

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN LAW ENFORCEMENT ASSOCIATION
Involving Certain Employees of
DOA-OFFICE OF STATE EMPLOYMENT RELATIONS

Case 658
No. 64124
SE-107

Decision No. 31195

Appearances:

Sally A. Stix, Law Offices of Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, WI 53711, appearing on behalf of the Wisconsin Law Enforcement Association.

Kurt C. Kobelt, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, WI 53701-2965, appearing on behalf of AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, WI 53707-7855, on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On October 28, 2004, the Wisconsin Law Enforcement Association filed a petition and showing of interest with the Wisconsin Employment Relations Commission seeking an election to determine whether certain law enforcement employees of the State of Wisconsin wish to be represented by the Association or wish to continue to be represented by AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO.

By letter dated November 11, 2004, the Commission advised the parties that the showing of interest which accompanied the petition was sufficient and asked the parties if there were any issues that needed to be resolved prior to the conduct of the election.

On November 18, 2004, Council 24 filed a motion to dismiss the petition as untimely.

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On November 19, 2004, the Association filed a request that the motion be dismissed as untimely filed.

On December 2, 2004, Council 24 filed a brief in support of its motion and a supporting affidavit. The parties then agreed that the affidavit provided a sufficient factual basis for disposition of the motion.

On December 13, 2004, the Association filed a brief in opposition to the Council 24 motion. Council 24 filed a reply on December 20, 2004.

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

FINDINGS OF FACT

1. The Wisconsin Law Enforcement Association, herein the Association, is a labor organization.
2. AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, herein Council 24, is a labor organization that serves as the collective bargaining representative of certain law enforcement employees of the State of Wisconsin.
3. The State of Wisconsin, herein the State, is an employer.
4. The State and Council 24 were parties to a May 17, 2003-June 30, 2003 collective bargaining agreement. Prior to June 30, 2003, the parties were unable to reach agreement on a successor agreement. On June 30, 2003, the parties agreed to extend the terms of the agreement effective July 1, 2003, subject to the right of either party to terminate the extension upon 30 days written notice. The parties have not reached an agreement on a successor bargaining agreement and have not terminated the June 30, 2003 extension agreement.

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

CONCLUSION OF LAW

The Association petition for election was timely filed within the meaning of the State Employment Labor Relations Act and gives rise to a question concerning representation within the meaning of Sec. 111.83(3), Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER

The motion to dismiss is denied

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within sixty (60) days from the date of this Directive in the collective bargaining unit consisting of all law enforcement employees employed by the State of Wisconsin, excluding limited term employees, sessional employees, project employees, supervisors, management employees and confidential employees, who were employed on December 30, 2004, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether such employees desire to be represented by the Wisconsin Law Enforcement Association, or by AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, or by neither of said organizations, for the purposes of collective bargaining with the State of Wisconsin.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of December, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

DOA-Office of State Employment Relations

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

The Association raises the threshold question of whether the Council 24 motion should be dismissed as untimely. The Association premises its argument on a portion of the WERC Hearing Examiner Manual which indicates that, prior to circulating a stipulation for election, a WERC examiner processing an election case may unilaterally raise the timeliness of the election petition after reviewing an existing contract. Because the WERC examiner processing this case did not raise a timeliness issue before circulating a stipulation for election, the Association asserts that Council 24 is now barred from raising that issue. We find this argument unpersuasive for several reasons.

First, nothing in the Manual indicates that if the examiner fails to raise a timeliness issue, then a party is precluded from doing so. Second, the WERC did not have a copy of any contract between the State and Council 24. Thus, no assessment could have been made of any timeliness issue. Third, the Manual specifies that it “is designed to provide general guidance in the handling of the petitions involving elections” and that “Any material herein can not supercede the statutes or administrative code.” (emphasis in original). Thus, it is clear the Manual is not binding on the Commission as to any specific procedural or substantive issue.

Turning to the issue of whether the Association petition is timely, as Council 24 recognizes, the Commission has previously addressed the timeliness of an election petition under the State Employment Labor Relations Act (SELRA) in a situation, like the present one, where a predecessor collective bargaining agreement between the State and an incumbent union has expired, and the parties to that agreement have agreed to extend its terms subject to unilateral termination by either party within a set period of notice. STATE OF WISCONSIN, DEC. NO. 23648 (WERC, 5/86). In that case, the Commission considered whether Sec. 111.83(5), Stats. (which has since been amended and renumbered as Sec. 111.83(6), Stats.) should apply in such situations. That provision, though amended in other respects, continues to state in pertinent part, “While a collective bargaining agreement between a labor organization and an employer is in force under this subchapter, a petition for an election in the collective bargaining unit to which the agreement applies may only be filed during October in the calendar year prior to the expiration of that agreement. . . .” Council 24 states, and we agree, that the foregoing provision applies only where an “actual contract” is “in force”. Council 24 further states, and we agree, that the current agreement has expired and that the extension agreements, which are terminable unilaterally, are not equivalent to a successor agreement.

In the 1986 decision, the Commission concluded that, if Sec. 111.83(6) Stats., did not apply, then SELRA was silent as to whether and when bargaining unit employees could seek to change their representative in situations where a contract was not “in force”. By analogy to the Municipal Employment Relations Act (MERA), which is silent about the timing of election petitions, the Commission exercised its discretion to develop an appropriate rule for the timing of State election petitions where no contract is in effect by balancing the competing statutory interests. Contrary to Council 24’s suggestion that the Commission inappropriately applied MERA principles to SELRA, the Commission in the 1986 case promulgated a very different rule of timing for SELRA petitions than the Commission applies under MERA. Under MERA, once a contract has expired, a petition will be timely filed if filed at any time, unless a petition for interest arbitration has been filed. MUKWONAGO SCHOOLS, DEC. NO. 24600 (WERC, 6/87). In the 1986 decision, however, the Commission thought such an open-ended timeliness rule would not fit SELRA’s policies, which the Commission articulated as “[t]he interest of stability of the existing relationship and of consistency of negotiations with the fiscal and budget planning processes of the State.” Dec. No. 23648 at 12. On the other hand, the Commission balanced those policies against the clear statutory policy favoring free choice of representatives: “Clearly, an existing representative cannot be permitted to remain free indefinitely from the possibility of a timely filing of a petition challenging its’ [sic] representative status.” *Id.* Hence, the Commission concluded that the appropriate rule under SELRA, where an existing agreement was not “in force” for purposes of Sec. 111.83(6), Stats., would be to require election petitions to be filed during October of the year preceding the end of the biennium following the nominal expiration date of the incumbent’s last agreement, thus “guaranteeing, at a minimum, a window of opportunity for timely challenging an incumbent in October of every even-numbered year.” *Id.*

Clearly, the Association’s petition is timely under the rule established in the 1986 STATE OF WISCONSIN decision. Council 24, however, argues that the Commission misinterpreted the Legislature’s intention in enacting Sec. 111.83(6), Stats. Council 24 argues that, by specifically stating a time period within which an election petition could be filed, the Legislature intended that to be the exclusive mechanism by which employees could change bargaining unit representatives. We see no reason to view Sec. 111.83(6), Stats., as a universal regulation of election petitions. Rather, we see it as regulating a particular situation, the one the Legislature specified at the outset of the provision, i.e., “While a collective bargaining agreement. . . is in force. . . .” We see no reason to presume that, by setting forth a timing rule in that one situation, the Legislature intended to divest employees of their right to seek an election in other situations, for example, where prolonged collective bargaining has not resulted in a successor agreement. Instead, it is more reasonable, as the Commission did in 1986, to view that provision as simply not addressing the other situations that could exist, such as a schism within the incumbent union, the incumbent’s abandonment of its representative role, or, as here, a situation of protracted negotiations without achieving a successor agreement.

Council 24 correctly points out that Sec. 111.83(6), Stats. was amended after the Commission's 1986 decision to specify when the change of representative takes effect. However, because our timeliness decision (like that of the 1986 Commission) is not based on Sec. 111.83(6), Stats. but rather on the remaining portions of SELRA, the amendment is not germane to the timeliness issue now before us. 1/

1/ If the Association displaces Council 24 as the collective bargaining representative and there is a dispute as to when the displacement takes effect, we will resolve that issue at that time.

Therefore, we have denied the Council 24 motion to dismiss and have directed that the election proceed. 2/

2/ The Association has asked that we order the State to provide it with the addresses of the eligible voters so that the Association can compete on a level playing field with Council 24. Council 24 and the State oppose this request.

We will issue a separate decision as to this request in the near future.

Dated at Madison, Wisconsin, this 30th day of December, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner