COURT OF APPEALS
DECISION
DATED AND RELEASED

December 21, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2449

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

VILLAGE OF CASSVILLE,

Petitioner-Respondent-Cross Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent-Co-Appellant-Cross Respondent,

TEAMSTERS LOCAL 579,

Respondent-Appellant-Cross Respondent.

APPEAL and CROSS-APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. The Wisconsin Employment Relations Commission (WERC) and Teamsters Local 579 (the Union) appeal from an order remanding this case to WERC for further proceedings. They contend that the trial court should have affirmed WERC's order on a prohibited labor practices complaint. The Village of Cassville cross-appeals the remand order, contending that the trial court should have set aside WERC's order. We reverse and remand, directing the trial court to enter an order affirming WERC's order.

In April 1992, the Union filed an election petition to allow certain village employees to vote for Union representation. In May 1992, the Village president, William Whyte, signed a stipulation for election with the Union, which defined the bargaining unit as the non-management and non-confidential employees of the water/sewer and street departments. In June, the election was held and four of the five stipulated employees in the proposed unit voted for the Union. On July 1, 1992, WERC certified the results.

On July 22, 1992, the Union filed a complaint with WERC alleging that the Village had engaged in prohibitive practices under the Municipal Employment Relations Act, §§ 111.70-111.77, STATS.

In March 1993, WERC's hearing examiner found that the Village had engaged in certain prohibited practices, and ordered it to remedy the situation. In doing so, the examiner rejected the Village's contention that the certified bargaining unit was inappropriate, holding "[a] claim of inappropriate bargaining unit may not serve as a defense to a refusal to bargain allegation ... where the party advancing such a defense has not sought reconsideration of the certification by the Commission or judicial review of the final order in the representation proceeding."

The Village moved for reconsideration, presenting evidence for the first time that the bargaining unit certification was void because Whyte lacked the authority to sign the May 1992 election stipulation that led to the certification. The hearing examiner refused to reconsider her decision. On administrative appeal WERC affirmed, holding that it would not address the issue of Whyte's authority because it was not timely raised.

The sole issue presented in the Village's petition for judicial review concerned WERC's failure to consider the evidence presented on reconsideration. In its decision, the trial court ordered WERC to reconsider the evidence on remand, citing § 227.49(3)(b), STATS., which directs that a rehearing will be granted on the basis of "some material error of fact." On appeal, the Union and WERC contend that the Village lost the opportunity to litigate the issue when it failed to seek timely review of the certification issued on July 1, 1992. On cross-appeal, the Village contends that the court's remand order was unnecessary because the evidence presented on reconsideration undisputedly established that the certification was invalid.

The Village cannot challenge the validity of the election in this proceeding. WERC's certification of the election issued on July 1, 1992, was final and judicially reviewable. ***City of West Allis v. WERC***, 72 Wis.2d 268, 272, 240 N.W.2d 416, 418 (1976). The Village had twenty days to petition for reconsideration of that decision under § 227.49(1), STATS., and thirty days to petition for judicial review under § 227.53(1)(a)2, STATS. Because it did neither, the certification had preclusive effect in all subsequent actions. ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis.2d 381, 398-99, 497 N.W.2d 756, 763 (Ct. App. 1993).

Even if the Village could have raised the issue of Whyte's authority, it did not timely do so. The Village first presented its evidence in its petition for a rehearing. Newly discovered evidence will result in reconsideration only if the evidence "could not have been previously discovered by due diligence." Section 227.49(3)(c), STATS. The Village offered no reason for its delay in submitting the evidence. For these reasons, we reverse the trial court's order and remand, directing the trial court to enter an order affirming WERC's order.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.