STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of<br><br>GENERAL DRIVERS & DAIRY EMPLOYEES UNION LOCAL NO. 563, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA<br><br>Involving Certain Employes of<br><br>CITY OF APPLETON PARKING AND TRANSIT COMMISSION | Case XCV<br>No. 21967 ME-1465<br>Decision No. 16090-A |

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AMENDING CERTIFICATION

On March 6, 1978 the Commission issued its Certification of Representative in the above-entitled matter. Thereafter, on August 11, 1978, General Drivers & Dairy Employees Union Local No. 563, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter Union, filed a Motion to Amend Certification with an accompanying Statement and Affidavit in support thereof. The City of Appleton Parking and Transit Commission, herein Municipal Employer, filed a response objecting to the proposed amendment. The Commission has reviewed the motion and arguments of the parties and the record in the matter and being fully advised in the premises, hereby issues the following Findings of Fact, Conclusions of Law and Order Amending Certification.

## FINDINGS OF FACT

1. At the November 2, 1977 hearing which was held on the petition herein, the Union and Municipal Employer agreed that if the Commission determined that the appropriate bargaining unit should include clerical employes, the appropriate bargaining unit of employes covered by this petition should consist of all employes employed as drivers, maintenance and clerical employes, but excluding supervisory, confidential, managerial, craft and professional employes.

2. On February 1, 1978, the Commission issued a Direction of Election wherein it found, inter alia, that the Municipal Employer employs various bus drivers as well as maintenance and clerical employes in its transit system and that said employes share common supervision and a common work location. Based on this finding, the Commission entered a conclusion of law that all regular full-time and regular part-time drivers, maintenance and clerical employes employed in the Municipal Employer's transit system excluding supervisory, confidential and managerial employes constitutes an appropriate bargaining unit within the meaning of Section 111.70(4)(d)2.a. of the Municipal Employment Relations Act. Thereafter, the Commission conducted an election on February 15, 1978 wherein all employes of the Municipal Employer's transit system then working as drivers, maintenance and clerical employes who were not challenged as supervisory, confidential or managerial employes, were deemed eligible to vote if they so desired. Neither the Union nor the Municipal Employer challenged any of the drivers, maintenance and clerical employes who voted in the election on the basis that they were not regular full-time or regular part-time employes. On March 6, 1978, the Commission issued its Certification of

Representative 1/ wherein it found that a majority of the employes in the bargaining unit described in its direction had voted in favor of being represented by the Union and certified the Union as the representative of the employes in said bargaining unit.

3. The findings contained in the Commission's Direction of Election dated February 1, 1978 inadvertently omitted a finding that the Union and Municipal Employer had agreed to the bargaining unit described in paragraph 1 above as the appropriate bargaining unit. Neither party brought such omission to the attention of the Commission until it became a matter of dispute in the bargaining between the Union and the Municipal Employer and the Union, on August 11, 1978, filed a motion to amend the certification to properly reflect the agreement of the parties.

Based on the above and foregoing Findings of Fact, the Commission enters the following

## CONCLUSIONS OF LAW

1. The Commission has the lawful authority to amend its certification in the above-entitled proceeding.

2. A bargaining unit consisting of all employes of the City of Appleton Parking and Transit Commission employed as drivers, maintenance and clerical employes, but excluding supervisory, confidential, managerial, craft and professional employes is an appropriate bargaining unit within the meaning of Section 111.70(4)(d)2.a. of the MERA.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and enters the following

## ORDER AMENDING CERTIFICATION

The bargaining unit represented for purposes of collective bargaining by General Drivers and Dairy Employees Union Local No. 563 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is hereby amended to read as follows:

> All employes employed as drivers, maintenance and clerical employes but excluding supervisory, confidential, managerial, craft and professinal employes.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Marshall L. Gratz, Commissioner

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1/ Decision No. 16090.

CITY OF APPLETON PARKING AND TRANSIT COMMISSION, XCV, Decision No. 16090-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AMENDING CERTIFICATION

In its Motion to Amend Certification, the Union asks the Commission to delete the limiting words "regular full-time and regular part-time" from the certified bargaining unit description. In support of its request the Union filed a Statement and Affidavit. The Statement alleges that the parties stipulated to a bargaining unit description without this phrase and that the Commission inadvertently overlooked said stipulation when it directed the election and certified the results. The Union alleges that this was, at most, harmless error, but that the Municipal Employer has insisted on utilizing the certified bargaining unit description in the negotiations thereby impeding collective bargaining. In the Affidavit the Union's business representative states that it is the Union's practice to represent "all employes" employed within the various bargaining units of employes of the City of Appleton which it currently represents, regardle of the regularity or full-time or part-time nature of their employment; tha the parties to the instant proceeding agreed that the unit should include all employes; that he did not realize at the time of the Direction of Election and Certification that the Commission had described the unit differently; and that since said Certification, the Municipal Employer has refused to agree to a collective bargaining agreement which would apply to "all employes" thereby creating an unnecessary barrier to negotiations.

In its response, the Municipal Employer states that it is opposed to said motion for essentially two reasons:

1. The Commission's order directing an election dated February 1, 1976 is conclusive since no petition for review was filed within thirty days thereafter and the motion herein was not received by the City until August 15, 1978. (The Municipal Employer relies on Section 111.70(4)(d)3, Section 111.07(8), and Section 227.16, Stats., in support of this argument.)

2. The Commission's findings, conclusions and order are correct.

It is the position of the Municipal Employer that if there is a legal basis for granting the Union's motion, a new election should be directed before changing the certification.

DISCUSSION:

A review of the transcript in this case discloses that the Union is correct in its assertion that the parties agreed to a bargaining unit description which did not include the limiting phrase "regular full-time and regular part-time." They agreed to a bargaining unit consisting of "all City of Appleton Transit System employes, including maintenance and, if the Commission determines that the clerical employes should be included

full-time and regular part-time" which is commonly utilized in bargaining unit descriptions certified by the Commission, was an inadvertent addition and was inconsistent with the stipulation of the parties. A further review of the record in this case discloses that all employes 4/ of the Employer were included on the eligibility list and allowed to vote in the election if they so desired. 5/

It is apparently undisputed that the Municipal Employer did not, at the time of the election, and does not now, employ any employes as drivers, maintenance or clerical employes who can not properly be characterized as "regular full-time or regular part-time." The apparent origin of the dispute in this case is the possibility that the Employer may in the future choose to employ casual or temporary drivers, maintenance or clerical employes, and the Union's desire to bargain concerning the wages, hours and working conditions that would apply in that eventuality.

Casual or temporary employes often perform work sufficiently different from other employes to justify their exclusion from a bargaining unit of regular full-time and regular part-time employes. However, they are nonetheless employes and entitled to representation. 6/ In some instances, especially where there are many such employes, a separate bargaining unit is appropriate for this purpose. 7/ Here, the parties agreed that the appropriate bargaining unit should include all employes of the Employer working as drivers, maintenance or clerical employes, which agreement would presumably include any irregular employes the Employer chooses to employ for such work, and we see no reason for refusing to honor that agreement unless we are precluded from doing so at this time as argued by the Municipal Employer. The unit agreed to would merely include irregular employes who perform work which is functionally related to the positions occupied by other employes in the unit. 8/

We disagree with the Municipal Employer's claim that we are precluded from amending our certification at this time. Our prior certification 9/ was based on findings which recognized the community of interest among the employes in the unit described therein. However, we neglected to find that the parties had stipulated to a different unit and therefore, never entered a conclusion of law as to whether that unit was appropriate for purposes of collective bargaining. We have now made such a finding and conclude that the unit is appropriate. Since there are no employes who were even arguably disenfranchised as a result of the limiting language contained in

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4/ Supervisory, confidential, and managerial positions are not deemed to be filled by "employes." See Section 111.70(1)(b), Stats.

5/ Although the Commission afforded the Municipal Employer an opportunity to identify any employes who were excluded from voting eligibility because of our use of the phrase "regular full-time and regular part-time," it failed to do so.

6/ Wauwatosa Board of Vocational and Adult Education (8158) 8/67; Madison Metropolitan School District (6746-C and 14161-A) 1/77.

7/ See, for example, our decision in the Kenosha Unified School District case involving substitute teachers. Decision No. 14908, 9/76.

8/ Cf. H. P. Wasson & Co. 104 NLRB 249, 32 LRRM 1086 (1953).

9/ Contrary to the Municipal Employer's claim, it is the Commission's certification, not its order directing the election which is appealable. See City of West Allis v. WERC 72 Wis. 2d 268 (1976). It is, of course, true that the motion herein was not filed for several months after the issuance of our certification.

our prior direction and certification 10/ and in view of fact that there is no other basis in the record for raising a question concerning representation we have amended our certification without directing a new election.

Dated at Madison, Wisconsin this 19th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Marshall L. Gratz, Commissioner

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10/ It should be noted that even if employes perform work which is sufficiently functionally related to other bargaining unit positions to be included in the same unit they may be ineligible to vote if they are temporary or casual. See H. P. Wasson & Co., supra, note 8, as supplemented at 105 NLRB 373, 32 LRRM 1273 (1953).