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Joint Committee on Finance

Paper #276

Composition of Employment Relations Commission (Employment Relations Commission)

[LFB 2017-19 Budget Summary: Page 163, #2]

CURRENT LAW

The Wisconsin Employment Relations Commission (WERC) consists of three commissioners appointed by the Governor, with the advice and consent of the Senate, for staggered six-year terms expiring on March 1 of the odd-numbered years. At the time of making new nominations to the Commission, the Governor is required to designate a member or nominee to serve as the Commission's Chairperson for a two-year term expiring on March 1 of the odd-numbered year. Each commissioner is appointed to two-thirds of a full-time equivalent position. The WERC is attached to the Department of Workforce Development for administrative purposes.

The WERC is responsible for administering labor relations law under the Wisconsin Employment Peace Act, Municipal Employment Relations Act, and State Employment Labor Relations Act (Subchapters I, IV, and V of Chapter 111 of the statutes respectively). These responsibilities include conducting elections to determine bargaining units and bargaining representatives; issuing decisions regarding unfair labor practice, election, unit clarification, and declaratory ruling cases; mediating collective bargaining disputes; and providing arbitration services for grievances arising over the interpretation and application of existing collective bargaining agreements. The Commission also serves as an administrative appeals body for reviewing personnel actions relating to the state civil service under Subchapter II of Chapter 230 of the statutes. In addition, the WERC provides labor management consensus bargaining training.

GOVERNOR

Reduce funding and position authority for the WERC by \$390,200 and 3.01 positions annually to reflect the following: (a) a reduction to the number of commissioners serving on the Commission from three to one; and (b) a reduction in staff resources for the Commission by 2.0 positions. Funding and position authority would be reduced from the Commission's general program operations appropriation.

Reduction to the Number of Commissioners. Provide that the WERC consist of one chairperson, appointed by the Governor for a six-year term, except that the term of the first chairperson appointed after the effective date of the bill expires on March 1, 2023. Advice and consent of the Senate for appointment of the chairperson would not be required under the bill. [Under current law, commissioners are confirmed by the Senate.] Provide that on the effective date of the bill, the three offices of commissioner at the WERC are eliminated. Modify current law to indicate that the WERC would be comprised of one chairperson, as opposed to three commissioners.

Repeal the current law provision that provides that each member of the Commission must be appointed to two-thirds of a full-time equivalent position. Further, repeal the current law provision that provides that no member of the Commission may hold any other public office or engage in any other occupation, business, or activity that is in any way inconsistent with the performance of the member's duties. Provide that the remaining chairperson of the Commission would be a full-time equivalent employee, and that the chairperson must devote his or her entire time to the duties of his or her office.

Associated with the reduction in the number of members of the Commission, decrease funding and position authority for the WERC by a net \$120,800 and 1.01 positions annually. The decrease in position authority of 1.01 positions results from increasing the full-time equivalency of the chairperson of the WERC by 0.33 position and eliminating the 0.67 full-time equivalency of the other two WERC commissioners.

Reduction in Staffing. Reduce staff resources for the Commission by \$269,400 GPR and 2.0 GPR positions annually to reflect the WERC's decreased workload. The 2.0 deleted positions would be 1.0 attorney position and 1.0 unclassified chief legal counsel position. Delete the statutory provision which specifies that the WERC division administrator must be an attorney and appointed by the Commission chairperson.

DISCUSSION POINTS

1. Base funding and position authority for the WERC totals \$1,536,900 (\$1,383,600 GPR and \$153,300 PR) and 9.01 GPR positions annually. Positions at the WERC include 2.01 Commissioners (three Commissioners serving as two-thirds of a full-time equivalent position), 1.0 unclassified chief legal counsel, 4.0 attorneys, 1.0 paralegal, and 1.0 office manager. Of these positions, 1.0 attorney is vacant.

2. As a result of the Governor's recommendation to reduce the size of the Commission,

funding and position authority for the WERC would total \$1,146,700 (\$993,400 GPR and \$153,300 PR) and 6.0 GPR positions. Positions at the Commission would include 1.0 commission chairperson (one full-time commissioner), 3.0 attorneys, 1.0 paralegal, and 1.0 office manager. In addition to reducing the number of commissioners, the bill would eliminate the unclassified chief legal counsel position and the vacant attorney position. The funding reduction under the bill is associated with the salary, fringe benefits, and supplies and services costs associated with the eliminated positions.

3. Significant reductions to the size of WERC were implemented under 2013 Act 20 (the 2013-15 biennial budget) due to decreasing workloads for the Commission. Under 2013 Act 20, 11.49 GPR positions and 5.0 PR positions, as well as funding associated with those positions, were eliminated from the agency. According to the Executive Budget Book, the reduction to the size of the WERC under the current bill is for a similar reason.

WERC Workload

4. Staff attorneys at the WERC mediate labor disputes, serve as grievance arbitrators, and conduct hearings and issue decisions as examiners in both labor relations matters and state employee civil service appeals. In civil service appeals, decisions issued by staff attorneys are recommended. The three commissioners review the evidence in a civil service appeals, as well as the recommended decision of the staff attorney, and deliver a final ruling. Reviewing these civil service appeals represents the primary workload of WERC commissioners, although, on occasion, individual commissioners may conduct hearings and serve as a mediators or arbitrators in a case that would normally be assigned to a staff attorney. In addition, certain decisions from staff attorneys, such as grievance arbitration decisions, are appealed to the commissioners (although, according to the WERC, this occurs infrequently).

5. The workload of the WERC has changed considerably in recent years, particularly as a result of enactment of 2011 Act 10. Under Act 10, collective bargaining was significantly curtailed for most public employees and interest arbitration for general municipal employees was repealed (except for certain municipal transit employees, and municipal fire and police employees). This has had the effect of reducing the traditional workload for the Commission. In comparing the 2010-11 caseload (the fiscal year prior to the effective date of Act 10) and 2015-16 caseload, it is clear that significant reductions have taken place in the following areas.

6. Grievance arbitration cases, which relate to disputes of how provisions in collective bargaining agreements are being applied, declined by 83% from 2010-11 to 2015-16. Mediation and interest arbitration cases, which relate to the negotiation of collective bargaining agreements, declined by 89% from 2010-11 to 2015-16. Finally, unfair labor practice complaint cases have declined by 82% over this time period.

7. In contrast, some caseload areas for the WERC have increased since Act 10. First, it should be noted that the overall number of WERC cases in 2014-15 and 2015-16 is comparable to the number of WERC cases in 2010-11. While Act 10 had a direct effect of decreasing or eliminating certain types of caseload, it also had the effect of redirecting caseload into other areas.

8. For example, with respect to most state employees, because Act 10 eliminated collective bargaining on all issues except base wages, disciplinary appeals, which had formerly been

processed under provisions specified in collective bargaining agreements, now come before the WERC. In 2015-16, the WERC handled 136 disciplinary appeals cases. In addition, Act 10 required municipalities that do not have a civil service system to create a grievance procedure for general municipal employees, which includes a hearing before an impartial hearing officer. On occasion, WERC staff attorneys or individual commissioners will be asked to act as the impartial hearing officer (this occurred 15 times in 2015-16).

9. Act 10 also requires the annual certification of representatives of each collective bargaining unit containing general municipal and state employees (except collective bargaining units containing certain municipal transit employees), as well as most protective occupation employees. Such elections were not required prior to Act 10 and are now required to be conducted by WERC. In 2015-16, the WERC conducted 426 recertification elections. [In addition, the WERC conducted 41 initial recognition elections, but these elections were also conducted prior to Act 10.] According to WERC officials, this certification work is generally administrative in nature and has been handled by staff attorneys and managed by the WERC's chief legal counsel.

10. In summary, Act 10 dramatically affected WERC's workload. As described above, some caseload work has been permanently reduced or eliminated and other areas of work have remained relatively constant or grown. In general, WERC officials indicate that the overall workload for the Commission has decreased significantly since Act 10.

Governor's Recommendation

11. As noted above, the Governor recommends reducing the size of the WERC. In order to assist the Committee consider the Governor's recommendation, the remainder of this paper is divided into two sections. The first section discusses the Governor's recommendation to reduce the number of WERC commissioners. The second section discusses the Governor's recommendation to eliminate the chief legal counsel and a vacant attorney position in the Commission.

A. Reduction To The Number of Commissioners.

12. The Governor recommends reducing the number of WERC commissioners from three to one. Further, the bill recommends increasing the full-time equivalency of the remaining commissioner (who would be the de facto chairperson of the WERC) from two-thirds time (0.67 FTE) to full-time (1.0 FTE). On the effective date of the bill, the three offices of commissioner at the WERC would be eliminated. Instead, the Commission would consist of one chairperson, appointed by the Governor for a six-year term, except that the term of the first chairperson appointed after the effective date of the bill would expire on March 1, 2023. Advice and consent of the Senate for appointment of the chairperson would not be required under the bill. Associated with this recommendation, the bill reduces funding and position authority for the WERC by \$120,800 GPR and 1.01 GPR positions annually.

13. According to the administration, "There is insufficient workload to justify three commissioners on staff. The remaining chairperson working in a full-time capacity will continue to issue final decisions on several civil service appeals issued by the commission each month - approximately 11 cases per month in FY16 - as well as final appeals in labor relations cases. Commissioners were involved in fewer than 2 labor relations cases per month. The early stages of

civil service appeals cases and labor relations cases can continue to be conducted by remaining WERC attorneys. This budget provision aligns the commission's staffing levels with the current workload." The WERC also states that from the perspective of efficiency alone, a single commissioner would not limit the agency's ability to carry out its duties.

14. In addition, the administration indicates that increasing the full-time equivalency of the chairperson of the WERC to full-time (from two-thirds time) would allow the chairperson to assume additional managerial duties in the agency. Currently, the chief legal counsel of the WERC (which is proposed for elimination) handles some of these responsibilities.

15. In recognition of the WERC's decreasing workload, the Committee could approve the Governor's recommendation to reduce the number of commissioners from three commissions to one chairperson [Alternative A1]. Under this alternative, the chairperson would be a full-time employee, and would be appointed to a six-year term, except that the term of the first chairperson appointed after the effective date of the bill would expire on March 1, 2023. Advice and consent of the Senate for appointment of the chairperson would not be required.

16. The bill inadvertently miscalculated the salary and fringe benefits reduction that should be applied to the WERC under the proposed reduction in the number of commissioners. The miscalculation is the result of utilizing incorrect salary and full-time equivalency data. If the Committee approves the Governor's recommendation to reduce the number of commissioners, the Committee could correct this technical issue by modifying the amounts under the bill by \$4,900 GPR annually (\$3,600 in salary costs and \$1,300 in fringe benefits costs) [Alternative A2a].

17. Under current law, advice and consent of the Senate is required for an appointment of a commissioner to the WERC. Under the bill, Senate confirmation would not be required for the remaining chairperson of the WERC. The Legislature may wish to retain the confirmation process in order to retain oversight of the WERC. Further, it could be argued that such oversight would be of greater value to the Legislature in the future given that the number of commissioners is being reduced from three to one.

18. In addition, note that under s. 17.07 of the statutes, state officers appointed by the Governor for a fixed term with advice and consent of the Senate may be removed by the Governor from office for cause. In contrast, state officers appointed by the Governor for a fixed term for which Senate confirmation is not required may be removed from office at the pleasure of the Governor. One could argue that the chairperson of the WERC should not be removable from office at the pleasure of the Governor, since this could potentially lead to a conflict in the WERC's decision-making process.

19. Given these considerations, if the Committee approves the Governor's recommendation to reduce the number of commissioners, the Committee may wish for the appointment of the remaining chairperson to require the advice and consent of the Senate [Alternative A2b].

20. On the other hand, reducing the number of commissioners from three to one may be detrimental to the deliberative nature of the WERC. Civil service appeals are typically decided upon by all three commissioners. In generating a decision, the commissioners deliberate together and, on

occasion, individual commissioners issue a concurring or dissenting opinion. It could be argued that this process provides for more insightful decisions from the WERC. To this point, the WERC states that, "There is an intangible benefit to having three people weighing in on final decisions. The state Court of Appeals, for example, utilizes three-judge panels for most appeals as do the U.S. Courts of Appeal."

21. Further, with only one commissioner appointed to a six-year term, instances may arise where a Governor who only serves one term of office does not have a chance to appoint a chairperson to the WERC. The current format of three staggered six-year terms ensures that each Governor is able to appoint at least one commissioner to the WERC. This format also allows for newly appointed commissioners to bring fresh perspectives to the decision making process. [Note that, as proposed by the Governor, the chairperson of the WERC would not be confirmed by the Senate, and, therefore, the Governor could remove the chairperson from office at his or her pleasure.]

22. Finally, while current law does provide for certain exceptions, a commission is generally defined as a three-member governing body. The exceptions to this definition (such as the Ethics and Elections Commissions, which each have six members) are commissions that consist of a greater number than three commissioners. Therefore, given that the WERC was established as a commission, it could be argued that the WERC should be comprised of more than one commissioner.

23. For the reasons outlined above, the Committee could decide to maintain current law and exclude the Governor's recommendation to reduce the number of commissioners from three to one [Alternative A4]. Under this alternative, advice and consent of the Senate would still be required for the appointment of WERC commissioners. Further, under this alternative, funding under the bill would be increased by \$120,800 GPR and 1.01 GPR positions annually.

24. Alternatively, if the Committee wishes to maintain three commissioners at the WERC, while also reducing the WERC's base budget, the Committee could reduce the full-time equivalency of the three commissioners from two-thirds time (0.67 FTE per commissioner) to half-time (0.5 FTE per commissioner) [Alternative A3]. The WERC indicates that it would be able to perform its responsibilities with such a reduction, although also notes that it may be more difficult to attract qualified commissioners to only half-time positions. Under this alternative, current law relating to the commissioners would be maintained, except that the statutes would be amended to reflect the fact that the WERC commissioners serve as half-time employees. This alternative would increase funding and position authority under the bill by \$46,800 GPR and 0.5 GPR positions annually.

B. Reduction in Staffing

25. The bill reduces the number of staff at the WERC by 2.0 GPR positions, including 1.0 chief legal counsel position and 1.0 vacant attorney position, to reflect decreasing workloads. Associated with the elimination of these two positions, the bill reduces funding for the WERC by \$269,400 GPR annually. Further, the bill deletes the statutory provision which specifies that the WERC division administrator must be an attorney and appointed by the Commission chairperson. The chief legal counsel currently acts as the division administrator.

26. The WERC indicates that while it could address its current workload with the proposed reduction in staffing, it believes one position proposed for elimination should be retained due to an anticipated increase in workload from civil service appeals resulting from 2015 Act 150. Act 150 made several changes to the state's civil service system, including the establishment of a specific procedure, with timelines, for an employee to contest an adverse employment decision.

27. Under the Act 150 procedure, within 10 days after receiving an appeal, the WERC must determine whether all procedural requirements associated with the appeal were completed properly and in a timely manner. Further, if all of the procedural requirements were met, the Commission must issue a decision on the appeal no later than 120 days after the date the appeal is filed with the WERC. In order to ensure that the Commission issues its decision no later than 120 days after an appeal is filed, the following requirements were established by Act 150: (a) the parties must participate in a pre-hearing conference within 20 days after filing the appeal; (b) discovery must be completed within 60 after the appeal is filed; (c) the WERC must rule on all motions within 30 days before the date of the hearing; (d) the WERC may only grant an extension to a deadline under (a), (b), or (c), under extraordinary circumstances, but the WERC may not extend the 120 decision deadline; and (e) continuances of the hearing may be granted by the WERC only in extraordinary circumstances.

28. These provisions of Act 150 took effect on July 1, 2016. According to the WERC, a reduction in two staff attorneys may make meeting the new time standards problematic, if the Commission's workload increases as state agencies and state employees become more acclimated with the new civil service laws.

29. Notwithstanding, as noted above, the WERC indicates that it can handle its current workload with the proposed reduction. Therefore, the Committee could approve the Governor's recommendation to reduce the WERC's budget by \$269,400 GPR and 2.0 GPR positions annually [Alternative B1]. Under this alternative, the two positions eliminated would include 1.0 unclassified chief legal counsel and 1.0 vacant staff attorney position.

30. One of the positions proposed for elimination includes the WERC's chief legal counsel. This position serves as the WERC's administrator, and serves in the unclassified service. Positions appointed in the unclassified service serve at the pleasure of the appointing authority, which, in the case of the chief legal counsel, is the chairperson of the WERC. Section 230.08 of the statutes identifies the number of division administrators agencies may have in the unclassified service. Section 230.08 identifies that the WERC may have one unclassified division administrator, in recognition of the WERC's chief legal counsel position. The bill does not delete the reference to the WERC's unclassified division administrator position under s. 230.08, even though the chief legal counsel position is proposed for elimination. In order to correct this issue, if the Committee eliminates the chief legal counsel position as recommended by the Governor, the Committee could also eliminate the reference to this unclassified position under s. 230.08 [Alternative B2].

31. Alternatively, the Committee could modify the Governor's recommendation and maintain the current unclassified chief legal counsel position, while still eliminating the vacant staff attorney position [Alternative B3]. This alternative would allow for the retention of staff experience, while still acknowledging the reduction in overall workload. As noted above, the WERC anticipates

that it may have trouble meeting the new time standards established under 2015 Act 150 if both positions are eliminated. Under this alternative, funding and position authority under the bill would be increased by \$186,800 GPR and 1.0 GPR position.

ALTERNATIVES

A. Reduction to the Number of Commissioners

1. Approve the Governor's recommendation to reduce the number of WERC commissioners from three to one. In addition, reduce funding and position authority for the WERC by \$120,800 GPR and 1.01 GPR positions annually. Under this alternative, the remaining commissioner would serve as a full-time employee, and would not be appointed with the advice and consent of the Senate.

| ALT A1 | Change to Base | | Change to Bill | |
|--------|----------------|-----------|----------------|-----------|
| | Funding | Positions | Funding | Positions |
| GPR | -\$241,600 | - 1.01 | \$0 | 0.00 |

2. Modify the Governor's proposal in either, or both, of the following manners. *Alternative A2a and A2b may be chosen in addition to Alternative A1.*

a. Increase funding under the bill by \$4,900 GPR annually in order to correct an inadvertent miscalculation in the reductions to the WERC's budget from reducing the number of commissioners from three to one.

| ALT A2a | Change to | |
|---------|-----------|---------|
| | Base | Bill |
| GPR | \$9,800 | \$9,800 |

b. Provide that the remaining chairperson of the Commission would be appointed with the advice and consent of the Senate.

3. Maintain current law related to the commissioners, except reduce the full-time equivalency the three commissioners from two-thirds time (0.67 FTE per commissioner) to half-time (0.5 FTE per commissioner). Associated with the reduction in the full-time equivalency of the commissioners, funding and position authority under the bill would increase by \$46,800 GPR and 0.5 GPR position annually.

| ALT A3 | Change to Base | | Change to Bill | |
|--------|----------------|-----------|----------------|-----------|
| | Funding | Positions | Funding | Positions |
| GPR | -\$148,000 | - 0.51 | \$93,600 | 0.50 |

4. Maintain current law.

| ALT A4 | Change to Base | | Change to Bill | |
|--------|----------------|-----------|----------------|-----------|
| | Funding | Positions | Funding | Positions |
| GPR | \$0 | 0.00 | \$241,600 | 1.01 |

B. Reduction to the Number of WERC Staff

1. Approve the Governor's recommendation to reduce the WERC's budget by \$269,400 GPR and 2.0 GPR positions annually, in order to eliminate 1.0 unclassified chief legal counsel position and 1.0 vacant attorney position.

| ALT B1 | Change to Base | | Change to Bill | |
|--------|----------------|-----------|----------------|-----------|
| | Funding | Positions | Funding | Positions |
| GPR | - \$538,800 | - 2.00 | \$0 | 0.00 |

2. Modify the Governor's proposal by eliminating the reference to WERC's unclassified division administrator position under s. 230.08 of the statutes. *This alternative may be chosen in addition to Alternative B1.*

3. Modify the Governor's proposal by only eliminating 1.0 vacant attorney position from the WERC. Under this alternative, the WERC's 1.0 unclassified chief legal counsel position would be maintained. In addition, funding under the bill would be increased by \$186,800 GPR and 1.0 GPR position annually.

| ALT B3 | Change to Base | | Change to Bill | |
|--------|----------------|-----------|----------------|-----------|
| | Funding | Positions | Funding | Positions |
| GPR | - \$165,200 | - 1.00 | \$373,600 | 1.00 |

4. Maintain current law.

| ALT B4 | Change to Base | | Change to Bill | |
|--------|----------------|-----------|----------------|-----------|
| | Funding | Positions | Funding | Positions |
| GPR | \$0 | 0.00 | \$538,800 | 2.00 |

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