

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
STEVENS POINT CITY EMPLOYEES,	:	
LOCAL 309, AFSCME, AFL-CIO	:	
	:	Case 1
Involving Certain Employes of	:	No. 41659 ME-2855
	:	Decision No. 7713-A
STEVENS POINT BOARD OF	:	
EDUCATION, STEVENS POINT	:	
AREA PUBLIC SCHOOLS	:	
DISTRICT NO. 1	:	
	:	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1973 Strongs Avenue, Stevens Point, Wisconsin 54481, appearing on behalf of Local 309, AFSCME, AFL-CIO.

Mr. Dean R. Dietrich, and Mr. Jeffrey T. Jones, Mulcahy & Wherry, S.C., Attorneys at Law, First Wisconsin Plaza, P.O. Box 1004, Wausau, Wisconsin 54401-1004, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER DISMISSING PETITION FOR ELECTION

Stevens Point City Employees, Local 309, AFSCME, AFL-CIO, having on January 27, 1989, filed a petition requesting the Wisconsin Employment Relations Commission to conduct an election among certain of the District's employes and then to accrete them to an existing collective bargaining unit of full-time and regular part-time custodial and maintenance employes currently represented by the Union; and hearing having been delayed due to the parties scheduling difficulties; and after efforts by the Commission to settle the matter were unsuccessful, hearing having ultimately been held on April 20, 1989 in Stevens Point, Wisconsin before Examiner Mary Jo Schiavoni, a member of the Commission's staff; and no stenographer having been present and the parties' having agreed that a tape recording of said hearing should be prepared in lieu of a transcript; and the parties having completed their briefing schedule on May 22, 1989; and the Commission having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Stevens Point Area Public Schools, District No. 1, hereinafter the District, is a municipal employer engaged in the operation of a public school system and has its offices at 1900 Polk Street, Stevens Point, Wisconsin 54481.

2. That Stevens Point City Employees, Local 309, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization and has its offices at 1973 Strongs Avenue, Stevens Point, Wisconsin 54481.

3. That by virtue of Stevens Point Area Public School District, Dec. No. 7713 (WERC, 10/66), the Union is the certified exclusive collective bargaining representative for certain employees of the District in a bargaining unit described as follows:

all regular full-time and regular part-time custodial and maintenance employees of the Stevens Point Board of Education, Stevens Point Area Public Schools, District No. 1, excluding supervisors and all other employees.

4. That since 1973, the District has utilized a group of individuals which it has referred to as LTE (Limited Term Employment) Custodians in two different respects; (1) it has hired LTE Custodians as substitutes for bargaining unit members who are absent due to illness, leaves of absence, vacations, etc. and (2) it has also utilized LTE Custodians for special remodeling projects during summer vacation or other breaks in the school calendar including drywalling, electrical, painting and other work involving building and construction skills.

5. That since at least 1973, the Union and the District have been parties to a series of collective bargaining agreements; that agreements from 1973 to 1984 contained the following provision:

Article VII Seniority Rights

B. 1. The above rules on establishing seniority shall not apply to temporary employees (employees hired for a specific project or for a definite length of time), however, in the event a temporary employee becomes a regular full-time or regular part-time employee, notice of his/her change in status shall be given to the Union and his/her seniority shall date from his/her last date of hire. A temporary employee is defined as an employee who is hired on a temporary basis for a specific period of time or for a special project but for less than a period of 90 calendar days. Temporary employees may work a part-time schedule or a full-time schedule. However, if the employee works longer than 90 calendar days without being separate from service for at least 90 calendar days before being rehired, he/she shall be credited with all time worked toward his/her probationary period and shall receive the rate of pay as outlined in Appendix "A" and Article 17 of this Agreement. He/she shall also receive the same fringe benefits granted other probationary employees. When an employee is hired for a special project and said project cannot be completed in the 90 day period as outlined above, a 30 day extension may be granted

provided the Union is notified.

6. That in the agreement covering the period of time from July 1, 1984 to June 30, 1986, Section B. 2. was added which provides as follows:

2. It is understood that regular employees shall have preference, within a building, in job assignments over temporary employees if the temporary employee is capable of performing the job assignment. This will not be used to circumvent an employee's regular duties. It is further understood that within a building, regular employees shall be offered overtime prior to offering overtime to temporary employees.

7. That the current agreement, which extends from July 1, 1986 to June 30, 1989, contains the following applicable provisions:

Article I - Recognition

A. The Board hereby recognizes the Union as the exclusive collective bargaining representative of all regular full-time and regular part-time Custodial and Maintenance employees of the Stevens Point Area Public Schools, District #1, excluding the super-visor of Buildings and Grounds, bus trans-portation employees, food service personnel, office clerical employees, supervisory personnel, central supply manager, and teachers, for the purpose of bargaining collectively on matters pertaining to wages, hours and working conditions of employment.

B. The Union and the Board recognize the right of any employee to join and participate in Union activities as well as their right not to join and not to participate in such activities. The Union and the Board agree not to discriminate in any manner against such employee because of his/her Union activity or his/her refusal to engage in such activity.

C. Definitions:

1. Regular Full-Time: Regular full-time employees shall mean employees hired to fill a regular full-time position in the bargaining unit.

2. Regular Part-Time: Regular part-time employees shall mean employees hired to fill a regular part-time position in the bargaining unit.

3. Limited Term Employees:

1. Limited term employees (LTE's) shall mean employees hired for a period not to exceed ninety (90) calendar days and excluding regular employees as defined in C.1 and C.2 above. If an LTE workers (sic) longer than 90 calendar days without being separated from service for at least 90 calendar days before being rehired, they shall be credited with all time worked toward their probationary period and shall be considered a regular employee. The Union may grant an extension of 30 calendar days upon written request of the Board of Education. Any LTE reemployed by the Board as a regular employee after being separated for

more than 90 calendar days shall be treated as a new hire.

2. It is further understood that under the following circumstances, the Board may need to hire an LTE for more than 90 calendar days provided for above. Such hiring shall be limited to filling in for a regular employee who is unavailable due to extended sick leave, medical leave, leave of absence and/or Worker's Compensation leave. In such event, an individual so hired shall be employed for the period of absence.

The Board agrees that in the event the regular employee does not return to employment, the position is subject to the posting procedure and the LTE worker shall not be considered for the position unless all regular employees do not post for said positions). However, should the LTE be the successful candidate for said position after completion of normal posting process, time worked shall be credited towards their regular probationary period and they shall be considered a regular employee.

. . .

Article 6 - Seniority Rights

A. Seniority shall be determined by continuous length of service with the school system beginning on the last date of hire, as a regular employee.

B. It is understood that regular employees shall have preference, within a building, in job assignments over limited term employees if the limited term employee is capable of performing the job assignment. This will not be used to circumvent an employee's regular duties. It is further understood that within a building, regular employees shall be offered overtime prior to offering overtime to limited term employees.

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8. That on January 27, 1989, the Union filed the instant petition requesting that the Commission conduct an election among the current LTE Custodians, five employees, and if a majority of said employees choose to be represented by the Union, accrete all LTE Custodians to the existing bargaining unit referred to in Finding of Fact 3; that the Union expressly disavows any interest in representing the affected employees in a separate unit; and that the Union argues that the disputed employees are neither casual nor temporary employees but rather that they are regular part-time employees.

9. That the District opposes the Union's petition arguing that the Commission should dismiss the petition on three separate grounds: (1) that the Union's petition for election is barred by the parties' collective bargaining agreement which excludes the LTE Custodians from the bargaining unit; (2) that LTE Custodians are casual employees and thus are not "municipal employees" eligible for union representation; and (3) that, in any event, inclusion of LTE Custodians within the regular custodian and maintenance bargaining unit is inappropriate because LTE Custodians do not share a community of interest with the regular bargaining unit employees.

10. That by agreeing to the contract language noted in Finding of Fact 7, above, the parties expressly and specifically agreed to exclude the LTE Custodians from the bargaining described in Finding of Fact 3; that this exclusion was not based upon statutory grounds; that the existing unit is not repugnant to MERA; and that there has been no material change in circumstances affecting the LTE Custodians' unit status since 1986.

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

CONCLUSION OF LAW

That absent an agreement of the parties on some other procedure, the Union can expand the existing bargaining unit to include any LTE Custodians who are regular part-time employees by means of: (1) a timely filed election petition including both those employees in the existing unit set forth in Finding of Fact 3 and the LTE Custodians; or (2) an election petition in a residual unit of all currently unrepresented regular full-time and regular part-time employees of the District which unit could be merged with the existing unit if the Union was selected by a majority of those voting as the collective bargaining representative.

Based upon the above and foregoing Findings of Fact and Conclusions of

Law, the Commission makes and issues the following

ORDER 1/

That the petition to conduct an election only among current LTE Custodians to determine whether they wish to be accreted to the existing custodian and maintenance bargaining unit described in Finding of Fact 3 be, and hereby is, dismissed.

Given under our hands and seal at the City of Madison, this 17th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

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227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties,, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

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(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

STEVENS POINT AREA
PUBLIC SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER DISMISSING PETITION FOR ELECTION

UNDERLYING FACTS

The basic facts are set forth in the Findings above. The case presents two issues for Commission determination. The first is whether the Union, in light of the parties' contractually agreed to recognition language, may petition for and receive an election among certain of the District's currently unrepresented employees and, upon receipt of a majority vote, have said employees accreted to the existing bargaining unit.

Assuming that the Union is not barred from receiving such an election, the second issue then involves a determination as to whether the disputed employees, the current LTE Custodians, should be appropriately included in the bargaining unit.

POSITIONS OF THE PARTIES

The Union requests the Commission to conduct an election among the LTE Custodians and to issue an order accreting them to the existing custodial and maintenance bargaining unit upon receipt of majority approval of the LTE Custodians. The Union expressly disavows any interest in representing the LTE Custodians in a separate unit. It has not, however, expressed a desire to or offered to stand an overall election in the existing custodial and maintenance unit.

The Union contends that the recognition clause of the contract does not exclude LTEs. Rather, LTEs are merely defined and their rights are described. This, it asserts, is not an implicit or explicit exclusion of these employees from the unit. Arguing in the alternative, the Union maintains that even if such an exclusion is found to exist, the petition should nevertheless be granted because there is no other appropriate unit in which these employees can be included. Pointing to the record evidence and to the statutory mandate to avoid undue fragmentation, the Union argues that a separate unit is inappropriate and that LTE Custodians share a community of interest with members of the existing custodial and maintenance bargaining unit. The Union asserts that if the Commission dismisses this petition, it will be depriving these employees of the opportunity to seek representation and thus be acting in a manner repugnant to Sec. 111.70(6), Stats.

Relying upon this same evidence, it maintains that LTE Custodians are neither temporary or casual employees but rather regular part-time employees with a reasonable expectation of continued employment.

The District disagrees with the Union's position. It argues that the Union's petition for election is barred by the parties' agreement to exclude the LTEs from the bargaining unit citing Mid-State Vocational Technical and Adult Education District No. 14, Dec. No. 14526-A (WERC, 5/85) and West Allis-West Milwaukee School District, Dec. No. 16405-C (WERC, 1/89). The District opposes an expansion of the agreed upon unit as proposed by the Union and notes that there is no evidence to suggest that the exclusion of the LTEs from the unit was based upon statutory grounds rather than the parties' mutual consent. It also stresses that the Union has failed to demonstrate the existence of any intervening event which has materially affected the status of

the LTE Custodians.

Furthermore, the District argues that the LTE Custodians are casual employees, whose inclusion in the existing bargaining unit would be inappropriate because they are not "municipal employees". Even if the Commission were to conclude that these employees are municipal employees, the District submits that the inclusion of the LTE Custodians is inappropriate because they do not share a sufficient community of interest with the existing regular full-time and regular part-time custodial and maintenance bargaining unit employees. Permitting a separate bargaining unit of LTE Custodians under these circumstances, it argues, would not result in undue fragmentation.

DISCUSSION

The initial question for determination is whether the Union's petition for election and subsequent accretion is barred by the parties' agreed upon contractual language. In Mid-State Vocational Technical and Adult Education District No. 14, Dec. No. 14526-A (WERC, 5/85), we held that where the parties have previously agreed to exclude certain existing positions held by municipal employees from an existing unit, it would be inappropriate, absent a showing that the existing agreed upon unit is repugnant to MERA or that a material change regarding the status of the disputed positions has occurred, to grant the union's request for inclusion in the unit of the excluded employees by unconditional order clarifying the bargaining unit. Rather, we held that the union therein was obligated to timely file a petition for election in the overall unit it seeks to represent to achieve the desired expansion of the unit to include the excluded positions.

In Mid-State, we were applying the principle established in Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76) and City of Cudahy, Dec. No. 128997 (WERC, 9/74) and recently reaffirmed in West Allis - West Milwaukee Schools, supra; and City of Sheboygan, Dec. No. 7378-A (WERC, 5/89), to the effect that we will honor parties' agreements on unit composition unless:

- 1.The positions in dispute did not exist at the time of the agreement; or
- 2.The positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions were or were not supervisory, confidential etc.; or
- 3.The positions in dispute have been impacted by changed circumstances which materially affect their unit status; or
- 4.The existing unit is repugnant to the Act.

While the decisions cited above were responses to requests for unconditional orders clarifying bargaining units, we are satisfied that the rationale in those cases is equally applicable to the election petition before us. Thus, if the parties herein have an agreement to exclude LTE Custodians and the conditions set forth above do not exist in the instant case, we will dismiss the Union's petition. 2/

2/ As we note in our Conclusion of Law, an existing regular full-time and regular part-time unit can also be expanded if a union seeks an election in a residual unit of all currently unrepresented regular full-time and regular part-time employees and asks that said residual unit be merged with the existing unit if the Union wins the residual election. City of

The District contends and the Union denies that the parties have mutually agreed to contract language in their most recent agreement which expressly excludes LTE Custodians from the regular custodial and maintenance bargaining unit. Findings of Fact 5, 6, and 7 fully set forth the evolution of the parties' bargaining language on the issue of LTES. The most recent language, as set forth in Finding of Fact 7, does more than merely define LTES, as the Union argues. Section C.3, when read in conjunction with Section A of Article 1, the recognition provision, expressly excludes Limited Term Employees (LTEs) from the bargaining unit. As the District correctly notes, since at least 1973, the parties have been aware of the District's use of LTES and have agreed that LTES would be excluded from the bargaining unit provided certain conditions were met. That is, if the use of LTES was limited to 90 days and they were not recalled to work within the next 90 days, the LTES were excluded from the regular custodial and maintenance unit. This conclusion that LTES have been expressly excluded is buttressed by the parties' revision of Article I during the last round of negotiations. Such a revision highlights the fact that the role of LTES has been specifically considered and has led to their exclusion from the unit by the parties.

Because the LTE Custodians have been expressly excluded by the most recent contractual language, and the exclusion was not based upon statutory grounds, the unit is clearly not repugnant to MERA, and there have been no material changes with respect to LTE Custodians since the execution of the most recent agreement, we conclude that the instant petition must be dismissed. 3/

Dated at Madison, Wisconsin this 17th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker Commissioner

Milwaukee, Dec. No. 13099 (WERC, 10/74); Fox Valley Technical Institute, Dec. No. 13204 (WERC, 12/74); Cochrane-Fountain City School District, Dec. No. 13700 (WERC, 6/75); MATC, Dec. No. 8382-A (WERC, 1/80). Here, AFSCME has not expressed an interest in pursuing this "residual" option and it is not clear whether there are any other regular full-time and regular part-time unrepresented District employees in addition to any of the LTE Custodians who may be regular part-time employees.

3/ Therefore, it is unnecessary to consider the issue of whether any or all of the LTES are casual employees who thus, in any event, would not share a sufficient community of interest with the regular full-time and regular part-time employees to be included in the existing unit. Contrary to the District's arguments, we would not that casual employees are "municipal employees" within the meaning of Sec. 111.70(1)(i), Stats., and thus can be represented for the purposes of collective bargaining in appropriate units of casual employees.