

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN ASSOCIATION FOR CORRECTIONAL LAW ENFORCEMENT

Involving Certain Employees of

STATE OF WISCONSIN

Case 873
No. 72580
SE-122

DECISION NO. 34481-A

Appearances:

Sally A. Stix and Timothy M. Scheffler, Stix Law Office, 700 Rayovac Drive, Suite 117, Madison, appearing on behalf of the Wisconsin Association for Correctional Law Enforcement.

Danielle L. Carne, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of the State of Wisconsin.

CERTIFICATION OF RESULTS OF ELECTION

On August 30, 2013, the Wisconsin Association for Correctional Law Enforcement (WACLE) filed a Petition for Annual Certification Election with the Wisconsin Employment Relations Commission pursuant to § 111.83(3), Stats. Pursuant to that petition, the Commission conducted an election from noon, November 1, 2013, thru noon, November 21, 2013, to determine whether at least 51 percent of the State of Wisconsin's "Security and public safety" employees wanted WACLE to be their collective bargaining representative.

On November 21, 2013, after voting had ended, the Commission provided WACLE and the State with election results that, of the 5,412 eligible voters, WACLE received the votes of 813 employees. The election results further indicated that there were an additional 2,323 voters whose eligibility was in dispute and that 103 of those voters had cast ballots that remained sealed due to their contested status.

On November 27, 2013, WACLE filed objections to the conduct of the election and amended those objections on December 5, 2013. The parties thereafter filed written argument. Pursuant to requests by the Commission, the State provided the Commission and WACLE with supplemental information as to voter eligibility, and WACLE and the State provided affidavits. The record was closed July 11, 2014.

Having considered the matter, the Commission concludes that the objections filed by WACLE do not affect the outcome of the election.

NOW, THEREFORE, by virtue of and pursuant to the power vested in the Wisconsin Employment Relations Commission by § 111.83(3) of the State Employment Labor Relations Act;

IT IS HEREBY CERTIFIED that at least 51 percent of the employees in the Security and public safety bargaining unit did not vote to be represented by the Wisconsin Association for Correctional Law Enforcement for the purposes of collective bargaining with the State of Wisconsin.

IT IS FURTHER CERTIFIED that the Wisconsin Association for Correctional Law Enforcement is no longer the collective bargaining representative of State employees in the security and public safety bargaining unit as of the date of this Certification unless there is a collective bargaining agreement currently in effect as to said employees. If there is such an agreement, then the Wisconsin Association for Correctional Law Enforcement loses its representative status as of the date said agreement expires.

Dated at Madison, Wisconsin, this 23rd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

MEMORANDUM ACCOMPANYING CERTIFICATION OF RESULTS OF ELECTION

Employees and labor organizations seeking to represent them are entitled to an election process which provides employees with a fair opportunity to cast a ballot without being subjected to improper influences. *WERC v Evansville*, 69 Wis.2d 140 (1975); *State of Wisconsin*, Dec. No. 34029-B (WERC, 5/13). Here, WACLE asserts that the Commission and the State engaged in conduct that denied employees that fair opportunity – in part by denying WACLE a reasonable opportunity to persuade employees to cast their ballots for WACLE.

Because we have not conducted a hearing on WACLE's objections, we must presume that WACLE's fact-based objections are correct when evaluating their impact. If we conclude that the fact-based objections (individually or collectively) are, if true, sufficient to deny employees that fair opportunity (and therefore call into question the election result), then we must hold a hearing and cannot now certify the election result.

Objection 1.

WACLE asserts a stay of the election should have been granted due to WACLE's pending unit clarification petition.

We reject this objection because § 111.83(3)(b), Stats., obligates the Commission to conduct the election in question “[a]nnually, no later than December 1” Where, as here, a unit clarification petition is filed on October 4, questioning the bargaining unit status of 2,323 potential voters, it is beyond dispute that the Commission could not have met its statutory obligations if it had delayed the election until the status of those voters was resolved. Instead, pursuant to Wis. Admin. Code § ERC 80.06, we proceeded with the election in a timely manner but allowed all of those employees whose status was contested to vote if they chose to do so. The eligibility of those challenged voters could then be resolved after the election, if necessary, to reach an election result. As reflected by the following analysis, such a resolution is not needed here.

Prior to the election in question, the “Security and public safety” bargaining unit that WACLE represented consisted of 5,932 employees. However, on October 4, 2013, prior to the election, WACLE filed a Petition to Clarify Bargaining Unit which sought to remove 520 employees from the bargaining unit. The State did not agree that the employees should be removed from the unit. Therefore, the parties were only able to agree to the voting eligibility of 5,412 employees. WACLE's petition to clarify also sought to add 1,803 employees to the bargaining unit. The State did not agree to the proposed additions to the unit and, thus, the number of agreed-upon eligible voters remained 5,412. The combination of the disputed deletions and additions created 2,323 employees whose voting status was challenged. All 2,323 employees were permitted to cast ballots.

In this election, WACLE received 813 uncontested yes votes. Ballots were also cast by 103 of the 2,323 employees whose voting status was in dispute. Assuming for the sake of argument that all 103 challenged ballots cast were yes votes for WACLE, and that all 103

challenged ballots were cast by voters who would ultimately be determined to be eligible, WACLE's vote total would increase to 916. To meet the "at least 51 percent" statutory election standard with 916 votes, there could be no more than 1,797 eligible voters. It is apparent that under any resolution of the eligibility dispute created by WACLE's petition to clarify, the number of eligible voters is far greater than 1,797. Indeed, the best election outcome for WACLE would be rejection of the proposed increase of the 1,803 voters and acceptance of the proposed removal of the 520 voters which yield the 5,412 voters the parties agreed were eligible. WACLE would have needed 2,760 votes in such a circumstance to meet the 51 percent standard – 1,844 more votes than they did receive.

In light of these calculations, it is apparent that resolution of the status of the challenged voting population is not necessary to reach an election result.

Lastly, WACLE asserts that a fair election cannot be conducted if it does not know who is eligible to vote and thus cannot focus its campaign efforts. We again note our statutory obligation to conduct a December 1 election, but also add that WACLE obviously had the opportunity to focus its efforts on the 5,932 employees in the unit at the time it filed its election petition, or on the 5,412 agreed upon eligible voters that remained after WACLE's unit clarification petition was filed.

Objection 2.

WACLE contends that a stay of the election should have been granted due to WACLE's October 15, 2013 unfair labor practice complaint.

Assuming for the sake of argument that WACLE's complaint made allegations sufficient to negatively impact the conduct of a fair election, it is apparent that, in the context of an unfair labor practice complaint filed 16 days prior to the scheduled start of the election in question, the Commission could not have met its statutory December 1 election obligation if it had delayed the election until the merits of such a complaint were decided. Where there is no statutory deadline for the conduct of the election, a stay is appropriate in some circumstances. *See State of Wisconsin*, Dec. No. 34029-B (WERC, 5/13). Where such a complaint is filed within a timeframe that allows for disposition without interference with the statutory timetable, disposition of the merits of the complaint is appropriate. However, in the context of the looming December 1 deadline, a stay could not be granted.

Even without a stay, WACLE's interests are protected because, post-election, we are able to assess whether the complaint allegations, if meritorious, would be sufficient to warrant setting aside the election results and conducting another election. In such circumstances, we would not certify the election results and would proceed to decide the merits of the complaint.

WACLE's complaint alleges that the State violated the statutory rights of two employees at one worksite in the context of disciplinary meetings. In an election with at least 5,412 eligible voters at multiple worksites, we conclude that the State's conduct, if proven illegal, would not

have interfered with voter choice to the extent necessary to warrant the conduct of another election.

Objection 3.

WACLE contends that it should not have had to participate in the certification election because it had only become the bargaining representative of the “Security and public safety” employees on July 30, 2013. However, § 111.83(3), Stats., obligates the Commission to conduct the election in question “[a]nnually, no later than December 1” There are no statutory exceptions based on the timing of when a labor organization became a bargaining representative.

Objection 4.

WACLE asserts it won the election because it received at least 51 percent of the votes that were cast. However, as is apparent from § 111.83(3)(b), Stats., a winning union must receive “... at least 51 percent of the votes of all of the general employees in the bargaining unit.” Therefore, WACLE’s statutory interpretation is without merit.

Objection 5.

WACLE contends that, if the failure to vote has the same election result impact as a “no” vote, the § 111.83(3)(a), Stats., statutory obligation to conduct a “secret ballot” is compromised.

The “secret ballot” obligation refers to those who choose to actually cast their ballots – their choice remains a “secret.” Those who do not vote do not cast a ballot within the meaning of § 111.83(3), Stats.

Objection 6.

WACLE asserts the telephone and internet methodology utilized to conduct the election was not reliable.

First, our general experience with the methodology in question satisfies us that it is reliable. The Commission has conducted over 1,000 certification elections and unions have met the 51 percent standard more than 80 percent of the time. Further, in the context of the number of voters and the election results here, the alleged problems recited by WACLE are not sufficient in number to affect the election outcome.

Objection 7.

WACLE contends that the State refused to provide home contact information which would have allowed WACLE to contact employees regarding the election.

Section 19.36(10)(a), Stats. states:

(10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35(1) to records containing the following information, except to an employee or the employee's representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111.

(a) Information maintained, prepared, or provided by an employer concerning the home address ... unless the employee authorizes the authority to provide access to such information.

In *State of Wisconsin*, Dec. No. 31271-B (WERC, 8/06), the Commission concluded that § 19.36(10)(a), Stats., did not require the State to provide home addresses to a union in the context of an election campaign. Thus, the State's refusal here was not improper.

Objection 8.

WACLE argues that the State blocked emails sent by WACLE supporters to fellow employees reminding them to vote. The State denies that it did so.

In support of this objection, WACLE provided an affidavit from an employee indicating that on November 18, 2013 she sent a mass email to bargaining unit employees reminding them to vote; that some employees advised her that they did not receive the email; that she resent the reminder email on November 20, 2013; that one employee advised her that he did not receive the resent message until after the voting period had ended; and that the sending employee's email provider advised her that her messages had been blocked by State servers.

The voting period began on noon, November 1, 2013, and ended at noon, November 21, 2013. In the context of an election in which WACLE needed at least 1,844 more votes to win, we conclude that if the State did block the emails in question (sent three days and one day before voting ended) the State's conduct would not have impacted the election result. It is beyond fanciful to conclude that the allegedly blocked emails would have produced 1,844 additional WACLE votes if the emails had reached employees.

Objection 9.

WACLE contends that the State failed to provide adequate notice of the election to voters. The State asserts that it did provide such notice.

The only potential example of inadequate notice cited by WACLE is no more than an inference derived from alleged low turnout at one worksite. However, WACLE is correct that the State's response to this objection provides specific examples of a few instances in which the election notice was not posted for the entire 20 day, 24/7 period during which votes could be

cast. Clearly these minor incidents would not have resulted in a gain of 1,844 votes. We note with regard to this objection, as well as No. 8, that WACLE itself bears some responsibility for notifying voters of the election.

Objection 10.

WACLE asserts that the notice provided by the Commission was defective because it described the election's purpose to be whether employees "want to continue to be represented" by WACLE. WACLE contends such a notice may have been confusing to employees not currently represented by WACLE but who were nonetheless eligible to vote.

First, we note that the potential for confusion has no application to the 5,932 employees who were represented by WACLE during the election. Second, if confusion existed, the confused voter was able to contact the Commission or WACLE itself during the 20-day voting period to obtain clarification. Lastly, we note that, even assuming all 1,803 employees not currently represented by WACLE were confused and all 1,803 such employees would have voted for WACLE, WACLE still would have fallen short of the 1,844 votes needed to win (assuming the best possible WACLE voting scenario discussed earlier herein).

Objection 11.

WACLE contends that the Wisconsin State Employees Union (WSEU) failed to transfer monies owed to WACLE and thereby hampered WACLE's ability to organize and communicate with unit employees.

First, we note that this objection was filed after the eight-calendar-day period for filing objections had expired. Thus, it is arguably untimely.

Second, it is questionable whether any such WSEU conduct is a matter as to which we have jurisdiction in the context of this election.

Third, in the context of the number of eligible voters and the votes cast, the impact of any relevant wrongful failure to transfer funds on the election process is not sufficient to affect the election outcome.

Finally, neither the Commission nor the State of Wisconsin is obligated to collect monies owed by one union to another.

Given the foregoing, whether viewed individually or collectively, WACLE's objections do not warrant the conduct of a hearing or the conduct of a new election. Therefore, we have certified the election results.

Dated at Madison, Wisconsin, this 23rd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner