

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN

No. 11885-M

4. That at the time that the State and Local 3271 stipulated to the inclusion of the Education Consultant I and Education Consultant II classifications the Wisconsin Board of Vocational, Technical and Adult Education, hereinafter the Board, employed Lawrence Allwardt in the position of Certification Officer; that at that time Allwardt was classified as either an Education Consultant I or an Education Consultant II; that Allwardt held the position of Certification Officer from June of 1966 until sometime in the Fall of 1974, and was classified as an Education Consultant II when he left the position in 1974; that in May of 1975 the Certification Officer position vacated by Allwardt was filled by Louis Chinnaswamy; that Chinnaswamy held the position of Certification Officer until he transferred out of it in July of 1980; and that he was classified as an Education Consultant II when he left the Certification Officer position.

5. That on December 15, 1980 the Personnel Certification Officer position in the Board's Bureau of Program Accountability was filled by the position's present incumbent, John Orlofske; that Orlofske entered the position classified as an Administrative Officer I, rather than as an Education Consultant II; and that since that time the State has unilaterally excluded the position from the bargaining unit represented by Local 3271.

6. That the duties of the Certification Officer position, both when Allwardt and Chinnaswamy were in the position, and since Orlofske has been in the position, have included the consideration and final determination on requests for certification in vocational areas made on behalf of teachers employed by local Vocational, Technical and Adult Education (VTAE) districts and teachers employed by certain State institutions, and defending the certification decision on behalf of the State against challenges by individual applicants, collective bargaining representatives or local VTAE districts in administrative hearings and/or the courts; that the decision as to whether a teacher receives VTAE certification is based on a determination as to whether their academic credentials and occupational experience meet the standards set forth in Chapter AV-3 of the Wisconsin Administrative Code; that such decision is a judgemental decision and not merely a clerical application of objective criteria; that while Allwardt and Chinnaswamy held the position there were additional functions assigned to the position; that when Chinnaswamy held the position he spent approximately seventy percent (70%) of his time performing certification functions and thirty percent (30%) of his time in program audit activities; and that sometime between the time Chinnaswamy transferred out of the Certification Officer position in July of 1980, and December 15, 1980 when Orlofske started in the position, the non-certification-related functions of the position were eliminated and the position's functions limited to the certification-related duties, with approximately forty percent (40%) of the time being allocated for the certification decision making process.

7. That Orlofske reports directly to the Director of the Bureau of Program Accountability.

8. That most of the requests for certification are for teachers employed by local VTAE districts, and who may be represented in collective bargaining by either Wisconsin Federation of Teachers (WFT) locals or Wisconsin Education Association (WEA) locals; that certification requests are also received for teachers employed by certain State institutions, e.g. Division of Corrections and the Department of Health and Social Services, and who are also members of the bargaining unit represented by Local 3271; that, as regards those teachers employed at such State institutions, the VTAE certification is not required by those institutions before the teacher can be hired, but must thereafter be obtained in order for the teacher to remain in his/her position; and that Orlofske is the only person at the Board's Bureau of Program Accountability performing this VTAE certification function, although there are two individuals there who perform somewhat similar functions relative to emergency medical technicians and fire science.

9. That in performing his functions as a Personnel Certification Officer Orlofske has access to the "personnel files" of the applicants for certification; that those files contain only academic records and verification of work experience submitted by the applicants in support their requests, and do not contain materials that have to do with performance evaluations or disciplinary matters; and that in addition to Orlofske, other personnel at the Bureau of Program Accountability, in positions which the State does not contend are confidential, also have access to those files.

10. That while Chinnaswamy was in the Certification Officer position there were three challenges to his certification decisions; that those challenges involved individuals represented by WFT locals other than Local 3271 and were defended against by Chinnaswamy on behalf of the State; and that up to the time of the hearing Orlofske had not had any challenges to his certification decisions.

11. That under the parties' 1979-1981 and current labor agreements, VTAE certification has been, and is, a factor to be considered in the exercise of transfer, bumping and recall rights by teachers who are members of the bargaining unit; that under the parties' current labor agreement, a teacher in the bargaining unit must have his/her certification for another vocational area on file prior to receiving a layoff notice, or at least already submitted the request for additional certification prior to that time, in order for the teacher to exercise any bumping or recall rights in those additional areas; that in a case where only the request for additional certification is on file prior to the teacher receiving a layoff notice, Orlofske must continue to process the request and make the decision on whether to issue certification, and if necessary, defend his decision against a challenge from the teacher and/or Local 3271; and that during the term of the parties' 1979-1981 agreement both Chinnaswamy and Orlofske were required to make determinations as to whether bargaining unit teachers who were on layoff were "certifiable" in other areas for the purpose of their eligibility for employment in other areas.

12. That Orlofske, in the Personnel Certification Officer position, is responsible for making the decision as to whether a requesting teacher receives VTAE certification; that as to those individuals who are members of the bargaining unit and employed in those positions which require VTAE certification, such certification decisions affect their ability to remain in their positions after initially being hired without such certification, and such decisions also affect their rights under the parties' labor agreement to transfer, bump or be recalled from layoff; and that the duties and responsibilities of a Personnel Certification Officer, as set forth above, are insufficient to render the position confidential.

13. That both the parties' 1979-1981 labor agreement and their current labor agreement contain the following provision for resolving disputes as to the inclusion or exclusion of a position in the bargaining unit:

"ARTICLE II

Section 1 Bargaining Unit

. . .

E. Disputes which may arise concerning the inclusion or exclusion of individual positions within the bargaining unit will also be submitted to the Wisconsin Employment Relations Commission for final resolution. The Employer agrees to give advance notice in writing to the President of the Wisconsin Federation of Teachers, Local 3271 of any reallocation or reclassification action which results in the removal of an employe from the bargaining unit."

14. That Local 3271 originally also requested a determination as to whether the position held by Merrill Bodine, and classified as an Educational Administrative Officer III, should be included in the bargaining unit set forth herein; and that prior to the hearing in these matters Local 3271 withdrew its petition as to Bodine's position and no evidence was taken regarding that position.

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

CONCLUSION OF LAW

1. That the position of Personnel Certification Officer at the Wisconsin Board of Vocational, Technical and Adult Education, Bureau of Program Accountability, is not a confidential, supervisory or management position and therefore, the occupant of that position, John Orlofske, is an "employee" within the meaning of Section 111.81(15) of the State Employment Labor Relations Act.

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

ORDER 2/

1. That the position of Personnel Certification Officer at the Wisconsin Board of Vocational, Technical and Adult Education, Bureau of Program Accountability be, and hereby is, included in the above-described bargaining unit.

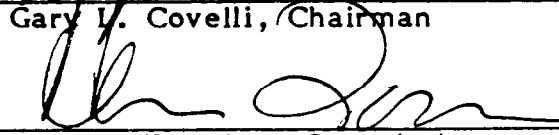
2. That the Petition to Clarify Bargaining Unit filed by the Wisconsin Federation of Teachers, Local 3271, AFT, AFL-CIO, regarding the position held by Merrill Bodine, and classified as an Educational Administrative Officer III, be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of November, 1982.

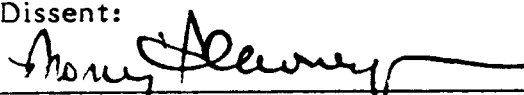
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Gary L. Covelli, Chairman


Herman Torosian, Commissioner

I Dissent:


Morris Slavney, Commissioner

2/ 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.

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 (continued on page 5)

(Continuation of Footnote 2)

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.

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

Local 3271's petition regarding the Personnel Certification Officer position requests that the Commission order the inclusion of that position in the bargaining unit described in Finding of Fact No. 3. In support of its request, Local 3271 notes that the position was included by stipulation of the parties when the unit was first formed. 3/ Local 3271 contends that the basic certification functions of the position performed by Orlofske were also performed by the two prior occupants of the position, and that they were included in the unit. Further, there are other members of the bargaining unit who perform similar certification functions and who are not considered confidential employees. It is also contended that Orlofske does not have access to materials which could be considered confidential.

The State asserts that the position should be excluded from the unit due to the confidential/managerial nature of its duties. In support thereof, the State contends that the certification decisions that Orlofske makes at times involve members of the bargaining unit and impact on their rights under the parties' labor agreement. The State further contends that Orlofske's decisions may determine whether a WFT supporter or a WEA supporter remains employed in the unit or gets laid off.

Section 111.81(15) of SELRA excludes from the definition of "employee" those "individuals privy to confidential matters affecting the employer-employee relationship. . ." The Commission has held that for an employee to be considered a confidential employee, and thus excluded from the bargaining unit, the employee must have access to, have knowledge of, or participate in confidential matters relating to labor relations. 4/ The Commission has further held that in order for the information to be considered "confidential", it must deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters relating to labor relations between the bargaining representative and the employer, and must not be available to the bargaining representative or its agent. 5/

Here although Orlofske makes certification decisions that at times involve employees who are members of the bargaining unit represented by Local 3271 and which decisions may affect the ability of such employees to continue in their positions, the vast majority of such decisions involve employees outside the instant bargaining unit.

Further and more importantly, while Orlofske's certification decisions involving members of the unit also impact on the ability of those employees to transfer, bump or be recalled into other teaching positions in the unit, since the agreement requires that the employees have VTAE certification in those other areas, 6/ Orlofske in making such decisions as, in all of his decisions, is not "privy to confidential matters affecting the employer-employee relationship . . ." as statutorily required of a confidential employee.

Finally, it is clear from the record that Orlofske's responsibility for defending his certification decisions from challenges by individuals or bargaining

-
- 3/ Neither party has taken the position that this dispute is not properly before the Commission.
- 4/ State of Wisconsin, (14143-B) 10/77; Kenosha VTAE District, (14993) 10/76.
- 5/ Walworth County, (18846) 7/81; Cooperative Education Service Agency No. 4, (14177-A) 7/80.
- 6/ The State's argument that Orlofske could use his authority to make certification decisions to weed out supporters of opposing unions in the unit does not go to Orlofske's involvement in confidential matters, but instead states a possible misuse of Orlofske's ability to affect the employment status of some unit members.

representatives does not put him in the status of a confidential employee within the definition stated above. It is noted that as of the date of the hearing herein none of Orlofske's decisions have been challenged and only three of Orlofske's predecessors' certification decisions over a period of five years were challenged; none of which involved the employees in the instant bargaining unit.

Therefore it is concluded that Orlofske's duties and responsibilities are not sufficiently confidential in nature, so as to justify the exclusion of the Personnel Certification Officer position from the bargaining unit.

As to the issue of managerial status, Sec. 111.81(20) of SELRA defines "managerial" employees as "those personnel engaged predominantly in executive and managerial functions including such officials as division administrators, bureau directors, institutional heads and employees exercising similar functions and responsibilities as determined by the Commission". In previous cases 7/ we have held that managerial status must be demonstrated by a showing that the holder of the position in question participates in a significant manner in the formulation, determination and implementation of management policy or that the holder of such a position has the effective authority to commit the municipal employer's resources. Here, while Orlofske in performing his duties makes judgmental decision, he does not in a significant manner formulate, determine and implement management policy. Thus, Orlofske is not a management employee and should not be excluded from the unit in question on said basis.

Finally, contrary to our dissenting colleague, we are not convinced that the instant position is supervisory. We agree, as noted earlier, that Orlofske does exercise some degree of independent judgment but we find nothing in the record to support a conclusion that he has authority ". . . to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action".

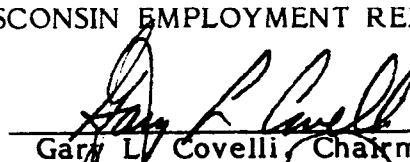
Our colleague bases his supervisory conclusion on a finding that Orlofske's decisions pertaining to certification "authoritatively affect the assignment of employees in the bargaining unit, and are subject to the grievance and arbitration procedures . . .". While it is true that Orlofske's decisions may very well affect the assignment of employees in the bargaining unit, Orlofske in no way "authoritatively recommends" the assignment of employees which is the statutory criterion for determining supervisory status. The decision of assignment, or recommendation thereof, as is the case with the decision or recommendation to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline employees or to adjust their grievances, rests with someone other than Orlofske.

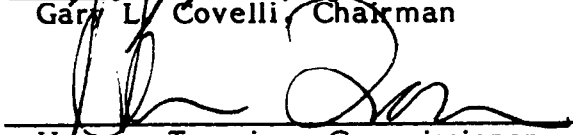
Further, as to Orlofske's participation in the grievance and arbitration procedure, we find nothing in the record to make a determination as to whether decisions of certification are subject to the grievance and arbitration procedure. In any event, as noted above, Orlofske's predecessor, Chinnaswamy, occupied said position over a period of approximately 5 years there were only 3 challenges to his certification decisions. Further, up to the time of the instant hearing Orlofske had not had any challenges to his certification decisions. Thus, the instant position, at best, requires de minimus participation in any challenging procedures; grievance and arbitration or otherwise.

Dated at Madison, Wisconsin this 23rd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Gary L. Covelli, Chairman


Herman Torosian, Commissioner

7/ Department of Transportation, State of Wisconsin, (10592-F), 1/73;
University of Wisconsin-Madison, (10648-B), 11/72; State of Wisconsin
(Professional-Education), (15108), 12/76.

MEMORANDUM OF DISSENT

The State, in this proceeding, would exclude the position involved from the bargaining unit, arguing that the position is either managerial or confidential. My colleagues have concluded that the occupant of the position is neither a managerial nor a confidential employee, and therefore the position is included in the bargaining unit. A unit clarification proceeding is not an adversary proceeding, and the Commission, in effect, conducts an investigation, in which it attempts to elicit facts material to the determination of the issues involved. The Commission, in such a proceeding, is not limited to the positions taken by the parties. Here, the State has not contended that the position is supervisory. Of course, the WFT does not contend that it is.

The State contends that the retention of the position in the bargaining unit would be untenable, since the decisions made by the occupant are "directly tied to labor related matters". e.g. layoffs, transfers, recall and reinstatement. The State is also concerned because the decisions made by the occupant are intimately involved with contractual rights and obligations. It summarizes its position, in part, as follows:

Whether it is determined that the position "is confidential or managerial or that it belongs in another of the stutority (sic) mandated bargaining units, it should be clear that to place him in the Professional Educational bargaining unit would be an inappropriate decision which would subject him to pressures from conflicting loyalties and responsibilities."

The term "supervisor" as defined in Sec. 111.81(19) of SELRA, means

"any individual whose principal work is different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action, if his exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is not necessary that all the indicia of supervisory status be present in order to find a position to be supervisory in nature, however it is necessary that those factors should be present in sufficient combination and degree to clearly establish such supervisory status. 8/

In light of the decisional responsibilities exercised by Orlofske relating to the certification of employees in the bargaining unit involved, where in performing such duties, exercises independent judgment, rather than performing routine or clerical duties, and since such decisions authoritatively affect employees in the bargaining unit, and are subject to the grievance and arbitration procedures set forth in the collective bargaining agreement existing between Local 3271 and the State, and thus involves Orlofske therein as an agent of the State employer, in responding and defending the determination leading to the grievance, I conclude that Orlofske's duties and responsibilities are sufficient in combination and degree to warrant the exclusion of the position occupied by him from the unit involved herein, as a "supervisory employee."

Dated at Madison, Wisconsin this 23rd day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Commissioner

8/ City of Lake Geneva (18507) 3/81.