

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :
WEST SUBURBAN COUNCIL :
Involving Certain Employees of : Case 42
WAUWATOSA SCHOOL DISTRICT : No. 44867 ME-3074
Decision No. 26761-A
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Appearances:
Ms. Sandy Schwellinger, Executive Director, West Suburban Council, 4620
West North Avenue, Milwaukee, Wisconsin 53208, appearing on behalf
of the Union.
Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Mark F. Vetter and
Ms. Jane M. Knasinski, 111 East Kilbourn Avenue, Milwaukee,
Wisconsin 53202-6613, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF
LAW AND ORDER

Pursuant to a Direction of Election, the Wisconsin Employment Relations Commission conducted an election on February 19, 1991 to determine whether certain employees of the Wauwatosa School District wished to be represented by West Suburban Council for the purposes of collective bargaining with the District. Fourteen of nineteen eligible employees voted with eight ballots being cast for no representation and six ballots for West Suburban Council.

On February 21, 1991, West Suburban Council filed objections to the election asserting that the results may have been influenced by: (1) an alleged District failure to properly post copies of the Commission's Notice of Election and Policy on Absentee Ballots; and (2) a District letter to employees which identified Wisconsin Education Association Council (WEAC) as the labor organization seeking to represent employees.

Hearing on the objections was conducted by Examiner Peter G. Davis in Wauwatosa, Wisconsin on March 19, 1991. The parties filed written post-hearing argument, the last of which was received on May 2, 1991.

Based upon its review of the record, the Commission makes and issues the following

FINDINGS OF FACT

1. West Suburban Council, herein the Union, is a labor organization having its principal offices at 4620 West North Avenue, Milwaukee, Wisconsin 53208.
2. Wauwatosa School District, herein the District, is a municipal employer having its principal offices at 12121 West North Avenue, Wauwatosa, Wisconsin 53226.
3. Pursuant to a Stipulation for Election filed by the Union and the District, the Wisconsin Employment Relations Commission issued a Direction of Election on January 25, 1991 to allow "all regular full-time and regular part-time student supervisors" employed by the District to determine whether they wished to be represented by the Union for the purposes of collective bargaining. The Union and the District subsequently agreed that the election should be conducted on Tuesday, February 19, 1991 from 10:30 a.m. to 1:30 p.m. When the election date was agreed upon by District and Union representatives, said representatives did not know that three supervisors would be at a training session the day of the election at a site approximately 15 miles from the site of the election.
4. On Wednesday, January 30, 1991, the Commission mailed the following letter and the enclosures identified therein to the District's Director of Personnel, Ms. Monica McCauley:

Enclosed are several Notices, which include sample(s) of the ballot(s) relating to the vote which the Commission will conduct among certain of your employees. We are enclosing copies of the Commission's Policy on Absentee Ballots.

We request that copies of the Notice and Policy be posted **immediately** at time clocks, on bulletin boards, or at other conspicuous places, in order that all eligible employees may be fully advised regarding

the details of the balloting and the nature of the ballot(s) to be used.

We request that the Employer and Labor Organization(s) involved each designate persons to act as observers, who should appear at the polling place fifteen (15) minutes prior to the opening of the polls, in order to receive their instructions with respect to their duties and responsibilities as observers.

McCauley received these documents on Friday, February 1, 1991. On Monday, February 4, 1991, McCauley's Secretary placed the following Memo and the Commission's Notices of Election and Absentee Ballot Policy in the District's internal mail system for delivery to West High School, East High School, and Plank Road School, the three schools where student supervisors work:

DATE: February 4, 1991

TO: Tom Kneusel, Audrey Evers & Robert Peterson

FROM: Monica McCauley

Notice of Election

Enclosed is a copy of the Notice of Election from the WERC for all full and part-time student supervisors.

Please post this Notice in an appropriate place where visible by all student supervisors in your building.

5. On Tuesday, February 5, 1991, McCauley's February 4 memo and a copy of the Commission's Notice of Election and Policy on Absentee Ballots were received at Wauwatosa West High School. The Notice and Policy were posted that same day in the employe lounge most frequented by student supervisors on a bulletin board used to post official notices. Copies of these documents were also received at Wauwatosa East High School and the Plank Road School on February 5. At East High School, the Notice and Policy were placed that same day directly over or adjacent to the student supervisors' mail boxes. At Plank Road, documents were placed in the mailbox of the one student supervisor employed there. All student supervisors were scheduled to work on all weekdays between February 5, 1991 and February 19, 1991.

6. On February 5, 1991 at West High School and February 6, 1991 at East High School, District Director of Personnel McCauley conducted information meetings regarding the election which were attended by a total of 10 student supervisors. On or about February 7, 1991, all student supervisors received the following letter from McCauley:

On Tuesday, February 19th, from 10:30 a.m. to 1:30 p.m. the Wisconsin Employment Relations Commission (WERC) will hold an election among student supervisors. The purpose of the election will be to determine whether the supervisors want to be represented by the Wisconsin Education Association Council (WEAC). We thought you might like to know a few additional details concerning the election procedures.

1. The voting booths will be set up so as to ensure that your vote can be cast in absolute secrecy. A WERC representative will be present to conduct and supervise the balloting. In addition, one observer designated by the Union and one observer designated by the School District will be present.
2. We agreed to hold the election in the Board Room at East High School.
3. The voting procedure requires that you go to the table at which the WERC representative and the observers are sitting, give your name, take into the enclosed voting booth the ballot given you by the WERC representative, mark it with an "X" and then deposit it in the ballot box.
4. The outcome of the election will be determined by a majority of those actually voting, and not by a majority of those who have a right to vote. There are 18 employees eligible to vote in the election. You are eligible if you are full-time or part-time, even if only 10%. If only 9 of them vote, 5 "yes" votes would mean the Union wins the right to bargain for all 18 employees.

5. Regardless of whether you have signed a union card or have indicated your preference for the Union -you have not committed yourself until you have actually marked your ballot and deposited it in the ballot box. You are completely free to vote as your conscience and reasoning dictate. No one will know how you voted in the election.
6. The WERC ballot gives you two choices. You can choose between "No" union or the Wisconsin Education Association Council (WEAC). You are to indicate your choice by placing an "X" in the appropriate box. PUTTING AN "X" IN THE RIGHT HAND BOX MEANS YOU DO NOT WANT THE UNION TO REPRESENT YOU.

This is a difficult and confusing time for you. The basic issue is whether you want an outside organization to represent you. Bringing in a third party does not make things simpler or easier, but just makes everything more complicated.

We prefer to continue our longstanding tradition of dealing directly and openly with you without the interference of a third party. We have worked together in a friendly, cooperative atmosphere in the past. We would like to keep it that way. We urge you to vote "No" on February 19th.

Pursuant to the constitution and by laws of the Union, student supervisors of the District who chose to join the Union would also be obligated to belong to the Wisconsin Education Association Council (WEAC)

7. On or about February 12, 1991, student supervisors received the following letter from West Suburban Council Executive Director Schwellinger:

It is my understanding that representatives from the District have recently met with you and discussed their willingness to deal with your concerns without your voting to join West Suburban Council. I would ask that you consider the following before deciding how to cast your vote on Tuesday, February 19th.

- If the District is willing to deal with your concerns, why haven't they done so for many years?
- The following items (and many more) are subject to bargaining:
 - improved benefits
 - holiday pay
 - vacation pay
 - increased hourly rates
 - right to a job the following school year
 - layoff by seniority
- If you join the West Suburban Council, you won't have to bargain on your own. I would be the spokesperson as well as the one to provide you with research. Proposals would be developed in our office, based on your needs.
- Regarding the issue of dues no dues are collected until the first contract is successfully negotiated. Current dues levels are \$18.40/month for ten months. If you are a part-time teacher, you only need to pay dues to the teacher's association. You will not be required to pay double dues.
- What rights do you currently have to a job for next year? None. You are subject to the whims of the District.

I would be happy to answer any questions that you may have. The West Suburban Council phone number is 449-0837. Call and ask for Sandy.

Before you vote, ask yourself if you think the District has been treating you fairly and professionally.

Regardless of how you vote, please remember to do so on

Tuesday, February 19th between 10:30 A.M. - 1:00 P.M.
at the Board Room in Wauwatosa East High School.

During the week prior to the February 19 election, Schwellingner also held an information meeting at West High School which was attended by some student supervisors. During this meeting, employees advised Schwellingner that several eligible voters would be attending a training conference on February 19 and asked Schwellingner whether these employees could vote by absentee ballot. Schwellingner subsequently advised several of the employees attending the meeting that the deadline had passed for requesting absentee ballots under the Commission's Absentee Ballot policy.

8. On February 19, 1991 the Commission election was conducted. Fourteen of nineteen eligible employees voted with six ballots being cast for West Suburban Council and eight ballots being cast for no representation. The Plank Road student supervisor voted. Of the nine student supervisors employed at East High School, eight voted. The employee who did not vote was attending the training program referenced in Finding of Fact 3. Of the nine student supervisors employed at West High, five voted. Two of the employees who did not vote were attending the training session referenced in Finding of Fact 3.

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

CONCLUSION OF LAW

The objections filed by West Suburban Council do not provide a sufficient basis to conclude that a new election should be conducted herein.

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

ORDER 1/

1. The objections filed by West Suburban Council are hereby overruled.

2. 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 Wauwatosa School District who cast their ballots did not select West Suburban Council as their bargaining representative.

Given under our hands and seal at the City of
Madison, Wisconsin this 18th day of July, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner

(See Footnote 1/ on Page 6)

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- 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.

WAUWATOSA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Union

The Union argues that the Commission should conduct another election because: (1) the District failed to timely post the Commission's Notice of Election and Policy on Absentee Ballots in conspicuous places; and (2) the District incorrectly advised employees that WEAC rather than West Suburban Council was seeking to represent them. The Union contends that these actions by the District denied employees the opportunity to vote and misled employees as to the identity of the labor organization seeking to represent them.

As to the posting, the Union asserts that it is not clear whether the Notices were posted in sufficient time to allow employees to timely exercise their right to vote by absentee ballot. The Union further contends that even assuming timely posting, it is not clear whether the District posted the Notices in appropriate locations at East and West High Schools.

As to the District's incorrect identification of WEAC as the labor organization seeking to represent student supervisors, the Union asserts that this error had the potential to cause confusion among voters and affect the outcome of the election.

Given the foregoing, the Union asks that a new election be conducted.

The District

The District argues the election was fairly conducted and that the Union's objections should be dismissed.

Responding to the posting issue, the District initially asserts that because the statutes and administrative code do not impose an obligation to post the Notices, the District cannot be found to have violated a nonexistent obligation. Assuming an obligation to post did exist, the District contends that the Notices were properly posted as soon as possible upon receipt from the Commission. The District asserts there is no evidence that the three employees absent on February 19 due to training were unaware of the absentee ballot policy. The District further argues that these three employees knew of the training conflict well prior to the election and could have inquired as to absentee ballot voting procedures. Lastly, the District cites Fond du Lac School District, Dec. Nos. 17638-A, 21767 (WERC, 6/84) for the proposition that even assuming the two employees at West High were not properly notified, their votes could not have affected the outcome and that the election results should therefore be immediately certified.

As to the reference to WEAC in its letter to employees, the District contends that the reference was, at most, harmless error. The District notes that WEAC and the Union are affiliated; that the two employee witnesses who testified both indicated they knew they were voting for the Union; and that a subsequent campaign letter from the Union eliminated any confusion. Further, the District cites Gateway Technical Institute, Dec. No. 14381-B (WERC, 6/76) wherein the Commission certified election results even though the ballot incorrectly identified the labor organization. The District argues that any confusion in this case is less substantial than the potential confusion in Gateway.

Given the foregoing, the District asks that the election results be certified.

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." When employees exercise that right of choice through a Commission conducted election, the Commission is obligated to ensure that employees have a fair and free opportunity to vote as they see fit. Fox Valley VTAE, Dec. No. 25357-A, (WERC, 11/88). For employees to have a fair opportunity to vote, they must be aware of when and where they can cast their ballots. Thus, when we conduct on-site elections, we require employers to post notices in the work place which provide employees with such information. Here, it is alleged that employees were not made aware of the election and/or did not have an opportunity to vote because the District did not appropriately post the Notice of Election and Policy on Absentee Ballots in a timely manner.

From our review of the record, we are satisfied that copies of the Notice

and Policy on Absentee Ballots were posted in appropriate locations or otherwise made available to employees in sufficient time to allow for timely receipt of absentee ballot requests and to generally advise eligible employees of the election.

The Commission directed the District to post the Notice and Policy "at time clocks, on bulletin boards, or at other conspicuous places. . . ." The District met this obligation at West High by posting the Notice and Policy in the employee lounge most used by student supervisors on a bulletin board used for posting official notices. At East High and Plank Road, the Notice and Policy was appropriately posted near or in employee mail boxes. While we acknowledged that any employee wishing to timely file an absentee ballot request had at most three days (including the February 5 day of posting) to take such action, we conclude such time was sufficient. We further note that there is no employee testimony that the timing of the posting deterred the three employees who were at a training session from seeking to vote by absentee ballot. Nor was there testimony that any employee was unaware of the date, time, and location of the election. Thus, we conclude all employees had a fair opportunity to vote. Given the foregoing, we do not find this objection to be a persuasive basis for conducting a new election.

We also conclude the District's erroneous identification in its campaign literature of WEAC as being the labor organization seeking to represent the student supervisors does not warrant conducting a new election.

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, supra. Further, we have repeatedly held that inaccurate campaign propaganda does not provide a persuasive basis for conducting a new election unless the statement in question is so misleading as to prevent a free choice by the employees. Fond du Lac County, Dec. No. 16096-B (WERC, 9/78); Sawyer County, Dec. No. 25681-A (WERC, 3/89). The question before us thus becomes one of determining whether the District letter made it improbable that the voters were able to freely cast their ballot. Fox Valley, supra; Fond du Lac County, supra; and Sawyer County, supra.

Here, we conclude that it was highly probable that no employee was so misled by the District letter that they could not freely cast their ballot. We reach this conclusion because the Commission's Notices and the ballot used by employees to vote correctly identified West Suburban Council as the labor organization in question. We further note that a Union letter sent to all student supervisors subsequent to the McCauley letter correctly identified the labor organization to be listed on the ballot. Finally, we are aware of no

evidence which suggests that any employe was confused by the District's statement. Thus, we are satisfied that the District's error did not adversely affect the employes' ability to freely and fairly decide whether they wished to be represented by the Union.

Accordingly, we have certified the election results.

Dated at Madison, Wisconsin this 18th day of July, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner