

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

|                                  |   |                      |
|----------------------------------|---|----------------------|
| In the Matter of the Petition of | : |                      |
|                                  | : |                      |
| STATE OF WISCONSIN EDUCATION     | : |                      |
| PROFESSIONALS, AFT, WFT,         | : | Case 20              |
| LOCAL 3271, AFL-CIO              | : | No. 15844 SE-55      |
|                                  | : | Decision No. 11884-M |
| and                              | : |                      |
|                                  | : |                      |
| STATE OF WISCONSIN               | : |                      |
|                                  | : |                      |

Appearances:  
Mr. Timothy E. Hawks, Shneidman, Myers, Dowling, Blumenfield & Albert,  
Attorneys at Law, Suite 1200, 735 West Wisconsin Avenue, Milwaukee,  
Wisconsin 53233, appearing on behalf of the Union.  
Mr. Sanford Cogas, Attorney at Law, Department of Employment Relations,  
149 East Wilson Street, Madison, Wisconsin 53707-7855, appearing on  
behalf of the State Employer.

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

Wisconsin Education Professionals, Local 3271, WFT/AFT, AFL-CIO, having, on February 7, 1984 petitioned the Wisconsin Employment Relations Commission to clarify the state-wide professional-education bargaining unit to include positions of Library Associate 1 - Scandinavian/German Language - Project and Library Associate 1 - German Project; and hearing in the matter having been scheduled for April 9, 1984 and rescheduled and held on April 18, 1984 in Madison, Wisconsin, before Examiner Edmond J. Bielarczyk, Jr., a member of the Commission's staff; and a stenographic transcript of the proceedings having been distributed on May 25, 1984; and the parties having submitted briefs by July 11, 1984, and the Union having submitted a reply brief on July 20, 1984, and the State Employer having informed the Commission on August 15, 1984 it would not submit a reply brief; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Wisconsin Education Professionals, Local 3271, WFT, AFT, AFL-CIO, hereinafter referred to as the Union, is a labor organization maintaining its principal offices at 2021 Atwood Avenue, Madison, Wisconsin; and, that the Union is the certified bargaining representative of all Professional Education employees employed in the classified service of the State of Wisconsin, excluding project employees, limited term employees, sessional employees, and managerial, confidential and supervisory employees, hereinafter referred to as the bargaining unit.
2. That the State of Wisconsin, hereinafter referred to as State Employer, has principal offices in Madison, Wisconsin and operates the several University of Wisconsin Libraries including the Memorial Library on the Madison campus.
3. That the State Employer employs bargaining unit personnel in classifications including Library Associates 1 and 2 in the Machine Readable Cataloging (hereinafter MARC) Department of the Memorial Library; that said Library Associates are in the classified service of the State; and, that said Library Associates regularly perform cataloging of monographs acquired by the Library as well as the filing of catalog records concerning such monographs.
4. That the MARC Department is principally responsible for preparation of brief catalog records that describe the monograph involved and for filing such records so that they are available to facilitate library patrons' use of the monograph; that when the Library initially receives a monograph, a MARC Department employe searches a computer data base to determine whether it has already been cataloged; that if there is no existing catalog entry, the monograph is ready for original cataloging by a MARC Department Library Associate; that since the early

1960's, the complement of permanent appointment MARC Department Library Associates has not been able to immediately catalog all of the monographs ready for immediate cataloging; that, for that reason, some of the monographs received by the Library for which no existing catalog record is found have been routed to a holding area known as "Control" while other such monographs have been directly routed to a MARC Department Library Associate for immediate cataloging; that there has been at least some backlog of uncataloged monographs since the early 1960's; that as of March, 1984 there were approximately 158,000 monographs awaiting original cataloging in the Control area; that Control monographs are assigned an accession number such that for Library patrons to acquire a monograph's accession number the patron must know the monograph's precise title; that since 1970, in addition to cataloging new acquisitions, permanent appointment Library Associates have performed cataloging of both Control monographs and newly received monographs as a part of their usual and normal duties; and, that the position descriptions for various permanent appointment MARC Department Library Associates include cataloging monographs and filing catalog records as a part of the duties of those positions.

5. That in calendar year 1983 the University Administration decided to establish a program to eliminate the backlog of monographs in Control by means of employment, training and assignment of a special project team for that specific purpose; to that end, six project employee positions were authorized, two of which are the subject of the instant proceeding; that position descriptions for the two positions in dispute herein were finalized on August 11, 1983, by the Assistant Director for Budget and Personnel for the University of Wisconsin General Library System; that those two positions were Library Associate 1 - Project - Scandinavian/German Languages and Library Associate 1 - Project - German; that the prescribed duties of said two positions primarily consist of the cataloging monographs and filing catalog records; that James Woods was hired for the first of the two above positions and Telli Zoeller was hired for the other; that each began employment on September 26, 1983; that Woods and Zoeller were trained for six months in the same manner as permanent appointment Library Associates; and, that after their completion of that six month period, however, Woods and Zoeller have worked exclusively on monographs backlogged in the Control area.

6. That on February 7, 1984 the Union filed the instant petition requesting a Commission order to the effect that the positions held by Woods and Zoeller are properly included in the state-wide Professional-Education bargaining unit; and, that the State Employer opposes the Union's request, asserting, contrary to the Union, the following:

- the positions in question are properly excluded from the bargaining unit by reason of their status as "project employees";

- it is beyond the Commission's subject matter jurisdiction to review the propriety of the State Employer's classification of positions as "project employees"; and

- in any event the positions in question are properly classified as project employees within the meaning of applicable statutes and administrative rules because the planned undertaking for which the positions were created (the elimination of the backlog of monographs in Control) is "not a regular function of the employing agency" within the meaning of sec. 230.27(1), Stats.

7. That the work for which Woods and Zoeller have been employed--including the immediate cataloging of new acquisitions performed by them during their early months of employment and their cataloging of monographs not cataloged immediately upon receipt--is all work that has been and continues to be a usual and normal function of the Memorial Library MARC Department and of the University of Wisconsin Libraries.

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

### CONCLUSIONS OF LAW

1. That Secs. 111.81(2)(b) and 111.80(4) of the State Employment Labor Relations Act grant the Wisconsin Employment Relations Commission subject matter jurisdiction of the instant dispute as to whether the individuals in question are "employees" or "project employees" within the meaning of Sec. 111.81(7) Stats.

2. That it is a necessary and appropriate exercise of the subject matter jurisdiction noted in Conclusion of Law 1, above, for the Wisconsin Employment Relations Commission to interpret and apply the Sec. 230.27(1), Stats., definition of "project employment" in determining the appropriate meaning and application of "project employees" in Sec. 111.81(7), Stats.

3. That the planned undertaking for which Woods and Zoeller were and are employed is "a regular function" of their employing agency within the meaning of Sec. 230.27(1), Stats.

4. That therefore, the occupants of the Library Associate 1 - Scandinavian/German Language - Project and Library Associate 1 - German - Project positions at issue herein are employees within the meaning of Sec. 111.81(7) of the State Employment Relations Act.

5. That the above positions are appropriately assigned to the state-wide Professional Education bargaining unit prescribed by Sec. 111.81(2)(a)6.g., Stats.

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

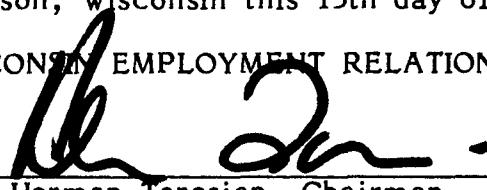
### ORDER CLARIFYING BARGAINING UNIT 1/

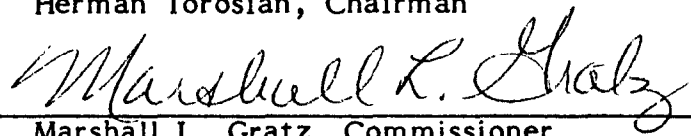
That the two positions referred to in Finding 5, above, presently occupied by Woods and Zoeller respectively, are included in the state-wide Professional Education bargaining unit described in Finding of Fact 1.

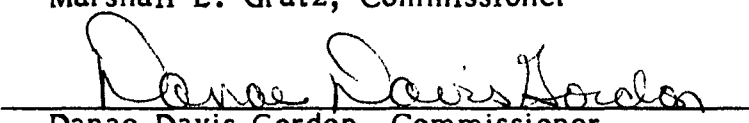
Given under our hands and seal at the City of  
Madison, Wisconsin this 13th day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

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1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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

(Footnote 1 continued on Page 4)

(Footnote 1 continued)

required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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. 227.20 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.

DEPARTMENT OF ADMINISTRATION (EDUCATION)

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

BACKGROUND

The Union seeks an order declaring that two Library Associate positions, although classified by the State Employer as "project" in nature, do not fall within the Sec. 230.27(1), Stats., definition of "project employment", such that the incumbents are "employees" within the meaning of Sec. 111.81(7), Stats., whose positions are properly assigned to the Professional Education unit represented by the Union.

The basic facts are set forth in the Findings of Fact. They need not be repeated here.

As noted in Finding 7, the Union's petition requires a determination of whether the two incumbents involved are "project employees" so as to be outside the Sec. 111.81(7) definition of "employee". The State Employer, contrary to the Union, asserts that such a determination is beyond the WERC's subject matter jurisdiction since it brings into question an interpretation of the definition of "project employment" contained in Sec. 230.27(1), Stats., and in administrative rules promulgated pursuant thereto by the Department of Employment Relations' Division of Personnel.

The State Employer further contends, contrary to the Union, that the positions meet all of the Sec. 230.27(1) criteria for project employment including requiring that the employment be for a "planned undertaking which is not a regular function of the employing agency". The Union asserts that the planned undertaking for which the instant positions were created is "a regular function of the employing agency" involved so as to take the instant positions outside the Sec. 230.37(1) definition of project employment and outside the exclusion of project employees from the Sec. 111.81(7) definition of "employee".

DISCUSSION

Dispute as to WERC Jurisdiction

We find no merit in the State Employer's contention that we are without jurisdiction to determine the merits of the Union's claim that Woods and Zoeller are "employees" within the meaning of Sec. 111.81(7), Stats. We previously have held that WERC has jurisdiction to determine whether individuals initially classified by the State Employer as "confidential" are nonetheless "employees" within that SELRA definition, 2/ and we find the rationale therein applicable herein as well.

The State Employer would distinguish that case on the grounds that there exists a statutory definition of "project employment" outside of SELRA whereas the definition of "confidential" is one that is set forth in Sec. 111.81(7) of SELRA itself.

The fact that legislation outside of SELRA provides specific guidance as to the intended definition of a term contained in SELRA does not oust the WERC of its jurisdiction and responsibility to determine the meaning and proper application of the "project employee" exclusion in Sec. 111.81(7), of SELRA. As we previously held with regard to confidential status, the State Employer's classification decisions cannot and do not preempt the WERC from deciding whether the position involved is within or outside of the "employee" definition in Sec. 111.81(7), Stats. That conclusion is equally valid whether the classification decision involved was subject to compliance with the SELRA definition of "confidential" or the ch. 230 definition of "project employment" or "project position".

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2/ State of Wisconsin, Dec. No. 18696 (WERC 5/81).

It is true that Sec. 230.06(1)(d), Stats., authorizes the Administrator of the Division of Personnel of the Department of Employment Relations to initially designate whether Classified Service positions are permanent, project, or etc. However, Sec. 230.01(13) unequivocally states that "Nothing in this chapter shall be construed to either infringe upon or supersede the rights guaranteed state employees under subch. V of ch. 111.", i.e., SELRA. Hence, neither Sec. 230.06(1)(d) nor any other portion of ch. 230 ousts the WERC of the ultimate responsibility and jurisdiction to determine Sec. 111.81(7) "employee" status disputes.

Also, the general policy set forth in Sec. 111.80(4), Stats., provides that determination of the "respective rights" of "the public, the state employee and the state as an employer. . . is to be by an "impartial tribunal". In our view, the WERC is the impartial tribunal intended under the legislative scheme to determine those respective rights concerning whether Woods' and Zoeller's employment is such as to entitle them to the protections afforded to "employees" under SELRA.

We therefore conclude that WERC has jurisdiction to determine whether Woods and Zoeller are "employees". Of course, in making this determination it is necessary and appropriate that the Commission apply the statutory criteria found in Section 230.27(1), Wis. Stats., with due consideration of administrative rules, if any, concerning the meaning and application of that provision.

#### Dispute as to Project Employee Status

Section 111.81(7) defines "employee" as follows:

"Employee" includes any state employee in the classified service of the state, as defined in s. 230.08, except limited term employees, sessional employees, project employees, employees who are performing in a supervisory capacity, management employees and individuals privy to confidential matters affecting the employer-employee relationship, as well as all employees of the commission.

Section 230.08(3)(a) defines the "Classified Service" as "all positions not included in the unclassified services", and subsection (3)(d) of that section further states that "Positions in the classified service shall be designated by the administrator (of the Division of Personnel of the Department of Employment Relations of the State Employer) as permanent, seasonal, sessional, project or limited term".

"Project employment" was defined in Section 230.27(1), Stats. (1979) 3/ as follows:

In this section 'project appointment' means the appointment of a person to a project position under (2) and 'project employment' means employment in a project position which is normally funded for six or more consecutive months and which requires employment for 600 hours or more per 26 consecutive bi-weekly pay periods for a planned undertaking which is not a regular function of the employing agency and which has an established probable date of determination. The duration of a

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3/ Section 230.27(1), Stats., was recently amended, but the modification did not change the basic requirements that are material herein. Specifically, Sec. 1615 of 1983 Wis. Act 27 amended Sec. 230.27(1) to read as follows:

A "project position" means a position which is normally funded for 6 or more consecutive months and which requires employment for 600 hours or more per 26 consecutive biweekly pay periods for a planned undertaking which is not a regular function of the employing agency and which has a established probable date of termination. No project position may exist for more than 4 years.

project appointment under this section may not extend for a period of more than four years, commencing with the appointment to the position.

The balance of the instant dispute turns on whether Zoeller or Woods are performing duties which are ". . . a regular function of the employing agency . . . ."

The State Employer argues that question should be answered in the affirmative. It notes that the instant positions were created for the specific (singular) purpose of eliminating the Control backlog, a project for which a probable date of completion has been established. It further argues that while the elimination of the cataloging backlog in Control is a part of the employing agency's overall mission, it is not a regular function of the employing agency since once the backlog is eliminated, the function of eliminating the backlog will no longer be performed by the agency. It argues that, as the record evidence shows, numerous other project positions have been created in the past where the project involved was the elimination of production backlogs. It asserts that in those cases, as here, the propriety of project employment was established by the fact that the position was created for a specific project (a singular purpose) with a probable completion date. Finally, it asserts that it is only fair to the hirees involved that their appointment be one of a clearly finite nature where, as here, it is anticipated that their employment will end upon completion of the project for which they are hired.

The Union asserts that the State Employer's arguments and historical references disregard the separate Sec. 230.27(1) requirement that the project not involve "a regular function" of the employing agency. The Union further asserts that cataloging of monographs generally is a regular function of the instant employing agency. It further asserts that both cataloging of newly received monographs and cataloging of monographs after they have awaited cataloging in Control for a period of time are both regular functions of the employing agency involved. It asserts that the record shows that both have been usual and customary Department functions for several years and both appear likely to continue to be for the indefinite future.

We agree with the Union that the interpretation of Sec. 230.27(1) urged by the State Employer would render the "regular function" language thereof meaningless. That the project have a specific singular purpose and an anticipated completion date are made necessary by the "planned undertaking" and "probable date of determination" requirements of the above provision. The "not a regular function" requirement must therefore require something further.

Given the dictionary definition of "regular", 4/ we share the Union's conclusion that it is appropriate to interpret that phrase as further requiring that the project not involve a function that is a usual and normal function of the employing agency at the time the project employment is authorized.

We have reviewed chs. ER-Pers 1 (Force and Effect of Rules; Definitions) and 34 (Project Appointments) of the Wis. Adm. Code (1983). We find that ER-Pers 2.01(7)(e) defines "project employment" in terms paralleling those in Sec. 230.27(1), Stats., noted above. ER-Pers 34.01(1) defines a "project appointment" as "appointment of a person to a project position under conditions of employment which do not provide for attainment of permanent status." The administrative rules could not, of course, negate the statutory "not a regular function of the employing agency" requirement. Our review of the abovenoted rules also reveals no specific interpretation of that quoted requirement. Hence the Administrative Rules do not conflict with the interpretation of that quoted language that we have adopted herein.

A review of the record demonstrates that permanent appointment employees in the Library Associate classifications catalog monographs and file catalog records as a usual and normal function of the MARC Department. They spend a substantial portion of their time on new acquisitions, but Control monograph cataloging has also been a usual and normal function of those employees and of their MARC Depart-

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4/ E.g., Webster's New Collegiate Dictionary (1979).

ment for many years. On that basis, alone, we would conclude that elimination of the Control backlog constitutes a usual and normal function of the Memorial Library MARC Department and of the University Libraries generally.

In addition, we find unpersuasive the State Employer's proposed distinction between cataloging of backlogged monographs and cataloging of new acquisitions. The one is merely the other performed on a time-delayed basis. Hence, we also conclude that the cataloging of monographs generally, whether immediately upon receipt or after some delay, is a regular function of Woods' and Zoeller's employing agency.

On each of those independent bases, we have concluded that the work for which Woods and Zoeller have been employed is a regular function of their employing agency. It follows that the employment of Woods and Zoeller does not fall within the scope of Sec. 230.27(1) "project employment" or, therefore, of Sec. 111.81(7) "project employee" status.

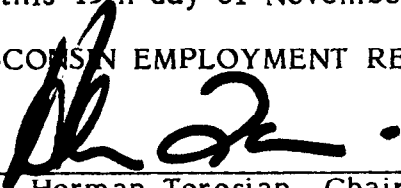
Since Woods and Zoeller are therefore not excluded from the Sec. 111.81(7) definition as "project employees", and since no other exclusionary basis has been asserted or proven herein, we have concluded that they are "employees" within the meaning of SELRA.

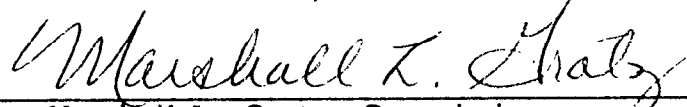
Their positions are appropriately assigned to the Professional Education unit, and we have so ordered.

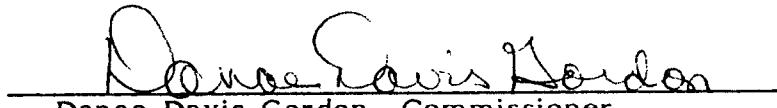
Dated at Madison, Wisconsin this 13th day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner