

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**MILWAUKEE MUSICIANS' ASSOCIATION LOCAL 8,  
AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA**

Involving Certain Alleged Employees of  
**MILWAUKEE CHAMBER ORCHESTRA**

Case 1  
No. 64900  
E-3117

**Decision No. 31580**

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**Appearances:**

**Marianne Goldstein Robbins**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53202, appearing on behalf of Milwaukee Musicians' Association Local 8, American Federation of Musicians of the United States and Canada.

**Matthew Falk**, Falk, Johnson LLC, Attorneys at Law, 111 East Wisconsin Avenue, Suite 1370, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Chamber Orchestra.

**ORDER**

On June 13, 2005, the Milwaukee Musicians' Association Local 8, American Federation of Musicians of the United States of America, filed a petition with the Wisconsin Employment Relations Commission seeking an election among certain alleged employees of the Milwaukee Chamber Orchestra to determine whether said alleged employees wished to be represented by Local 8 for the purposes of collective bargaining.

Hearing on the petition was held in Milwaukee, Wisconsin on August 23, 2005 before Commission Examiner Peter Davis. At hearing, evidence was taken as to whether the

Dec. No. 31580

individuals Local 8 seeks to represent are employees or independent contractors. At the conclusion of the hearing, a schedule for receipt of written argument was established and the transcript of the hearing was provided to the parties for their use in preparing said argument.

By letter dated November 29, 2005, Local 8 advised the Examiner that it was withdrawing its petition because of "the mounting evidence that the Chamber Orchestra, is at present, not functioning." Local 8 stated that it wished to withdraw without prejudice to its right to file another petition if the Chamber Orchestra reestablishes itself as an employer.

By letter dated December 1, 2005, the Orchestra took the position that the withdrawal should be with prejudice or, alternatively, that a decision should be issued on the merits. The Orchestra cited the time and resources it had expended responding to the petition and preparing a post hearing brief and indicated that its current financial and organizational duress was as evident at the time of hearing as it is at present.

The parties thereafter filed additional argument in support of their positions regarding the withdrawal request, the last of which was received January 3, 2006.

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

### **ORDER**

The request to withdraw the election petition without prejudice is denied.

On or before January 27, 2006, Local 8 shall advise the Wisconsin Employment Relations Commission and the Orchestra as to whether it wishes to withdraw the petition subject to a one year bar to refiling or instead wishes to proceed to a decision.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**MILWAUKEE CHAMBER ORCHESTRA**

**MEMORANDUM ACCOMPANYING ORDER**

Where, as here, hearing on a matter has begun or been completed, and the petitioning party moves to withdraw its petition, and another party objects to that withdrawal unless it is with prejudice, the Commission has dismissed the matter with prejudice to refiling for one year. In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 8974-C (WERC, 11/78), the Commission concluded it was “appropriate” to dismiss a unit clarification petition in such circumstances where the hearing had not been completed but three days of hearing had been held. In VERNON MEMORIAL HOSPITAL, DEC. NO. 12348-A (WERC, 2/74), the Commission cited “abuse of the Commission’s processes” when it dismissed a petition seeking a union security referendum in such circumstances after hearing had been completed and the referendum directed.

Implicit in these decisions is the rationale that where, as here, the parties and the Commission have expended considerable resources on a matter, dismissal with prejudice is the appropriate way to acknowledge and respect that expenditure. Local 8 has not presented us with a persuasive basis for reaching a different result here. Nothing in Sec. 111.05 (4), Stats.<sup>1</sup> is contrary to the result we reach, because we have not permanently barred Local 8 from filing another election petition. Nor is information in the Commission’s Hearing Examiner’s Manual contrary to the result we reach, as the Manual is silent on the question of whether withdrawal is with or without prejudice.<sup>2</sup> Any change in the status of the Orchestra’s condition is certainly relevant to Local 8’s internal decision as to whether it wishes to proceed but is not relevant to the expenditure of resources that makes dismissal with prejudice appropriate. Thus, we have denied Local 8’s request that the petition be dismissed without prejudice. Consistent with MILWAUKEE BOARD OF SCHOOL DIRECTORS and VERNON MEMORIAL HOSPITAL, *supra*, if Local 8 requests dismissal of the election petition, it will be with prejudice to the extent Local 8 is barred from filing another election petition as to the Orchestra’s alleged employees for one year from the date of the dismissal order.<sup>3</sup>

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<sup>1</sup> The portion of Section 111.05(4), Stats. upon which Local 8 relies provides:

The fact that an election has been held does not prevent the holding of another election among the same group of employees, provided that it appears to the Commission that sufficient reason for another election exists.

<sup>2</sup> In any event, both the text of the Manual and existing Commission precedent indicate that the Manual is not binding on the Commission as to procedural or substantive law. STATE OF WISCONSIN, DEC. NO. 31195 (WERC, 12/04); KAUKAUNA SCHOOL DISTRICT, DEC. NO. 31208 (WERC, 1/05).

<sup>3</sup> Local 8 points out that the NLRB would limit the length of the bar to six months. The NLRB’s procedures sometimes provide guidance to the Commission regarding similar situations, but the language, policies, and purposes of the statutes the Commission administers often differ from those pertaining to the NLRB. For instance, the NLRB requires that a showing of interest accompany an election petition covering unrepresented employees while we do not, unless the statute we are administering specifically so provides (e.g., such a showing is required by the State Employment Labor Relations Act). The NLRB has a six-month limitations period for filing unfair labor practice charges; the Commission’s limitations period is one year. In this instance, we conclude the one year bar best suits the purposes of the Wisconsin Employment Peace Act.

As reflected in our Order in this matter, Local 8 should advise us and the Orchestra on or before January 27, 2006 as to whether we should dismiss the petition with prejudice or proceed to a decision.

Dated at Madison, Wisconsin, this 11th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

