STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MICHAEL R. LANGIN

Involving Certain Employees of

ST. CROIX COUNTY

Case 206
No. 65025
ME-4047

Decision No. 31608

Appearances:

Michael R. Langin, AODA Counselor, St. Croix County Government Center, 1101 Carmichael Road, Hudson, Wisconsin, 54016, appearing on behalf of the Certified Alcohol and Other Drug Abuse Counselors.

Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of Local 576A, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR ELECTION

On August 5, 2005, the Wisconsin Employment Relations Commission received a document entitled "PETITION FOR DECERTIFICATION ELECTION" signed by Michael R. Langin, Sue Knutson, John Ganong, and Randy Cook which stated:

> We are professional Certified Alcohol and Other Drug Abuse Counselors and employees of St. Croix County, Wisconsin. We are currently represented by Local 576A, AFSCME, AFL-CIO. We request that the Wisconsin Employment Relations Commission conduct an election since we, the undersigned, no longer desire to be represented by Local 576A, AFSCME, AFL-CIO.

By letter dated August 11, 2005, the Commission served the petition on the County and Local 576A indicating that the petition was requesting that "an election be conducted among the employees in the bargaining unit described on the attached petition." The Commission's letter also asked that the County provide a list of employees in the bargaining unit so that the Commission could determine whether the petition had the support of at least 30% of said employees.

The County did not respond to the August 11 letter and on August 30, 2005, Langin called Commission General Counsel Peter Davis to ask about the status of the petition. After that telephone conversation, Davis sent the parties the following memo:

. . .

> Mr. Langin called me today to discuss the status of his election petition. During our conversation, it became clear to me that Mr. Langin is seeking an election in a separate unit of AODA Counselors to determine whether the Counselors wish to continue to be represented by AFSCME.
>
> In such circumstances, the 30% showing of interest requirement referenced in my August 11, 2005 letter is met if the petition has the support of at least 30% of the AODA Counselors. As all four AODA Counselors signed the election petition, it is clear that the 30% showing of interest has been met.
>
> The next step in the process is scheduling a hearing where Mr. Langin, AFSCME and the County can present evidence on why the WERC should allow the AODA Counselors to leave the existing bargaining unit.
>
> Please provide me with your availability for hearing.

. . .

On August 31, 2005, Local 576A representative Hartmann called Davis to discuss whether a hearing should be held. Following that conversation, Davis sent the parties the following letter:

. . .

> This will confirm that Mr. Hartmann called me today to question whether a hearing should be held in this matter. I indicated that although prior WERC decisions made it very unlikely that WERC would conclude that a separate unit of AODA Counselors would be appropriate, Mr. Langin was entitled to try to persuade the WERC otherwise if he filed a timely election petition.

> At Mr. Hartmann's request, I include a copy of the WERC decision in ROCK COUNTY, DEC. NO. 26303 (WERC, 1/90) as an example of a situation in which a group of employees in an existing unit have been given the opportunity to persuade the WERC that they are "an appropriate bargaining unit" and should be severed from an existing unit. I believe this decision supports Mr. Langin's right to a hearing in this case.
>
> However, I would also note that on the last page (page 19) of the ROCK COUNTY decision, WERC indicates that even where Factor (sic) 1-5 are strongly supportive of a separate unit, Factors 6 and 7 (anti fragmentation and bargaining history) are stronger considerations. Thus, even if Mr. Langin can establish that Factors 1-5 strongly support his position, I think it quite likely that Factors 6 and 7 will cause the WERC to dismiss the election petition he has filed.
>
> Lastly, I note that the last page of the ROCK COUNTY decision indicates that unhappiness with the representation received (sic) the current union does not form a valid basis for creating a new unit. Consistent with ROCK COUNTY and TAYLOR COUNTY, DEC. NO. 27360 (WERC, 8/92)-copy also enclosed, I will not allow any evidence regarding unhappiness with the quality of AFSCME's representation to be presented at any hearing.
>
> Given all of the foregoing, it remains my view that Mr. Langin is entitled to a hearing but that it is very likely that his election petition will be dismissed.
>
> If Mr. Langin wishes to proceed to hearing, I'd suggest November 3 or 4 as potential hearing dates. Let me know.
>
> . . .

By letter dated September 11, 2005, Hartmann advised Davis that he would not be providing potential hearing dates until satisfied that a hearing was appropriate, that he questioned why Davis was the hearing examiner, and that he reserved the right to file pertinent motions with the Commission.

By the following memo dated September 14, 2005, Davis responded to Hartmann's September 11, 2005 letter:

> . . .
>
> I write in response to Mr. Hartmann's letter of September 11, 2005. I enclose a copy of that letter for Mr. Langin.

> Consistent with the Commission's limited support staff resources, my limited technological ability and the absence of an email address for Mr. Hartmann, this letter is not on letterhead and will be sent to Mr. Hartmann in a hand addressed envelope.
>
> I stand by the view expressed in my August 31, 2005 memo that although Mr. Langin is not likely to be successful on the merits, he is entitled to a hearing. Mr. Langin telephonically advised me on September 13, 2005 that he does wish to proceed to hearing. Because I am assigned to process all WERC election petitions, I will be conducting the hearing.
>
> My strong preference is to conduct the hearing on a date that is mutually available for all parties but is consistent with the WERC's interest in prompt processing of election petitions. Thus, on or before September 21, 2005, I ask you all to provide me with your available hearing dates between October 13 and November 4, 2005. If I do not receive a response to this request, I will select the hearing date that best fits the schedules of those who have responded. Hearing will then be held on that date with or without the participation and presence of any party who fails to respond to my request for hearing dates.
>
> Feel free to respond by phone or email if you wish.
>
> . . .

On September 22, 2005, Davis advised the parties that: Hartmann had telephonically provided potential hearing dates and had also indicated that he would be filing a motion to dismiss the petition; and hearing would be held October 26, 2005 unless WERC granted any motion to dismiss that Hartmann files.

On October 13, 2005, a notice of hearing was mailed to the parties.

On October 19, 2005, Hartmann filed a motion with WERC asking that the petition be dismissed and, if the petition was not dismissed, that Davis be removed as hearing examiner.

On October 20, 2005, WERC Chairperson Judith Neumann conducted a telephone conference as to the Hartmann motions and then provided the parties with the following memo:

> . . .
>
> Please note that I am e-mailing this summary to Mr. Chabowski as I do not have an e-mail address for Mr. Hartmann. I will also fax a copy of this e-mail to Mr. Hartmann (on WERC letterhead).

This will summarize the contents of our prehearing conference this morning, which I initiated, per prior notice, at 8:30 a.m. at the telephone numbers that had been supplied to me. I was unable to reach Mr. Langin, though I tried twice at spaced intervals at the main telephone number at the Health Center. Mr. Weld and Mr. Hartmann participated in the call.

The purpose of the conference call was to discuss how to handle AFSCME's motion to dismiss and/or to designate a different examiner. As discussed, the Commission received AFSCME's motion yesterday, Wednesday, October 19, 2005. It is my understanding that the parties have been aware for several weeks, from discussions with Examiner Peter Davis, that this matter was scheduled for hearing on Wednesday, October 26, 2005. However, the formal notice of hearing was not sent until October 13, 2005 and not received by Mr. Hartmann until October 14. Mr. Hartmann indicated that he waited to file his motion until he received the designation of hearing examiner.

I stated in the conference call that the Commission's policy is to process and schedule election petitions promptly. In accordance with that policy, the Commission generally would not be disposed to postpone an election case hearing in order to respond to a motion to dismiss filed one week before the scheduled hearing. Rather, the Commission's policy would be to take such a motion under advisement and ask the parties to address it, along with all other issues, at the scheduled hearing.

Mr. Hartmann suggested that the Commission should depart from that policy in the present case, because, until he knew the identity of the examiner, he could not be certain that a motion to dismiss was appropriate. This suggestion was based upon Mr. Hartmann's view that Examiner Davis had already formed an opinion on the subject of the motion, i.e., that a decertification petition could appropriately be filed in a portion of an existing unit, if the petitioner intended to advance the argument that said portion was an appropriate unit and the petition was supported by 30% showing of interest in that group. In addition, Mr. Hartmann believes that Mr. Langin himself had not advanced this argument supporting his petition, but instead that Examiner Davis had "divined" Mr. Langin's intent in this respect, which Mr. Hartmann believes to be improper under the rules of administrative procedure.

Hence, as I understand AFSCME's argument, it is primarily interested in having a different examiner appointed so that it can be assured of a fair hearing on the argument that the petition is inappropriate. In the conference call, I explained

that the examiner in a representation case, such as an election case, has no decision-making authority regarding the merits or disposition of the petition. All such authority remains with the Commission itself. This is clear from the Commission's rules and notices and applies to Examiner Davis, as well, albeit he is also the Commission's General Counsel. In this case, Examiner Davis clearly did determine, from his discussions with Mr. Langin, that Mr. Langin intended his election petition to cover only the AODA counselors, who supported the petition by more than 30%. Further, Mr. Davis clearly did express an opinion that the petition would thus be appropriate to proceed to hearing. However, the Examiner's opinions are not binding on the Commission nor necessarily reflective of the Commission's point of view. Moreover, it is the Examiner's proper role to investigate the nature of representation petitions that are filed in order to assist the Commission in its determinations regarding those petitions. Indeed, it is essential to the prompt handling of election petitions that the Commission's investigator be able to conduct a free-flowing investigation, even if that includes some ex parte conversations. Of course, it is also appropriate that the examiner promptly advise all other parties as to the content of any such ex parte communications. It is my understanding, from the discussion during the prehearing conference, that Mr. Davis did so communicate with the other parties in this matter.

AFSCME is fully entitled to challenge an examiner's point of view and handling of an investigation by filing appropriate motions, as it has now done. Had AFSCME's motion been filed earlier, it is possible that the Commission could have responded prior to the scheduled hearing. However, since the Examiner's opinions on this issue do not bind the Commission, the Examiner's having expressed an opinion on the issue is not a reason to postpone the hearing or designate a different examiner.

Accordingly, the hearing will proceed as scheduled with Mr. Davis as Examiner.

Although the motion was filed too late to affect the hearing date, the issues it raises are before the Commission and will be addressed after the hearing. If AFSCME wishes to pursue its arguments that the matter has been mishandled procedurally, it may seek testimony or stipulations from the Examiner regarding his pre-hearing conduct, and of course may present that argument to the Commission as well. This is not intended to comment in any way upon any other avenues or redress AFSCME may have available regarding its procedural impropriety arguments.

> We also discussed AFSCME's concern with having received communications from the Examiner on plain paper rather than Commission letterhead. As indicated in the conference call, the Commission agrees that this is not good practice and has taken the steps to address it for the future.
>
> Please let me know if the foregoing information is inaccurate or should be supplemented in any way.
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> . . .

Hearing was held on October 26, 2005, in Hudson, Wisconsin before Examiner Davis. The parties thereafter filed written argument by December 23, 2005.

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

FINDINGS OF FACT

1. St. Croix County, herein the County, is a municipal employer that provides various services to its residents through its 850 employees. There are currently the following five bargaining units of County employees: law enforcement (68 employees); highway (67 employees); courthouse (107 employees); nursing home (77 employees); and non-professional human services (47 employees).

2. Local 576A, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, herein AFSCME, is a labor organization serving as the collective bargaining representative of the bargaining unit consisting of all regular full-time and regular part-time non-professional Human Services Department employees.

3. Michael R. Langin, Sue Knutson, John Ganong, and Randy Cook are Chemical Dependency Counselors, herein the Counselors, included in the Human Services Department unit. The Counselor position has been included in the unit since the unit was created in 1993.

4. The Counselors provide a variety of outpatient and outreach services related to alcohol and drug abuse. The position requires a high school diploma, training in chemical dependency counseling and certification by the State of Wisconsin as an Alcoholism Counselor. The "Required Skills, Knowledge and Abilities" contained in the June 2005 job description for the Counselor position are the following:

> Knowledge of community resources. Working knowledge of family-based services philosophy. Ability to manage treatment within the continuum of services available for chemically dependent clients with an emphasis on provision of services in the "least restrictive" setting. Ability to understand and

follow complex oral and written instructions. Ability to communicate effectively orally and in writing. Ability to work independently and make decisions in accordance with AODA unit policy and procedures. Able to plan and implement diverse therapeutic approaches to engaging clients who present as resistant to treatment. Ability to effectively utilize and augment a multidisciplinary team approach to treatment. Must be able to read, write, speak and understand English.

Other positions in the Human Services Department unit support the work of the Counselors and meet with citizens when providing services. Certain positions in the Humans Services Department bargaining unit require a two-year degree.

5. Employees in the Human Services Department unit share the common purpose of providing social services to County residents.

6. The Counselors have the highest hourly wage rate of employees in the Human Services Department unit ($21.07). Other unit positions with an hourly wage rate over $20 are W-2 Lead Worker, Economic Support Lead Worker, Fraud/Front End Coordinator, and Financial Employment Planner. The Counselors have the same fringe benefits as other employees in the Human Services Department unit.

7. The Counselors have a 40 hour work week with a daily schedule that varies to meet the needs of citizens. Other Human Services Department unit employees have a 40 hour work week with variable daily schedules.

8. The Counselors work in the same building as other Human Services Department unit employees.

9. The Counselors share common supervision with other Human Services Department unit employees.

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

CONCLUSIONS OF LAW

1. A petition filed by employee(s) seeking to decertify a current collective bargaining representative must be supported by a 30% showing of interest among the existing bargaining unit.

2. A collective bargaining unit consisting of all regular full-time and regular part-time Chemical Dependency Counselors employed by St. Croix County excluding supervisors, confidential, managerial and executive employees is not an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

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

ORDER

The petition for election is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of February, 2006.

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

St. Croix County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR ELECTION

We begin by considering the AFSCME argument that the petition should be dismissed for lack of a proper showing of interest, because the employees in question are not seeking union representation in a severed Counselors-only unit but rather simply seeking to decertify AFSCME as their collective bargaining representative. For the reasons discussed below, we agree that the instant petition was not supported by the appropriate showing of interest and should be dismissed on that basis. However, since the foregoing issue is of first impression and the appropriateness of the separate Counselors-only bargaining unit has been litigated, we have also considered and rejected the appropriateness of a Counselors-only unit. Hence, the Commission would not grant a petition for severance of the unit proposed here, even if it had been filed by a labor organization seeking to represent the petitioned-for unit.

As to the first issue, Sec. 111.70(4)(d)2.a., Stats., provides that our role when resolving disputes over the scope of a bargaining unit is to "determine the appropriate unit for **the purposes of collective bargaining** . . . ." **(**emphasis added). Where, as here, the goal of an election petition is to sever employees from an existing unit in order to decertify the incumbent union, the petition is not seeking a unit determination for the "purposes of collective bargaining" but rather seeks to terminate collective bargaining for the affected employees. While Sec. 111.70(2), Stats., gives employees the statutory right to end existing union representation, we conclude that the language of Sec. 111.70 (4)(d) 2.a., Stats., limits the context in which that right can be exercised to the unit in which the employees are currently represented.[1] Thus, where employees seek to decertify the incumbent union, they must do so in the context of the existing bargaining unit.[2]

However, the Commission has not previously ruled directly upon the foregoing issue and its prior case law could have been interpreted to permit the instant petition. As the Examiner advised AFSCME during the pre-hearing processing of this case, the Commission's ROCK COUNTY decision (DEC. NO. 26303 (WERC, 1/90) could have been read to indicate that a hearing and decision on the merits is appropriate in the instant situation. In ROCK COUNTY, as here, the named petitioner was an individual employee and it appears that the petition seeking to sever a portion of an existing bargaining unit was likely supported by 30% of the proposed unit rather than the entire existing unit. Upon consideration, the Commission

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[1] An exception to this general rule exists if the existing unit is not properly constituted because it includes employees who have not had their statutory opportunity to vote on inclusion. SEE Sec. 111.70(4)(d)2.a., Stats., which prohibits inclusion of craft or professional employees in the same unit as non-craft or non-professional employees unless a majority of the craft or professional employees so vote.

[2] Section 111.70(4)(d)2.c., Stats., provides that " A collective bargaining unit is subject to . . . modification as provided in this subchapter." Thus, where employees, through a labor organization that wishes to represent them, seek representation for the purposes of collective bargaining, a petition seeking to modify an existing unit may be appropriate if supported by a 30% showing of interest in the petitioned-for unit.

has concluded that ROCK COUNTY is not fully on point in the instant situation, because in ROCK COUNTY the Commission found as a fact that the individual petitioner represented a labor organization that had been formed to represent the petitioned-for unit.

Although AFSCME told the Examiner that AFSCME believed the instant petition was inappropriate as a matter of law, and although the Examiner informed AFSCME that it could challenge the petition through a properly-filed motion to dismiss, AFSCME did not file a motion to dismiss until a week before the scheduled hearing.[3] Consistent with the Commission's policy that election cases must be processed expeditiously, the Commission decided not to delay the scheduled hearing but instead to take AFSCME's motion to dismiss under advisement and decide it after the hearing. Since the parties have fully litigated the substantive issue of whether a separate unit of Counselors is appropriate, and since that issue, if not decided now, could arise again, we conclude it is appropriate to proceed to the decide this matter on its merits.

We turn then to whether the Counselors may appropriately form a separate bargaining unit. Section 111.70(4)(d)2.a., Stats., provides in pertinent part:

> The commission shall determine the appropriate bargaining unit for the purposes of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groups constitute a collective bargaining unit.

When deciding whether the unit sought is "appropriate" within the meaning of Sec. 111.70(4)(d)2.a., Stats., we measure the facts presented by the parties against the above-quoted statutory language. We use the following factors as interpretive guides to the statute:

1. Whether the employees in the unit sought share a "community of interest" distinct from that of other employees.

2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees.

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[3] AFSCME contends that it filed its motion on October 19, rather than earlier, because it did not receive the notice of hearing until October 14 and therefore did not realize that Examiner Davis would be the examiner until October 14. This issue was the subject of a prehearing conference conducted by the Commission Chair on October 20, 2005, which was followed by a conference summary that is set forth in full earlier in this decision. Essentially, the Commission disagreed that the identity of the examiner had any bearing on the issue of whether the instant petition should be dismissed and concluded that AFSCME had actual notice of the hearing date considerably earlier than October 14. Thus the Commission concluded that the hearing should go forward as scheduled with the motion to dismiss taken under advisement.

3. The similarity of wages, hours and working conditions of employees in the unit sought as compared to wages, hours and working conditions of other employees.

4. Whether the employees in the unit sought share separate or common supervision with all other employees.

5. Whether the employees in the unit sought have a common workplace with the employees in said desired unit or whether they share a workplace with other employees.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history.

ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS.2D 580 (1984).

We have used the phrase "community of interest" as it appears in Factor 1 as a means of assessing whether the employees participate in a shared purpose through their employment. We have also used the phrase "community of interest" as a means of determining whether employees share similar interests, usually – though not necessarily – limited to those interests reflected in Factors 2-5. This definitional duality is long standing and has received the approval of the Wisconsin Supreme Court. ARROWHEAD UNITED TEACHERS V. WERC, SUPRA.

Factor 6 reflects our statutory obligation under Sec. 111.70(4)(d)2.a., Stats., to "avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force."

Factor 7 – (bargaining history) involves an analysis of the way in which the workforce has bargained with the employer or, if the employees have been unrepresented, an analysis of the development and operation of the employee/employer relationship. MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

It is well established that, within the factual context of each case, not all criteria deserve the same weight and a single criterion or a combination of criteria listed above may be determinative. See, e.g., MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 20836-A and 21200 (WERC, 11/83) (common purpose); MARINETTE SCHOOL DISTRICT, SUPRA (similar interests); COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79) (fragmentation); LODI JOINT SCHOOL DISTRICT, DEC. NO. 16667 (WERC, 11/78) (bargaining history).

"In considering a petition for severance from an existing unit, especially one of long standing duration, factors 6 and 7 (fragmentation and bargaining history) weigh heavily against the petitioned-for unit and are nearly always dispositive." CITY OF WEST BEND, DEC. NO. 30830 (WERC, 3/04), at 6, citing earlier decisions. In light of this precedent, the small number of Counselors and the stable bargaining relationship of more than 10 years in the existing AFSCME unit, we conclude that the Counselors unit is not an "appropriate unit." Further, even if Factors 6 and 7 did not so definitively support our conclusion, we note that of the remaining factors, all but Factor 2 also provide strong support for our outcome.

As to Factors 1 and 3-5, the Counselors share a common purpose, wages, hours and working conditions, supervision and work place with their fellow Human Services Department unit employees.

As to Factor 2, the Counselors' certification and specialized counseling duties distinguish them somewhat from other Department unit employees as to their duties and skills. However, as AFSCME points out, such distinctions are inevitable in a large Human Services Department unit. Further, it is noteworthy that other unit positions require more formal education (2 year degree) than is required of the Counselors and thus to this extent the Counselors are not more "para-professional" than some other unit employees.

Given all of the foregoing, we have dismissed the petition for a Counselors-only bargaining unit. In doing so, we understand that the Counselors have expressed concerns about their ability as a minority group within the bargaining unit to influence the outcome of negotiations. However, as the Commission held in ROCK COUNTY, SUPRA, such concerns do not provide a persuasive basis for finding an existing unit to be inappropriate or a severed unit to be appropriate.

Dated at Madison, Wisconsin, this 7th day of February, 2006.

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

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