

No More Petitions! WERC Petition Requirement for Annual Recertification Elections Held to Be Invalid

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Practice Area: School Law & Government Law

Annual recertification election balloting for unions representing public school district employees will be held from November 4 through November 24, with the appropriate election fee due to the Wisconsin Employment Relations Commission ("Commission") by September 15, 2015. However, as the result of a July 31, 2015 Milwaukee County Circuit Court decision, petitions are no longer required to be filed by the exclusive bargaining representative.

Circuit Court Invalidates Petition Provision

Under Wis. Stat. § 111.70(4)(d)(3)b, the Municipal Employment Relations Act ("MERA"), annual recertification elections are required to be held for general municipal employee units. Initially, the Commission had established in Wisconsin Administrative Code ERC Chs. 70 and 80 that in order to recertify, exclusive bargaining representatives must file a petition and pay the appropriate filing fees by a date certain.

Then, on July 31, 2015, Milwaukee County Circuit Court Judge John J. DiMotto issued an order in *Wisconsin Ass'n. of State Prosecutors, et al. v. Wisconsin Employment Relations Commission, et al.*, Case Nos. 2015-CV-0501, 2015-CV-0328, 2015-CV-0329, which invalidated certain portions of Wisconsin Administrative Code ERC Chs. 70 and 80, governing the annual recertification elections for unions representing school district employees. In particular, the court concluded that the provision requiring such unions to file a petition for election in order to participate in the annual recertification elections conflicted with state law.

In finding that the Commission exceeded its statutory authority in promulgating the petition requirement, the court noted that requiring non-statutorily mandated action – that of filing a petition – contravenes the unambiguous statutory language which merely requires that the Commission conduct an election to certify the representative of a collective bargaining unit. The court declared that had the legislature intended the holding of an election to be contingent upon the filing of an election petition, the legislature would have included the requirement in the statute. Because the legislature included petition requirements elsewhere in the statutes, the court reasoned that the legislature would have included such a requirement for annual recertification elections had it intended for petitions to be required.

Thus, all that the MERA requires is for the Commission to conduct annual recertification elections. When the Commission enacted ERC Chs. 70 and 80, it imposed a condition precedent to its statutorily-required duty – a requirement that directly conflicts with the law requiring annual recertification elections. Because the Commission exceeded its statutory authority in imposing the petition requirement, the petition provisions were rendered invalid. Ultimately, the court held that the Commission must conduct recertification elections regardless of whether a petition for election was filed by the incumbent union.

Guidance Issued by the Commission

Circuit courts have the authority to invalidate administrative rules. When courts do so, state agencies are bound by the court's decision and must act accordingly. According to the Commission Chief Legal Counsel Peter Davis, the Commission has appealed this decision. However, the Commission must adhere to the Judge's Order while the appeal is pending. On Monday, August 17, 2015, the Commission confirmed that annual recertification elections will be held. In light of Judge DiMotto's decision, the Commission has issued the following guidance:

- (1) A union serving as the current collective bargaining representative of school district employees will not be required to file a petition for election with the Commission in order to participate in the elections. However, the Commission has advised that the unions are still required to submit the applicable filing fees to the Commission on or before September 15, 2015.
- (2) Although not required, the Commission has requested that the unions either complete and submit the petition for election or complete and submit an informational sheet. The Commission relies upon the information provided in the petition and/or informational sheet (which may be found on the Commission's website) in conducting the elections.
- (3) Unions should notify the school district that the union has initiated the annual recertification election process, as in the past, so as to trigger the school district's obligation to provide the Commission and the union with a proposed voter eligibility list.

What Does This Mean for Districts?

Districts with employees represented by a union should expect to receive notification from the union and/or the Commission about the annual recertification election process on or about September 15, 2015. A school district should be diligent in communicating with the Commission to determine whether its general municipal employees will be participating in elections for recertification. Shortly after districts receive notice regarding an annual recertification election, the district will be expected to generate a voter eligibility list, which includes the employees' names, addresses, and the last four digits of their social security numbers, and provide it to the Commission in an electronically sortable format, in accordance with Wis. Admin. Code § ERC 70.05, and provide to the union a separate voter eligibility list, which only includes the employees' names. This duty has not changed.

Districts are advised to remain flexible throughout this process. Districts with general municipal employee unions may want to consider asking the union president(s) whether the union(s) intend(s) to recertify. It would be helpful for districts to notify the Commission either: (1) that they have no general municipal employee units so no elections need to occur; or (2) that they do have general municipal employee units. In notifying the Commission of the status, it would be beneficial to provide the Commission with the contact information of the union president and request to schedule an election for the next election cycle.

The annual recertification election process beyond the elections scheduled to occur in November 2015 will be contingent upon the outcome of the appeal and any additional rulemaking by the Commission.

We will continue to monitor any new developments in the rules surrounding the recertification process. It is important to remember that nothing in Judge DiMotto's decision impacts the scope of bargaining or base wage rules. For that reason, we would encourage districts to continue their process of establishing and implementing wage systems consistent with law.

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