms. Mulholland touched the ballots; that upon Mr. Mulcahy and Mr. Stautz' return to the room, Ms. Mulholland proceeded to commence the preparation of the group election tally sheet and then handed the ballots to Mr. Abelson; that Mr. Abelson looked at the ballots and then handed them to Mr. Stautz; and that Mr. Stautz did count the ballots after his return to the voting area.

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

CONCLUSION OF LAW

That the circumstances and manner in which the election was conducted and the ballots were counted did not destroy the laboratory conditions for the election and do not warrant or require setting aside the election results.

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

ORDER

That the objections to the conduct of election filed by the Village herein are hereby denied and dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 15th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

VILLAGE OF JACKSON

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

POSITION OF THE VILLAGE:

The Village initially argues that the Commission's agent violated the portion of the Commission's Election Procedures Manual when she allowed the polling period to be extended until 1:10 p.m. In this regard, the Village asserts that the Procedures Manual states in relevant part as follows:

The closing time should not be extended just because the election opened late, unless agreed to by the parties prior to the balloting.

The Village also asserts that the Commission's election agent improperly counted ballots outside the presence of the Village observer and thus violated the Procedures Manual which states:

The actual participants in the count are the commission agent and official observers, in the number necessary. The agent alone first counts the ballots in the presence of the observers and then allows the observers to count.

Lastly, the Village contends that the presence during the voting period of AFSCME Representative Richard Abelson as the Union's election observer improperly influenced the results of the election. The Village notes that ERB 11.08(2) states that:

- (a) Any party may be represented by observer selected in accordance with such limitations as the Commission may prescribe.

The Village asserts that it is unaware of any authorization for a union to have one of its officials designated as the observer. The Village alleges that absent any specific rule from the Commission, it is appropriate and necessary to follow a set of rules which would provide for a "laboratory condition" for purpose of voting. The Village asserts that this would be consistent with the Commission's Procedure Manual which states as follows:

1. Electioneering: No electioneering will be permitted at or about the polling place during the hours of voting.
2. Observers May Not Electioneer: Election observers may not electioneer during their hours of duty.

The Village asserts that the presence of the AFSCME business representative would and did violate the "laboratory conditions." The Village argues that the last reminder that the employees have as to the secrecy and sanctity of the voting process was to see the Union representative seated at a table alongside the voting booth. The Village asserts that this constant reminder would undoubtedly influence the results of the election. The Village notes that the National Labor Relations Board has concluded that: "a union official should not ordinarily be designated to act as an observer at an election." Citing United States Gypsum Co., 80 NLRB 1205 (1948).

Given the foregoing, the Village asks that the election conducted in this matter be overturned and that a second election be directed under appropriate guidelines.

POSITION OF AFSCME:

As to the Village's first objection, AFSCME asserts that the Village was not prejudiced in any manner by the extension of the polling period until 1:10 p.m. and notes that the extension was an accommodation made at the Village's request.

As to the Village's second objection, AFSCME argues that the ballots were counted in a manner that was fair and impartial, and in a manner that accurately tabulated the results of the election. AFSCME notes that Mr. Mulcahy and Mr. Stautz voluntarily removed themselves from the room in the midst of the ballot counting, and that the ballots were indeed counted in the presence of Ms. Emery. AFSCME contends that if the Village were to prevail as to this contention, any election could be held indefinitely in abeyance merely by having one of the observers leave and not come back. Under the Village's theory, AFSCME asserts that the ballots could never be counted and argues that such a result is ridiculous.

As to the Village's third objection, AFSCME argues that the Commission has never had restrictions on union representatives acting as election observers provided that such representatives follow the Commission rules prohibiting electioneering. AFSCME notes that the Village does not contend that Abelson in any way tried to influence the employees when they appeared to vote or that Abelson conducted himself in a manner that was not consistent with the proper conduct expected of an observer. AFSCME argues that if there was to be a chilling affect on the election outcome, it would have been caused by having the highest level Village appointed official and the voting employees' supervisor, Village Clerk Stautz, acting as the Village observer. However, AFSCME asserts that as the tally reflects an election outcome of 6 to 0 in favor of AFSCME, it is fair to conclude that the voting employees rose above any intimidation caused by Mr. Stautz' presence. AFSCME further notes that in Iowa County, Dec. No. 23121-A (WERC, 4/86) the Commission found that the "laboratory conditions" were not destroyed even though the election was conducted without a voting booth and even though the chairman of the county board was present in the room where the voting took place despite his status as a non-observer. AFSCME argues that in the present case the integrity of the voting was strictly adhered to by the Commission's agent. A voting booth was used by all eligible voters and the sanctity of the secret ballot was guarded at all times.

Given the foregoing, AFSCME argues that the "laboratory conditions" were not compromised in any respect and that the Commission should dismiss the Village's objections and certify the election results.

DISCUSSION:

As we noted in Iowa County, we consider the Commission's "Election Procedure Manual" to be an internal guide to the Commission's elections' personnel, rather than a set of conditions the absence of which automatically warrant setting aside the result of an election. In assessing the instant objections, our purpose is to determine whether the "laboratory conditions" for a fair election have been compromised, not whether the Commission's instructions to elections personnel have been strictly adhered to.

In the instant circumstances, we are satisfied that the "laboratory conditions" have not been compromised and we have therefore dismissed the Village's objections.

As to the Village's first objection, we find that no harm to the "laboratory conditions" was caused by extending the opportunity for employees to vote on a basis which was apparently acceptable to all parties present.

As to the Village's second objection, the Stipulation of Facts reflects that a representative of the Village was present while the ballots were initially counted by the Commission agent and that the Village's formally designated observer had an opportunity and did in fact count the ballots upon his return into the voting area. Under these circumstances, it is apparent that the absence of the Village's formally designated observer during the period of time when the Commission's agent was counting the ballots did not compromise the integrity of the tallying process in any manner. Thus, we conclude that the requirements of ERB 21.08(4) were met. 1/

1/ ERB 21.08(4) states as follows:

Upon the conclusion of the election, the ballots shall be counted in the presence of and with the assistance of the parties or their observers, and the Commission agent conducting the election shall cause to be furnished to the parties the tally of ballots.

As to the Village's final objection, the Stipulation of Facts do not provide us with any basis for concluding that the presence of AFSCME Representative Abelson destroyed or compromised the "laboratory conditions." It is apparent that Abelson did not engage in any electioneering and we do not find it reasonable to conclude that employees were or reasonably could have been influenced in any way by his presence. While there may be circumstances in which we would intrude into the parties' choice of their election observer, we have found no need to do so during the several decades that we have been conducting such elections. While we acknowledge that our choice in this regard differs from that of the National Labor Relations Board, we have been provided with no basis for departing from our belief that the "laboratory conditions" are not ordinarily compromised when the parties choose to have elected officials, supervisors or union representatives serve as observers so long as the secrecy of the balloting process itself is maintained and no electioneering occurs.

Therefore, we are satisfied that the "laboratory conditions" for a free, fair and secret ballot election were maintained in the above-matter and we have therefore dismissed the Village's objections.

We will be issuing a Certification of the results of the election in a separate document.

Dated at Madison, Wisconsin this 15th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner