

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
	:	
NORTHWEST UNITED EDUCATORS	:	Case 89
	:	No. 40808 ME-2805
Involving Certain Employes of	:	Decision No. 25681-A
	:	
SAWYER COUNTY	:	
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Appearances:

- Mr. Michael J. Burke, and Mr. Alan D. Manson, Executive Directors, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, with Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, on the reply brief, appearing on behalf of Northwest United Educators.
- Ms. Kathryn J. Prenn, Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Sawyer County.
- Mr. Jack S. Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of Local 1213-D, AFSCME, AFL-CIO.

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

The Wisconsin Employment Relations Commission having, on September 16, 1988, issued a Direction of Election in the above matter to determine whether certain employes of Sawyer County wished to be represented for the purposes of collective bargaining by the Northwest United Educators or by Local 1213-D, AFSCME, AFL-CIO, or by neither of said labor organizations for the purposes of collective bargaining; and said election having been conducted on October 27, 1988; and Northwest United Educators having, on November 3, 1988, timely filed objections to the conduct of said election; and hearing having been held in Hayward, Wisconsin, on December 21, 1988, before Examiner Richard B. McLaughlin; and a transcript of the hearing having been received on January 10, 1989; and Northwest United Educators and Local 1213-D, AFSCME, AFL-CIO having filed written argument, the last of which was received on February 10, 1989; and the Commission having reviewed the record and the parties' arguments and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Sawyer County, herein the County, is a municipal employer which has its principal offices located at Sawyer County Courthouse, 406 Main Street, in care of P.O. Box 273, Hayward, Wisconsin 54843-0273.
2. That Northwest United Educators, herein the NUE, is a labor organization which seeks to represent certain professional employes of the County for the purposes of collective bargaining and which has its principal offices located at 16 West John Street, Rice Lake, Wisconsin 54868.
3. That Wisconsin Council 40, AFSCME, AFL-CIO, herein AFSCME, is a labor organization which has represented five separate bargaining units of County employes since at least 1980, and which has its principal offices located at 5 Odana Court, Madison, Wisconsin 53719; that the five separate bargaining units represented by AFSCME are individually known thus: Local 1213, which consists of certain employes employed by the County in its Highway Department; Local 1213-A which consists of certain non-professional employes employed by the County in its Social Services Department; Local 1213-B which consists of certain employes employed by the County in its Sherriff's Department; Local 1213-C which consists

of certain employes employed by the County in its Courthouse; and Local 1213-D which consists of professional employes in a bargaining unit specifically described in Findings of Fact 4 and 6; and that each Local is affiliated with AFSCME.

4. That on September 16, 1988, the Commission issued a Direction of Election which stated in pertinent part:

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this direction in the collective bargaining unit consisting of all regular full-time and regular part-time employes of Sawyer County, including Social Workers, but excluding all non-professional employes of the Department of Social Services, the Courthouse, the County Highway Department and Law Enforcement personnel, all confidential, supervisory and managerial employes, who were employed on September 16, 1988, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of the employes voting desire to be represented by Northwest United Educators or by Local 1213-D, AFSCME, AFL-CIO, or by neither of said organizations, for the purpose of collective bargaining with Sawyer County on questions of wages, hours and conditions of employment.

that on October 27, 1988, an election was conducted by Commission agent Georgann Kramer pursuant to said Direction; that said election was conducted at the Sawyer County Courthouse Committee Room between the hours of 8:00 a.m. and 10:00 a.m.; that after the polls were closed, the ballots were counted and a tally sheet was prepared and signed by Kramer and representatives of the County, the NUE and AFSCME, Local 1213-D; and that the tally sheet reflected the following result:

1. ELIGIBLE TO VOTE	<u>15</u>
2. BALLOTS CAST (Includes <u>all</u> ballots)	<u>13</u>
3. BALLOTS CHALLENGED	<u>0</u>
4. BALLOTS VOID	<u>0</u>
5. BALLOTS BLANK	<u>0</u>
6. VALID BALLOTS COUNTED (Total ballots cast minus challenged ballots void ballots, and blank ballots)	<u>13</u>
7. BALLOTS CAST FOR NORTHWEST UNITED EDUCATORS	<u>4</u>
8. BALLOTS CAST FOR LOCAL 1213-D, AFSCME, AFL-CIO	<u>9</u>
9. BALLOTS CAST FOR NO REPRESENTATION	<u>0</u>

5. That on November 3, 1988, the Commission received objections to the conduct of the October 27, 1988, election; and that those objections read, in pertinent part, as follows:

WHEREFORE, pursuant to ERB 11.10, Wis. Adm. Code, NUE alleges that the scheduling of a bargaining session by the County and Local 1213-D, AFSCME, AFL-CIO during the pendency of the election proceeding interfered with the rights of Northwest United Educators to a fair election. Further, Mr. Gillispie's October 24, 1988 letter to the eligible voters, with its reference to the scheduled bargaining session, interfered with the rights of Northwest United

Educators to a fair election. Finally, the October 27, 1988 negotiations session between the County and Local 1213-D, AFSCME, AFL-CIO, prior to the WERC's issuance of the Certification of Representative, interfered with the rights of Northwest United Educators to a fair election.

6. That the County and AFSCME have been parties to a series of collective bargaining agreements; and that the most recent of those agreements covering the Local 1213-D bargaining unit contains, among its provisions, the following:

#### ARTICLE 2 - RECOGNITION

The Employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time employees of Sawyer County, including Social Workers, but excluding all non-professional employees of the Department of Social Services, the non-professionals of the courthouse, the County Highway Department, and Law Enforcement personnel, also excluding all elected officials and all managerial, supervisory and confidential employees pursuant to certification by the Wisconsin Employment Relations Commission, or as modified by mutual agreement with respect to wages, hours and conditions of employment.

. . .

#### ARTICLE 26 - DURATION

This Agreement shall become effective as of January 1, 1987, and shall remain in full force and effect through December 31, 1988, and shall renew itself for additional one year periods thereafter, unless either party, pursuant to this Article, has notified the other party in writing that it desires to alter or amend this Agreement at the end of the contract period.

##### Section 1 - Bargaining Procedure:

Step 1: On or before July 1, 1988, or any subsequent year, the Union shall present its bargaining request to the County.

Step 2: The County shall present its proposals to the Union by August 1st of that year.

Step 3: Negotiations will commence not later than September 1st of that year.

7. That Chuck Block is employed by the County in its Department of Social Services as a Social Worker 3; that Block serves as the President of AFSCME, Local 1213-D, and in that capacity serves on the negotiations team which negotiates with the County; and that Block contacted Michael Burke, who is an Executive Director of the NUE, sometime in June of 1988, to determine if the NUE would be interested in serving as the exclusive collective bargaining representative for the employees represented by AFSCME, Local 1213-D.

8. That until July of 1988, James Ellingson served as the AFSCME representative for the five County bargaining units identified in Finding of Fact 3; that Ellingson, in a letter to the County's Acting County Clerk dated June 27, 1988, notified the County that AFSCME wished to open negotiations for successor agreements covering the five AFSCME represented bargaining units; and that the June 27, 1988, letter reads as follows:

This letter will serve to open the contracts of #1213 Highway, #1213-A Social Services, #1213-B Law Enforcement, #1213-C Courthouse, and #1213-D Professional for 1989 bargaining.

The Union will provide its bargaining proposals prior to our initial bargaining session.

9. That on June 29, 1988, Burke filed a Petition For Election Involving Municipal Employes with the Commission; that Box 2 of that form identifies the bargaining unit represented by AFSCME, Local 1213-D; that Box 4 of that form states: "NUE believes that a majority of the employees in the above unit wish to change bargaining representatives from AFSCME to NUE. (See attached showing of interest.)"; and that on or about July 5, 1988, the parties were advised by the Commission that the requisite 30% showing of interest did accompany the NUE petition.

10. That Sam Gillispie serves as AFSCME's Associate Director, and in July of 1988, assumed the responsibility of serving as the collective bargaining representative for the five AFSCME represented bargaining units of County employes; that Gillispie contacted the president of each of the five AFSCME represented Locals and requested that he meet with each of them and with the employes represented by each Local to determine what demands the Local would make to the County in its initial proposal, and how those demands would be advocated; that Block sent a letter to Gillispie dated August 16, 1988, which set forth the demands Local 1213-D wished to have put before the County in negotiations; that hearing on the NUE's election petition took place on August 24, 1988; that Gillispie met on September 8, 1988, with four of the AFSCME Locals, including Local 1213-D, to refine each Local's bargaining demands and to reduce those demands to writing; that Local 1213-A had already reduced its proposals to finished form and chose not to meet that day; that the Commission issued the Direction of Election noted in Finding of Fact 4 on September 16, 1988; that Gillispie met with the negotiating teams of each of the five AFSCME Locals on September 26, 1988; that sometime in the final week of September, 1988, Gillispie spoke by phone with Kathryn Prenn, the attorney representing the County in its negotiations with the five AFSCME represented Locals; that during that conversation Prenn informed Gillispie that the election directed by the Commission on September 16, 1988, was to be held on October 27, 1988; that Gillispie determined that Prenn would be in Hayward on that date, and suggested that the AFSCME represented Locals and the County meet to discuss their initial proposals on October 27, 1988, after the completion of the election; that Prenn agreed to meet on that date, but informed Gillispie that should AFSCME not prevail in the election, the County would not bargain with AFSCME for the Local 1213-D unit; that Gillispie agreed to meet with the County on that date; that Gillispie confirmed the meetings in five letters to Prenn, each dated October 4, 1988; that those letters confirmed that the County would meet with Local 1213, AFSCME, at 10:30 a.m., with Local 1213-A at 11:00 a.m., with Local 1213-B at 11:30 a.m., with Local 1213-C at 12:00 p.m., and with Local 1213-D at 12:30 p.m.; that Gillispie's October 4, 1988, letters included the initial proposals of each bargaining unit; that Gillispie sent to each employe in the Local 1213-D unit a letter dated October 24, 1988, which reads as follows:

Later this week on Thursday, October 27, 1988, between 8:00 a.m. and 10:00 a.m. at the Courthouse in the Committee Room, you will have the opportunity to vote for the union who will represent you in collective bargaining, grievances meetings, and hearings. The choice you will make is between AFSCME Local 1213-D, AFL-CIO, the Northwest United Educators, and no representation.

In making your decision, please consider that the dues structure is significantly higher with the Northwest Educators (you will pay at least \$25.00 per month) than it is with AFSCME. Also, I have scheduled our first negotiation session with Sawyer County for 12:30 p.m. on October 27, 1988. The County has informed me that they will not negotiate with AFSCME should we lose the election on October 27. The current contract expires on December 31, 1988. Contract negotiations would be stalled. These are important points to consider when deciding how you will vote.

I am asking you to vote for AFSCME. When I first arrived in Sawyer County, there were a number of complaints about how AFSCME had previously serviced your local. I asked you to give AFSCME Council 40 another chance. You, the members, gave

it to me. I have attended all of your meetings and kept your local union officers informed both by telephone and in writing. I've made a commitment to handle your negotiations. You will not have to deal with the previous Staff Representative. We have hired Victor Musial and he will sit with me at the bargaining table and be ready to take over after the new contract is settled.

In AFSCME, you, the membership, run the union. The union does not run you. AFSCME Council 40 represents over 23,000 members. We have the capability to represent you better, because we concentrate our efforts in dealing with the problems of the membership from the local level.

I ask you to vote for AFSCME Local 1213-D on October 27, 1988. Thank you.

that each of the five AFSCME represented Locals did meet with the County on October 27, 1988, to discuss their initial proposals; that no further negotiation sessions between the County and AFSCME Local 1213-D have occurred since that date; but that the County has met with the four other AFSCME Locals since that date; and that sometime between July and October of 1988, Gillispie and the County settled a grievance filed by Block.

11. That the County and AFSCME have been parties to a series of collective bargaining agreements with each of the five Locals represented by AFSCME since at least 1980; that among these agreements, the County and each AFSCME represented Local entered into a collective bargaining agreement covering 1982; that the County and each AFSCME represented Local agreed to a successor agreement to the 1982 agreements which covered 1983 and 1984; that each of the agreements covering 1983 and 1984 contained a limited reopener for 1984 which permitted either party to negotiate the contractual wage rates and three other items of each party's choice; that during the negotiations conducted under this limited reopener, the County and AFSCME reached agreement on a collective bargaining agreement for each AFSCME represented bargaining unit and covering 1984 and 1985; that the County and each AFSCME represented Local reached agreement on a collective bargaining agreement covering 1986; that the most recent agreement covering each of the AFSCME represented Locals covers 1987 and 1988; that each of the agreements reached between the County and AFSCME from 1980 through 1988, including those agreements specifically noted above, contain a common initial and expiration date; that since at least 1982, each agreement reached between the County and each AFSCME represented Local contains a common negotiations procedure which governs the reopening of negotiations, and which, with the exception of the relevant date, reads as reflected in Article 26 set forth in Finding of Fact 6 above; that Ellingson notified the County of AFSCME's desire to open negotiations for the items subject to the limited reopener covering 1984 in a letter dated June 22, 1983, to the then incumbent County Clerk; that the June 22, 1983, letter mentioned all of the five AFSCME represented Locals; that Ellingson notified the County of AFSCME's desire to open negotiations for successor agreements to those in effect for 1984-85 in a letter dated March 8, 1985, to the then incumbent County Clerk; that the March 8, 1985, letter mentioned all five AFSCME represented Locals; that throughout the period from 1980 through 1986, the County and the AFSCME represented Locals would conduct their initial collective bargaining session in late August, September or early October; that, for example, the first session in the negotiations which resulted in the 1983-84 labor agreements occurred on September 1, 1982, and the first session in the negotiations which resulted in the 1986 labor agreements occurred on September 10, 1985; that throughout this period of time the County and AFSCME bargained separately with each AFSCME Local on the same day, or over a two consecutive day period; that the parties' negotiation practices during the period from 1980 through 1986 have varied from the provisions specified in Article 26 set forth in Finding of Fact 6; and that, for example, AFSCME has not required the County to present its initial proposal to the AFSCME represented Locals by August 1 of a given year, but has allowed the County to present that proposal at the parties' initial bargaining session.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the contingent scheduling of an initial bargaining session between the County and AFSCME, the communication of the existence of said session to employees prior to the election and the conduct of said initial bargaining session after balloting was completed did not render it improbable that the employees in question were able to freely cast their ballot.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

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

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld  
S. H. Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner

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

POSITIONS OF THE PARTIES

The NUE argues, in its initial brief, that "analysis of NLRB and WERC case law supports its position that a new election must be ordered in this matter." Specifically, the NUE contends that General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948), establishes the "laboratory conditions" standard governing the Board's conduct of representation elections. Beyond this, the NUE contends that in Dal-Tex Optical Co., 137 NLRB 1782, 50 LRRM 1489 (1962), the Board determined that the laboratory conditions standard was more restrictive than the standard applied to determine interference proscribed by Section 8(a)(1) of the National Labor Relations Act. It follows, according to the NUE, that employer conduct which constitutes an unfair labor practice violates the laboratory conditions standard, and that certain conduct not severe enough to be considered an unfair labor practice may also violate that standard. However Board law is viewed in the abstract, the NUE urges that "the County and AFSCME, in knowingly scheduling a bargaining session for the same day as the election, engaged in conduct violative of the "laboratory conditions standard." The County's actions in scheduling the session "supported one labor organization over another", according to the NUE, and AFSCME's October 24, 1988, letter advising employees of that session influenced the outcome of the election. Beyond this, the NUE urges that established Commission case law demands that the results of the October 27, 1988, election be set aside. The NUE specifically cites Fox Valley Vocational, Technical and Adult Education District, Dec. No. 25357-A (WERC, 11/88), as the general statement of the relevant standard. That general standard, as particularly applied in Fond du Lac County, Dec. No. 16096-B (WERC, 9/78), demands, according to the NUE, that the October 27, 1988, election results be set aside, since preceding County and AFSCME campaign conduct and propaganda contained a promise of benefit or a threat. Acknowledging that an incumbent union can legally employ "normal advantages of incumbency" such as "call(ing) meetings of members at the work site, electing or selecting officers and bargaining team representatives, constructing bargaining goals, consulting with individual members and representing some in the processing of potential or actual grievances", the NUE argues that such advantages should not be permitted to subvert the laboratory conditions essential to a free election. Specifically, the NUE asserts that the Commission should insist that "all actions and activities between the employer and the incumbent union involving collective bargaining for the successor agreement be suspended entirely during the pendency of the election . . ." A contrary conclusion would, according to the NUE, "provide all employers with the potent option for favoring an incumbent union." Nor would the setting aside of the October 27, 1988, election unduly favor a petitioning union, according to the NUE, which states its argument on this point thus:

It might then be argued that for the WERC to forbid the employer and incumbent union from scheduling such a session would favor the petitioner. This is simply not so, for in this case, as in all others, it is the fundamental function of the WERC to establish, within its powers, a neutral ground for an election. If one side in a situation such as this is favored by the setting of a date to bargain with the implied or stated threat of a delay in negotiations if the incumbent union is not reelected, then relatively speaking a neutral atmosphere favors the petitioner; but this is only because the requisite neutral atmosphere removes the improper and unfair advantage of one party.

The NUE concludes by requesting "(a) firm clear decision by the WERC that all negotiations activities and communications between the challenged union and the employer are to be held in absolute abeyance . . ." and by requesting that the results of the October 27, 1988, election be set aside and a new election be ordered.

After an extensive review of the background to the present matter, AFSCME notes that the NUE asserts three bases to set aside the election results, and that "(t)here is little dispute regarding the principal facts in this case."

Established Commission case law demonstrates, according to AFSCME; that "(t)he main issue in this proceeding is whether or not the conduct to which NUE has objected prevented employees from freely casting their ballots in this election." Beyond this, AFSCME notes the existence of a related issue concerning post-election conduct, and specifically the conducting of a negotiations session before the Commission certified the results of the election. The record underlying these issues will not, according to AFSCME, support any conclusion that the County or AFSCME committed any act in violation of the Municipal Employment Relations Act. AFSCME contends that preparations for bargaining a successor agreement covering Local 1213-D had begun well before NUE filed the election petition, and that "(t)he filing of the election petition . . . did not alter the representation rights and responsibilities of Local 1213-D - nor should it have." Beyond this, AFSCME argues that "(a)t no time has NUE demonstrated that a majority of the professional employees desired to change their representation status", and that under RCA Del Caribe, Inc., 262 NLRB No. 116, 110 LRRM 1369 (1982), AFSCME enjoys a "strong presumption in favor of . . . continuing majority status." AFSCME states its view of the appropriate standard to establish the necessary laboratory conditions for an election thus: "In order to create election period "laboratory conditions" the incumbent union and the employer should maintain the "status quo" with respect to their method of conduct." In this case, according to AFSCME, the record demonstrates that "the petition did not alter the functioning of the Union." More specifically, AFSCME asserts that the reopening of the 1213-D contract, the preparation of that local's proposals, and the scheduling of the initial bargaining session all reflect a well-established historical pattern. The scheduling of the initial negotiations session for the same date as the election reflects, according to AFSCME, "sheer convenience since the principle representatives of the parties planned to be in Sawyer County that day." Since both parties understood the session would not take place if NUE prevailed, there can be, according to AFSCME, no finding of misconduct. Because the October 27, 1988, bargaining session was the parties' first face to face meeting, and marked the first time the County made any bargaining proposals, AFSCME argues that "there can be no contention . . . that the election was tainted by pre-election promises or proposals." Beyond this, AFSCME asserts that it and the County were entitled to rely on the results of the election since the results were known two hours before any bargaining occurred, and there was no dispute about the accuracy of the results. In addition, AFSCME argues that there is no persuasive policy reason why an incumbent union should be required to do anything more than maintain the status quo, which, in this case, demanded that the Local 1213-D negotiations be jointly processed with the four other locals. In support of the position, AFSCME contends that the Board's law, as articulated in Del Caribe supra., states "an even stronger doctrine" which does not permit an employer to withdraw from bargaining with an incumbent union. Beyond this, AFSCME argues that the October 24, 1988, letter is entirely proper under the Commission's decision in Fond du Lac County, supra. In addition, AFSCME contends that the record establishes that any delay in negotiations was the least significant of the four issues involved in the election campaign, and that the letter had no impact on the voters. AFSCME concludes its brief by requesting the Commission to overrule the objections filed by NUE and "forthwith issue its certification of the results of the election."

In reply to AFSCME's initial brief, the NUE focuses solely on AFSCME's citation of Del Caribe. Noting that Del Caribe marks "a radical departure from prior NLRB case law and is yet unsettled as to its implications for the private sector", NUE urges that the Commission "should be very cautious about adopting the majority view rationale in that decision". Beyond this, NUE urges that Del Caribe "simply does not fit public sector labor relations in Wisconsin." Noting that the Commission has "in the past declined to follow NLRB precedent", NUE asserts that Del Caribe rests on "questionable" economic considerations which are not applicable to the present case. In addition, the NUE asserts that "the Commission's election procedures vary enormously from those of the NLRB" and particularly that Commission election procedures take longer than the Board's, thus exacerbating the "potential for abuse" noted in the dissents to Del Caribe. NUE concludes by noting:

(T)he underlying principles of MERA are better served by a doctrine of strict employer neutrality. This requires a municipal employer to refrain from continuing to bargain with an incumbent union during the period in which the Commission processes a bona fide representation petition.



In reply to the NUE's initial brief, AFSCME rejects the contention that any AFSCME or County actions "rendered it improbable that the professional employees were able to freely cast their ballots on October 27, 1988." Specifically, AFSCME argues that the conduct pointed to by NUE is "insignificant", since "(t)he scheduling of negotiations was a matter of convenience; was well known to all parties; "conformed with the long history of negotiations between AFSCME and the County"; and did not occur "until after the employees chose to keep AFSCME as their exclusive bargaining representative." Beyond this, AFSCME asserts that "NUE had ample time to communicate with unit employees about the impact of a change of representatives on the bargaining process." Contending that Gillispie's October 24, 1988, letter was neither a threat nor a promise of benefit, AFSCME urges that the delay focused on in that letter was "an inherent fact" which unit employees recognized as such, and which played no role in the election results. In addition, AFSCME contends that the "strict neutrality" principle urged by NUE in fact "favor(s) the rival union as it casts a pale over the legitimacy of the incumbent union." As AFSCME states the point:

Why should the incumbent union be stripped, at any time, of its obligations and rights simply because its status is under challenge? Why should the status quo be changed? What is the difference between negotiations that involve the resolution of grievances, which NUE appears to sanction . . . and negotiations over future terms and conditions of employment?

The Del Caribe approach is preferable, according to AFSCME, for it permits "employees (to) determine their vote based on real world considerations and not in an artificially created environment." Urging that an initial bargaining session is of dubious significance under current law, and that no bargaining actually occurred prior to the election, AFSCME contends that the dispute over the impact of Del Caribe may well be irrelevant. AFSCME concludes by requesting the Commission to overrule the objections filed by NUE, and to "forthwith issue its certification of the results of the election."

The County did not submit any argument in this matter.

#### DISCUSSION

One of the rights accorded municipal employees by Sec. 111.70(2) Stats., is the right to be represented for the purposes of collective bargaining by a "labor organization of their own choosing". Thus, when employees seek to exercise that choice through an election conducted by the Commission pursuant to Sec. 111.70(4)(d), 2.a., Stats., they are entitled to an election climate which is free of conduct or conditions which improperly influence them and which is fair to all parties on the ballot. WERC v. Evansville, 69 Wis. 2d 140 (1975); Washington County, Dec. No. 7694-C (WERC, 9/67); St. Croix County, Dec. No. 8932-E (WERC, 9/87). Where the secrecy of the voting process itself is maintained, there is a strong presumption that the ballots actually cast reflect the true wishes of the employees participating. Fox Valley Vocational, Technical and Adult Education District, supra. Therefore, where, as here, objections are filed which allege that conduct or conditions existed which prevented the employees from freely expressing their preference as to union representation and that the election results should be set aside, the question before us is whether the conduct or conditions in question render it improbable that the voters were able to freely cast their ballot. Fond du Lac County, supra.; Town of Weston, Dec. No. 16449-B (WERC, 2/79); St. Croix County, supra.

The objections asserted by NUE involve: (1) the scheduling of the October 27, 1988, bargaining session; (2) Gillispie's October 24, 1988, letter to unit members; and (3) the holding of the October 27, 1988, bargaining session, after the election was completed, but before the Commission's certification of those results. The second assertion is derivative of the other two assertions. In Fond du Lac County, supra., the Commission stated its well established rule regarding "campaign propoganda" thus:

(T)he repeated position of this Commission has been that campaign propoganda will not be reviewed unless it is either a statement which is so misleading as to prevent a free choice by the employees or one which contains a promise of benefit or a threat.

If the scheduling and the conducting of the October 27, 1988, bargaining session constitutes a basis for setting aside the election, then Gillispie's letter must also be considered improper. If the scheduling and the conducting of the October 27, 1988, bargaining session does not constitute a basis for setting aside the election, then Gillispie's letter can not be considered improper. Discussion of the three objections must, then, focus on the scheduling and the conducting of the October 27, 1988, bargaining session. As preface to this discussion, it is important to point out that a determination regarding the alleged interference with the free choice of the employes in the October 27, 1988, election turns not on the subjective impressions of the employes, but on whether the questioned acts, viewed objectively, had the probable effect of interfering with that free choice. Town of Weston, supra.

We conclude that the contingent scheduling of a bargaining session between the municipal employer and the incumbent labor organization to occur after the election itself is conducted and the communication of same to the voters did not render it improbable that the voters were able to freely cast their ballots.

We would initially note that such conduct by the incumbent union and the employer is consistent with the incumbent's ongoing status as the collective bargaining representative. As it is the voter's satisfaction or dissatisfaction with the manner in which the incumbent representative carries out its responsibilities which is tested through the election process, and as the incumbent generally has an independent and ongoing responsibility to represent the employes during the pendency of an election petition, we conclude that such conduct, like the continued processing of grievances during the term of a contract, can be an appropriate part of the "election climate" within which employes cast their ballot. Such conduct does not breach the municipal employer's obligation to remain "neutral" once a bonafide "question concerning representation" has arisen. Brown County, Dec. No. 19442-A (WERC, 9/82).

Given the foregoing, we conclude that the scheduling of the bargaining session and the communication of same to the voters does not provide a basis upon which to overturn the election.

As to the issue of whether voter free choice was rendered improbable by the holding of an initial bargaining session after the balloting was completed but during the period within which objections could be filed, we would initially make the obvious chronological observation that conduct occurring after the balloting was complete cannot affect the voter's choice. While the parties did run the risk that whatever was accomplished during this initial session would become a nullity 1/ if objections were filed which warranted the conduct of another election, their conduct did not intrude into voter free choice. Thus, we also reject this objection as a basis for overturning the election.

Having reached the foregoing conclusions, we have herein dismissed NUE's objections. We will be issuing a Certification of the results of the election in a separate document.

Dated at Madison, Wisconsin this 20th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld  
S. H. Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner

1/ See generally Milwaukee County, Dec. No. 12583-A (Torosian, 10/74); aff'd by operation of law, Dec. No. 12583-B (WERC, 11/74).