

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

BRIAN KLOS

Involving Certain Employees of

OZAUKEE COUNTY

Case 94
No. 71723
ME-4680

Decision No. 34031

Appearances:

Brian Klos, Equipment Operator, Ozaukee County Highway Department, P.O. Box 994, Port Washington, Wisconsin 53074-0994, appearing on his own behalf.

Richard Saks, Hawks Quindel, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Office and Professional Employees International Union, Local 35.

Jason Dzwinel, Director of Human Resources, Ozaukee County, 121 West Main Street, Port Washington, Wisconsin 53074, appearing on behalf of Ozaukee County.

**ORDER DENYING MOTION TO DISMISS/STAY
AND DIRECTING ELECTION**

On August 22, 2012, Brian Klos filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether certain employees of the Ozaukee County Highway Department wished to continue to be represented by the Office and Professional Employees International Union, Local 35, for the purposes of collective bargaining with the County.

On August 30, 2012, Local 35 filed a motion to dismiss the petition citing ongoing litigation as to the validity of annual certification elections. On September 17, 2012, Local 35 filed a brief in support of the motion arguing the petition should be dismissed or held in abeyance in light of the unsettled state of the law.

Thereafter, the parties discussed the impact any 2012 collective bargaining agreement might have on the matter. On November 19, 2012, the County advised the Commission that agreement on a 2012 collective bargaining agreement had been reached with OPEIU. On December 5, 2012, Klos advised the Commission that he wanted to pursue his petition.

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

ORDER

1. The motion to dismiss or stay the petition for election is denied.

2. An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Order in a collective bargaining unit consisting of all employees of the Ozaukee County Highway Department in the position classifications of equipment operator, foreman, mechanic and patrolman, excluding supervisory, managerial, confidential, and executive employees who were employed on January 9, 2013, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether such employees desire to continue to be represented by Office and Professional Employees International Union, Local 35 for the purposes of collective bargaining with Ozaukee County.

Given under our hands and seal at the City of Madison, Wisconsin, this 9th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

Commissioner Judith Neumann did not participate.

OZAUKEE COUNTY (Brian Klos)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO
DISMISS/STAY AND DIRECTING ELECTION

Pursuant to the terms of Sec. 111.70(4)(d) 3.b. of the Municipal Employment Relations Act and ERC 73, Local 35 filed a Petition for Annual Certification Election with the Wisconsin Employment Relations Commission on January 30, 2012 as to the Ozaukee County Highway bargaining unit that it represented for the purposes of collective bargaining with the County. Voting in said election concluded on March 28, 2012 and that same day the Commission posted the unofficial election results in the Local 35 election (and more than 100 other annual certification elections that ended that same day) and began the process of sending out (alphabetically by employer name) official election tally results to all affected parties. Receipt of the tally sheet triggered an eight day period during which objections to the conduct of the election could be filed. If no objections are filed (or if any filed objections are determined to be without merit), the Commission would then certify the election results and announce whether the petitioning union did or did not continue as the collective bargaining representative.

On March 30, 2012, United States District Court Judge William Conley issued a Decision and Order concluding among other matters that the requirement of annual certification elections contained in Sec. 111.83(3)(b) of the State Employment Labor Relations Act (which paralleled such elections held pursuant to Sec. 111.70 (4)(d) 3.b., Stats.) was unconstitutional and enjoining the Commission from taking any further action as to such elections.

Upon its March 30, 2012 receipt of Judge Conley's Decision and Order, the Commission suspended issuance of official election tally results as to the elections that concluded March 28, 2012. At the time of suspension, a tally sheet had not been sent to the parties in Ozaukee County and the Commission has not taken any additional action.

Judge Conley's decision is currently on appeal before the Seventh Circuit Court of Appeals.

Because we have not certified the results and consequences of the March 28, 2012 election results, the status of Local 35 is today the same as it was during the March 2012 election process. Local 35 is the collective bargaining representative of the Ozaukee County Highway unit unless and until we certify an election result that establishes otherwise. The recently completed bargaining between the County and Local 35 as to a 2012 collective bargaining agreement is consistent with our conclusion in this regard.

In the context of the foregoing, Local 35 asserts that the election petition should be dismissed or held in abeyance until litigation in the courts has been completed regarding the constitutionality of annual certification elections. While Local 35 is correct that there is

uncertainty as how and when that litigation will be concluded, at present there is no uncertainty as to Local 35's status. It is also important to note that if we were to grant Local 35's request, the uncertainty as to when litigation will end could produce substantial delay before an election could be conducted-delay that runs contrary to the exercise of the Secs. 111.70(2) and 111.70(4)(d) 5 statutory rights of employees to determine if they wish to be represented for the purposes of collective bargaining.

Local 35 also asserts that continued processing of this election would run counter to the Commission's general policy of not entertaining an election petition until at least one year has passed since the most recent election had been conducted (if the union lost the election) or the election results were certified (if the union won the election).¹ While that continues to be our general view in the context of consecutive "conventional" non-annual certification election petitions, we are satisfied that this general policy is not applicable in the unique circumstances which Local 35 cites - we currently do not know if the election conducted in March 2012 was valid nor do we have "certified" results if the election is held to be valid.

Thus, we have denied Local 35's request that the election petition be dismissed or held in abeyance and have directed the election requested by Klos.

Dated at Madison, Wisconsin, this 9th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

Commissioner Judith Neumann did not participate.

¹ In Village of Deerfield, Dec. No. 26168 (WERC, 9/89), well prior to the advent of annual certification elections, the Commission held that: (1) where employees select a collective bargaining representative, an election petition is normally untimely if filed within one year of the certification of the election results; and (2) where employees do not select a collective bargaining representative, an election petition is normally untimely if filed within one year of the date the election is conducted. We note that this policy allows for exceptions to its "normal" application and that given the passage of time since this petition was filed, almost one year will have passed between the conduct of this election and that conducted in March 2012.