

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WAUPACA COUNTY LAW ENFORCEMENT OFFICERS ASSOCIATION AND  
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT  
EMPLOYEE RELATIONS, COMPLAINANT,

vs.

WAUPACA COUNTY, RESPONDENT.

Case ID: 298.0010  
Case Type: COMP\_MP

DECISION NO. 39426-A

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**Appearances:**

Andrew D. Schauer, Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin appearing on behalf of Waupaca County Law Enforcement Officers Association and Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

James Macy, Attorney, von Briesen & Roper, S.C., 55 Jewelers Park Drive, Suite 400, Neenah, Wisconsin, appearing on behalf of Waupaca County.

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

On April 29, 2022, the Waupaca County Law Enforcement Officers Association, WPPA/LEER filed a complaint with the Wisconsin Employment Relations Commission alleging that Waupaca County had committed prohibited practices within the meaning of Wis. Stat. § 111.70(3)(a) 1. and 5. of the Municipal Employment Relations Act. On May 6, 2022, the Commission appointed Peter G. Davis as the hearing examiner in this matter.

On June 6, 2022, Waupaca County filed an Answer.

On June 16, 2022, Examiner Davis conducted a hearing in Waupaca, Wisconsin. The parties thereafter filed briefs and supplemental argument at the Examiner's request-the last of which was received March 2, 2023.

Having considered the record and being fully advised in the premises, I make and issue the following:

### **FINDINGS OF FACT**

1. The Waupaca County Law Enforcement Officers Association, WPPA/LEER, hereinafter referred to as the Union, is a labor organization that serves as the collective bargaining representative of certain public safety employees of Waupaca County.

2. Waupaca County, herein after referred to as the Employer, is the employer of certain public safety employees represented by the Union.

3. On March 8, 2022, the Union and Employer signed a 2022-2024 collective bargaining agreement. That agreement contained the following provisions:

Arbitrator: Any grievance that cannot be settled through the above procedures may be submitted to an arbitrator. The parties shall request a list of five (5) arbitrators from the Wisconsin Employment Relations Commission. The parties shall alternately strike names from the list until one (1) remains, who shall be appointed the Arbitrator. A toss of a coin shall determine which party shall make the first strike.

4. On April 7, 2022, the Union filed a request that the Commission provide a panel of five “WERC commissioners/staff members” from which the parties would select an arbitrator as to a one-day suspension.

5. On April 7, 2022, the Commission did not employ five “commissioners/staff members”. On April 11, 2022, the Commission provided a panel of all three “commissioners/staff members” then employed.

6. The County thereafter refused to select an arbitrator from the April 11 panel because it did not contain five potential arbitrators.

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

### **CONCLUSIONS OF LAW**

1. By refusing to select an arbitrator off the April 7, 2022 panel, Waupaca County did not commit prohibited practices within the meaning of Wis. Stat. § 111.70(3)(a) 1. or 5.

2. The positions taken by Waupaca County Law Enforcement Officers Association, WPPA/LEER, in the context of this litigation are not “frivolous” within the meaning of Wis. Stat. § 227.483(1).

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

**ORDER**

1. The complaint is dismissed.
2. Waupaca County's request for attorney fees and costs is denied.

Issued at the City of Madison, Wisconsin, this 27<sup>th</sup> day of April 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

While it is not explicitly stated in the contract language set forth in Finding of Fact 3, the parties agree the five names to be provided are to be Commission employees who are generally available to provide grievance arbitration services. The parties further agree that at the time the disputed panel was provided, the Commission did not employ five such individuals.

Complainant Union nonetheless argues that the Respondent County was contractually obligated to select an arbitrator from among the three names on the panel provided because: (1) the contract requires that five names be requested but nonetheless obligates the parties strike from however many names are provided by the Commission; (2) the parties have selected an arbitrator from a list of three names in the past; and (3) if it believed the existing arbitration language to be inoperable, the County should have raised that issue while the parties were bargaining the 2022-2024 contract. None of these arguments are persuasive.

Complainant Union's contention that the obligation to strike is not linked to the number of names on a panel is at odds with the commonly understood manner in which arbitration clauses function. It is implicit in the existing language that the striking process will occur in the context of the five names provided. Had the parties intended the highly unusual process Complainant Union advocates, I would expect to see additional contract language specifying that unusual obligation.

The parties disagree as to whether they have stricken from a three-person panel in the past. Respondent County acknowledges that it previously agreed to use one of the three Commission employed arbitrators listed on a Commission provided three name panel, but contends that was pursuant to mutual agreement with the Complainant Union rather than use of a striking process. Complainant Union contends that a de facto striking process was utilized. However, even assuming that the parties had previously stricken from a three-person panel, that would not obligate the County to do so again. One instance would not be sufficient to create the type of past practice that could amend the clear contractual language.

As to the contention that the Respondent County should be held to account for failing to raise the panel issue during collective bargaining over the 2022-2024 agreement, I conclude that both parties had the same incentive to raise the issue of whether there was a need to amend the existing language. Neither did. The absence of any discussion or amendment simply placed the parties in the scenario they now confront and does not warrant a conclusion that the Respondent County is contractually obligated to strike from a three-person panel.

Given the foregoing, the complaint has been dismissed. However, because the contentions advanced by Complainant Union are not "frivolous", Respondent County's motion for fees and costs is denied.

Issued at the City of Madison, Wisconsin, this 27<sup>th</sup> day of April, 2023.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner