

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
DRIVERS, WAREHOUSE AND DAIRY
EMPLOYEES UNION, LOCAL NO. 75
Involving Certain Employees of
BROWN COUNTY

Case 22
No. 37159 ME-101
Decision No. 11983-B

Appearances:

Mr. Glenn E. Tarkowski, Business Representative, 1546 Main Street, Green Bay, WI 54302, on behalf of the Union.
Mr. John C. Jacques, Assistant Corporation Counsel, Brown County Courthouse, P.O. Box 1600, Green Bay, WI 54301, on behalf of the County.

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

Drivers, Warehouse and Dairy Employees Union, Local No. 75, herein referred to as the Union, having on June 20, 1986, filed a petition requesting that the Wisconsin Employment Relations Commission clarify a bargaining unit of employees employed by Brown County, hereinafter referred to as the County, in the Brown County Courthouse Complex, by determining whether the position of part-time Surveyor Aide should be included in said unit; and a hearing in the matter having been conducted on September 10, 1986 in Green Bay, Wisconsin, before Examiner Amedeo Greco, a member of the Commission's staff; and a stenographic transcript having been made of the hearing and received on October 6, 1986; and the parties having filed briefs which were received by November 7, 1986; and the Commission having reviewed the evidence and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Brown County is a municipal employer and has its offices at 305 East Walnut Street, Green Bay, WI 54301.

2. That Drivers, Warehouse and Dairy Employees Union, Local No. 75 is a labor organization with its offices at 1546 Main Street, Green Bay, WI 54302.

3. That in Brown County, Dec. No. 11983 (WERC, 7/73) the Union was certified as collective bargaining representative of all regular full-time and regular part-time employees employed by Brown County in its Courthouse Complex.

4. That the County first established the part-time Surveyor Aide position in its Surveyor Department in early 1984 when, by letter dated February 16, 1984, it awarded that job to Anthony Huberty, who is still the incumbent in that position; that in said hire letter from the County's Personnel Department, Huberty was informed that he was a "seasonal/temporary employee" and therefore not covered under the collective bargaining agreement; that the County's 1985 and 1986 annual budgets have specified the maximum number of hours a year Huberty can work; and that the County Board denied County Surveyor Leslie VanHorn's 1985 request to have Huberty treated as a regular position in the County's organization chart.

5. That except for a layoff he experienced in the latter part of 1984; Huberty ever since his hire has averaged about 20 hours of work a week throughout the entire year; that Huberty worked about 1292 hours in 1985 and is expected to work 1040 hours in 1986, the authorized maximum in that year's budget; that Huberty works the same 8:00 a.m.-4:30 p.m. work day as other employees on the days he does work; and that because of a special remonumentation survey which will last several years, there is no indication that Huberty's work will cease in the immediate future.

6. That Huberty works out in the field about ninety percent of his time where he measures angles and distances and does excavation work for the recovery and maintenance of the corners of the public land survey system; that when work is unavailable in the field, Huberty spends the remaining ten percent of his time in the Surveyor's office in the County's Northern Building where he drafts index maps and survey maps at his own drafting table; that Huberty's field and office duties are similar to those performed by Assistant Surveyor Jerry Czech who is in the bargaining unit, with the primary difference being that whereas Czech, a licensed surveyor, can officially stamp and validate the survey results, Huberty, who is unlicensed, cannot; that Huberty performs almost all of the duties set forth in the County's Assistant Surveyor job description; and that Huberty and Czech are both supervised by County Surveyor Leslie VanHorn.

CONCLUSION OF LAW

1. That Anthony Huberty, occupant of the position of part-time Surveyor Aide, is a municipal employe within the meaning of Section 111.70(1)(i) Stats., and should be included in the collective bargaining unit represented by the Union.

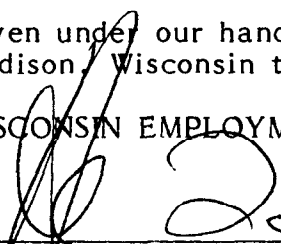
ORDER CLARIFYING UNIT 1/

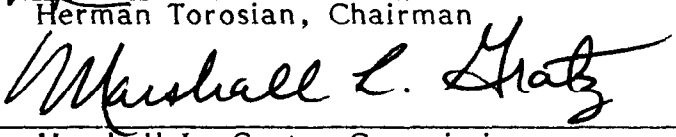
That the position of part-time Surveyor Aide is hereby included in the certified collective bargaining unit set forth Finding of Fact No. 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 23rd day of December, 1986.

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 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

(Footnote 1 continued on Page 3)

(Footnote 1 continued)

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.

BROWN COUNTY

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

Positions Of The Parties

The Union requests inclusion of the part-time Surveyor Aide in the bargaining unit, claiming that Huberty is a regular employee who shares the same community of interests as other bargaining unit members and pointing out that while there is some flexibility in setting Huberty's work schedule, it nevertheless "hasn't diminished the regularity of employment . . . to exclude his position from the Unit." The County, in turn, asserts that Huberty should be excluded because there is no indication that he wants to be included in the unit; that only the County can determine whether an employee is a regular or part-time employee; and that pursuant to that authority, it has chosen to treat Huberty as a casual on-call employee who does not have a fixed work schedule.

Discussion

In resolving this issue, we first note that it is immaterial whether Huberty himself wishes to be included or excluded from the bargaining unit since it is well established that an employee's personal views are not dispositive in the kind of unit placement issues presented here. 2/ Similarly, there is no merit in the County's additional claim that Section 59.025, Stats. gives it the sole right to determine whether an employee is a casual or regular part-time employee, as the County's legal authority to create a position is not in dispute here; rather, this case involves the separate question of whether, once a position is created and filled, it falls within the various definitions provided for in Section 111.70, Stats. and related case law. Since the Commission itself is statutorily responsible for deciding such issues based upon the individual facts of each case, a point which the Court in Arrowhead, supra, expressly reconfirmed, an employer's own characterization in such matters cannot be given the deference here requested.

The determinative factor in deciding whether an employee is deemed a regular part-time or casual employee is the regularity of employment rather than the number of hours worked. 3/ The record shows that but for a brief layoff, Huberty has worked about 20 hours a week ever since his January, 1984 hire and that, moreover, he apparently will continue to work in the future given the several years of work remaining in the municipal employer's special remonumentation survey. Accordingly, not much weight can be given to the fact that Huberty was initially hired by the County as a casual or seasonal employee, since it now is clear that Huberty in fact is a regular part-time employee. The facts that Huberty often works different days of the week and that his work schedule is somewhat flexible depending upon the County's weekly needs are insufficient to negate Huberty's regularity of employment. We also find that Huberty shares a community of interest with other bargaining unit members in the Surveyor's Department since he shares common supervision and an office with them, while working common hours with and generally performing the same duties as bargaining unit member Assistant Surveyor Czech.

2/ The County's reliance on Arrowhead United Teachers v. W.E.R.C., 116 Wis. 2d. 580, (1984) is misplaced because the Court's decision there did not hinge on employee desires; instead, the only reference to this subject was in the Court's recitation of the Circuit Court's earlier opinion in the case.


3/ Juneau County, Dec. No. 18728-A (WERC, 1/86).

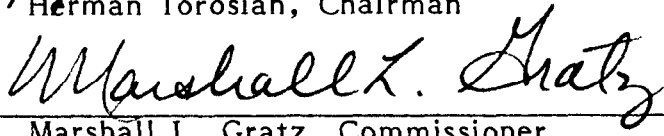
Based upon the foregoing, we therefore find that Anthony Huberty's position should be included in the collective bargaining unit.

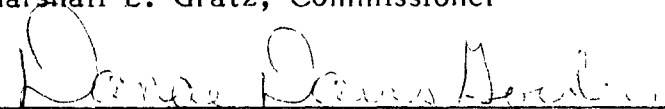
Dated at Madison, Wisconsin this 23rd day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner