STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Involving Certain Employes of

MANITOWOC SCHOOL DISTRICT

Case 48
No. 58107
ME-3744

Decision No. 29771-B

Appearances:

Mr. Robert Huston, Director of Human Resources, Manitowoc School District, 1010 Huron Street, P.O. Box 1657, Manitowoc, Wisconsin 54221-1657, appearing on behalf of Manitowoc School District.

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

ORDER DENYING MOTION TO DISMISS

On October 20, 1999, Wisconsin Council 40, AFSME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether employes in a bargaining unit described as:

> All regular full-time and regular part-time Manitowoc Public School District employees except supervisory, managerial and confidential employees and except certified employees and employees of the Building and Grounds Department and teacher aides

wished to be represented for the purposes of collective bargaining by Wisconsin Council 40.

At the Commission's request, Wisconsin Council 40 and the District met and reached agreement on November 8, 1999 regarding which District employes were eligible and ineligible to vote in the petitioned-for election. The parties' agreement indicated 36 employes were eligible to vote and that 21 specifically named District employes were ineligible to vote because they were "Supervisory," "Managerial" or "Confidential" employes.

On December 15, 1999, the Commission conducted the petitioned-for election. Thirty four of the 36 eligible employes voted with 30 votes cast for representation by Wisconsin Council 40 and four votes cast for no representation. Based on these election results, the Commission issued a Certification of Representative on January 3, 2000 declaring that Wisconsin Council 40 is the collective bargaining representative of:

> All regular full-time and regular part-time employes of the Manitowoc School District, excluding supervisory, managerial, confidential, professional and building and grounds employes and teacher aides.

On February 21, 2000, Wisconsin Council 40 filed a petition to clarify bargaining unit with the Wisconsin Employment Relations Commission seeking to add to the unit 10 employes/ positions that the District and Council 40 had previously agreed were ineligible to vote in the election because they were managerial or confidential employes.

By letter dated February 23, 2000, the District moved to dismiss the petition based on the eligibility/ineligibility agreement reached by the District and Council 40 in November, 1999.

The parties waived hearing, stipulated to certain exhibits, and filed written argument, the last of which was receive March 27, 2000.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision

Having considered the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

The motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of July, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I dissent.

James R. Meier /s/
James R. Meier, Chairperson

Manitowoc School District

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

POSITIONS OF THE PARTIES

The District

The District argues the February 21, 2000 petition should be dismissed based on the District and Union's November, 1999 agreement that the employes in dispute were ineligible to vote in the representation election.

Having previously agreed that the employes were confidential or managerial employes, the District contends that it is unfair to the District and the affected employes to allow the Union to now seek the employes' inclusion in the newly formed bargaining unit. The District asserts that the Union's petition has caused great unrest among the affected employes and negatively affected the District's ability to conduct its business. Under these circumstances, the District asks that the petition be dismissed and the Union barred from refiling until January 1, 2004 or such time as the Commission deems prudent. The District argues that the passage of time should allow time for the current bad feelings to heal and for the parties to bargain two collective bargaining agreements.

If the Commission does not dismiss the unit clarification petition, then the District asks that the election results be set aside.

The Union

The Union requests that the Commission deny the District's motion to dismiss the unit clarification petition or set aside the election results.

The Union argues that through the unit clarification petition, it asks the Commission to exercise its statutory jurisdiction to determine whether or not employes are indeed confidential or managerial employes. The Union contends it acted in a manner consistent with existing Commission law that allows for the filing of a unit clarification petition where the parties have voluntarily agreed that the affected employes are excluded from a bargaining unit due to confidential or managerial status.

As to the District's request that the election results be negated, the Union asserts that the request is untimely and, in any event, without merit.

DISCUSSION

Section 111.70(2), Stats., gives "municipal employes" the "right to form, join or assist labor organizations" and "to bargain collectively through representatives of their own choosing . . ." Section 111.70(4)(d), Stats., gives "municipal employes" the opportunity to exercise these rights by having the Commission conduct an election among "municipal employes" to determine whether the "municipal employes" wish to be represented by a union.

Because the above-cited rights are only possessed by "municipal employes," only "municipal employes" are eligible to vote in a Commission conducted election and, if a union is selected as the bargaining representative, only "municipal employes" are eligible to be included in the collective bargaining unit.

Section 111.70(1)(i), Stats., defines a "municipal employe" as:

> . . . any individual employed by a municipal employer other than an independent contractor, supervisor or confidential, managerial or executive employes.

Therefore, individuals employed by the municipal employer who are "supervisors" or "confidential, managerial or executive employes" are not eligible to vote in a Sec. 111.70(4)(d), Stats., election or to be included in any resultant bargaining unit.

Given all of the foregoing, before the Commission can conduct an election pursuant to Sec. 111.70(4)(d), Stats., a determination needs to be made as to which of the individuals employed by the municipal employer are eligible to vote by virtue of their "municipal employe" status and which such individuals are ineligible to vote because they are "supervisors" or "confidential, managerial or executive employes."

Because the Commission has the statutory responsibility to administer Secs. 111.70(1)(a) and 111.70(4)(d), Stats., a union and employer always have the right to litigate voter eligibility issues before the Commission. The Commission always stands ready to make such eligibility determinations following receipt of an election petition. However, because parties (1) may wish to avoid the expense and delay which litigation over such issues does produce, (2) know the duties and responsibilities of the individuals in question, and (3) have access to members of the Commission's staff who can assist them in understanding the law the Commission would apply if the eligibility issues were litigated, the Commission allows a union and employer to reach agreement on who is and is not eligible to vote. As part of such an agreement, the parties can also agree that certain individuals have the right to vote subject to the ability of either party to "challenge" their ballot and subsequently litigate the eligibility issue if the ballot(s) in question may affect the election outcome.

The parties to this dispute elected not to have the Commission decide who was eligible to vote and instead reached an agreement on all voter eligibility issues. Their agreement indicates that certain named individuals were not eligible to vote because they were "confidential" or "managerial" employes and thus were not "municipal employes."

The Union won the election 30-4. The Union then filed the instant unit clarification petition asserting that 10 of the individuals it had previously agreed were ineligible to vote in the election because they were "confidential" or "managerial" employes are, in fact, "municipal employes" who should be included in the newly formed bargaining unit. Citing the earlier agreement on "confidential" and "managerial" status, the District argues that at least for some period of time, the Union should be barred from litigating whether these individuals are in fact "municipal employes."

For at least the last 25 years, the Commission has allowed unions and employers to litigate issues of "municipal employe" status in unit clarification proceedings – even where the petitioning party has previously agreed that the individuals in dispute are or are not "municipal employes." 1/ CITY OF CUDAHY, DEC. NO. 12997 (WERC, 9/74); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 13134-A (WERC, 1/76); CITY OF SHEBOYGAN, DEC. NO. 7378-A (WERC, 5/89); MANITOWOC COUNTY, DEC. NO. 7116-C (WERC, 11/91); ELCHO SCHOOL DISTRICT, DEC. NO. 27640-C (WERC, 4/97).

1/ By contrast, where there are no issues regarding "municipal employe" status and parties reach an agreement on whether employes should or should not be included in a bargaining unit, we honor the parties' agreement and will not rule on the merits of a unit clarification petition which seeks to "undo the deal." We treat such agreements differently because, unlike the situation presented herein, statutory rights are not directly implicated. Thus, for instance, if the parties in this case had agreed that the now disputed employes were municipal employes but were ineligible to vote or be included in the unit, we would not allow the Union to proceed with this unit clarification petition.

We do so because statutory rights of "municipal employes" under Sec. 111.70(2), Stats., are at stake and because we have the statutory responsibility to administer the statutes which create those rights. Thus, although we do not compel the parties to litigate such issues in an election proceeding, we are always an available forum for litigation of questions as to whether an individual is a supervisor, or a confidential, managerial or executive employe. Sometimes, as here, it is a union that wishes to litigate such issues following an election and sometimes it is the employer (See RIB LAKE SCHOOL DISTRICT, DEC. NO. 29652-B (WERC, 7/2000).

Perhaps in recognition of the statutory nature of the issues presented by the Union petition – including the Union's right to bargain on behalf of

> All regular full-time and regular part-time employes of the Manitowoc School District, excluding supervisory, managerial, confidential, professional and building and grounds employes and teacher aides

the District seeks only to delay not deny the Union's ability to proceed with a unit clarification petition. However, given the statutory nature of the rights at stake and our statutory responsibility to enforce those rights, we conclude that we can no more delay litigation of the statutory rights than we could deny same. If these individuals are not "confidential" or "managerial" employes, they are "municipal employes" the Union is now statutorily entitled to represent for the purposes of collective bargaining. If these individuals are "confidential" or "managerial" employes, then they cannot be included in the unit because they are not "municipal employes." All affected parties are entitled to an answer to those questions now. Therefore, we deny the District's motion to dismiss the petition for unit clarification.

We also deny the District's alternative request that the election results be overturned because the individuals in question were not allowed to vote. Not only is the request untimely under ERC 11.10 (i.e. objections to the conduct of election must be filed within 5 working days of the date the parties receive a tally sheet of the election results) but as noted earlier herein, the District was entitled to resolve the voter eligibility/"municipal employe" status of these individuals before the election and chose not to. The District chose instead to enter into an agreement that did not allow these individuals to vote.

It is worth noting that just as municipal employes have the statutory right to select a union to represent them, they have the statutory right to seek to change the identity of the union or to decide that they no longer wish to be represented by any union. Thus, the employes now in the bargaining unit and any employes added to the unit by virtue of this unit clarification have the future right to petition for an election to determine whether they wish to continue to be represented by Wisconsin Council 40.

We acknowledge the dissenting opinion of Chairperson Meier. We understand the frustration expressed in this case by the District. It echoes union arguments made in other unit clarification cases where a municipal employer seeks to alter a previously stipulated bargaining unit. See RIB LAKE SCHOOLS, DEC. NO. 29652-B (WERC, 7/2000).

We do not disagree that the policy we follow and apply again today can lend itself to a certain political gamesmanship by either side. For immediate tactical advantage related to the

election results being sought, either side may agree to the inclusion or exclusion of a person in the putative bargaining unit, regardless of whether the position held by that person is a statutory fit for inclusion or exclusion. If a majority of the stipulated voters vote against representation, the matter ends. If a majority votes in favor of representation, an attempt to adjust the unit to a closer conformity to the statutes can still be made.

There appear to be two possible means of preventing this pre-election tactical maneuvering.

One such means would be for the Commission to carefully scrutinize the make-up of *all* proposed bargaining units, whether or not the parties have agreed to a list of eligible voters in the representation election. At present, the Commission engages in a careful review of only those proposed bargaining units on which there is disagreement, i.e., the parties cannot agree on who should be included or excluded. As to prospective bargaining units where the parties stipulate membership, however, the current Commission practice is to provide only a cursory review. Absent an obvious flaw in the unit's proposed composition, a *pro forma* approval always follows.

This practice is consistent with Commission preference to rely on the parties to govern themselves in accordance with the statutes. Most do. Thus under this policy, as a practical matter the Commission generally allows the parties to stipulate to whatever bargaining unit is agreeable to each. It is only if there is disagreement between the parties that the Commission will intervene.

Besides granting the parties the opportunity of attempting to reach their own agreement, this policy has the additional advantage of administrative efficiency. If the Commission were to begin to scrutinize closely every proposed stipulated bargaining unit, it would be required to conduct formal hearings and receive testimony and evidence as to each proposed unit. In our view, this procedure would be not only cumbersome and create an unnecessary administrative burden to the Commission and its staff, but create unacceptable delays and expense to the parties we serve. Moreover, given the delays that would necessarily be caused, the procedure might well engender new forms of gamesmanship, quite possibly more egregious than the mischief complained of by our dissenting colleague.

In his dissent, Chairperson Meier proposes a second option. Chairperson Meier urges the Commission to renounce its current policy and hold stipulating parties to any agreement they may enter that places employes in or out of a bargaining unit, absent a material change in duties and responsibilities. Under this theory, a deal would remain a deal, except for changes in position duties.

This is a tempting prospect. In our view, however, it suffers from a fatal flaw: the statutes do not permit a mixture of supervisory, confidential, managerial or executive employes in the same bargaining unit with other municipal employes. See Secs. 111.70(1)(i), 111.70(2)

and 111.70(6), Stats., By forcing parties to live with the bargaining unit composition deals they have struck even though contrary to statute, in effect the Commission legislates new law instead of administering existing law.

We are not legislators. If the problem described by our dissenting colleague cuts as deeply as it appears to him, it is a problem to be addressed by the Legislature. Until the Legislature chooses to modify the law, however, we believe we have the obligation of applying it as it is written.

Dated at Madison, Wisconsin this 19th day of July, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Manitowoc School District

Dissenting Opinion of Chairperson James R. Meier

As in RIB LAKE, DEC. NO. 29652-B (WERC, 7/2000), where an employer sought to renege on a prior agreement including employes in a bargaining unit, I would dismiss the instant unit clarification petition through which the Union seeks to renege on a prior agreement excluding employes from a unit as confidential and managerial employes. Where parties agree that an employe/position is in or out of the unit, I conclude they should be held to that agreement absent a material change in duties and responsibilities. No such change is present here. Therefore, I dissent.

I believe the majority opinion makes the best case that can be made for the Commission's long standing willingness to allow litigation of "municipal employe" status in the face of a prior agreement of the parties resolving that very issue. However, given the damage that such litigation does to labor management relationships and thus to labor peace, I no longer find the majority rationale to be a sufficient basis for allowing such litigation.

The general rule is that a "deal is a deal" and thus that the Commission will not entertain a petition for unit clarification seeking to undo the deal. However, when establishing this general rule in CITY OF CUDAHY, DEC. NO. 12997 (WERC, 9/74), the Commission created an exception that allowed unions and employers to renege if the deal was premised on an agreement that the employes in question were or were not supervisors, or managerial, confidential or executive employes. The majority argues that the rationale behind this exception is the view that inclusion of non-municipal employes in a bargaining unit is prohibited by statute and that it is for the Commission not the parties to determine municipal employe status.

The majority's language above states it this way: "We do so because statutory rights of municipal employes under Sec. 111.70(2), Stats., are at stake and because we have the statutory responsibility to administer the statutes which create those rights." But that is merely a rationalization for poor policy, for as the majority points out in footnote 1, "where there are no issues regarding 'municipal employe' status and the parties reach an agreement on whether employes should or should not be included in a bargaining unit, we honor the parties' agreement and will not rule on the merits of a unit clarification petition which seeks to 'undo the deal,'" Thus, the majority would be enforcing the agreement if it did not give any reason whatsoever for the inclusion or exclusion of the employes in question. Would such employes not have statutory rights?

Further, evidence that "statutory rights" is a mere rationalization for poor policy is the fact that the Commission will not accept petitions for unit clarification from employes who

believe they are not supervisory, confidential or managerial and thus are wrongly excluded from a unit or who believe they are supervisory, confidential or managerial and thus wrongly included in a unit. Do they not have statutory rights at stake and does not the Commission have the "statutory responsibility" to administer the statutes which creates those rights?

The majority asserts that my result is "fatally flawed" because it has the potential for allowing non-municipal employes (i.e. supervisors, etc.) to be impermissibly included in a bargaining unit with municipal employes. I would only note that by not allowing unit clarification petitions to be filed by unit employes who believe they are supervisors, etc, we have historically created the same potential risk. Thus, if my result is contrary to law, so is our refusal to process such unit clarification petitions.

Thus, I do not find the majority rationale persuasive.

As is evident from the record in this case, (which is attached as Appendix A), our willingness to allow parties to renege on previously reached agreements encourages gamesmanship, generates ill will and breeds contempt for the parties, the law and the Commission. These impacts are also contrary to our statutory obligation to proceed in a manner that enhances labor peace.

Thus, I dissent.

I believe the Commission should prospectively renounce the poor policy which the majority restates and hereby announce that I will vote to hold parties to an agreement placing employes in or out of a bargaining agreement absent a material change in duties and responsibilities.

Dated at Madison, Wisconsin this 19th day of July, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

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Appendix A

[The contents of Appendix A consist of 22 pages which been scanned and converted to PDF format in a companion file named 29771-bx.pdf **which can be viewed by use of Adobe Acrobat Reader 4.x software available free from Adobe Corporation at** http://www.adobe.com/prodindex/acrobat/readstep.html **]**