

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**TOWN OF SHEBOYGAN, TOWN OF SHEBOYGAN SANITARY
DISTRICT NO. 2 AND TOWN OF SHEBOYGAN SANITARY DISTRICT NO. 3**

Involving Certain Employees of

**TOWN OF SHEBOYGAN, TOWN OF SHEBOYGAN SANITARY
DISTRICT NO. 2 AND TOWN OF SHEBOYGAN SANITARY DISTRICT NO. 3**

Case 6
No. 69072
ME-4214

Decision No. 32876

Appearances:

Sam Gieryn, Staff Representative, AFSCME Council 40, 187 Maple Drive, Plymouth, Wisconsin 53703, appearing on behalf of Town of Sheboygan Public Works Employees, Local 1749, AFSCME, AFL-CIO.

Michael J. Bauer, Hopp Neumann Humke, Attorneys at Law, 2124 Kohler Memorial Drive, Suite 110, Sheboygan, Wisconsin 53081, appearing on behalf of Town of Sheboygan, Town of Sheboygan Sanitary District No. 2 and Town of Sheboygan Sanitary District No. 3.

ORDER

On July 20, 2009, the Town of Sheboygan, Town of Sheboygan Sanitary District No. 2 and Town of Sheboygan Sanitary District No. 3, herein the Employer, filed a petition with the Wisconsin Employment Relations Commission seeking an election among certain of its employees for the purposes of determining whether said employees wish to continue to be represented for the purposes of collective bargaining by Town of Sheboygan Public Works Employees, Local 1749, AFSCME, AFL-CIO.

On July 24, 2009, Local 1749 filed a motion with the Commission asking that the election petition be held in abeyance pending resolution of a prohibited practice complaint filed

No. 32876

by Local 1749 on July 3, 2008 alleging that the Employer had not bargained in good faith as to the wages, hours and conditions of employment of employees who had been newly added to the Local 1749 bargaining unit.

The parties thereafter filed written argument in support of and in opposition to the Local 1749 motion-the last of which was received on September 15, 2009.

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

ORDER

The petition for election is held in abeyance pending disposition of the July 3, 2009 prohibited practice complaint.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th 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

TOWN OF SHEBOYGAN

MEMORANDUM ACCOMPANYING ORDER

Both parties correctly recite the applicable law which was well stated in MENOMINEE COUNTY, DEC. NO. 26236 (WERC, 11/89) as follows:

The Commission has long adhered to the policy of refusing to proceed with the processing of an election petition during the pendency of a related unfair labor practice/prohibited practice complaint absent an express waiver by the complainant of the effects of the alleged unlawful conduct on the outcome of the election. 2/ Where it has been discussed in Commission cases, the purposes ascribed to the policy have been twofold: (1) insuring that the election environment is free of any coercive effects of alleged unfair labor practices before employee preferences are tested through the election process 3/; and (2) avoiding the known risk that a second election and perhaps a second election hearing could become necessary depending on the outcome in the related complaint proceeding and in the first election. 4/

2/ Compare Coronet Printing Co., 6799 (7/64) and Cedar Lakes Home for the Aged, supra, with Morris Resnick, Inc., 343 (1/42); Evangelical Deaconess Society, 472 (2/43); S and R Cheese Co., 1338 (6/47); Sheboygan Dairyman's Co-op Assn., 1482 (11/47) and 1482-A (12/47); St. Francis Hospital, 4737 (4/58); and Kress Packing Co., Inc., 5581 (8/60).

3/ See, e.g., Evangelical Deaconess Society, supra, at pp 3-4. ("Until such unfair labor practice or practices and the effect have been completely eradicated, the freedom of choice essential to the employees' uncoerced expression of their desire for a continuance of or a change in bargaining agent, is not possible.")

4/ Thus, in Cedar Lake Home, supra, it was stated at p. 4, "Part of the justification for subjecting the Petitioner to lengthy delay . . . is to avoid the necessity and expense of conducting multiple hearings involving the same issues and conducting more than one election." The Association's emphasis on statements in that decision, to the effect that the complaint filing alone ought not delay a related election, overlooks the fact that the case was decided in a context wherein the union was willing to waive the effect of the alleged unfair labor practice on the election outcome and it was the employer who was objecting that employee free choice would nonetheless remain intolerably affected until the complaint allegations were fully heard and decided. The decision, however, held that given the Union's waiver, the filing of the complaint, per se, would not warrant delaying the election.

In our view, that policy remains a viable means of pursuing those objectives and one that is consistent with the underlying purposes of MERA.

Moreover, that policy appears entirely applicable to the circumstances at issue herein. It constitutes an appropriate basis for denying both the request to unconditionally proceed with the election and the alternative request to unconditionally proceed to fully hear the representation issues before holding that matter in abeyance. For, the instant complaint involves an allegedly unlawful threat to subcontract work being performed by employees within the bargaining unit as to which the election was being sought. (Footnote omitted.) Absent a waiver of the effects of the complaint on the election, the resolution of the merits of the complaint could obviously affect the viability of the results of any election conducted before the complaint is heard and any violations cited therein remedied. Moreover, it is by no means certain that our granting the Association's alternative request for unconditional conduct of the representation hearing would produce a record that deals with all or only issues that would need to be decided once the complaint proceeding was finally resolved.

Here, as in PLATTEVILLE, we are persuaded that if the allegations of unlawful conduct set forth in LAW's complaint turn out to be meritorious, the viability of the results of an election conducted during the pendency of the complaint could be affected. Therefore, we granted LAW's motion. (footnote text omitted).

The Employer argues that the conduct alleged in the complaint cannot taint the election results because there is no merit to the complaint allegations. However, as reflected in the MENOMINEE decision, the test to be applied is whether the viability of the election results could be affected if the complaint allegations prove to be meritorious. Thus, while the Employer may ultimately prove to be correct as the merits of the complaint, the result will not be known and cannot be ascertained until after the facts are established by an evidentiary hearing or stipulation and the applicable law is argued and applied. Because we are satisfied that the bad faith bargaining allegations, if proven, could affect the viability of the election results, we have

granted the Local 1749 motion to hold the election petition in abeyance. However, given the importance placed on the prompt processing of election petitions, we will expedite the processing of the complaint so as not to delay the election any more than is appropriate.

Dated at Madison, Wisconsin, this 25th 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