

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

KEWAUNEE COUNTY COURTHOUSE
EMPLOYEES, LOCAL 2959,
AFSCME, AFL-CIO

Involving Certain Employees of

KEWAUNEE COUNTY

Case 2
No. 39291 ME(u/c)-209
Decision No. 13185-E

Appearances:

- Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220, appearing on behalf of the Union.
- Ms. Elma E. Anderson, Corporation Counsel, Kewaunee County, Kewaunee County Courthouse, 613 Dodge Street, Kewaunee, Wisconsin 54216, appearing on behalf of the County.

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

Kewaunee County Courthouse Employees, Local 2959, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission on August 13, 1987, in which the Union requested the Commission to clarify that the excluded position known as Part-Time Assistant Janitor should be included in a bargaining unit of employees represented by the Union and employed by Kewaunee County. Hearing on the matter was conducted in Kewaunee, Wisconsin, on December 9, 1987, before Richard B. McLaughlin, an Examiner on the Commission's staff. A transcript of that hearing was prepared and submitted to the Commission by December 28, 1987. The parties filed briefs by February 8, 1988. The Commission, having considered the record, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. Kewaunee County Courthouse Employees, Local 2959, AFSCME, AFL-CIO (the Union), is a labor organization which maintains its offices in care of P.O. Box 370, Manitowoc, Wisconsin 54220.

2. Kewaunee County (the County), is a municipal employer which maintains its offices at the Kewaunee County Courthouse, 613 Dodge Street, Kewaunee, Wisconsin 54216.

3. Among the facilities operated by the County are three facilities known as the Courthouse, the Courthouse Annex and the Safety Building. The Safety Building houses the County's traffic police and sheriff's department and contains the radio room and jail. The Annex houses the County's Social Services and Public Health Departments. The County's central administrative offices are housed in the Courthouse.

4. The Commission, in a decision captioned as Case II, No. 18385, ME-1111, Dec. No. 13185, and issued on January 23, 1975, certified the Union as the exclusive collective bargaining representative of a bargaining unit described thus:

. . . all employees of Kewaunee County employed in the Courthouse and associated departments, including secretarial-clerical employees in the Highway Department and professional employees employed in the Department of Social Services, excluding elected officials, supervisory, managerial, confidential and law enforcement employees and Highway Department employees, other than secretarial-clerical employees . . .

The County and the Union have been parties to a number of collective bargaining agreements since the time of that certification, including one in effect, by its terms, from January 1, 1987, through December 31, 1988. That agreement contains, as Article 1, a provision entitled "RECOGNITION," which reads as follows:

The Board recognizes the Union as the exclusive bargaining agent of all employees of Kewaunee County employed in the Courthouse and associated departments, including secretarial-clerical employees in the Highway Department and professional employees in the Department of Social Services, excluding elected officials, supervisory, managerial, confidential, and deputized law enforcement employees and Highway Department employees, other than secretarial-clerical employees pursuant to the elections conducted by the Wisconsin Employment Relations Commission on January 10, 1975, and certified by said Commission on January 23, 1975, and as amended on October 2, 1979, in regard to any and all issues involving wages, hours, or conditions of employment.

That agreement contains, as Article 4, a provision entitled "WAGES," which reads, in relevant part, as follows:

A. CLASSIFICATIONS

. . .

CLASS GRADE 6

Assistant Janitor

. . .

B. HOURLY RATES EFFECTIVE JANUARY 1, 1987

Date of Employment	After 12 Months	After 24 Months	After 36 Months
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. . .

Class Grade 6	\$ 8.14	\$ 8.47	\$ 8.82	\$ 9.18
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. . .

That agreement also provides for a number of fringe benefits, including premium pay for overtime hours worked (Article 3, Section D); paid vacation (Article 5); sick leave (Articles 6 and 11); paid holidays (Article 7); participation in the Wisconsin Retirement System (Article 8); various insurance benefits (Articles 9 and 10); paid funeral leave (Article 12); and the right to process grievances (Article 16). The agreement also provides, at Article 3, Section B, the following provision entitled "WORK WEEK:"

The work week shall be five (5) eight (8) hour days, Monday through Friday, except for maintenance and custodial employees who shall have forty (40) hours per week on a schedule set by the Personnel Committee.

5. This proceeding concerns the unit status of a position known as Part-Time Assistant Janitor. Dan Wavrunek is the employee presently filling this position. The Union contends that the position of Part-Time Assistant Janitor is a regular part-time position properly included in the bargaining unit described above. The County contends that the position is a casual-temporary position which should not be included in the bargaining unit described above. Mike Kinjerski is the employee presently filling the position known as Assistant Janitor. The parties agree that the Assistant Janitor position is properly included in the bargaining unit noted in Finding of Fact 4.

6. Dennis Van Den Berg, who is not a member of the bargaining unit described in Finding of Fact 4, functions as the head custodian of the County's maintenance department. The County's maintenance department consists of Van Den Berg, Kinjerski and Wavrunek, and is responsible for certain maintenance and custodial duties required by the three facilities noted in Finding of Fact 3.

7. The County created the position known as Part-Time Assistant Janitor on October 16, 1985. The position was created to account for any work not performed by Van Den Berg or Kinjerski due to their attendance to other duties or to their absence from work. At the time of the position's creation, Kinjerski was on medical leave, due to an illness. Harold J. Reckelberg, the Chairman of the County Board, instructed Van Den Berg to find an individual capable of meeting the County's needs. Van Den Berg suggested Wavrunek, who started work for the County in the position known as Part-Time Assistant Janitor on October 16, 1985. Reckelberg informed Wavrunek, at the time of his hire, that the County would not guarantee him work, and would not pay him any fringe benefits.

8. Wavrunek performs various custodial duties in all three of the facilities noted in Finding of Fact 3. His duties have not substantially changed from the time of his hire through the present. Among the duties performed by Wavrunek at the Courthouse are cleaning the restrooms, changing light bulbs and cleaning humidifiers. Among the duties performed by Wavrunek at the Annex are cleaning restrooms, removing and burning trash, mopping, sweeping and vacuuming floors and carpets and changing light bulbs. Among the duties performed by Wavrunek at the Safety Building are cleaning the restrooms, mopping floors, removing trash, and changing light bulbs. Wavrunek will also cut grass and shovel snow as needed. Kinjerski performs the duties noted above, and Wavrunek will perform Kinjerski's or Van Den Berg's custodial duties when those employees are not available. Except when he is on vacation, Wavrunek performs the duties noted above for the Safety Building each Monday, Wednesday and Friday. Wavrunek has followed this schedule at the Safety Building since his hire on October 16, 1985. Wavrunek performs the duties noted above for the Annex every other week day. His duties at the Annex take him at least one hour per work day. He has followed that schedule for about one year. Wavrunek's duties at the Courthouse follow no set pattern, and are performed by Wavrunek on an as needed basis as directed by Van Den Berg. Wavrunek's employment history with the County was summarized in a letter from Edward J. Dorner, the County Clerk, to Wilson dated December 9, 1987. That letter, in relevant part, reads thus:

Mr. Wavrunek was employed by Kewaunee County on October 16, 1985. During the remainder of 1985 he worked 117 hours. During 1986 Mr. Wavrunek worked a total of 544.5 hours. This would average to about 10.5 hours per week. So far in 1987 Dan has worked 425.5 hours through November 13, 1987. This would average out to slightly less than 10 hours a week.

Wavrunek can refuse, and has refused, specific work assignments. The County has allowed Wavrunek, since the date of his hire, to set his own hours to accommodate his duties in the position known as Part-Time Assistant Janitor with his duties as a part time employee at the Post Office.

9. Wavrunek performs similar duties to Kinjerski. Wavrunek has received \$5.00 per hour for the hours he works, without regard to the number of hours worked or to when those hours are worked. Wavrunek has received this rate of pay since his date of hire. Wavrunek is paid on a different payroll than employees in the Courthouse bargaining unit. Wavrunek records his own hours and gives that record to Van Den Berg for processing through the payroll system. Unlike employees in the Courthouse bargaining unit, Wavrunek is paid once per month. He is not eligible to participate in the Wisconsin Retirement System. All of the employees in the Courthouse bargaining unit are eligible to participate in that system, since all of those employees work at least twenty hours per week. Unlike employees in the Courthouse bargaining unit, Wavrunek receives no fringe benefits. Wavrunek routinely sees Van Den Berg at the Post Office and will periodically ask Van Den Berg if there are any non-routine duties he should perform, such as work at the Courthouse. Wavrunek does not have to routinely report to Van Den Berg regarding his duties at the Safety Building. Employees in the Courthouse bargaining unit work at each of the facilities noted in Finding of Fact 3, but Wavrunek has little routine contact with such employees, since he typically works before or after those employees' normal hours.

10. The County has no present intention to alter the hours in the position known as Part-Time Assistant Janitor, absent unforeseen circumstances. Wavrunek is at present, and has been since October of 1985, regularly employed in that position. Wavrunek has a reasonable expectation of continued employment in that position. Wavrunek, as the incumbent of the position known as Part-Time Assistant Janitor, is a regular part-time employee who is properly included in the bargaining unit noted in Finding of Fact 4.

CONCLUSIONS OF LAW

Wavrunek, as the occupant of the position known as Part-Time Assistant Janitor, is a "Municipal employee" within the meaning of Sec. 111.70 (1) (i), Stats., who occupies a position which is neither casual nor temporary, but which is a regular part-time position, properly included within the bargaining unit noted in Finding of Fact 4.

ORDER CLARIFYING BARGAINING UNIT 1/

The position known as Part-Time Assistant Janitor is hereby included in the bargaining unit noted in Finding of Fact 4.

Given under our hands and seal at the City of
Madison, Wisconsin this 31st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner
A. Henry Hempe
A. Henry Hempe, Commissioner

- 1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(Footnote 1 continued on Page 5.)

(Footnote 1 continued from Page 4.)

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

The background facts, procedural development and basic positions taken by the parties in this case are as stated in the preface and Findings of Fact.

POSITIONS OF THE PARTIES

The Union summarizes its position on the disputed position thus:

The work performed by Mr. Wavrunek on a regular basis is identical to work performed by bargaining unit personnel (Mr. Mike Kinjerski). Mr. Wavrunek receives no fringe benefits and a rate of pay less than those specified in (the labor agreement) and is paid on a special payroll once a month. Less wages are the only distinguishable features of Mr. Wavrunek's employment.

Turning to a review of the record, the Union contends that Wavrunek has a regular work schedule and that "(t)he Commission has consistently ruled the determining factor in deciding whether an employee is casual is the regularity of employment rather than the number of hours worked." Beyond this, the Union argues that Wavrunek can not be characterized as an on-call employee, since he has regular assignments and reports for work without having to check with his supervisor for all of his assignments. In addition, the Union asserts that even if Wavrunek was originally hired as a short term replacement for Kinjerski, both Wavrunek and the County now "anticipate (his) continued employment for an indefinite period of time." Contending that "(t)he expectation of continued employment is a critical factor used by the Commission to differentiate between regular and temporary employees," the Union asserts that Wavrunek must be considered a regular part-time employee. Noting that the Commission has included on-call employees in bargaining units of regular employees, the Union argues that "(t)he fact that an employee may have a flexible work schedule is not grounds to exclude the position from a bargaining unit of regular employees." Since Wavrunek shares a "sufficient community of interest" with other Courthouse employees, it follows, according to the Union, that the Commission must order his position to be included within the Courthouse bargaining unit.

The County states the issue for decision thus:

Whether the part time assistant janitor position held by Mr. Daniel (Wavrunek) ought to be included in the certified unit known as Kewaunee County Courthouse Employees, Local 2959, AFSCME, AFL-CIO.

The County contends that a review of the record establishes that Wavrunek was originally hired to cover Kinjerski's absence from work due to medical reasons, and that Wavrunek was hired to work on an "as-needed" basis with no guarantee of continued employment. Beyond this, the County contends that Wavrunek has responded to specific work requests by his supervisor and has refused certain offers of work. While noting that "the determining 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," the County argues that the Commission has considered other factors to determine "whether less than full-time employees share a sufficient community of interest to be included in the same bargaining unit." Among those factors, according to the County, is "the right to reject work which the employer makes available." In the present matter, the record, according to the County, establishes that Wavrunek works on an on-call, as-needed basis, in a position not "provided for in the collective bargaining agreement nor . . . ever specifically created by resolution of the County Board." Because Wavrunek was hired with the express understanding that he could not be guaranteed employment, it follows, according to the County, that "(t)he agreement that was reached between (Wavrunek) and the county employer specifically negated any expectation of continued employment, reasonable or otherwise." The County concludes that a review of the record establishes that Wavrunek lacks any community of interest with other bargaining unit employees, and thus that his position must not be included in the Courthouse bargaining unit.

DISCUSSION

The parties' dispute regarding the unit status of the Part-Time Assistant Janitor is narrow and well-defined. The parties correctly note that the determinative factor in deciding whether an employee is deemed a regular part-time or a casual employee is the regularity of employment rather than the number of hours worked. 2/

In the present matter, the record demonstrates that Wavrunek has been regularly employed as the Part-Time Assistant Janitor. Since October of 1985, he has consistently averaged about ten hours per week in performing his custodial duties. The County has correctly noted that work "done on an "on-call" or "as-needed" basis . . . tends to show that the individual is a casual rather than a regular part-time employee." 3/ However, in this case, Wavrunek's "on-call, as-needed" status is shown solely with regard to his irregular duties at the Courthouse. The fact remains that Wavrunek works at the Annex and the Safety Building as a matter of routine. Furthermore, Wavrunek's ability to "refuse" work is limited to those occasions when he is on vacation or is called to work in the event of an unscheduled absence by a co-worker. Viewing his work at the three facilities as a whole, the record demonstrates that the County has consistently "called" and "needed" Wavrunek for about ten hours of work over at least the past two years. The County also notes that Wavrunek determines his own hours. However, the Commission has stated that:

. . . flexibility as to working time does not automatically determine that an employee is a casual employee . . . In determining whether or not employees are regular part-time, the Commission is primarily concerned with regularity of employment. 4/

In this case, the demonstrated regularity of Wavrunek's employment controls, 5/ and Wavrunek must be considered a regular part-time, not a casual, employee.

The County also argues that Wavrunek is a temporary employee. The Commission defines a temporary employee as "one who lacks an expectation of continued employment" 6/ There is no persuasive basis in the record to conclude that Wavrunek lacks a reasonable expectation of continued employment. The consistent regularity of his employment in the past has been demonstrated, and the record reveals no reason to believe that regularity will not extend into the foreseeable future. The County contends that Wavrunek has not been guaranteed work. This is true, but not relevant to the determination here. Few employees enjoy a guarantee of work, and the Commission has, in an analogous setting, determined that: "Mere uncertainty as to whether funding will continue is insufficient to support a conclusion that (employees) lack a reasonable expectation of continued employment." 7/ Nor can the fact that Reckelberg and Wavrunek mutually understood, at the time of Wavrunek's hire, that the County would not guarantee Wavrunek work be considered to bind the Commission. 8/ The issue posed here is simply whether the

2/ See, among other cases, Juneau County, Dec. No. 18728-A (WERC, 1/86); Brown County, Dec. No. 11983-B (WERC, 12/86); and Green Lake County, Dec. No. 24955, 24956 (WERC, 11/87).

3/ Ibid., at 52.

4/ Juneau County, Dec. No. 18728-A (WERC, 1/86) at 11.

5/ Compare School District of Pittsville, Dec. No. 21806 (WERC, 6/84) where the Commission found a position known as "Floater-Custodian" to be a regular part-time and not a casual position when the occupant averaged four to five hours of work per week on a year round basis.

6/ Manitowoc County, Dec. No. 15250-B (WERC, 9/77) at 3.

7/ School District of Pittsville, Dec. No. 21806 (WERC, 6/84) at 4.

8/ See Brown County, Dec. No. 11983-B (WERC, 12/86).

position of Part-Time Assistant Janitor constitutes a regular part-time position. under the MERA. The record will not support the County's assertion that the position meets the Commission's established definition of a "temporary" position. It follows that the position is a regular part-time position.

The County has asserted that Wavrunek lacks a sufficient community of interest with unit employes to warrant his placement in the Courthouse bargaining unit. Since Wavrunek and Kinjerski perform essentially the same duties and the parties acknowledge that Kinjerski is properly in the Courthouse unit, the County's assertion has been resolved in the original certification of the bargaining unit which the parties have incorporated into their collective bargaining agreement. In any event, the present record viewed in light of the Commission's traditional community of interest criteria 9/ would warrant placing the position known as Part-Time Assistant Janitor in the Courthouse bargaining unit.

The Union, in the conclusion to its brief asserts that "Wavrunek meets the contract qualifications for benefits (in Article 2)." Against this background, it is appropriate to note that "(o)ur order does not mean that the collective bargaining agreement automatically applies to the newly included employe . . . that matter is left for the parties to negotiate." 10/

Dated at Madison, Wisconsin, this 31st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

9/ See Arrowhead United Teachers Organization v. WERC, 116 Wis 2d. 580, 591-592, (1984).

10/ Juneau County, Dec. No. 18728-A (WERC, 1/86) at 12.