STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of STATE OF WISCONSIN EDUCATION PROFESSIONALS, AFT, WFT, LOCAL 3271, AFL-CIO and STATE OF WISCONSIN	Case 20 No. 34469 SE-90 Decision No. 11884-O

Appearances:

Mr. Timothy E. Hawks, Shneidman, Myers, Dowling, Blumenfield & Albert, Attorneys at Law, Suite 1200, 735 West Wisconsin Avenue, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Union.

Ms. Susan Sheeran, Employment Relations Specialist, Department of Employment Relations, Division of Collective Bargaining, 137 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State Employer.

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

On November 13, 1984, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit in the above matter, wherein the Commission concluded that the state-wide professional-education bargaining unit established by Sec. 111.81(2)(a)6.g., Stats., included the positions of Library Associate 1 - Project - Scandinavian/German Languages and Library Associate 1 - Project - German. The State of Wisconsin filed a timely petition for rehearing pursuant to Sec. 227.12, Stats., on November 30, 1984, asserting that the Commission's decision was based upon certain material errors of law. The State of Wisconsin Education Professionals, AFT, WFT, Local 3271, AFL-CIO, the labor organization representing the employes in the professional-education unit for the purposes of collective bargaining, opposed the petition. The Commission granted the petition on December 28, 1984. Additional hearing was conducted on March 19 and 20, 1985, in Madison, Wisconsin, by Peter G. Davis, a member of the Commission's staff. Both parties submitted additional written argument, and the period within which reply briefs were to be received ended August 12, 1985. The Commission has reviewed the entire record and the written arguments submitted by the parties and concluded that its Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit should be modified in the following manner:

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 employes employed in the classified service of the State of Wisconsin, excluding project employes, limited term employes, sessional employes, and managerial, confidential and supervisory employes, hereinafter referred to as the bargaining unit.

2. That the State of Wisconsin, hereinafter referred to as the 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 when the Legislature creates new positions within state government, as an exercise of its budgetary power, it typically will specify whether the positions are to be permanent, project or otherwise; that contrary to this general procedure which is applicable to most state agencies, the University of Wisconsin budget approved by the Legislature reflects only an allocation of dollars and generic full-time equivalent positions (FTE's); that as a result, the University possesses legislatively delegated authorization to create new positions and decides whether the positions shall be permanent, project or otherwise; that in July 1983, the University decided to use six of its legislatively authorized FTE's to create a project team to attempt to eliminate the MARC cataloging backlog; that the University decided that the two positions at issue in this proceeding would be project positions and that the positions would be filled by project appointments; that the decision to fill the project positions with project appointments was delegated to the University by the Administrator of the Division of Merit Recruitment and Selection, Department of Employment Relations; 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 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 are trained; and that after their completion of that six month period, however, Woods and Zoeller have worked exclusively on monographs backlogged in the Contral area.

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), Stats., grant the Wisconsin Employment Relations Commission subject matter jurisdiction over the instant dispute as to whether the individuals in question are "employes" or "project employes" within the meaning of Sec. 111.81(7), Stats.

2. That the term "project employes" as utilized in Sec. 111.81(7), Stats., refers to employes having project appointments to project positions.

3. That the Wisconsin Employment Relations Commission does not have jurisdiction under the State Employment Labor Relations Act to determine whether project positions created directly by or implicitly authorized by the Legislature are in compliance with Sec. 230.27, Stats.

4. That because the decision to utilize project as opposed to permanent appointments to fill project positions is a decision made by or delegated by the Administrator of the Division of Merit Recruitment and Selection, Department of Employment Relations, under Sec. 230.05(2), Stats., the Personnel Commission is an available forum under Secs. 230.44 and 230.45, Stats., for employes or their representatives to seek review of such decisions.

5. That because the Personnel Commission has statutory jurisdiction to review decisions to utilize project as opposed to permanent appointments when filling project positions, the Wisconsin Employment Relations Commission will not exercise whatever jurisdiction it may have to review such decisions.

6. That because the occupants of the Library Associate 1 - Project - Scandinavian/German Languages position and the Library Associate 1 - Project - German position at issue herein possess project appointments to project positions, they are "project employes" within the meaning of Sec. 111.81(7), Stats., and thus are not "employes" within the meaning of Sec. 111.81(7), 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 Woods and Zoeller, the Library Associate 1 - Project - Scandinavian/German Languages and Library Associate 1 - Project - German, respectively, are not included in the state-wide Professional-Education bargaining unit.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

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

(Footnote 1/ continued on page 4)

1/ (Continued)

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.

STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS (PROFESSIONAL-EDUCATION), Case 21, Decision No. 11884-O

POSITIONS OF THE PARTIES

The State

The State argues that the Commission erred as a matter of law by concluding that Sec. 111.81(2)(b), Stats., gives the Commission jurisdiction to determine that project employes are eligible for assignment to an appropriate statutory bargaining unit. The State contends that Sec. 111.81(7), Stats., provides for exclusion from the definition of employe based upon (1) type of position (i.e., limited term, sessional and project) and (2) duties and responsibilities (i.e., confidential, supervisory and management). The State asserts that the Commission lacks statutory authority to review legislative budgetary determinations regarding position type and should not infer such jurisdiction from the Commission's jurisdiction to review classification decisions based upon duties and responsibilities. The State asserts that as project employes are specifically excluded from the statutory definition of employe found in Sec. 111.81(7), Stats., project employes are ineligible for unit assignment. The State alleges that the Commission can only include permanent or seasonal employes in a bargaining unit.

The State contends that the Commission based its initial decision in this matter on the faulty premise that the determination that a position is a project position is a classification decision akin to a decision by the State that a position is supervisory or confidential. The State alleges that classification decisions under Sec. 230.09(1), Stats., which the Commission has reviewed and in some instances overturned in other unit clarification proceedings, focus upon the duties and responsibilities of permanent positions and that the determination that a position shall be project as opposed to permanent, seasonal, sessional or limited term has nothing to do with the duties and responsibilities of the position. The State thus argues that the only classification decision made as to the two positions in question was that the positions should be classified as Library Associate and that said decision was irrelevant to the issue of bargaining unit status.

Here, the State asserts that decisions as to type of position (project) and type of appointment (project) determined the bargaining unit status of the employes in question. Had permanent appointments been made to the positions in question, the State contends that the employes would be included in the unit represented by the Union. As decisions as to position type are legislative and budgetary in nature, the State argues that a taxpayer lawsuit may be the only means of challenging such decisions. However, the absence of effective appeal procedures does not, the State argues, provide a legitimate basis for assertion of Commission jurisdiction. The State contends that decisions as to appointment type which are made or delegated by the Administrator, Merit Recruitment and Selection, are appealable to the Personnel Commission under Secs. 230.44 and 230.45, Stats. As such issues fall within the Personnel Commission's jurisdiction, the State asserts that it is the Personnel Commission, not this Commission, which the statutes contemplate should be turned to for relief if appropriate.

Should the Commission continue to conclude that it has jurisdiction to review a determination that a position is project, the State asserts that the Commission erred as a matter of law when interpreting Sec. 230.27, Stats. The State contends that the record generated after the Commission granted the petition for rehearing amply demonstrates that the Sec. 230.27 concept of "regular function of the employing agency" was improperly defined by the Commission. The State argues that "regular" is best defined herein as "recurring or functioning at fixed or uniform intervals" and that the record makes it clear that use of project positions is appropriate in situations involving backlogs or peak workloads.

Should the Commission continue to conclude that it has jurisdiction and that it has correctly interpreted Sec. 230.27, Stats., the State argues that the Commission must address the question of whether the Commission's decision has the effect of creating permanent positions contrary to Sec. 16.505, Stats., and permanent appointments thereto contrary to Secs. 230.15, 230.25 and 230.27, Stats.

The State respectfully requests that given the foregoing, the Commission should dismiss the petition for unit clarification.

The Union

The Union asserts that the State's position in this matter is essentially a contention that the exercise of the Commission's statutory authority under Secs. 111.81(2)(b) and 111.80(4), Stats., somehow violates other statutory provisions and therefore that the Commission must in fact lack jurisdiction. The Union argues that even if it were true that exercise of jurisdiction caused some subsequent violation of other statutes, such a result would not deprive the Commission of jurisdiction but would instead simply recommend the prudent exercise of such jurisdiction to avoid such a result.

The Union disputes the State's assertion that placement of the two positions in the bargaining unit necessarily requires either a change in the employe's appointment from project to permanent or the termination of the two employes with the positions subsequently being filled through typical civil service procedures. The Union contends that the only necessary consequence of the Commission's decision is to make the two employes represented classified employes whose wages, hours and conditions of employment are established through collective bargaining.

As to the State's argument that Commission interpretation of the Sec. 230.27(1), Stats., sets up a conflict with the Legislature regarding the creation of a project position, the Union initially notes that the statutes on their face do not authorize the Legislature to create project positions. The Union argues that the Sec. 230.03(11) definition of "position" which is incorporated in Secs. 16.50(1)(a), 16.501 and 13.101, Stats., says nothing about types of positions which can be created or abolished. The Union asserts that it is the Administrator of the Division of Merit Recruitment who is given the statutory authority to designate a position as project.

Turning to the State's arguments regarding the role of the Joint Committee on Finance, the Union asserts that the Committee's role in project/permanent position choices is not explicit but rather may be inferred from the Committee's appropriation responsibilities. The Union further argues that the rehearing record demonstrates that no legislative body is particularly interested in the civil service or State Employment Labor Relations Act (SELRA) consequences of permanent or project position designations. The Union contends that the Commission is the body to whom the parties must turn to obtain appropriate decisions as to the SELRA consequences of position designations. A Commission decision providing employe status to the two individuals in question does not interfere, in the Union's view, with legislative power because it does not create a permanent position or demand a permanent appointment to said position.

Turning to the State's contention that the Commission erred when concluding that the two employes were performing work which was "a regular function" of the employing agency within the meaning of Sec. 230.27(1), Stats., the Union asserts that much of the evidence presented on rehearing supports rather than controverts the Commission's interpretation.

As to the issue of whether there are alternative avenues of appeal to decide the issues before the Commission, the Union asserts that there are no such avenues. The Union argues that the basic issue before the Commission is one of determining whether the positions held by the two employes in question are project positions. The availability of an appeal to the Personnel Commission over whether it was proper to make a project appointment to the project position does not provide a mechanism for addressing the propriety of the establishment of the project position itself.

Given the foregoing the Union asserts that the Commission made no material error of law in its original decision. The Union does request that, given Sec. 111.81(3)(b)'s reference to assigning "eligible employes," the Commission consider modifying Conclusion of Law 5 so as to specify that the "employes" rather than their positions are included in the bargaining unit.

DISCUSSION

The record upon which we based our November 1984 decision presented us with only a partial view of the statutory and administrative processes which led to the establishment of the two positions in question and to the filling of said positions by Woods and Zoeller. The rehearing proceedings have provided us with a more complete understanding of those processes, and based on the new clarified evidence we are now persuaded that our original decision was flawed in certain respects.

In our initial decision we acted upon several critical assumptions which the record on rehearing proved to be erroneous. We assumed that because Sec. 230.08(3)(d), Stats., specified that "Positions in the classified service shall be designated by the administrator as permanent, seasonal, sessional, project, or limited term," the Administrator of the Division of Merit Recruitment and Selection exercised that authority as to the two positions in question. We now discover that the Administrator did not designate the two positions as project but instead that the University of Wisconsin made that decision under its legislatively approved authority to create positions (permanent, project or otherwise) without the specific approval required of other agencies. Because we assumed that the Administrator exercised the Sec. 230.08(3)(d) authority, we analogized the decision to make a position project in nature to a classification decision by the Secretary of the Department of Employment Relations that a position was confidential, supervisory or managerial. Consistent with our prior holdings that classification decisions do not bind us when determining whether a position falls within the "employe" definition in Sec. 111.81(7), Stats., we stated that a similar conclusion was appropriate for a project designation. We now discover that we are being asked to review an agency decision sanctioned by the legislative budgetary process.

We also proceeded in our initial decision upon an assumption that the issue of whether the employes in question were eligible for inclusion in a bargaining unit turned upon the question of whether a position was permanent or project. The record on rehearing demonstrates that it is the type of appointment received by the individual filling a position which is determinative as to unit status. Thus, if a decision is made to fill a project position with a permanent appointment, the employe in question is eligible for inclusion in a bargaining unit. Appointment decisions are ultimately an exercise of the authority of the Administrator of the Division of Merit Recruitment and Selection pursuant to Sec. 230.05(2), Stats., and as such are appealable to the Personnel Commission under Secs. 230.44 and 230.45, Stats.

Lastly, we proceeded under an assumption that if we did not assert jurisdiction over the instant dispute, there would be no impartial administrative tribunal to whom challenges of state employer action impacting on unit eligibility could be taken. Having become persuaded that it is the type of appointment which ultimately determines unit status, the availability of the Personnel Commission to labor organizations seeking review of appointment decisions reveals that our assumption as to our singular status as an available impartial tribunal was also erroneous.

Given the foregoing clarifications of the record in the instant matter, we look afresh at the relevant statutory provisions and related practices to ascertain whether our initial conclusions remain valid.

Section 111.81(7), Stats., defines "employe" by establishing a broad categorical inclusion ("any state employe in the classified service of the state as defined in s. 230.08") followed by specific exceptions ("limited term employes,. . . project employes. . ."). The provisions of Sec. 230.08(3), Stats., define the classified service in terms of "positions" and Sec. 230.08(3)(d), Stats., makes it clear that project "positions" are included in the "classified service." 2/ Thus it is clear that employes holding project positions fall within the broad category of employes who are, unless otherwise excluded, "employes" within the meaning of Sec. 111.81(7), Stats., and thus have SELRA rights. Having established the foregoing, the inquiry shifts to a determination of the meaning of the specific exclusion for "project employes."

2/ Section 230.08(3)(a) and (d) stated at the time this proceeding was initiated:

> **(3)** Classified Service. (a) The classified service comprises all positions not included in the unclassified service.
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> . . .
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> (d) Positions in the classified service shall be designated by the administrator as permanent, seasonal, sessional, project or limited term.

One possible interpretation of this specific exclusion would be to exclude all employes who fill project positions without regard for whether their appointments are permanent or project. As indicated earlier herein, neither party to this proceeding asks us to adopt such an interpretation, and there is ample support in the statutes and administrative rules for drawing a distinction between employes in project positions based upon the type of appointment. Section 230.27(2m), Stats., establishes that the rights of an employe in a project position on a project appointment are less than and are distinct from those of employes possessing permanent appointments. Indeed, the term we are attempting to interpret properly, "project employes," is used within that statutory provision to describe employes having project appointments to project positions. ER Pers 34 specifies that its detailed provisions about project appointments are inapplicable to persons with permanent appointments to project positions. Given the foregoing, we conclude that the statutory exclusion of "project employes" in Sec. 111.81(7) can most reasonably be interpreted as excluding only persons having "project" as opposed to "permanent" appointments to project positions.

The Union herein does not ask us to review the decision by the State to fill the two positions through project as opposed to permanent appointments. Instead, the Union asks that we review the propriety of the State's decision to establish project as opposed to permanent positions. Given the record now before us we are persuaded that it was not the Legislature's intent to establish a statutory scheme whereby our exercise of jurisdiction under SELRA would extend to review of legislative judgments of whether a position should be permanent or project. We therefore decline the Union's invitation.

As the Union's theory focused upon the propriety of the decision to establish project positions, the issue of whether we should exercise jurisdiction over the decision to use project appointments to fill the project positions has not been a central part of the controversy before us. Because the Personnel Commission is an available tribunal to which such decisions can be appealed, we choose not to exercise any jurisdiction we may have to review the appointment decision.

Given the foregoing and Woods' and Zoeller's status as project appointments in project positions, we have concluded that they are not in the unit.

We wish to make it clear that we will continue to exercise our jurisdiction to resolve disputes over whether individuals having permanent appointments are confidential, management or supervisory employes under SELRA.

Dated at Madison, Wisconsin this 21st day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner