

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

JESUS M. MARTI

Involving Certain Employees of

CITY OF KENOSHA

Case 225

No. 68677

ME-4200

Decision No. 32300-B

Appearances:

Jesus M. Marti, 2405 16th Place, Kenosha, Wisconsin 53140, appearing on his own behalf.

Daniel G. Vliet, Davis & Kuelthau, Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Kenosha.

Barbara Zach Quindel, Hawks Quindel, Attorneys at Law, 700 West Michigan Avenue, Milwaukee, Wisconsin 53201, appearing on behalf of Amalgamated Transit Union, Local 998.

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

On February 23, 2009, Jesus Marti filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether part-time bus drivers employed by the City of Kenosha wish to continue to be represented by Amalgamated Transit Union, Local 998 for the purposes of collective bargaining.

On March 9, 2009, the Commission advised the parties that the petition was supported by at least 30% of the part-time bus drivers.

On March 9, 2009, Local 998 filed a motion to dismiss the petition alleging that the part-time bus drivers are included in a part-time and full-time bus driver bargaining unit and thus that conducting an election in only part of the bargaining unit would be inappropriate.

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On March 18, 2009, the City filed a position statement opposing the motion to dismiss.

Hearing on the motion was held in Kenosha, Wisconsin on July 22, 2009 before Commission Examiner Peter G. Davis. The City and Local 998 made oral argument at the conclusion of the hearing and Marti filed written argument by e-mail on July 28, 2009. A transcript of the hearing was received on July 31, 2009.

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

FINDINGS OF FACT

1. The City of Kenosha, herein the City, is a municipal employer that provides bus transportation services.
2. Amalgamated Transit Union, Local 998, herein the Union, is the collective bargaining representative of part-time and full-time bus drivers employed by the City.
3. Jesus Marti, herein Marti, was at the time he filed the election petition a part-time City bus driver represented for the purposes of collective bargaining by the Union.
4. On December 20, 2007, the City and Union asked the Commission to conduct an election among the City's part-time bus drivers to determine if they wished to be represented by the Union for the purposes of collective bargaining with the City. As part of their request, the City and the Union agreed that if the majority of the part-time drivers who vote choose to be represented by the Union, then all part-time drivers would be added to the existing full-time City drivers bargaining unit.

Pursuant to the December 20, 2007 request, the Commission conducted an election among the part-time drivers and a majority of the voting part-time drivers selected the Union as their collective bargaining representative. On February 20, 2008, the Commission issued a Certification of Representative which stated in pertinent part:

. . . pursuant to the stipulation of the parties, since a majority of the voting employees in the voting group voted for representation, the voting group will be added to the existing bargaining unit of full-time drivers; and that pursuant to the provisions of Sec. 111.70 of the Municipal Employment Relations Act, Amalgamated Transit Union, Local 998, is the exclusive collective bargaining representative of the employees in the combined unit for the purposes of collective bargaining

5. There is an existing January 1, 2008-December 31, 2009 collective bargaining agreement between the City and the Union which establishes the wages, hours and conditions of employment of the full-time bus drivers.

6. Following issuance of the Commission's February 20, 2008 Certification of Representative, the City and the Union have been bargaining over the part-time drivers' wages, hours and conditions of employment but have not reached an overall agreement. The most recent bargaining session between the parties was November 19, 2008. However, the parties have reached a number of tentative agreements including one which states:

The Union shall be the sole representative for collective bargaining of the City's operating employees classified as part-time Bus Operators but excluding supervisory, managerial and confidential employees.

During the bargaining, there has been no direct discussion as to whether the parties wished to alter their prior agreement reflected in the Commission's February 20, 2008 Certification that the part-time employees are included in the same bargaining unit as the full-time employees. The most recent City settlement package to the Union included a proposal that whatever agreement is ultimately reached by the parties as to the part-time employees' wages, hours and conditions of employment should be attached as an appendix to the existing 2008-2009 full-time employee contract. The Union's counter-proposal did not directly respond to that portion of the City's settlement package.

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

CONCLUSIONS OF LAW

1. By their conduct, the City and the Union have not created a separate part-time driver bargaining unit.

2. Because the City and the Union have not created a separate part-time driver bargaining unit, there currently exists a bargaining unit of full-time and part-time drivers employed by the City.

3. A petition seeking an election in a part-time driver bargaining unit will only be considered on its merits by the Wisconsin Employment Relations Commission if timely filed by a labor organization seeking to represent a part-time driver bargaining unit for the purposes of collective bargaining.

4. Marti does not represent a labor organization seeking to represent a part-time driver bargaining unit for the purposes of collective bargaining.

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 11th day of September, 2009.

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

CITY OF KENOSHA

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

As reflected in Finding of Fact 4, in February 2008, we certified that the Union was the collective bargaining representative of a single collective bargaining unit consisting of the City's part-time and full-time drivers. Marti seeks an election among only the part-time drivers for the purpose of ending the Union's representation of these employees and returning them to unrepresented status. The Union argues that such an election is inappropriate because there is no part-time driver bargaining unit. The City and Marti argue that the City and Union have by their conduct created a separate part-time driver unit in which an election is now timely and appropriate.

We understand that in the eyes of Marti and the part-time drivers, the ongoing separate bargaining over the part-time drivers' wages, hours and conditions of employment can make it seem as if the Union is not willing to or interested in representing the part-time drivers as part of the full-time and part-time driver bargaining unit created in February 2008. However, as the Union points out, such bargaining is required to establish the part-time drivers' wages, hours and conditions of employment during the period for which there already is an existing full-time driver contract.

Nonetheless, if after the February 20, 2008 Commission Certification of a combined full-time and part-time driver unit, the City and the Union have agreed to create a part-time driver unit, then Marti's election petition is appropriate and the motion to dismiss should be denied.

The City argues that during the bargaining over the part-time drivers' wages, hours and conditions of employment, the parties did agree to create a separate part-time employee bargaining unit and points to the parties' tentative agreement which states:

The Union shall be the sole representative for collective bargaining of the City's operating employees classified as part-time Bus Operators but excluding supervisory, managerial and confidential employees.

We agree that this tentative agreement creates an inference that the Union and City have agreed to create a separate part-time driver bargaining unit. However, the evidence also establishes that there has been no direct discussion at the bargaining table over creation of a separate part-time bargaining unit. In such circumstances, and particularly in the context of a recent election by which these same parties agreed to add the part-time drivers into the full-time driver unit, the tentative agreement noted above is simply not sufficient to persuade us that the parties have now agreed to the creation of a separate part-time driver bargaining unit.

In reaching this conclusion, we have considered Marti's argument that the part-time drivers cannot have been added to the full-time driver bargaining unit because no agreement has been reached on the part-time drivers' wages, hours and conditions of employment. However, as reflected in Finding of Fact 4, by agreement between the City and the Union, the part-time drivers were added to the full-time driver bargaining unit in February 2008. Therefore, the lack of an agreement does not mean that part-time drivers have never been included in the full-time driver bargaining unit.

We have also considered Marti's argument that the separate status of part-time drivers is evidenced by the fact that the Union has not allowed the part-time employees to become Union members or otherwise participate in internal Union business. We note that the Union asserts its actions have been consistent with its constitution and by-laws and that the evidence establishes that a part-time driver was part of the Union bargaining team in the ongoing negotiations. We do not have the Union's constitution and by-laws in the record before us and thus cannot make any judgments as to whether they are being followed or not. However, assuming for the sake of argument that the Union is not complying with its constitution and by-laws as to part-time drivers, that at most would create another inference that the Union and City have agreed to create a part-time driver bargaining unit. Even if such an inference were combined with the inference created by the tentative agreement discussed earlier in this decision, there still would not be enough evidence to persuade us that the Union and City have agreed to create a separate part-time driver bargaining unit less than a year after a combined part-time and full-time driver bargaining unit was created.

Where, as here, a petition seeks an election in a portion of an existing bargaining unit (in this case among part-time drivers who are currently included in the same bargaining unit as full-time drivers), we have held that a hearing on the appropriateness of the proposed smaller bargaining unit will only be held if the petition is filed by a union that seeks to represent the smaller group of employees. ST. CROIX COUNTY, DEC. NO. 31608 (WERC, 2/06). Where, as here, Marti does not represent such a union but rather seeks to decertify the union as the collective bargaining representative, we have held that he can only successfully do so through an election among all employees in the existing bargaining unit that the current union represents. ST. CROIX COUNTY, *supra*. Because Marti seeks an election in only a portion of the

existing full-time and regular part-time bargaining unit and because he does not represent a union seeking to replace the Union as the collective bargaining representative of the part-time drivers, we have granted the Union's motion to dismiss his petition for election.

Dated at Madison, Wisconsin, this 11th day of September, 2009.

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