

# Wisconsin Employment Relations Commission

## LABOR AND EMPLOYMENT RELATIONS ASSOCIATION

October 13, 2017

### WERC-Still Alive?

By Peter G. Davis-Attorney\*\*

### **I. Agency Reorganization**

Pursuant to the terms of the 2017-2019 State of Wisconsin budget, effective September 23, 2017, the composition of the Wisconsin Employment Relations Commission changed from three 2/3-time Commissioners appointed by the Governor and confirmed by the Senate for six-year terms to one full-time Chairman to be so appointed and confirmed. In addition, the positions of Chief Legal Counsel and one additional attorney were eliminated.

### **Chairman and Staff**

Chairman James Daley-appointed for a term expiring March 1, 2023-Senate confirmation pending.

Attorney Peter Davis (1975-present)

Attorney Raleigh Jones (1982-present)

Attorney Danielle Carne (2005-2013 and 2016-present)

Paralegal Dawn Clark (2013-present)

Office Manager Carol Lynch (2013-present)

### **General Agency Contact Information**

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\*\* As always, the speaker's views and remarks are not necessarily those of the WERC.

## **II. Decline in Workload Continues**

The decline in WERC workload which formed the premise for the WERC reorganization continued into fiscal year 2016-2017.

Excluding the roughly 400 annual recertification elections WERC conducts each year, the WERC case intake for fiscal year 2016-2017 declined to 193 from a total of 288 in fiscal year 2015-2016.

In fiscal year 2015-2016, 151 “traditional” labor relations cases were filed along with 136 State employee civil service appeals (mainly discipline). In fiscal year 2016-2017, only 102 “traditional” labor relations cases were filed along with only 84 State employee civil service appeals (mainly discipline).

<b>Major Case Type</b>	<b>FY15-16</b>	<b>FY16-17</b>
Grievance Arbitration	48	45
Mediation	40	28
Initial Elections Petitions	41	14
Unfair Labor Practice Complaints	17	13
State Employee Civil Service Appeals	136	84
Independent Hearing Officer Requests	15	3

## **III. Annual School District and State Employee Certification Elections**

2017 elections set for Noon November 1 thru Noon November 21

By toll free phone and online 24/7 using services of the American Arbitration Association.

Each voter has a specific ID based on name and last four digits of SS#

### **Pending Litigation-Oral Argument Scheduled for December 5, 2017**

Is WERC statutorily obligated to conduct an annual certification election even if the incumbent union does not request such an election?

The circuit court and court of appeals said yes. 372 Wis. 2d 347 (2017)

Wisconsin Supreme Court accepted WERC petition for review. 2015AP2224

Prior to the end of the voting period, does Wisconsin’s open records law require WERC to disclose the names of employees who have already voted in annual certification elections?

The circuit court said yes.

WERC bypass petition granted accepted by Wisconsin Supreme Court.  
2016AP2214

## **Election Issues**

Voter eligibility initially linked to individual's employment status on date the petition was filed=employees hired between that date and date of the election are not eligible absent mutual agreement BUT anyone either union or employer asserts is eligible will be allowed to vote (subject to challenge with status resolved after election if needed).

Pending unit clarification petition will not delay the election. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14).

Pending prohibited practice complaint will not delay the election. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14).

Union must file for and win a certification election to remain the collective bargaining representative even where it won a "regular" election to obtain certified status only months before. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14).

Employer refusal to provide home addresses of employees was not improper. **State of Wisconsin**, Dec. No.34481-A (WERC, 7/14), **State of Wisconsin**, Dec. No. 31271-B (WERC, 8/06).

Employer blocking union emails to voters could impact election. **State of Wisconsin**, Dec. No. 34481-A (WERC, 7/14)

Employee who leaves the bargaining unit between eligibility date and date of election is not eligible. **Elmbrook Schools**, Dec. No. 34304-A (WERC, 3/14).

Employee failure to vote due to difficulty with phone voting procedure is not a basis for conducting a new election. **Herman Schools**, Dec. No. 34318-A (WERC, 4/14), **Fontana Joint 8 School District**, 36503-A (WERC, 1/17)

Employees forgetting to vote is not a basis for conducting a new election. **Town of Woodruff**, Dec. No. 34944-A (WERC, 5/14), **Village of Salem Lakes**, Dec No. 36878-B (WERC, 5/17)

Employer total failure to post election information is a basis for conducting a new election. **Town of Manitowish Waters**

Failure to provide requested affidavits is valid basis for concluding election objections had been abandoned. **State of Wisconsin**, Dec. No. 34479-A (WERC, 5/14)

Substantial errors in the voter eligibility list (primarily omission of many eligible voters) is a basis for conducting new election. **Milwaukee Schools**, Dec. No. 34373-A (WERC, 5/14)

## **IV. WERC Labor Decisions**

**City of Monona**, Dec. No. 36748 (WERC, 11/16). Incentive payments to public safety bargaining unit members who choose not to be covered by a health insurance plan are prohibited subjects of bargaining under Sec. 111.70(4)(mc) 6, Stats. which prohibits bargaining over:

1. All costs and payments associated with health care coverage plans
2. The design and selection of health care coverage plans,
3. The impact of costs/payments and design/selection on wages . . .

**State of Wisconsin**, Dec. No. 36964-A (Davis, 7/17) aff'd by operation of law (WERC, 7/17). No constitutional due process rights apply to a post-discipline grievance meeting regarding a written reprimand. Employer limitations on role of an employee representative in unilaterally established grievance process closely mirrored those that would be applicable/permissible to a pre-disciplinary hearing and thus did not/could not violate the right to engage in lawful concerted activity.

**LaCrosse Schools**, Dec. No. 34685-A (Davis, 3/14) aff'd by operation of law Dec. No. 34685-B (WERC, 4/14) By seeking to make the Union a party to an employee resignation agreement, Employer bargained over a prohibited subject of bargaining and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a) 4, Stats. Union had no duty of fair representation as to the employee in the context of her discharge or resignation. Union had no claim or right (independent of employee's) to settle by way of being a signatory to the agreement. Union can choose to offer advice (upon employee request) and union/employer interaction on that basis (as long as union is not made a party to any agreement) is permissible.

## **V. Administrative Rule-Making**

WERC has begun the process of proposing amendments to/deletions of existing labor relations rules made obsolete or inaccurate by virtue of 2011 Wisconsin Act 10 and 2015 Act 1 ("Right to Work") and potentially the decision of the Wisconsin Supreme Court in recertification election case.

WERC has begun the process of proposing creation of new rules and amendments to existing state employee civil service rules in light the statutorily established (see Sec. 230.445(3), Stats.) expedited appeal process applicable to employee discipline for post-July 1, 2016 conduct.

## **VI. Base Wage Bargaining Issues**

CPI % cap applicable to bargaining over base wage increases is trending up.

For contracts beginning July 1, 2017=1.26%  
For contracts beginning January 1, 2018=1.84%

No pending base wage disputes before WERC.  
No base wage administrative rule-making underway.

Because the length of “initial” collective bargaining agreements is unregulated (see Sec. 111.70 (4) (cm) 8m. Stats) (and presumably a mandatory subject of bargaining?), commencement date might well impact the applicable CPI#.

## **VII. Right to Work Law**

Amended the Wisconsin Employment Peace Act effective March 11, 2015.

No active cases before the WERC.

All legal challenges under state and federal constitutions have ultimately proven to have been unsuccessful except as to the Sec. 111.06(1), Stats. provision that prohibits contractual dues checkoff provisions unless revocable upon 30 days’ notice. In December 2016, U.S. District Court Judge Conley found that provision to be invalid as preempted by and conflicted with the LMRA provision allowing up to one-year limits on revocation. See 16-cv-77-wmc. Judge Conley’s decision was appealed to the Seventh Circuit and oral argument was held September 15, 2017. No decision yet but you can listen to the oral argument.

<http://media.ca7.uscourts.gov/oralArguments/oar.jsp>