

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of:

United Lakewood Educators-Kettle Moraine Educational Support Staff Association,
WEAC Region 7

Involving Certain Employees of the Kettle Moraine School District

Case ID: 113.0020
Case Type: REC_ME

DECISION NO. 38586-A

Appearances:

Kristi Nelson Foy, Staff Attorney/Director of Employee Services, 563 A.J. Allen Circle, Wales, Wisconsin, appearing on behalf of the Kettle Moraine School District.

Rebecca Ferber Osborn, Legal Counsel, Wisconsin Education Association Council, 13805 W. Burleigh Road, Brookfield, Wisconsin, appearing on behalf of the United Lakewood Educators-Kettle Moraine Educational Support Staff Association, WEAC Region 7.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND CERTIFICATION OF ELECTION RESULTS**

From Noon November 4 thru Noon November 24, 2020, the Wisconsin Employment Relations Commission conducted an on-line/telephonic election to determine if certain employees of the Kettle Moraine School District (Employer) wished to continue to be represented for the purposes of collective bargaining by the United Lakewood Educators-Kettle Moraine Educational Support Staff Association, WEAC Region 7 (Union). On November 25, 2020, the Commission provided the parties with the tally of the election results.

On December 2, 2020, the Employer filed an objection to the conduct of the election based on a raffle the Union had conducted during the election. The parties thereafter stipulated to certain facts and filed written argument and the matter became ripe for Commission action on February 25, 2021.

On March 22, 2021, Chairman Daley advised the parties of the potential for a perception of a conflict of interest. On March 25, the Employer responded objecting to Daley's involvement in the proceeding. The Union was silent on the matter. Wisconsin Admin. Code ERC § 18.08(3)(c), which was invoked by the Employer, indicates that "the filing of a recusal request does not

necessarily require that the commission member or examiner recuse himself or herself from further participation in the proceeding”. After taking into account the objections raised by the Employer, the Commission finds that Chairman Daley is competent to proceed without bias in this matter.

Having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. The Kettle Moraine School District, herein the Employer, is a municipal employer.
2. The United Lakewood Educators-Kettle Moraine Educational Support Staff Association, WEAC Region 7, herein the Union, is a labor organization that serves as the collective bargaining representative of certain employees of the Employer. The employees represented by the Union are paid an hourly wage ranging from \$13 to \$22 per hour.
3. On three occasions before the election started at Noon on November 4, 2020, the Union emailed the 57 eligible voters informing them of the opportunity to win Amazon gift cards if they chose to vote in the election. Entry into the raffle occurred by the employee’s placement of their name in an envelope at a work site, or by emailing their entry to the Union if they were working remotely. Until after the raffle was over and the election ended, the Union would not know if an employee entering the raffle had actually voted and did not ask any person entering whether they had actually voted. The opportunity to enter and win was shared by 270 other employees of the Employer who were simultaneously eligible to vote in another election being conducted during the same period of time. During the election, 137 voters from the two elections participated in the raffle.
4. Of the 57 eligible voters, 39 voted to continue to be represented by the Union and one employee’s status as a voter was challenged. The Union needed at least 29 votes for continued representation to retain its status as the collective bargaining representative.

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

CONCLUSIONS OF LAW

1. The provisions of Wisconsin election law set forth in chapters 5 to 12 of the Wisconsin Statutes do not apply to elections conducted by the Wisconsin Employment Relations Commission.
2. The raffle opportunity to win one of three \$25 Amazon gift cards was not conduct that affected the results of the election.

3. In this election, the Union was entitled to rely upon the precedent established by the Commission in *Dairyland Greyhound Park, Inc.*, Dec. No. 26851-H (WERC, 2/93) which did not prohibit raffles.

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

CERTIFICATION OF ELECTON RESULTS

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

IT IS HEREBY CERTIFIED that at least fifty-one percent (51%) of the employees in the support staff bargaining unit voted to continue to be represented by the United Lakewood Educators-Kettle Moraine Educational Support Staff Association, WEAC Region 7, for purposes of collective bargaining with the Kettle Moraine School District.

Issued at the City of Madison, Wisconsin, this 14th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND CERTIFICATION OF ELECTION RESULTS**

The objections filed by the Employer assert that the raffle: (1) violates Wisconsin's election law as set forth in Chapters 5 to 12 of the Wisconsin Statutes; and (2) in the alternative, should be prohibited citing the current view of the National Labor Relations Board (NLRB) banning such election day activity. In subsequent argument, the Employer also contends that the raffle subjected potential voters to illegal coercion from the Union if they failed to vote.

As to the applicability of Wisconsin's election law, Wis. Stat. § 5.02(4) makes clear that the provisions of chs. 5 to 12 do not apply to elections conducted by the Wisconsin Employment Relations Commission. Wisconsin Stat. § 5.02(4) defines the scope of chs. 5 to 12 as follows: "[e]lection" means every *public primary and election (emphasis added)*.

Further, assuming arguendo that the raffle in question would violate chs. 5 to 12, it is by no means clear that the violation would overturn an election result—as opposed to exposing those conducting or participating in the raffle to criminal liability.¹

While the Wisconsin Legislature could choose to specify the types of conduct that are prohibited as to Commission conducted elections, it has not done so and has instead left it the Commission to make such determinations.

As to whether the Commission should follow current NLRB election law² prohibiting raffles, the Commission has always found NLRB law to be worthy of consideration but has also always made its own determination as to how best to interpret the labor laws that it administers. Prospectively, the Commission is persuaded that raffles should be prohibited. However, the Commission further concludes that the Union was entitled to rely on the Commission precedent existing at the time this election was conducted which did not prohibit raffles but instead made a case-by-case determination as to whether the conduct affected the outcome of the election.³ To establish that the raffle affected the outcome of the election, the evidence would need to prove that there were at least 11 employees who would not have voted for the Union but for the incentive provided by the raffle.

It cannot be determined how many of the 57 voters in this election were among the 137 voters who participated in the raffle. Whatever the number was, the Commission is satisfied that under the analysis applied in *Dairyland*, the opportunity to win one of three \$25 Amazon gift cards⁴ did not affect the outcome of the election. In reaching that conclusion, the Commission has

¹ The Employer has not cited any decisions interpreting Wis. Stat. Chs. 5-12 as to raffles.

² See *Atlantic Limousine*, 331 NLRB 1025 (2000).

³ See *Dairyland Greyhound Park, Inc.*, Dec. No. 26851-H (WERC, 2/93), Wis. Admin. Code §§ ERC 70.09 and 70.10, and *Racine Unified School District*, Dec. No. 35149-A (WERC, 3/15).

⁴ While this is the accurate number and value of the gift cards, the three email communications from the Union to the voters were inaccurate or vague. The first pre-election communication referenced two \$50 cards while the remaining two emails referenced three gift cards of unidentified value. Assuming arguendo that employees viewing these emails concluded that they could win one of three \$50 gift cards, that assumption would not alter the result reached herein.

considered the number and value of the gift cards, the compensation level of the eligible employees, the chances of an employee “winning” if they chose to enter, and the margin by which the Union “won” the election. Therefore, the Employer’s objection is not sustained, and the election result is certified.⁵

Raffles Prospectively Prohibited

Much has changed in Wisconsin labor law since the Commission’s decision in *Dairyland*.⁶ While the Commission is not mandated to follow NLRB precedent, it makes sense to do so going forward.⁷ Analyzing raffles under our *Dairyland* precedent lends itself to a subjectivity which is difficult to quantify in reaching a conclusion. How is the Commission to determine with certainty the impact that a raffle may have had on the results of an election?

On a prospective basis the Commission will be following the raffle prohibition established in *Atlantic Limousine*, which provides a bright line rule with predictable results.⁸ The Commission will now view raffles as conduct that de facto impacts the results of any election the Commission conducts.

Issued at the City of Madison, Wisconsin, this 14th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

⁵ In reaching this determination, the Commission has considered the Employer contention that the raffle presented the Union with the opportunity to engage in coercive activity toward those who had not voted. There is no specific allegation that any such activity occurred. Further, any Union comparison of the names of those who entered the raffle as the election progressed against the list of eligible voters would not have produced an accurate list of non-voters because there were many who voted but did not enter the raffle.

⁶ One of the arguments made by the Union in this matter is that the raffle in question was a “get out the vote” effort, and as such did not explicitly promote one outcome over another. However, since the passage of Act 10, as reflected in Wis. Stat. §111.70(4)(d) 3.b., the decision not to vote has the same impact on the election result as an affirmative “no” vote. As such, there is some question as to whether an effort dressed as a neutral voter engagement strategy can realistically be viewed as a neutral “get out the vote” effort in such a setting.

⁷ The integrity of election results, once taken for granted, has become a more contentious area in recent American history. Both the Presidential elections of 2016 and 2020 have been cast with shades of illegitimacy regarding the eventual winners, creating increased hostility towards our system of government. The social contract we bind ourselves to becomes increasingly fragile. The former Commission *Dairyland* precedent allowed the losing party to cast doubt as to the legitimacy of the election outcome, as the Employer has asserted here.

⁸ “Specifically, our rule prohibits employers and unions from conducting a raffle if (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” See *Atlantic Limousine*, 331 NLRB 1025 (2000).