

Wisconsin Employment Relations Commission

LABOR AND EMPLOYMENT RELATIONS ASSOCIATION

September 13, 2019

WERC - Now and in the Future

By Peter G. Davis - Staff Attorney**

I. Agency Information

Chairman and Staff

Chairman James Daley-appointed and confirmed by the Senate for a term expiring March 1, 2023.

Attorney Peter Davis (1975-present)

Attorney Raleigh Jones (1982-present)

Paralegal Dawn Clark (2013-present)

Office Manager Carol Lynch (2013-present)

General Agency Contact Information

Wisconsin Employment Relations Commission (WERC)

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

II. Case Intake Stable

The total WERC case intake has been stable for the last three fiscal years with slightly more than half of matters filed being “traditional” labor relations cases.

Excluding the roughly 350-400 annual recertification elections WERC conducts each year, the yearly WERC total case intake was 194 (18-19), 190 (17-18) and 189 (16-17).

In fiscal year 2018-2019, 100 “traditional” labor relations cases were filed along with 94 State employee civil service appeals (mainly discipline).

Major Case Type	FY16-17	FY17-18	FY18-19
Grievance Arbitrations	45	33	27
Mediations	28	25	30
Initial Elections Petitions	14	23	18
Unfair Labor Practice Complaints	13	8	16
Declaratory Rulings	2	3	2
Impartial Hearing Officer Requests	3	11	7
State Employee Civil Service Appeals	84	87	94

III. Annual School District and State Employee Recertification Elections

2019 recertification elections for school district and state employee unions who want to seek to retain their status as collective bargaining representatives begin at noon November 6 and continue until noon November 26. Filing deadline is Monday September 16, 2019.

The next round of recertification elections for non-school district/state employee unions will be in the Spring of 2020 with a filing deadline of January 30, 2020.

The only current state employee labor organizations serving as collective bargaining representatives (and thus eligible to file) are three craft employee unions and one attorney union.

In 2018, 261 school/district/state employee elections were conducted by WERC with over 55,000 eligible voters.

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 social security number.

IV. Wisconsin Labor Related Court Decisions

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 says no in 5-2 decision. 2015AP2224 issued 2/18

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.
Wisconsin Supreme Court says no in 5-2 decision. 2016AP2214 issued 2/18.

Last chance agreement can constitute an intentional, knowing and explicit waiver of the statutory police/fire commission procedures for discharging an employee. *Beck v City of Fond du Lac*, 2017AP969, Court of Appeals, District II in 7/18. Unpublished.

Union steward not discharged in part because of her lawful concerted activity. *Faure v WERC*, 2017AP842, Court of Appeals, District III in 2/19. Unpublished.

V. WERC Labor Decisions

City of Waukesha, Dec. No. 37481 (WERC, 8/18). Applying "new" applicable statutory provisions, WERC concludes the balancing test continues to be the appropriate analytical tool when resolving mandatory/permissive subject of bargaining disputes. WERC determines that contract provision that prevents City from reassigning already scheduled qualified employees to different work location.

City of Janesville, Dec. No. 37480 (WERC, 8/18). WERC dismisses declaratory ruling petition seeking ruling as to whether employees have a contractual right to wash personal vehicles on City property under contract provision protecting "personal amenities" that "primarily relate to mandatory subjects of bargaining." No current duty to bargain dispute under Sec. 111.70(4)(b), Stats. and not appropriate to exercise Sec. 227.41, Stats. jurisdiction because ruling would not provide state-wide guidance and would denigrate contractual grievance arbitration procedure.

General Heating and Air Conditioning, Inc. Dec. No. 37777-A (Davis, 3/19), aff'd Dec. No. 37777-B (WERC, 4/19), appeal pending Dane Co. Cir Ct. WERC dismisses complaint alleging employer violated Wisconsin's Right to Work by allegedly requiring union membership as condition of employment. WERC lacks jurisdiction over such a claim because NLRB does. WERC Right to Work jurisdiction is limited to regulation of content of a bargaining agreement that requires union membership as a condition of employment. No such allegation was made.

State of Wisconsin, Dec. No. 37790-B (Davis, 2/19), aff'd Dec. No. 37790-C (WERC, 8/19). State did not violate a grievance settlement agreement (AKA a collective bargaining agreement) when it subsequently removed an employee from an unclassified civil service position and returned him to the classified civil service position, he previously held at the time of the settlement agreement.

Whitestone/Weimer/MacGillis/WPPA, Dec. No. 37788-A (Davis, 5/19), petitions for review pending. By inaccurately advising fellow employees that the current collective bargaining representative had been replaced and thus should not be contacted with any issues, an employee interfered with his fellow employees' exercise of statutorily protected rights and thereby violated Sec. 111.70(3)(b) 1, Stats. Employee obligated to pay attorney fees and costs because his legal position was "frivolous." Law firm and attorney advising employee not found to have committed prohibited practices.

School District of New Holstein, Dec. No. 37954-A (Davis, 5/19) petition for review pending. Because suspensions of union president had reasonable tendency to interfere with his lawful concerted activity and were based at least in part on hostility toward such activity, District violated Secs. 111.70(3)(a) 1 and 3, Stats.

VI. Election Issues

WERC holds election petition in abeyance pending final disposition of prohibited practice complaint where the alleged employee/law firm conduct has potential to impact the conduct of a free and fair election. **Waukesha County**, Dec. No. 37971 (WERC, 7/19)

WERC cites interests in finality when rejecting employer/union request for new election after election had been conducted and results certified (no objection was timely filed). **Village of Waterford**, Dec. No. 37416-B (WERC, 6/18); **Village of Footville**, Dec. No. 37343-B (WERC, 6/18).

Employee who leaves the bargaining unit prior to the election no longer eligible to vote. **School District of La Crosse**, Dec. No. 37107-A (WERC, 12/17).

Absent claim that posting of election notice was inadequate as means of advising employees how and when they could vote, WERC rejects claim that new election should be conducted because employer allegedly did not also email notice to employees. **School District of La Crosse**, Dec. No. 37107-A (WERC, 12/17).

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)

VII. Right to Work Law

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 September 2018, U.S. Seventh Circuit Court of Appeals (No. 17-1178) found that provision to be invalid as preempted by and conflicting with the LMRA provision allowing up to one-year limits on revocation. Petition for rehearing filed by State and denied. Petition for US Supreme Court review filed and then withdrawn.

VIII. Janus Issues

On August 29, 2019, Operating Engineers Local 139 filed a civil lawsuit in federal court (19-cv-1233-Eastern District of Wisconsin) asserting that under the

rationale of the US Supreme Court's decision in Janus v AFSCME, 138 S.Ct. 2448 (2019), the Act 10 prohibition against voluntary dues deduction, limitation of collective bargaining to base wages and treatment of a non-vote as a no vote in elections violate the First and/or Fourteenth Amendment(s) and 42 U.S.C 1983.

City of Madison/Teamsters, Award No. 7954 (Davis, 2/19). Janus decision does not apply/extend to contractual dues checkoff provisions applicable to union members. City violated the bargaining agreement by honoring employee requests to end payroll deduction of dues. City ordered to resume payroll deductions and pay union an amount equal to the dues not deducted.

IX. Base Wage Bargaining Cap

Maximum allowable bargained base wage increase is trending down.

Agreements beginning 7/1/19 = 2.44%

Agreements beginning 1/1/20 = 2.07%

X. WERC Future

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