

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**DODGE COUNTY AFSCME REPRESENTED EMPLOYEES,
LOCALS 1323, 1323-A, 1323-E, 1323-G, 1576, COUNCIL 40,
AFSCME, AFL-CIO, Complainants.**

vs.

DODGE COUNTY, Respondent.

Case 234
No. 72024
MP-4757

Decision No. 34177

Appearances:

Nancy L. Pirkey, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of Respondent.

David Dorn, Staff Representative, AFSCME Council 40, 336 Doty Street, Fond du Lac, Wisconsin 54935, appearing on behalf of Complainants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT**

On March 18, 2013, Dodge County AFSCME Represented Employees, Locals 1323, 1323-A, 1323-E, 1323-G, 1576, Council 40, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission alleging that Dodge County had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 4 and 1, Stats. by refusing to bargain a successor collective bargaining agreement and unilaterally implementing a new employee compensation structure. On April 12, 2013, the County filed a motion to dismiss and AFSCME responded to the motion on May 3, 2013. The parties stipulated to facts relevant to the motion on May 22, 2013.

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

No. 34177

FINDINGS OF FACT

1. Dodge County, herein the County, is a municipal employer.
2. Dodge County AFSCME Represented Employees, Locals 1323, 1323-A, 1323-E, 1323-G, 1576, Council 40, AFSCME, AFL-CIO, herein AFSCME, are labor organizations.
3. Prior to June 29, 2011, AFSCME and the County reached agreement on contracts expiring December 31, 2011 for various bargaining units of County employees represented by AFSCME.
4. In December 2011, AFSCME and the County reached agreement on contracts expiring December 31, 2012 for various bargaining units of County employees represented by AFSCME. Each of those contracts contained a clause stating that the County recognized AFSCME as the exclusive bargaining representative with respect to wages.
5. On or before January 30, 2012, AFSCME did not file a petition for an annual certification election as to any of the County employee bargaining units.
6. After January 30, 2012, the County refused to bargain with AFSCME as to collective bargaining agreements for calendar year 2013.
7. The 2012 contracts expired December 31, 2012.
8. On or about January 1, 2013, the County implemented a new compensation plan that modified the wages of County employees.

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

CONCLUSIONS OF LAW

1. Pursuant to Sec. 111.70 (4)(d) 3. b and ERC 73.03(7)(b), when AFSCME did not file a petition for an annual certification election on or before January 30, 2012, AFSCME thereby lost its status as the collective bargaining representative for the purpose of bargaining a calendar year 2013 collective bargaining agreement.
2. As of January 30, 2012, the County had no obligation to bargain with AFSCME over the base wages to be paid to County employees upon expiration of the 2012 collective bargaining agreement.
3. As of January 1, 2013, AFSCME was not the collective bargaining representative of any County employees for any purpose.
4. The County did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. by refusing to bargain with AFSCME over a successor to the 2012 collective bargaining agreement or by unilaterally implementing a new compensation plan on January 1, 2013.

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

ORDER

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

DODGE COUNTY

**MEMORADUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT**

The County has moved to dismiss the complaint. ERC 12.04(2)(f) states:

(f) *To dismiss.* A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

When reviewed in a manner consistent with ERC 12.04(2)(f), the complaint asserts the County violated its duty to bargain with AFSCME by: (1) refusing to bargain over a successor to the 2012 agreement; and (2) unilaterally altering the wages of employees after the 2012 agreement expired. Consistent with ERC 12.04(2)(f), when ruling on the motion we assume the facts alleged in the complaint are true- as supplemented by the parties' subsequent fact stipulation.

Section 111.70 (4)(d) 3.b., Stats. provides in pertinent part:

b. Annually, the commission shall conduct an election to certify the representative of the collective bargaining unit that contains a general municipal employee. The election shall occur no later than December 1 for a collective bargaining unit containing school district employees and no later than May 1 for a collective bargaining unit containing general municipal employees who are not school district employees. The commission shall certify any representative that receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit. If no representative receives at least 51 percent of the votes of all of the general employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented.

To administer this statutory provision, the Commission promulgated administrative rules that were in effect at all times relevant to this dispute.¹ ERC 73 of those rules contained the following pertinent provisions:

ERC 73.01 Policy. This chapter implements the portion of s. 111.70(4)(d) 3.b.,

¹ The Commission's emergency administrative rules took effect September 15, 2011. The Commission suspended further rule-making on March 30, 2012 in response to a federal court order and the emergency rules expired April 13, 2012 pursuant to Sec. 227.24, Stats.

Stats., requiring the commission to conduct an initial annual election, no later than May 1, 2012, to determine whether collective bargaining representation shall continue for represented **municipal sector general nonschool district employees** who, as of January 30, 2012 are not subject to a collective bargaining agreement, **or who are subject to a collective bargaining agreement entered into on or after June 29, 2011.** The existing exclusive representative of such employees that wishes to continue said representation, or any other labor organization interested in representing such employees must file a petition on or before January 30, 2012 requesting the commission to conduct a secret ballot election to determine whether at least 51% of the bargaining unit employees eligible to vote favor collective bargaining representation by the petitioner or any other petitioning labor organization. **If no timely petition is filed, the result is the same as if only the existing representative filed a timely petition and the election resulted in decertification of the existing representative. (emphasis added).**

. . .

ERC 73.03 Petition for election.

(7) TIME FOR FILING, CONSEQUENCES OF FAILURE TO TIMELY FILE, NOTICE

(a) *Time for filing.* To be timely, a petition must be filed on or before January 30, 2012.

(b) *Consequences of failure to timely file.* If no collective bargaining agreement is in effect, the bargaining representative shall no longer be entitled to exclusive status for the purposes of collective bargaining as of January 30, 2012. **If a collective bargaining agreement is in effect, the bargaining representative shall no longer be entitled to exclusive representative status for purposes of collective bargaining as of the expiration of the agreement. (emphasis added).**

The County contends that the January 30, 2012 deadline for filing was applicable to the AFSCME units because the 2012 agreements were entered into after June 29, 2011. Because AFSCME did not file any petitions for annual certification elections, the County asserts AFSCME thereby lost its status as the collective bargaining representative. AFSCME disagrees and alleges that it was and is still the collective bargaining representative by virtue of the contractual recognition clause language contained in the 2012 agreements. AFSCME contends that by agreeing to the recognition clause, the County has voluntarily recognized AFSCME's ongoing status as the collective bargaining representative.

Reviewing the language of Sec. 111.70(4)(d)3.b., Stats., we conclude that seeking and winning an annual certification election is the exclusive means by which an existing collective bargaining representative can continue to have that status. There are no statutory exceptions to or exclusions from the annual certification requirement. The provisions of ERC 73 are consistent with our conclusion as to the exclusivity of the statutory process. ERC 73 did not contain any exceptions to or exclusions from the annual certification requirement and ERC 73.01 specifically stated “The existing exclusive representative of such employees that wishes to continue said representation . . . must file a petition on or before January 30, 2012 . . .” AFSCME is correct that initial union representation of a bargaining unit can occur if the municipal employer is willing to voluntarily recognize the union as the collective bargaining representative. However, once a union becomes the collective bargaining representative, it can only retain that status by timely seeking and winning an annual certification election. Thus, assuming for the sake of argument that the contractual recognition clauses in the 2012 agreements reflect a County intent to voluntarily recognize AFSCME’s status as a collective bargaining representative, the exclusivity of the statutory annual certification election process trumps any such intent.

Because it is undisputed that AFSCME did not file the required petitions for annual certification, ERC 73.03 (7)(b) and Sec. 111.70(4)(d) 3.b., Stats. make it clear that AFSCME was no longer the collective bargaining representative upon the December 31, 2012 expiration of the 2012 agreement. Therefore, we conclude it is also clear that the County had no duty to bargain with AFSCME as of January 1, 2013 and thus no obligation to maintain the wages reflected in the expired 2012 agreement. Thus, the County did not violate Secs. 111.70(3)(a) 4 and 1, Stats. when it modified those wages by its January 1, 2013 implementation of a compensation plan.

As to the complaint allegation regarding the County’s pre-January 1, 2013 refusal to bargain successor agreements, ERC 73.03(7)(b) states “If a collective bargaining agreement is in effect, the bargaining representative shall no longer be entitled to exclusive representative status for purposes of collective bargaining as of the expiration of the agreement.” Similar language is found in Sec. 111.70(4)(d)3.b., Stats. which provides “If no representative receives at least 51 percent of the votes of all of the general employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented.” The above-quoted language conveys a legislative intent that where a collective bargaining agreement has been reached prior to the date the incumbent union fails to file an annual certification election petition or loses an annual certification election, the collective bargaining agreement remains in force as does the union’s ability to enforce its terms. The question posed by this litigation is whether AFSCME’s continuing status as a collective bargaining representative for contract enforcement purposes also encompasses a right to bargain a successor 2013 agreement. We conclude it does not.

By operation of Sec. 111.70(4)(d) 3.b., Stats., and ERC 73, as of 4:31 pm on January 30, 2012, the end date of AFSCME’s status was established to be the December 31,

2012 expiration of the then existing contract. Section 111.70(4)(d) 3.b., Stats. specifies that the employees' status after December 31, 2012 is "nonrepresented" and that the "nonrepresented" status must last at least "12 months." Thus, as of 4:31 pm on January 30, 2012, the County employees in question were going to be "nonrepresented" for at least calendar year 2013. In such circumstances, we think it clear that the County had no duty to bargain a 2013 contract. In our professional experience, "nonrepresented" employee status in the labor relations context is synonymous with not being eligible to be covered by a bargaining agreement. If the employees are ineligible for bargaining agreement coverage, then there can be no duty to bargain such an agreement. Therefore, we conclude that the County did not commit a prohibited practice within the meaning of Secs. 111.70(3)(a) 4 and 1, Stats. by its post-January 30, 2012 refusal to bargain a 2013 agreement.

Given all of the foregoing, we have dismissed the complaint.

Dated at Madison, Wisconsin, this 26th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner