

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case I  
No. 11693 ME-337  
Decision No. 8209-D

Mr. Robert Chykowski, Representative, WCCME, AFSCME, AFL-CIO, appearing on behalf of the Petitioner.

Mr. Jay S. Carmichael, Attorney at Law, appearing on behalf of the Municipal Employer.

Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, having, on January 11, 1978, filed a petition with the Wisconsin Employment Relations Commission, wherein it requested the Commission to clarify an existing collective bargaining unit consisting of certain employees of Tomah Area School District to determine whether Marie Kuehl and Margaret McDaniel should be included in said collective bargaining unit; and a hearing having been held in the matter at Tomah, Wisconsin, on March 9, 1978, Dennis P. McGilligan, Examiner, being present; the transcript was completed on March 17, 1978, however, the parties waived receipt of the transcript and briefs in the matter; and the Commission having considered the evidence and arguments of the parties and being fully advised in the premises, hereby issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

1. That on November 30, 1967, following an election conducted by it, the Wisconsin Employment Relations Commission certified Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the Union, as the exclusive collective bargaining representative of all regular full-time and regular part-time employees of Tomah Area School District, hereinafter referred to as the District, including custodial employees, bus drivers, clerical employees, and school luncheon employees, but excluding supervisory employees, confidential employees, temporary employees and teaching personnel.

2. That the Commission clarified said bargaining unit by Order dated March 23, 1972 to include the positions of bus maintenance man, clerical aide, and paraprofessional employe or teacher aide.

3. That the Union and District are parties to a collective bargaining agreement effective from July 1, 1976 to June 30, 1978, which contains, among other provisions, the following:

## "ARTICLE 2 - RECOGNITION

### Section 1

The Employer hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees including custodial employees, bus drivers, clerical employees, school luncheon program employees, teacher aids [sic] and school bus maintenance employees, but excluding supervisory employees, confidential employees, temporary employees & teaching personnel, for the purpose of bargaining collectively on all matters pertaining to wages, hours, and working conditions of employment.

. . .

## ARTICLE 6 - LEAVE OF ABSENCE

Section 1. Applications for leave of absence for personal reasons shall be made to the Employer in writing and reviewed by the business manager and the steward; the granting of any leave and the length of time for such leave shall be contingent upon the reasons for the request. The business manager may grant leaves of absence of fourteen (14) calendar days or less. Leaves of absence for more than fourteen (14) calendar days shall be discussed by the business manager with the Union. Any such request shall then be presented to the School Board or its duly authorized representatives with the recommendation. The action taken by the School Board or its representative with respect to the request shall be promptly conveyed to the Union. All leaves of absence shall be without pay. Persons hired to replace other employees will be 'temporary'. Temporary employees shall not be hired for more than 90 calendar days in one year.

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## ARTICLE 15 - STANDARDS AND PRACTICES

The Union agrees that the Employer may continue its practice of hiring persons outside the bargaining unit on a temporary basis to perform services during school vacation periods. The Employer agrees that the privileges and benefits enjoyed by the employees covered by this agreement prior to their designation of the Union as the collective bargaining agent shall be continued unless changed by mutual consent of the parties.

. . .

## ARTICLE 18 - WORK DAY, WORK WEEK AND PREMIUMS

Section 1. The work day shall consist of eight (8) hours and the work week shall consist of forty (40) hours for full-time employees. This shall not be construed as establishing either a minimum or a maximum work day or work week. The forty (40) hour week shall be continued for office employees. Part-time employees and teaching aides shall continue to work the hours now worked during the period of this agreement. All hours worked in excess of

eight (8) in any work day or forty (40) in any work week, whichever is greater but not for both, shall be paid at one and one-half the regular straight-time hourly rate for the employee involved.

Overtime and premium time shall not be pyramided."

4. That on January 11, 1978, the Union filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify the existing collective bargaining unit by including the custodian positions occupied by Marie Kuehl and Margaret McDaniel within said bargaining unit.

5. That Marie Kuehl and Margaret McDaniel are employed by the District as substitute employees during the school year when one of the regular full-time or regular part-time employees is ill or absent from work for some other reason that the individuals noted above perform work on an irregular, call-in basis except during summer vacation when said employees have performed work on a regularly scheduled basis as temporary employees; that the District has always treated said employees as temporary employees when they were employed during the summer vacation period and bargained over contract terms with this understanding in mind; that Marie Kuehl and Margaret McDaniel are casual employees during the school year.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

#### CONCLUSION OF LAW

That on the basis of their irregularity of employment during the school year and their temporary employment during the summer months the occupants of the positions noted in paragraph 4 of the Findings of Fact are not regular part-time employees within the meaning of Article 2, Section 1 of the parties' collective bargaining agreement; that instead the employees are, during the school year, casual employees as determined by the Commission under Section 111.70 of the Municipal Employment Relations Act, and during the summer vacation period, temporary employees, excluded from the bargaining unit as certified by the Commission and as reflected by Article 2, Section 1, Article 6, Section 1 and Article 15 of the collective bargaining agreement.

#### ORDER CLARIFYING BARGAINING UNIT

That Marie Kuehl and Margaret McDaniel are excluded from the collective bargaining unit presently represented by Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, consisting of all regular full-time and regular part-time employees of the Tomah Area School District including custodial employees, bus drivers, clerical employees, school luncheon program employees, teacher's aides, clerical aides and school bus maintenance employees, but excluding supervisory employees, confidential employees, temporary employees and teaching personnel.

Given under our hands and seal at  
the City of Madison, Wisconsin this *9th*  
day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

*Morris Slavney*  
Morris Slavney, Chairman

*Herman Torosian*  
Herman Torosian, Commissioner

*Marshall L. Gratz*  
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

The Union seeks to clarify an existing bargaining unit presently represented by it to include the custodian positions occupied by Marie Kuehl and Margaret McDaniel. The Union basically contends that their employment has become so substantial that said employees are in effect regular part-time employees and therefore members of the bargaining unit. The District, on the other hand, argues that these employees perform work on a call-in, irregular basis and should continue to be excluded from the bargaining unit.

The Commission has long held that the determinative factor in deciding whether an employee is casual is the regularity of employment rather than the number of hours worked. <sup>1/</sup> The record indicates that said employees are called in during the school year as substitutes on a sporadic and irregular basis by the District to fill in for regular employees who are ill or absent from work for some other reason.

The two employees in question have worked during the summer vacation period on a regularly scheduled basis. However, in this capacity they are excluded from the bargaining unit by Article 2, Section 1, Article 6, Section 1 and Article 15 of the parties' collective bargaining agreement. Past practice and bargaining history support an interpretation of the contract in this manner.

In view of the foregoing, we find that a combination of the two employees' temporary summer employment and their irregular employment during the school year does not result in a conclusion that they are regular part-time employees within the meaning of Article 2, Section 1 of the parties' collective bargaining agreement but that said employees are, during the school term, casual employees as determined by the Commission under Section 111.70 of the Municipal Employment Relations Act, and during the summer vacation period, temporary employees according to the terms of the parties' collective bargaining agreement. Consequently, we have excluded them from the aforementioned bargaining unit.

Dated at Madison, Wisconsin this 9th day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Herman Torosian  
Herman Torosian, Commissioner

Marshall L. Gratz  
Marshall L. Gratz, Commissioner

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<sup>1/</sup> Richland County (11484) 12/72; Florence County Jt. School Dist. No. 1 (6677) 3/64; Janesville Board of Education (6678) 3/64.