

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
MILWAUKEE TEACHERS EDUCATION ASSOCIATION	:	Case XIX
	:	No. 12307
Involving Certain Employes of	:	ME-395
	:	Decision No. 8901
MILWAUKEE BOARD OF SCHOOL DIRECTORS	:	
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Appearances:

Zubrensky, Padden Graf & Bratt, by Mr. Richard Perry, for the Petitioner.

Mr. John F. Kitzke, Chief Negotiator, Milwaukee Board of School Directors, for the Municipal Employer.

DIRECTION OF ELECTION

Petition having been filed by Milwaukee Teachers Education Association with the Wisconsin Employment Relations Commission requesting that an election to determine bargaining representatives be conducted, pursuant to Section 111.70 of the Wisconsin Statutes, among all regularly employed substitute per diem teachers in the employ of Milwaukee Board of School Directors, Milwaukee, Wisconsin, and a hearing on such petition having been conducted at Milwaukee, Wisconsin on September 4, 1968, Robert B. Moberly, Examiner, being present; and the Commission having considered the evidence, arguments and briefs of counsel and being satisfied that a question has arisen concerning representation for certain employes of Milwaukee Board of School Directors;

NOW, THEREFORE, it is

DIRECTED

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within sixty (60) days from the date of this Directive in the collective bargaining unit consisting of all regularly employed substitute per diem teachers (excluding all other employes and supervisors), who are listed on the list of substitute per diem teachers as of the date of this Direction, February 21, 1969, and who have taught at least thirty (30) or more days in the one-year period immediately

preceding the date of this Direction, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether or not a majority of such employes desire to be represented by Milwaukee Teachers' Education Association, for the purposes of conferences and negotiations with the Milwaukee Board of School Directors on questions of wages, hours and conditions of employment.

Given under our hands and seal
at the City of Madison, Wisconsin,
this 21st day of February, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas Slavney
Morris Slavney, Chairman

William R. Wilberg
William R. Wilberg, Commissioner

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MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION

Milwaukee Teachers Education Association, hereinafter referred to as the Association, filed a petition with the Wisconsin Employment Relations Commission requesting that an election, pursuant to Section 111.70, Wisconsin Statutes, be conducted among "all regularly employed substitute per diem teachers, excluding supervisors, in the employ of the Milwaukee Board of School Directors," hereinafter referred to as the Municipal Employer. In the operation of the school system the Municipal Employer employs, among others, approximately 4800 regular certified school teachers, approximately 300 to approximately 1100 substitute per diem teachers in 156 schools, teaching approximately 138,000 students.

The Association was certified by the Commission in February of 1964 as the collective bargaining representative for employes in the collective bargaining unit consisting of "all regular teaching personnel teaching at least fifty per cent of a full teaching schedule (including Recreation Instructors V and Vice Principals teaching a full schedule), employed by the Milwaukee Board of School Directors, excluding substitute per diem teachers, office and clerical employes, and all other employes, supervisors and executives".^{1/} Since that time, however, the Municipal Employer has adopted a resolution recognizing the Milwaukee Teachers Education Association "as the duly certified exclusive collective bargaining representative for all regular teaching personnel (called 'teachers') teaching at least fifty per cent of a full teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, recreation instructors and teaching vice-principals) employed by the Board excluding substitute per diem teachers, office and clerical employees, and other employees, supervisors and

1/ Milwaukee Board of School Directors, Dec. No. 6595, 2/64;
Milwaukee Board of School Directors, Dec. No. 8030, 6/67.

executives;".^{2/}

Substitute per diem teachers are hired by the Municipal Employer (1) when a regular certified, appointed teacher is temporarily unavailable due to illness or some other reason, and (2) when, as is presently the case, it is unable to hire certified teachers in sufficient numbers. The Municipal Employer maintains a list containing the names of substitute per diem teachers who may be called when there is a need for them. The number of individuals on this list varies during the year from less than 300 to more than 1100. There is no minimum or maximum number of individuals who can be included on the list, and the number may vary from hour to hour. The turn-over rate of substitute per diem teachers from one school year to the next is approximately fifty per cent, as compared to a turn-over rate of approximately fifteen per cent for regular certified teachers. Some substitute per diem teachers lack the requisite education qualifications to become fully certified teachers.

Substitute per diem teachers are paid on a day-to-day basis, and have the option of refusing any assignment offered to them. Substitute per diem teachers are paid twenty-five dollars per day, and if they teach nineteen consecutive days or more on the same assignment, the rate is raised to twenty-eight dollars per day and made retroactive to the first day of that teaching period. While most of the substitutes on the list work on a short-term basis (less than nineteen days on a single assignment), about 135 to 150 substitutes work on a long-term basis (nineteen days or more on a single assignment). In addition, many substitute per diem teachers (three of whom testified at the hearing) teach the full 190 days of the 190-day school year, except for illness, death in the family and the like.

The Municipal Employer would have the Commission dismiss the petition, primarily on two grounds, namely, (1) that the substitute per diem teachers are not employees, but independent contractors, and (2) that should the Commission find that the substitute per diem teachers are not independent contractors, that they are only casual and, therefore, not employees within the meaning of Section 111.70.

The issues arising from the evidence, arguments and briefs of counsel are as follows:

(1) Are substitute per diem teachers in the employ of the Municipal Employer employees within the meaning of Section 111.70, Wisconsin

^{2/} Exh. 13, p. 5.

Statutes, entitled to be represented for the purposes of collective bargaining?

(2) If the answer to the first issue is in the affirmative, is a unit consisting of only substitute per diem teachers an appropriate collective bargaining unit?

(3) If the answer to the second issue is in the affirmative, who shall be eligible to participate in the election?

The test of whether a person is an employe or independent contractor is that of the "right of control". Essentially, a person is an employe rather than an independent contractor if the employer for whom the services are performed reserves the right to control the manner and means by which the job is accomplished.^{3/}

The evidence shows that the Municipal Employer reserves the right to control the manner and the means by which the job of substitute teaching is accomplished. A substitute per diem teacher is subject to the supervision and direction of the principal of the particular school where he is teaching. The Municipal Employer, primarily through its principals, reserves the right to determine the books used in classrooms, to direct substitute per diem teachers in their methods of teaching, and to control discipline problems encountered by substitute per diem teachers. While this authority may not always be exercised by individual principals, the test is whether there exists a right of control rather than whether that right is exercised.^{4/} It is true that the substitute per diem teacher may refuse a proffered teaching assignment. However, this circumstance in itself is not conclusive, and in view of the other factors indicating an employment relationship, we deem such substitute per diem teachers to be employes and not individual contractors.

While many substitute per diem teachers are not certified teachers, all of them are engaged in the profession of teaching. There is already established a unit of regular certified teachers in the employ of the Municipal Employer. Unlike regular teaching personnel, substitute per diem teachers do not receive such fringe benefits as health insurance, sick leave, funeral leave, emergency days, leaves of absence, personal leaves, maternity leaves and convention leaves. The only fringe benefit received by substitute per diem teachers which is also received by regular teaching personnel is certain pension rights granted

^{3/} Rugene, Inc., Dec. No. 5786, 8/61. See also Prigge's Chartered Buses, Inc., Dec. No. 8061, 6/67; Florence County Joint School District No. 1, Dec. No. 6143, 10/62.

^{4/} See, e.g., Operating Engineers, Local 12, 168 NLRB No. 112, 67 LRRM 1019 (1967).

to some substitute teachers by Section 119.265, Wisconsin Statutes.^{5/}

Substitute per diem teachers further differ from regular teaching personnel in that they do not receive annual pay increments given to other teachers, they are unable to obtain tenure, and they do not receive the benefit of certain desirable reassignment and promotional policies. In addition, regular teaching personnel are paid on the basis of an annual salary, while substitute per diem teachers, as their name indicates, are paid on the basis of a per diem rate.

In holding that substitute per diem teachers constitute a separate division, we believe that this case in many respects is similar to Milwaukee Board of Vocational and Adult Education, Dec. No. 6343, 5/63, where we held that part-time persons teaching less than 50% of a regular teaching schedule constitute a division separate from the bargaining unit of persons teaching more than 50% of a regular teaching schedule for the reason that

"teachers who teach less than 50% of a full teaching schedule do not participate in sick leave, teacher retirement benefits, nor tenure, while those who teach 50% or more of the teaching schedule do participate in said benefits. Furthermore, evidence of the division which the Municipal Employer has created between the two groups is the fact that the great majority of the teachers who teach more than 50% of a regular teaching schedule are paid on a yearly basis, every two weeks, while those who teach less are paid on a per diem basis and hired for a single semester."

Since substitute per diem teachers are employees engaged in the teaching profession, in a division separate and apart from regular certified teachers, said division is the residual of the employees engaged in the profession of teaching, and therefore, there is no need for a self-determination vote to establish that division as a separate bargaining unit.

There remains the further question of which substitute per diem teachers shall be entitled to vote in the election.

In previous decisions we have held that the right to vote in representation elections is extended only to those persons in the bargaining unit who have a definite interest in the wages, hours and

^{5/} This section provides, in essence, that substitute teachers who have taught for a period of three school years or more of not less than 100 days each year may elect to become a member of the public school teachers' annuity and retirement fund.

working conditions of employees in the unit.^{6/} Casual or temporary employees generally are not considered eligible to vote. The primary question here, then, is which substitute per diem teachers are likely to have a sufficient interest in their wages, hours and working conditions so as to entitle them to vote in the representation election. As we mentioned earlier, some substitute per diem teachers as a matter of course have been teaching 180 to 190 days of the 190-day school year. Obviously, such teachers have a sufficient measure of interest in their conditions of employment to permit them to vote. But there doubtless may be other persons on the Municipal Employer's list of substitute per diem teachers who have not taught a single day either in the last school year or to date in the present school year. It seems equally clear that these persons do not have sufficient interest in employment conditions to permit them to vote and would be considered casual employees. The problem thus is one of defining the sufficiency of the interest which will permit an employee to vote in the representation election. The Association suggests that a substitute per diem teacher be permitted to vote if he has taught 10% or more, or perhaps 15% or more, of the amount of teaching days in the last school year. The Municipal Employer in its brief suggests that all substitute per diem teachers are casual employees and therefore ineligible to vote.

We reject the Municipal Employer's argument that all substitute per diem teachers are casual employees, and instead conclude that only those individuals teaching less than 30 days of the school year should be considered casual employees who are ineligible to vote. Those substitute per diem teachers teaching at least 30 days of the school year are deemed to be regular employees either full-time or part-time, and eligible to vote. It is our judgment, under all the circumstances, that in drawing the line at 30 days of the total teaching year, we are establishing a fair measure of the interest which should be required of substitute per diem teachers in the unit involved here before they are permitted to vote.

With the above discussion in mind, we conclude that substitute per diem teachers will be considered "regular employees" and eligible to vote if they are listed on the Municipal Employer's list of substitute per diem teachers as of the date of this Direction, and if they

^{6/} Florence County Joint School District No. 1, Dec. No. 6143, 10/62; Joint School District No. 10 of the City of Appleton, et seq., Dec. No. 7151, 5/65, and cases cited therein.

have taught at least 30 or more days in the one-year period immediately preceding the date of this Direction.

At the hearing the parties agreed that if an election were directed, they would then attempt to agree upon the eligibles and if no agreement could be reached, that a further hearing would be conducted for the purpose of taking evidence with regard to the issues. The hearing need not necessarily be conducted if the parties can agree on all the eligibles. It may be that the issues thereon might involve an insignificant number of individuals, and the Commission could conduct the election and permit the parties to challenge those individuals who are in issue. In any event, we urge the parties to expedite the submission of the list to the Commission, and if there are individuals in issue, to indicate on said list the individuals who are in issue and to describe the nature of the issues.

Dated at Madison, Wisconsin this 21st day of February, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Morris Slavney, Chairman



William R. Wilberg, Commissioner