

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
RACINE EDUCATIONAL ASSISTANTS ASSOCIATION
Involving Certain Employes of
RACINE UNIFIED SCHOOL DISTRICT

Case 10
No. 54308
ME-846

Decision No. 10095-F

Appearances:

Weber & Cafferty, S.C., by **Attorney Robert K. Weber**, 2932 Northwestern Avenue, Racine, WI 53404, and **Mr. James Ennis**, Executive Director, Racine Education Association, 516 Wisconsin Avenue, Racine, WI 53403-1051, appearing on behalf of the Racine Educational Assistants Association.

Mr. Frank L. Johnson, Director of Employee Relations, and **Ms. Keri A. Paulson**, Employee Relations Supervisor, Racine Unified School District, 2220 Northwestern Avenue, Racine, WI 53404-2597, appearing on behalf of the Racine Unified School District.

**FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNIT**

On May 1, 1997, the Racine Educational Assistants Association filed a petition seeking to clarify the existing bargaining unit of educational assistants by including the position of the Community Work Experience Program participant. Hearing in the matter was held in abeyance with the agreement of the parties.

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Hearing on the petition was ultimately held on August 5, 1998, in Racine, Wisconsin, before Douglas V. Knudson, a member of the Commission's staff. A stenographic transcript was made of the hearing and a copy of the transcript was received on August 19, 1998. The filing of post-hearing briefs was completed by October 6, 1998.

The Commission, having considered the evidence and the arguments and briefs of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. The Racine Educational Assistants Association, herein the Association, is a labor organization with offices at 516 Wisconsin Avenue, Racine, Wisconsin 53403.
2. The Racine Unified School District, herein the District, is a municipal employer with offices located at 2220 Northwestern Avenue, Racine, Wisconsin 53404.
3. The Union is the certified bargaining representative for all regular full-time and regular part-time educational assistants, both certified and non-certified, employed by the Racine Unified School District, excluding managerial, supervisory, confidential and all other employees.
4. The District signed a Work Experience Program Side Agreement and a Wisconsin Works Worksite Agreement with the Racine County Human Services Department, which agency was authorized by the State of Wisconsin to establish community work experience programs under which W-2 participants work in uncompensated community jobs as a condition of continuing to receive W-2 benefits. The Agreements are attached to this decision as Appendix 1 and 2.
5. In April of 1997, the Principal at the District's Mitchell Elementary School published a weekly bulletin containing, inter alia, the following paragraph:

A new assistant will be hired from the Community Work Experience Program. She will be assisting in various ways but will not take anyone's place-she will be there to help. Possible areas: helping with reading, playground, lunchroom, hallway/bathroom patrol. See me if you need someone. She'll be here 20 hours per week.

Sherri Smith was the W-2 participant referenced in the bulletin and she began working at the School on April 14, 1997. When the school year ended, she worked as part of the District's summer school program, which program ended on July 30, 1997, and she returned to Mitchell Elementary School at the beginning of the 1997-98 school year. She left Mitchell in September or October 1997, when she took a job with a private employer. Another W-2 participant, Bactasha Glass, worked at Mitchell Elementary School for the period of January to April of 1998.

While at Mitchell School, Smith and Glass performed duties similar to the duties performed by other employees in the educational assistant bargaining unit, such as lunchroom supervision, playground supervision, and helping teachers by making copies of materials and assisting students with their class work. Smith and Glass always worked with another District employee when they performed either playground or lunchroom supervision. The hours worked by bargaining unit employees range from 10½ to 40 per week.

Neither Smith nor Glass were paid by the District for the hours they worked at Mitchell Elementary School. W-2 provided Worker's Compensation coverage for Smith and Glass. The District did fill out and return W-2 performance evaluation forms for Smith and Glass. Said evaluation forms were different than the performance evaluation forms used for the bargaining unit employees, which forms are returned to the District's Human Resources office. W-2 also sent forms to the District for recording the attendance of Smith and Glass. Those forms were completed and returned to CWEP. The District does not use such attendance forms for the bargaining unit employees.

There were no bargaining unit employees on layoff in either the 1996-97 or the 1997-98 school year. Neither did Smith or Glass fill a vacant position.

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

CONCLUSION OF LAW

The W-2 participants are not municipal employees of the District within the meaning of Sec. 111.70(1)(i), Stats.

Based on the above and foregoing Finding of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The W-2 participants are not appropriately included in the bargaining unit identified in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

RACINE UNIFIED SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

The Association asserts that there is a sufficient community of interest between the W-2 participants and the educational assistants in the existing bargaining unit for the W-2 participants to be included in said unit. There is similarity in benefits, hours, duties, supervision and work sites. The only benefits received by bargaining unit employees, but not received by the W-2 participants, are insurance and workers compensation coverage. While the W-2 participants are not directly compensated by the District, a number of the bargaining unit employees also are funded by state or federal programs or by outside sources. Further, the site agreements between the District and Racine County refer to the District as the employer.

The Principal at the Mitchell Elementary School testified to being the overall supervisor of the W-2 participants in the same manner as she is the supervisor for the bargaining unit employees. The W-2 participants are not the same as the other individuals who perform volunteer services, such as tutoring of students, for the District.

The District contends that the W-2 participants are not its employees. Although those persons perform work for the District, they are not paid for such work, but rather, perform the work in order to obtain work experience and to meet the requirements of the W-2 program. The participants do not receive fringe benefits, such as health insurance or holiday pay, to which bargaining unit employees are entitled. The District did not select the W-2 participants nor did it terminate their employment.

DISCUSSION

The District has entered into an agreement with the Racine County Human Services Department to provide work experience and training for W-2 participants. Said agreement requires the District, inter alia, to provide productive work opportunities for the participants, to provide supervision of them, to keep records of their attendance, and to evaluate their work performance. Although the District remains free to reject or expel participants, the District has absolutely no voice in their initial selection, the duration of their stay, or what, if any, wages, benefits, or other remuneration will be paid to them. Neither does the District incur any liability for payment to participants of any wages, benefits, or other remuneration. While

the participants do not work on days which are holidays for the bargaining unit employes, they do not receive any payments for such days as do the eligible bargaining unit employes. Similarly, lunch and rest breaks received by the participants are not time for which they are paid.

As reflected in SHEBOYGAN COUNTY, DEC. NO. 23013-A (WERC, 4/86); WASHBURN COUNTY, DEC. NO. 21674-A (WERC, 7/97) and CITY OF COLUMBIS LIBRARY BOARD, DEC. NO. 29492 (WERC, 11/98), employer status is determined by identifying the ultimate decision maker in the critical areas of hiring, discipline and compensation. The record establishes that the District does not hire W-2 participants, does not discipline W-2 participants and does not compensate W-2 participants. Thus, it is clear W-2 participants are not municipal employes of the District.

We recognize the work experience and training provided the participants necessarily includes components of bargaining unit work. However, that does not convert the participants into municipal employes and bargaining unit members. Employment status is the goal. The District is merely supplying a means through which participants can attain this goal.

Given the foregoing, it is clear that the W-2 participants are not municipal employes of the District, but rather, are gaining work experience pursuant to the requirements of the State of Wisconsin W-2 program.

Dated at Madison, Wisconsin, this 21st day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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