

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

:

GENERAL TEAMSTERS, LOCAL 662 : Case 2

: No. 43681 ME-2980

Involving Certain Employes of : Decision No. 26689-A

:

CITY OF ST. CROIX FALLS :

(DEPARTMENT OF PUBLIC WORKS) :

:

Appearances:

Ms. Christel Jorgenson, Business Agent, P.O. Box 86, Eau Claire, WI 54702-0086
Weld, Riley, Prenn and Ricci, S.C., by Mr. Joel L. Aberg, 715 S. Barstow,
Suite 111, Eau Claire, WI 54702-1030, on behalf of the City of St. Croix Falls

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, 1990, the Commission conducted an election among certain employes of the City of St. Croix Falls by mail ballot to determine whether the employes desired to be represented by General Teamsters Local 662 for the purposes of collective bargaining. The ballots were opened and counted on December 11, 1990 and on December 17, 1990 the City filed objections to the conduct of election. The parties thereafter filed written argument in support of and in opposition to said objections, the last of which was received on January 2, 1991. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of St. Croix Falls, herein the City, is a municipal employer having its principal offices at St. Croix Falls, Wisconsin.

2. General Teamsters, Local 662, herein the Union, is a labor organization having its principal offices at Eau Claire, Wisconsin 54702-0086.

3. Pursuant to a Direction of Election issued on November 15, 1990, the Commission conducted a mail ballot election in the following collective bargaining unit:

all regular full-time and regular part-time employes of the City of St. Croix Falls Department of Public Works (water, wastewater and street departments), excluding supervisory, managerial, confidential and clerical employes

to determine whether the employes in said collective bargaining unit desire to be represented for the purposes of collective bargaining by General Teamsters Local 662.

4. Mail ballots were sent to the five eligible voters on November 28, 1990, 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 December 10, 1990, or it will not be counted.

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5. By letter dated November 28, 1990, the City and Union were advised by the Commission in pertinent part:

You will note that the ballots must be received at our office on or before December 10, 1990. They will be opened and counted in the Commission's Madison office on Tuesday, December 11, 1990, beginning at 10:00 a.m.

6. Two mail ballots were received in the Commission's offices on or before December 10, 1990. On December 11, 1990, Commission Election Supervisor Georgann Kramer called the Commission's receptionist at approximately 10:00 a.m. to determine whether any additional mail ballots had been received. The Commission's receptionist advised Ms. Kramer that no additional ballots had been received. Ms. Kramer then proceeded to open the two mail ballots. Shortly thereafter, she received a telephone call from the City Administrator asking as to the results of the election. Kramer advised the Administrator

that two ballots had been received with one ballot in favor of representation by General Teamsters, Local 662 and one ballot against such representation. Shortly thereafter, Kramer went to her mailbox to review mail she had received that morning and discovered three mail ballots in the instant election. As the mail ballots in question had been received in the Commission's offices prior to 10:00 a.m., Kramer proceeded to open and count said ballots. Later that day, Kramer advised the Administrator that the results of the election had changed and now reflected that three employes had voted in favor of representation by General Teamsters, Local 662 and two employes had voted for no representation.

7. On December 17, 1990, the City filed objections to the conduct of the election asserting that the three ballots were not timely received under the deadline contained in the Commission Notice received by eligible voters and further that the ballots were not timely counted pursuant to the arrangements specified in Kramer's letter of November 28, 1990. The City asserts that the Commission should proceed to certify the election results as producing a vote against representation by General Teamsters, Local 662.

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

CONCLUSION OF LAW

As the three mail ballots in question were received by the Commission prior to 10:00 a.m. on December 11, 1990, it is appropriate to count said ballots.

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 objections to the conduct of the election filed by the City are 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 City of St. Croix Falls who cast their ballots have selected General Teamsters, Local 662 as their collective bargaining representative; and that General Teamsters, Local 662 is now the exclusive collective bargaining representative

(Footnote 1/ appears on page 3.)
of all employes in the collective bargaining unit set forth in Finding of Fact 3 for the purposes of collective bargaining with the City of St. Croix Falls on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of
Madison, Wisconsin this 29th day of January,
1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

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

(Footnote 1/ continues on page 4.)

(Footnote 1/ continues from page 3.)

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 in this matter including a December 18, 1990 Memorandum prepared by Ms. Kramer setting forth the events of December 11, 1990. 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 which forms the basis for the Findings of Fact made by the Commission herein.

POSITIONS OF THE PARTIES:

The City

The City acknowledges that in Flambeau School District, Dec. No. 26238-A (WERC, 5/90), the Commission concluded that it was appropriate to count as valid any mail ballots received prior to the actual commencement of the ballot count. However, the City asserts that in this case the Commission implicitly, if not expressly, failed to follow its new policy and reverted to its past standard of practice. The City contends that the Notice received by employes as well as the letter sent by Kramer to the parties indicate that ballots not received on or before December 10, 1990 would not be counted. As the three ballots in question were not timely received, the City argues it was inappropriate that they be counted. The City also alleges that it was inappropriate for the Commission to in essence have two ballot counts in this case.

The City asserts that where the Commission has expressly indicated that it will follow its past procedures for ballot counting and where the Commission's "new" policy was not preceded by either administrative rulemaking procedures or formal notice to the public, it is appropriate for the Commission to insist on the strict compliance with deadlines for ballot receipt and counting. The City further argues that it had a right to rely on the unambiguous express representations made by the Commission in this matter as to how the balloting would be conducted. While the City has no objection to a Commission policy which allows more flexibility in determining the will of voting employes, the City does object to the Commission's changing the rules in the middle of this election proceeding. The City argues there is no evidence to suggest the parties expected anything other than that which the Commission's communications expressly represented as to the manner in which ballots would be counted.

Given the foregoing, the Commission should proceed to certify the results of the election as reflecting the failure of a majority of the employes voting to select union representation.

The Union

The Union asserts that all ballots in question were appropriately counted by the Commission. The Union argues that the ballots in question were mailed on December 5, 1990, ample time for their having been timely received in Madison. The Union contends that to uphold the City's challenge would penalize the employes for matters over which they had no control: a delay caused by the Postal Service and/or a mix-up at the Commission's offices. Given the Commission's holding in Flambeau School District, supra., the Union asks that the objections be dismissed and that it be certified as the collective bargaining representative of the employes.

DISCUSSION:

It is undisputed that the ballots of all five employes were received prior to the scheduled 10:00 a.m. commencement of the ballot count on December 11, 1990. Pursuant to our decision in Flambeau School District, supra., it was appropriate for Kramer to count all five ballots. While it is obviously unfortunate that Kramer was not aware that three additional ballots

had been received prior to her initial ballot count, we do not find this unfortunate circumstance to be a basis for denying the three employes in question the opportunity to have their ballots counted.

We acknowledge that the Notice sent to employes advised them that their ballots would not be counted unless received on or before December 10, 1990. 2/ We further acknowledge that while this sentence accurately communicates the paramount importance upon prompt placement of ballots in the mail, it does not accurately set forth the current Commission policy as to the counting of ballots received after the deadline. 3/ However, the employes were not misled to their detriment. Pursuant to our result herein, all employes have participated in the decision as to whether they will be represented by the Union. Our result furthers the interests of maximizing participation while avoiding delay. The result urged by the City would deny participation to a majority of the workforce. Thus, even under the circumstances herein, we feel compelled to count the three ballots.

Dated at Madison, Wisconsin this 29th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

2/ The November 28, 1990 letter sent to the parties did not contain such an assertion and advised them of the date and time of the ballot count.

3/ Future Notices will advise employes, in pertinent part, as follows:

If you desire to vote, please do so promptly. Ballots will be opened and counted in the Commission's offices in Madison, Wisconsin on (date) commencing at (time). Ballots must be received in the Commission's offices prior to the count to be valid.