STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

ELMBROOK EDUCATION ASSOCIATION

Involving Certain Employees of

ELMBROOK SCHOOL DISTRICT

Case 50
No. 71047
ME-4380

Decision No. 33414-A

CERTIFICATION OF RESULTS OF ELECTION

Pursuant to a Direction of Election previously issued by it in the above entitled matter, the Wisconsin Employment Relations Commission between November 18 and December 8, 2011, conducted an election pursuant to Sec. 111.70(4)(d) 3.b. of the Municipal Employment Relations Act, to determine whether at least 51 percent of the employees of the Elmbrook School District represented by the Elmbrook Education Association for the purposes of collective bargaining want to continue to be so represented.

The result of the election reported to the parties by the Commission on December 15, 2011 was as follows:

1.	Number of eligible voters	156
2.	Total votes cast	87
3.	Votes cast for the above-named Labor Organization	79
4.	Votes cast for no representation	8

On December 15, 2011, the Association filed an objection to the election results asserting that an ineligible employee had voted. The District subsequently agreed and thus the number of eligible voters in the election was reduced to 155 employees and total votes cast

to 86 votes. Whether the ineligible voter voted "Yes" or "No" is not known. For the purposes of this Certification, the Commission will assume the ineligible voter voted "No" and thus the election results become as follows:

1.	Number of eligible voters	155
2.	Total votes cast	86
3.	Votes cast for the above-named Labor Organization	79
4.	Votes cast for no representation	7

The parties thereafter filed written argument as to the election result, the last of which was received January 26, 2012. Having considered the matter, a Commission majority concludes that the Association did not receive the votes of "at least 51 percent" of the eligible voters.

NOW, THEREFORE, by virtue of and pursuant to the power vested in the Wisconsin Employment Relations Commission by Sec. 111.70(4)(d)3.b. of the Municipal Employment Relations Act;

IT IS HEREBY CERTIFIED that at least 51 percent of the employees in the bargaining unit represented by the Elmbrook Education Association did not vote to have the Association continue as their collective bargaining representative and thus that pursuant to Sec. 111.70(4)(d) 3.b., Stats. and ERC 71.11, the Association is no longer the collective bargaining representative of said employees as of the date of this Certification and said employees shall not be included in a substantially similar collective bargaining unit for at least one year following the date of this Certification.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of March, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

I dissent.

Judith Neumann /s/
Judith Neumann, Commissioner

Elmbrook School District

MEMORANDUM ACCOMPANYING CERTIFICATION OF RESULTS OF ELECTION

As reflected in the preface to our Certification, the parties have agreed that an ineligible voter voted in the election and thus that the correct number of eligible voters is 155.[1] As also reflected in the preface, we do not know whether the ineligible voter voted "Yes" or "No" but we will assume a "No" vote for the purposes of this Certification and thus that the Association received 79 "Yes" votes. Thus the issue before us is narrowed to whether 79 is "at least 51 percent" of 155 - the Sec. 111.70(4)(d)3.b., Stats, standard the Association must meet if it is to continue as the collective bargaining representative. Because 79 is 50.967% of 155, we conclude the Association did not receive the "Yes" votes of "at least 51 percent" of the eligible voters.

Understandably, neither side to this dispute has provided any direct authority from this or any other jurisdiction as to the meaning to be given the statutory language of "at least 51 percent". We are left with little other than applying the plain language of the statute to the facts. We believe that the requirement of "at least 51 percent" creates a bare minimum which cannot be met by "rounding" up the vote total to meet the percentage requirement.

Wisconsin does have a 51% minimum requirement contained in the statutory procedure for creating inland lake protection and rehabilitation districts under Sec. 33.21, Stats. In order to establish such a district, 51% of the landowners within the proposed district must sign a petition to that effect. Sec. 33.25(1)(a), Stats. In Nielsen vs. Waukesha County Board of Supervisors, 178 Wis.2d 498, 504 N.W.2d 621 (Ct. App. 1993), the Court addressed an appeal over a challenge to the validity of the signatures. Relevant to the issue here, the Court of Appeals calculated the numerical threshold by multiplying the number of landowners by 51% and "rounding" off to the next highest number. *Id.* at 510. If we apply that arithmetic calculation here (155 x 51%), it yields 79.05 which, if rounded off to the next highest number, would calculate as 80 - one more vote than the 79 votes we are presuming the Association received here. We do not view Nielsen as controlling authority but the result reached therein is consistent with the result we reach here.

The Association argues that the statutory phrase "at least" suggests that that the closest percentage to 51% should suffice and thus that 50.967% meets the 51% standard. We disagree. We view the phrase "at least" as conveying a statutory intent that 51% is the bare minimum that must be met and thus that "rounding" is not statutorily contemplated or appropriate to meet the 51% standard.

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[1] The ineligible vote was cast due to a Commission error.

Given the foregoing, we conclude that the Elmbrook Education Association did not receive "at least 51 percent" of the votes of the eligible employees and, therefore that the Association's status as the collective bargaining representative ends as of the date of this Certification.[2]

Dated at Madison, Wisconsin, this 21st day of March, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

[2] Our dissenting colleague disregards the fact that this is not a typical electoral contest. The labor organization is required to obtain the support of "at least 51%" of the members of a group for which it seeks to be the exclusive representative. The record does not reflect any active opposition by the employer to the union's efforts. The percentage comparison of "yes" votes to "no" votes under this standard is irrelevant. Margins of victory (or loss) can be narrow or broad but they are never "irrational or pointlessly harsh". Our task is to certify those labor organizations who meet the standard not to editorialize over the outcome.

Elmbrook School District

DISSENTING OPINION OF COMMISSIONER NEUMANN

In this case, we are interpreting for the first time the new requirement that a union must be selected by 51% of the entire bargaining unit, rather than the previous (and much more common) electoral requirement of a majority of those voting. The majority has concluded that "'at least 51 percent' creates a bare minimum which cannot be met by 'rounding' up the vote total to meet the percentage requirement."

I agree that the statute creates a bare minimum of 51%. However, the question here is what "51%" should be interpreted to mean. The majority concludes, without much discussion, that it cannot be met through the normal arithmetic means of rounding up or down to the nearest whole number. I dissent because I see no contextual reason to disregard normal arithmetic here and because equitable considerations strongly favor an interpretation that utilizes rounding.

Contrary to the majority's apparent assumption, the phrase "at least" is not inherently at odds with rounding. That assertion is simply circular logic. In my view, 50.967% is arithmetically and therefore functionally equivalent to 51%. In the majority's opinion, it is not. Each of our views could be consistent with the language. It follows, therefore, that we must interpret the statute on a basis other than its language.

I would suggest that, absent a clear contrary indication, arithmetic supplies an objective way to resolve the question. The Nielsen case cited by the majority completely supports that principle: faced with a similar issue, the court relied upon arithmetic rounding. Contrary to the majority's misleading suggestion, the court in that case did not in any way suggest that rounding should operate only in a direction that would make it most difficult to reach the requisite 51%. In that case it so happened that the closest rounding was up (51% of 339 was 172.89). It is clear in context that the court would have rounded down, had that been the closest whole number. Thus, whether or not Nielsen is binding precedent, it certainly supports the common sense of using arithmetic to interpret a whole number percentage in a statute.

Just as important and perhaps more compelling, interpreting the statute to reach a conclusion that the Association should lose its right to bargain because it needed three-hundredths (or five-hundredths if you apply the 51% to the total electorate) more of a vote strikes me as irrational and pointlessly harsh. Here, 79 of the 87 people who cared enough to vote (91% of the voters) chose Association representation – an overwhelming expression of voter support for exactly the opposite of the result the majority would impose. I recognize that

the Legislature saw fit to impose a difficult electoral hurdle. What I do not recognize is any equitable reason, or any contextual reason, for us to make it even more exacting, and thereby deprive the vast majority of voting employees of their right to collective representation when dealing with their employer over wages.[3]

Dated at Madison, Wisconsin, this 21st day of March, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

[3] If the majority is suggesting in its footnote responding to my dissent that these elections are unique because they are somehow not a contest between two sides, I would respond that such point, even if true, is irrelevant. The situation here calls for a choice which is registered by tallying a vote. It is therefore an ordinary election. In addition, there are winners and losers. It would be an imaginary world indeed where an employer, regardless of how vigorously it asserts its opposition, is not the perceived winner if the union loses, as are those bargaining unit members who are opposed to union representation. As to the propriety of my "editorializing," the subject of my adjectives "harsh" and "irrational" is not the margin of victory or loss, but rather the majority's interpretation of the law, in which they choose to require the union here to receive an additional three-hundreds of a percentage point even though it won 91% of the votes cast. It is, of course, the very purpose of a dissent to "editorialize" about the wisdom or equity of the majority's interpretation of the law.