

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

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WISCONSIN COUNCIL 40, LOCAL 2223, :

AFSCME, AFL-CIO :

:

Involving Certain Employes of : Case 20

: No. 45286 ME-481

: Decision No. 10445-F

EAU CLAIRE COUNTY :

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Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of AFSCME, Local 2223.
Keith R. Zehms, Corporation Counsel, Eau Claire County, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54701, appearing on behalf of Eau Claire County.

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

On February 7, 1991, AFSCME, Local 2223 filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify an existing bargaining unit by including the position of Substitute Houseparent. Hearing on the petition was held on May 7, 1991 in Eau Claire, Wisconsin. The record was closed on June 14, 1991 upon completion of the post-hearing briefing schedule. Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO and its affiliated Local 2223 hereinafter collectively referred to as the Union, are labor organizations with offices located at 5 Odana Court, Madison, Wisconsin.
2. Eau Claire County, hereinafter the County, is a municipal employer with offices at 721 Oxford Avenue, Eau Claire, Wisconsin.
3. The Union is the certified 3/ bargaining representative of "all regular full-time and regular part-time employes employed by Eau Claire County in the Courthouse clerical unit, but excluding supervisory, managerial, confidential and professional employes."
4. On February 7, 1991, the Union filed a unit clarification petition requesting that the positions of Substitute Houseparent, occupied by Phyllis and Roger Ede, be included in the bargaining unit.
5. Since at least 1973 the County has operated a shelter care home with eight beds (a duplex with four beds for males and four beds for females) as a temporary residence for adolescents who are of the ages 12 through 17 and who come under the jurisdiction of the juvenile court. Houseparents work in pairs of one male and one female. They work a schedule of four days on duty and four days off duty. A day consists of six hours sleep time, six hours personal time and twelve hours of duty time. Houseparents are paid based on a 12-hour day. In addition to the Houseparents, Shelter Care Night Aides are on duty daily

from 11:00 p.m. to 5:00 a.m. and Recreational Aides are on duty from 6:00 p.m. to 10:00 or 10:30 p.m. on weekdays and at varying times on weekends.

6. There are two pairs of regular Houseparents who are in the bargaining unit represented by the Union. In 1987 the County began using substitute Houseparents to cover the absences of the regular Houseparents. The substitute Houseparents perform essentially the same duties as the regular Houseparents perform. The substitutes work only on an on-call basis and are not guaranteed any set number of hours of work. Substitutes have the right to refuse offered work. Roger and Phyllis Ede were the first substitute Houseparents employed by the County and they are still the first persons contacted when substitutes are needed. The Edes have only refused work on two occasions, due to illness. However, in or about April 1991 the County added three more persons to the list of substitutes. The Union is seeking to include only Roger and Phyllis Ede in the bargaining unit as regular part-time employes, since it agrees with the County that the other three substitute Houseparents are casual employes.

7. In calendar year 1989 Roger and Phyllis Ede always worked as a team and each worked a total of 777 hours for the year. The Edes worked during 15 of the 26 two-week payroll periods in 1989. In calendar year 1990 Phyllis Ede worked in 19 of the 26 payroll periods for a total of 818 hours and Roger Ede worked in 17 payroll periods for a total of 758 hours. Phyllis Ede worked in four of the first nine payroll periods in 1991 for a total of 108 hours and Roger Ede worked in two of the first nine payroll periods for a total of 72 hours.

8. Phyllis and Roger Ede work a sufficient number of hours on a sufficiently regular basis to warrant being found to be regular part-time employes of the County.

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

CONCLUSION OF LAW

That Phyllis and Roger Ede are regular part-time employes of the County.

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

ORDER CLARIFYING BARGAINING UNIT 2/

That Substitute Houseparents Phyllis and Roger Ede are included in the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 20th day of September,
1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

Herman Torosian, Commissioner

William K. Strycker, Commissioner

(See footnote 2/ on pages 4 and 5)

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- 2/ 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.

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.

(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.

. . .

(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.

EAU CLAIRE COUNTY

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

The sole issue to be decided is whether Phyllis and Roger Ede are regular part-time employees.

POSITION OF THE UNION

Each of the Edes worked on a frequent and regular basis over a relevant period of time. They rejected work only when ill. Both employees have expectations both of continued employment and of future hours of work similar to past years. Their work has been sufficiently frequent to warrant inclusion in the bargaining unit as regular part-time employees.

POSITION OF THE COUNTY

The substitute Houseparents are not guaranteed any number of hours. They are called in to work only when a regular Houseparent is absent. There is no regular schedule of available work and they have the right to refuse work. A review of the hours of work by the substitutes fails to show any regular pattern or cycle. The employees work on an on-call, or as needed, basis. Accordingly, they are casual employees as defined by the Commission in Laona School District, Dec. No. 22825 (WERC, 8/85) and cannot be accreted to the bargaining unit.

DISCUSSION

The Edes work solely as substitutes, i.e., on an on-call or as-needed basis and they are free to accept or reject the offered work. 4/ As contended by the County, such a work schedule can be indicative of a casual status. However, the Commission has held that where a regular amount of work is available for part-time employees, individuals who perform something more than a de minimis amount of that work on a regular basis will be found to be regular part-time employees despite their ability to reject work. 5/ Further, even if there is uncertainty as to when the employees will be needed, if there has been, and continues to be, a significant number of hours of work for the employees to perform on a regular basis, then employees who work with sufficient regularity will qualify as regular part-time employees. 6/

A review of the work records of the Edes shows that each of them averaged between 14 and 16 hours of work per week during calendar years 1989 and 1990. Further, each of the Edes worked in a majority of the two-week payroll periods (ranging from 58-69%) during said two years.

It further appears that in 1989 both Edes, working as a team, were each

4/ The Edes have rejected work only when they were ill.

5/ Oconto County (Sheriff's Department), Dec. No. 21847-C (WERC, 12/90).

6/ Ibid.

employed for a total of 777 hours. In 1990, Phyllis Ede worked a total of 818 hours and her husband Roger, 758 hours. Thus, in these years, the Edes worked a significant percentage of the yearly hours of a full-time Houseparent.

During the first nine payroll periods of the 1991 calendar year, the average number of hours worked per week by either of the Edes was considerably lower than such annual averages for the preceding two years. However, the average number of hours worked per week by the Edes during the first nine payroll periods of both 1989 and 1990 also were lower than the weekly averages on an annual basis for each of those years. Thus, the 1991 average appears to reflect a consistent seasonal reduction in the amount of work available to the Edes, rather than an overall decrease in the amount of work available on an annual basis.

Given the foregoing we are satisfied that, unlike the substitute bus drivers in Laona 7/ the work record of the Edes establishes that they work a sufficient number of hours on a sufficiently regular basis to qualify them as regular part-time employees and to warrant their inclusion in the bargaining unit.

Dated at Madison, Wisconsin this 20th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chair

Herman Torosian, Commissioner

William K. Strycker, Commissioner

7/ In Laona, the employees in question worked 25 and 32 hours, respectively, in a 5 month period.