STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of NORTHWEST UNITED EDUCATORS Involving Certain Employes of FLAMBEAU SCHOOL DISTRICT	Case 26 No. 42916 ME-2943 Decision No. 26238-A

Appearances:
Mulcahy and Wherry, S.C., Attorneys at Law, by Mr. James M. Ward, 715 South Barstow Street, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the District.
Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Direction of Election issued by the Wisconsin Employment Relations Commission on November 15, 1989, the Commission conducted an election among certain employes of the Flambeau School District by mail ballot to determine whether the employes desired to be represented by Northwest United Educators for the purposes of collective bargaining. The ballots were opened and counted on January 3, 1990 and on January 8, 1990 the District filed objections to the conduct of the election. The parties thereafter filed written argument in support of and in opposition to said objections, the last of which was received on February 19, 1990. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. That pursuant to a Direction of Election issued on November 15, 1989, the Commission conducted a mail ballot election in the following collective bargaining unit:

> all regular full-time and regular part-time non-professional employes of the Flambeau School District, excluding supervisory, managerial, confidential and professional employes

to determine whether the employes in said collective bargaining unit desired to be represented for the purposes of collective bargaining by Northwest United Educators.

2. That the mail ballots sent to eligible voters were accompanied by a Notice of Election which provided instructions to the voters and stated in pertinent part:

> "If you desire to vote, will you please do so promptly. Your ballot must be received in our office on or before January 2, 1989, or it will not be counted";

that the reference to January 2, 1989 was erroneous and should have read January 2, 1990; and that there is no evidence that this error misled any voter.

3. That on or before January 2, 1990, 36 mail ballots were received in the Commission's offices from the 42 eligible employes; that on January 3, 1990, the 36 mail ballots were opened and counted with Northwest United Educators receiving 19 votes and 17 votes being cast for no representation.

4. That on January 3, 1990, the Commission received a mail ballot from Mary Dicus which bore a postmark date of December 29, 1989; that on January 4, 1990, the Commission received a mail ballot from Mabel Holman which bore a postmark date of December 30, 1989; and that on January 8, 1990, the Commission received a mail ballot from Annette Vaughn which bore a postmark date of December 22, 1989.

5. That on January 8, 1990, the District filed objections to the conduct of the election asserting that the three mail ballots which were not timely received should be opened and counted because they were placed in the mail within a timeframe which the voter could reasonably have anticipated would lead to timely receipt by the Commission; and that the District's objection

also asserted that another eligible voter had deposited his ballot in the mail but that for reasons unknown, said ballot has never been received by the Commission.

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

CONCLUSION OF LAW

That as the mail ballots referenced by the District's objection to the conduct of the election were not received in a timely matter pursuant to the requirements for voting established by the Commission in this matter, said ballots are not valid.

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

CERTIFICATION OF REPRESENTATIVE 1/

1. That the objection to the conduct of the election filed by the District is dismissed.

2. That by virtue of and pursuant to the power vested in the Wisconsin Employment Relations Commission by Sec. 111.70(4)(d)3, Stats., it is hereby certified that the required number of eligible employes of the Flambeau School District who timely cast their mail ballots have selected Northwest United Educators as their collective bargaining representative; and that Northwest United Educators is now the exclusive collective bargaining representative of all employes in the collective bargaining unit set forth in Finding of Fact 1 for the purposes of collective bargaining with the Flambeau School District on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

I concur.

A. Henry Hempe /s/
A. Henry Hempe, Chairman

Footnote 1/ on page 3

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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,
CONCLUSION OF LAW AND CERTIFICATION OF REPRESENTATIVE

The Commission advised the parties herein of its intent to take notice of its file including the three mail ballot envelopes of Holman, Dicus and Vaughn and the Notice of Election sent to all voters. The parties waived hearing and did not object to the Commission's intention to take such notice. Thus, the Commission formally takes notice of its file in this matter and said file forms the basis for the Findings of Fact made by the Commission herein.

POSITIONS OF THE PARTIES

The District's Initial Brief

The District initially notes that the Notice of Election sent to each eligible voter erroneously stated the deadline for the Commission's receipt of mail ballots as January 2, 1989. While the District does not argue that this error, standing alone, constitutes sufficient grounds for setting aside the election, it maintains that said error gives the Commission a basis for allowing some measure of deviation from the intended January 2, 1990 deadline for receipt of mail ballots.

The District acknowledges that in CESA No. 12, Dec. No. 20944-B (WERC, 6/84) and Wisconsin Humane Society, Dec. No. 14198-B (WERC, 7/76), the Commission did not deviate from a policy of strict adherence to a deadline established for receipt of mail ballots. However, the District argues that in both of said cases, it seems clear that the late ballots rejected by the Commission had not been deposited in the mail within a timeframe reasonably calculated to ensure timely receipt. Here, the District asserts that the three late ballots at issue were mailed within a timeframe reasonably calculated to ensure receipt by the January 2, 1990 deadline. The District contends that it seems beyond dispute that the ballot of Vaughn (postmarked December 22, 1989) and the ballot of Dicus (postmarked December 29, 1989) were mailed within a timeframe reasonably calculated to reach the Commission in a timely manner. The District asserts that only the ballot of Holman (postmarked December 30, 1989) is somewhat questionable in that Holman left no margin for error. Although the District thus acknowledges the case for receipt of Holman's ballot is less strong, the District nonetheless argues that all three ballots should be opened and counted.

The District contends that the National Labor Relations Board (NLRB), like the Commission, imposes a deadline for receipt of mail ballots. However, notwithstanding stated deadlines, the District asserts that the NLRB is flexible in its approach to late ballots and will count ballots received after the deadline if mailed at a time which the voter "could reasonably anticipate" would yield timely receipt through the normal course of the mails. Kerrville Bus Company, 257 NLRB No. 34, 107 LRRM 1466, (1981); Queen City Paving Company, 243 NLRB No. 12, 101 LRRM 1472 (1979).

Applying the "reasonably anticipated" standard of the NLRB, the District urges the Commission to open the three ballots in question.

The Union's Responsive Brief

The Union argues that the Commission has historically taken a strict approach regarding timelines for receipt of mail ballots. The Union asserts that there are strong policy and practical reasons for the Commission to continue its strict approach in this case.

The Union notes that in CESA 12, supra, the Commission held that there are certain risks inherent in use of a mail ballot. The Union argues that when the parties agree to a mail ballot, they are agreeing to accept the risk of the vagaries of the postal service. The Union asserts that there will always be late ballots in mail elections as well as excuses as to why the ballots were late. The Union alleges that once the Commission agrees to look at the "merits of each claim," it has opened up "a proverbial Pandora's (Ballot) Box." The Union contends that if the Commission were to adopt such an approach, the Commission might as well schedule a hearing date on whether late ballots should be counted in each election it conducts since litigation and the resulting uncertainty will become common in every close election.

The Union further argues that to open and count a small number of ballots will inevitably and improperly compromise the desired confidentiality of the voters' choice.

Lastly, the Union contends that the Commission's strict existing standard advances the interests of efficient administration of the agency and of stability in a bargaining relationship.

Even if the Commission were to adopt the more liberalized standard urged

by the District herein, the Union asserts that no basis would exist to challenge the results of this particular election. The Union contends that given the time of year the ballots were mailed and the locations reflected in the postmarks, neither Holman nor Dicus mailed their ballots within a timeframe which "reasonably anticipated" timely receipt by the Commission. The Union acknowledges that a much stronger case can be made for counting the ballot of Vaughn under a liberal standard. However, as one ballot would not be determinative herein, the Union asserts that there is no need to consider the merits of Vaughn's ballot.

Given the foregoing, the Union urges the Commission to dismiss the objection filed by the District.

The District's Reply Brief

As to the Union's Pandora's Box argument, the District asserts that under the standard it is proposing, the Commission need look no further than the date of postmark to determine whether the "reasonably calculated" standard has been met. The subjective intent of the voter would not be considered and no hearing would be necessary. Thus, the District contends that its standard need not cause the delay necessitated by conduct of a hearing.

As to the Union's breach of confidentiality argument, the District notes that in any challenge ballot situation, the confidentiality of a voter's choice is potentially compromised. The District further argues that in this case, at least from the standpoint of ascertaining the true intentions of the affected voter, the opening of late mail ballots presents less of a confidentiality problem than the typical challenge which is raised prior to the time the ballots were cast, inasmuch as the employes in question had no reasonable basis for concluding that their ballots would be kept segregated and opened in a separate manner due to late receipt.

As to the Union's assumption of risk argument, the District acknowledges that each election format carries its own set of risks. Nevertheless, the District argues that there are two important distinctions between a mail ballot arriving beyond the deadline for receipt and a voter who arrives at the polls too late to cast a ballot. First, under the "reasonably calculated" standard, the late mail ballot was actually cast in a timely manner, not withstanding its late receipt. Second, the District notes that the "reasonably calculated" standard entails an essentially objective analysis requiring only comparison of date of postmark which can be analogized to the period during which the polls are open. Thus, the District asserts it is not asking the Commission to consider excuses for late deposit in the mails anymore than it would ask the Commission to consider a tardy voter's excuses for failing to arrive at the polls in time.

The District acknowledges that strict adherence to a deadline in a mail ballot situation promotes administrative efficiency. However, the District asserts that a more worthwhile end would be served by permitting maximum participation in a representation election. Although the District acknowledges that some finality must be brought to the process, it asserts that finality can be achieved through means other than an inflexible deadline for receipt of mail ballots. The District notes in this regard that there is a five-day deadline following the tally of ballots during which objections may be filed. It asserts that during that five-day period, virtually all mail ballots meeting the "reasonably calculated" standard will ordinarily have reached the Commission. Thus, it argues that the desired finality could be achieved by way of adherence to the five-day objection deadline. The District submits that such a policy

strikes a far better balance between administrative convenience/finality and maximum election participation than does a rigid application of a deadline.

The District admits that the "reasonably calculated" standard would entail a brief delay in the commencement of bargaining should the Union win the election. However, the District notes that in this case it is obviously not a foregone conclusion that the Union would emerge victorious if the three ballots in question were counted. The District contends it cannot discern how labor stability would be promoted by granting bargaining rights to a minority union through the expedient of leaving unopened and uncounted three mail ballots cast in a timely manner under the "reasonably calculated" standard.

If the Commission were to adopt the "reasonably calculated" standard, the District notes that the Union essentially concedes that the ballot of Vaughn would meet that standard. The District acknowledges that the ballot of Holman was cast in a somewhat questionable timeframe within the "reasonably calculated" standard. Thus, the District argues that the pivotal ballot may be that of Dicus, mailed on December 29, 1989. The District contends that this ballot meets the "reasonably calculated" standard. Thus, the District argues that at least two of the three mail ballots should be opened and counted.

DISCUSSION

All parties acknowledge that the Commission has historically adhered to a policy requiring strict compliance with deadlines for the receipt of mail ballots. Requests for exceptions to this policy were rejected in the CESA No. 12 and Wisconsin Humane Society cases cited to us by the parties herein. However, as we have not previously specifically ruled upon a request for an exception based upon the alleged vagaries of the United States Postal Service and as our rationale in Wisconsin Humane Society and CESA No. 12 included the potential for exceptions to exist, 1/ we have entertained argument in this case.

As the Commission noted in CESA No. 12, a mail ballot procedure has certain inherent risks linked to reliance on the postal system. As aptly noted by the Union herein, the inherent risk presented by reliance on mail service is not distinguishable from the risk in an on-site election that unforseen circumstances will prevent a voter from timely casting a ballot. However, acknowledgment of the risks inherent in each balloting procedure does not satisfactorily address the merits of the specific exception sought herein by the District.

When determining whether the exception sought by the District should be created, we are placed in a position of balancing strong competing interests. Strict adherence to the deadline advances the interests of finality of result and avoidance of the delay inherent in delaying the tally of ballots and litigating disputes such as this. 2/ Flexibility in the application of the deadline maximizes participation. On balance, we are persuaded that the interests of finality and avoidance of uncertainty and delay predominate. 3/ Thus, we conclude that we will not adopt the "reasonably calculated" standard posited by the District and therefore will not consider how such a standard would impact on the three ballots in question. 4/ However, through consideration of this case and the competing policy interests presented, we have determined that it is appropriate to alter our existing policy in a manner which will increase the opportunity for voter participation while continuing to avoid delay and uncertainty in the tally of ballots and certification of

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2/ In both cases, we cited the clear instructions to the voters regarding the consequences of untimely receipt and stated: "The policy underlying those instructions is sound and no reasons sufficient to change same, or to except the instant situation from its application have been presented herein."

3/ The District correctly notes that if the Commission were to adopt a "reasonably calculated" standard, hearings and argument would not be necessary in those cases in which it could easily be determined whether a particular postmark complied with such a standard. However, as the facts of this dispute make clear, there will likely be instances in which application of a "reasonably calculated standard" would at least produce the delay inherent in receipt of argument.

4/ While our decision brings finality to this proceeding, it is of course the case that the employes' decision to be represented by the Union is not irrevocable. The employes retain the right to petition for another election in the future if they so desire. Village of Deerfield, Dec. No. 26168 (WERC, 9/89); Mukwonago Schools, Dec. No. 24600 (WERC, 6/87).

5/ Although the District's objection also makes reference to a fourth ballot allegedly placed in the mail but never received, the District did not pursue this objection in its written argument.

election results. Thus, in the future, we will count as valid any late mail ballots which are received prior to the actual commencement of the ballot count. In mail ballots, as indicated by the facts of this case, it is our general practice to count the ballots the day after the deadline for ballot receipt. Thus, application of this new policy to our general practice would allow us to count any ballots received in the morning of the day after the deadline.

We need not consider whether it would be appropriate to apply this change retroactively to this case because the only ballot potentially validated would be insufficient to alter the election results.

Given the foregoing, we have certified the Union as the collective bargaining representative of the employes in question.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Concurring Opinion of Chairman Hempe

I concur in the expansion of our previous rule with respect to the counting of representational ballots.

Disenfranchisement of any voter on a representational issue is a serious matter. I perceive our result as an attempt to strike a reasonable balance between the goal of obtaining broad voter participation and that of finality of result.

Consistent with that perception, I do not join the majority's dicta which posits as predominant "the interests of finality and avoidance of uncertainty and delay." In particular, I am not persuaded that somewhat prompter electoral results offer any compelling advantage when accomplished at the expense of voter participation.

Notwithstanding the disquieting notion that we may do less than perfect justice in this matter, I am satisfied that the evolutionary step we take today is as equitable as the totality of circumstances here permits.

By A. Henry Hempe /s/
A. Henry Hempe, Chairman