

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
ROCK VALLEY UNITED TEACHERS

Involving Certain Employees of
THE SCHOOL DISTRICT OF JANESVILLE

Case 1
No. 59255
ME-1020

Decision No. 6678-A

Appearances:

Attorney Laura Amundson, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Rock Valley United Teachers and the Janesville Education Association.

Lathrop & Clark, LLP, by **Attorney Michael J. Julka** and **Attorney Shannon L. Day**, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the School District of Janesville.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 4, 2000, the Rock Valley United Teachers filed a petition with the Wisconsin Employment Relations Commission seeking the clarification of a bargaining unit of certain professional employees of School District of Janesville by the inclusion of certain homebound teachers. The District opposed the petition.

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Hearing was held in Janesville, Wisconsin on June 6, 2001, and July 2, 2001, before Examiner Amedeo Greco, a member of the Commission's staff. The parties subsequently filed briefs and reply briefs that were received by September 10, 2001. Both parties thereafter submitted additional materials that were received by September 25, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Janesville Education Association, herein the Association, is a labor organization with its principal offices at 1215 Suffolk Avenue, Janesville, Wisconsin.

2. The School District of Janesville, herein the District, is a municipal employer with its principal offices at 527 South Franklin Street, Janesville, Wisconsin.

3. On April 20, 1964, the Wisconsin Employment Relations Commission issued a Certification of Representatives in Case I, No. 9569, ME-134, Decision No. 6678, certifying the Association as the collective bargaining representative of employees in the following bargaining unit:

“all regular full-time and all regular part-time certificated teaching personnel employed by the Janesville Board of Education including guidance counselors, teaching principals, speech and hearing specialists and librarians, but excluding per diem teachers, psychologists, interns, recreational directors, and all other employees, supervisors and administrators. . .”

4. Homebound teachers are employees of the District who are assigned on an as needed basis to teach students at locations other than a school building. Homebound teachers can reject teaching assignments. The District has employed homebound teachers since the mid-1970's. Homebound teachers have never been included in the Association bargaining unit.

During the 2000-2001 school year, 11 different homebound teachers accepted work assignments from the District. These assignments produced a range of 42 to 996 total hours worked during the 2000-2001 school year by each of the 11 homebound teachers. Homebound teachers are compensated at an hourly rate specified in the District's 2000-2001 Substitute Teacher Handbook. Substitute teachers have never been included in the Association bargaining unit.

5. Over the years, the District and the Association have voluntarily modified the description of the bargaining unit represented by the Association.

The 1973-1975 bargaining agreement between the District and the Association stated in part:

Article I. Definitions

As used in this Agreement,

...

“Teachers” means all full-time and regular part-time professional staff members covered by this Agreement.

Article II. Recognition

The Board of Education recognizes the Janesville Education Association as the exclusive representative for the following unit of employees:

All regular full-time and regular part-time certificated teaching personnel employed by the Janesville Board of Education, including guidance counselors and librarians, but excluding per diem teachers, psychologists, special area consultants, science and social studies coordinators, interns, recreational directors and all other employees, supervisors and administrators.

The parties’ 1975-1977 bargaining agreement modified the unit description as follows:

Article I. Definitions

As used in this Agreement,

...

“Teachers” means all full-time and regular part-time professional staff members covered by this Agreement.

A “regular part-time teacher” is a teacher who is hired under contract or who is hired by a letter of employment for 50% or more of a full-time teaching load and the position is scheduled for 38 weeks of employment.

A “part-time teacher” is a teacher whose services are scheduled at the time of employment to be 50% or more of a full-time teaching load and for more than 17 consecutive weeks but less than 38 consecutive weeks in a school year.

...

Article II- Recognition

The Board recognizes the Association as the exclusive representative for the following unit of employees:

All regular full-time and regular part-time certificated teaching personnel employed by the Board, including guidance counselors and librarians, but excluding substitute teachers, psychologists, special needs consultants, coordinators, interns, recreational directors, supervisors and administrators.

The 1999-2001 bargaining agreement in effect when this unit clarification petition was filed provides:

ARTICLE I-DEFINITIONS

As used in this Agreement:

...

“Teachers” means all professional staff members covered by Article II, Recognition, of this Agreement.

A “regular part-time teacher” is a teacher who is hired under contract or who is hired by a letter of employment for 50% or more of a full-time teaching load, and the position is scheduled for 38 weeks of employment.

A “limited-term contract teacher” is a teacher whose services are scheduled at the time of employment to be 50% or more of a full-time teaching load or for more than 17 consecutive weeks in a school year.

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ARTICLE II-RECOGNITION

The Board recognizes the Association as the exclusive representative for the following unit of employees:

All regular full-time, regular part-time and limited-term certificated teaching personnel employed by the Board, including guidance counselors, librarians/media specialists, speech and language clinicians, psychologists, but excluding substitute teachers, coordinators, interns, graduate residents, supervisors and administrators.

6. Homebound teachers are not “regular full-time, regular part-time and limited term certificated teaching personnel” within the meaning of the 1999-2001 bargaining agreement between the District and the Association.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The 1999-2001 collective bargaining agreement between the School District of Janesville and the Janesville Education Association excludes homebound teachers from the bargaining unit represented by the Association.

2. The existence of the agreement to exclude homebound teachers from the bargaining unit precludes inclusion of homebound teachers in the bargaining unit through a unit clarification petition.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

The petition for unit clarification is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of February, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

JANESVILLE SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

POSITIONS OF THE PARTIES

The Association maintains that the bargaining unit should be clarified to include the homebound teachers because they are regular full-time and/or regular part-time employees who have never been mutually excluded from the teachers bargaining unit; because they “have similar interests and a ‘shared purpose’ in their employment” with the certificated classroom teachers; because both groups share “virtually identical” duties and skills; because despite some differences, they “share a community of interest”; and because their exclusion would “avoid undue fragmentation”. The Association also asserts that the homebound teacher position did not exist when the bargaining unit initially was certified in 1964; that even if the position did exist, the current “homebound program differs drastically from its earlier incarnations”; that the contractual recognition clause’s failure to expressly refer to the homebound teachers is not controlling; that homebound teachers are not substitute teachers; that it is not necessary for the homebound teachers to meet all of the criteria needed to constitute either a regular part-time or limited-term contract teacher; and that homebound teachers do not share a greater community of interest with substitute teachers.

The District argues that the bargaining unit should not be clarified because the “homebound instructor positions were voluntarily excluded from the existing bargaining unit by the parties. . .” as shown by the contractual recognition clause and that no sufficient “community of interest” exists between the homebound teachers and other bargaining unit positions so as to warrant the inclusion of the homebound teacher positions in the bargaining unit. The District further states that the Association’s community of interest arguments “are unpersuasive when comparing the homebound instructor position and regular teaching personnel overall.”

DISCUSSION

Based on the positions taken by the District in this matter, there is the threshold question of whether the parties voluntarily agreed to exclude the homebound teachers from the bargaining unit and, if so, whether that agreement precludes subsequent inclusion of the homebound teachers by unit clarification.

As to the question of whether an agreement exists, we have ruled that:

When determining whether an agreement to include or exclude positions from a unit exists, we examine all relevant evidence including any agreement by the parties to a bargaining unit description, any agreement by the parties to the eligibility list utilized in the election; the historical inclusion or exclusion of the position from the unit, and pertinent bargaining proposals or contract provisions. Thus, an agreement to include or exclude positions need not be explicitly stated by the parties and can be established by circumstantial evidence. However, unless we are satisfied that the agreement was clearly understood by all parties, we will not honor same and will proceed to meet our statutory obligations under Sec. 111.70(4)(d)2.a., Stats. to determine “the appropriate bargaining unit for the purposes of collective bargaining.” (footnote citation deleted).

WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92).

Here the record establishes that although the District has employed homebound teachers since the mid-1970's, these employees have never been included in the Association bargaining unit.

The record further establishes that the parties have negotiated a contractual recognition clause that, in pertinent part, limits inclusion in the bargaining unit to “regular full-time, regular part-time and limited-term certificated teaching personnel” and have also negotiated contractual definitions for the terms “regular part-time and limited-term teaching personnel” as follows:

A “regular part-time teacher” is a teacher who is hired under contract or who is hired by a letter of employment for 50% or more of a full-time teaching load, and the position is scheduled for 38 weeks of employment.

A “limited-term contract teacher” is a teacher whose services are scheduled at the time of employment to be 50% or more of a full-time teaching load or for more than 17 consecutive weeks in a school year.

Although the contractual term “regular full-time” is not contractually defined, there is no Association argument that the homebound teachers should be included in the unit because they are “regular full-time” employees within the meaning of the contract. 1/ If there were such an argument, it would not be persuasive because none of the homebound teachers work a full-time schedule.

1/ The Association does generally argue that the homebound teachers are “regular” employees under Commission precedent because there is a regularly available amount of work for them to perform and the employees perform that work on a regular basis despite the right to refuse assignments. However, the threshold issue we are deciding turns on the parties’ own contractual definition of “regular”—not on how we would define “regular” under Commission precedent.

As to the contractual phrases “regular part-time teacher” and “limited-term contract teacher”, the Association concedes that the homebound teachers do not fit within the contractual definitions.

The record further indicates that the parties have never explicitly bargained over the inclusion or exclusion of the homebound teachers.

In summary, the record establishes that: (1) homebound teachers have never been included in the unit; (2) the parties have bargained a contractual description of their bargaining unit that does not include the homebound teachers; and (3) the parties have never explicitly bargained over the question of the inclusion or exclusion of the homebound teachers. Having considered the matter, we are persuaded that the combination of the contractual definition of who is included in the unit and the long standing exclusion of homebound teachers is sufficient to constitute an agreement between the parties that the homebound teachers are not part of the Association’s bargaining unit. 2/

2/ In reaching this conclusion, we have not found it necessary to consider and resolve the District’s contention that the homebound teachers are “substitute teachers” within the meaning of the contractually-established exclusions from the bargaining unit.

Having reached the conclusion that such an agreement exists, we turn to the question of whether this agreement precludes inclusion of the homebound teachers by unit clarification.

Where, as here, the parties have contractually agreed to exclude positions from a bargaining unit, we honor that agreement and will not allow either party to alter the unit’s scope unless:

1. the positions did not exist at the time of the agreement; or
2. the positions were included or excluded based on an agreement that the employees holding the positions were (or were not) supervisors, confidential employees, etc. or
3. the positions in dispute have been impacted by changes circumstances which materially affect unit status; or
4. the existing unit is repugnant to the Municipal Employment Relations Act.

WISCONSIN DELLS, supra.

Here, the positions existed when the parties reached agreement on the scope of their unit and there is no evidence or contention that the agreement was based on alleged supervisory or confidential status of the homebound teachers. The record does not establish that there have been any recent material changes in the position of homebound teacher. Lastly, the record does not establish that the existing exclusion of homebound teachers is repugnant to the Municipal Employment Relations Act.

Therefore, we will honor the existing agreement to exclude the homebound teachers and have dismissed the unit clarification petition. 3/

3/ The Association can pursue representation of the homebound teachers by filing an election petition. If such a petition is filed, we would then evaluate whether the proposed bargaining unit is an appropriate one under the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 26th day of February, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

