

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
MADISON INDEPENDENT WORKERS UNION
Involving Certain Employees of
THE EGGPLANT, INC.

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Case I
No. 23007 E-2962
Decision No. 16514
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Appearances:

Ms. Mary Lynne Donohue, Business Agent, and Mr. James Ptacek,
Organizer, appearing for the Petitioner.
Murphy, Stolper, Brewster & Desmond, Attorneys at Law, by Mr.
Fred Gants, and Mr. Dennis Koepke, Owner, appearing for
the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DIRECTION OF ELECTION

Madison Independent Workers Union having, on May 12, 1978, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election, pursuant to Section 111.05 of the Wisconsin Employment Peace Act, among certain employees in the employ of The Eggplant, Inc., to determine whether said employees desired to be represented by the Petitioner for the purposes of collective bargaining; and a hearing on said petition having been held at Madison, Wisconsin on June 8 and 14, 1978, before Douglas V. Knudson, a member of the Commission's staff; and the Commission, having reviewed the evidence and arguments of the parties, and being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law and Direction of Election.

FINDINGS OF FACT

1. That Madison Independent Workers Union, hereinafter referred to as the Union, is a labor organization and has its offices at Madison, Wisconsin.
2. That the Eggplant, Inc., hereinafter referred to as the Employer, operates a restaurant in Madison, Wisconsin; and, that one of its principal owners is Dennis Koepke of Madison, Wisconsin.
3. That on May 12, 1978, the Union filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election to determine whether all regular full-time and regular part-time employees, including waiters, waitresses, bartenders, cooks, dishwashers, buspersons and janitors, excluding clerical employees, bookkeepers, professional employees, managerial employees, guards and supervisors, desired to be represented by the Union for the purpose of collective bargaining; that during the course of the hearing on the petition, held on June 8 and 14, 1978, the parties agreed to exclude irregular part-time and casual employees from the aforementioned unit; however, the Employer claimed, contrary to the Union, that the janitor is an independent contractor, that Kay Dricken is a supervisory and managerial employee, and, that Karen Ritter and Deborah Saupe are irregular part-time and casual employees.
4. That the duties of janitor, currently performed by Raymond Burgett, are not those of an independent contractor, but rather are those of an employee of the Employer.

5. That Kay Dricken, occupying the position of Head Cook, performs duties customarily associated with a lead worker position and neither exercises sufficient supervisory duties to constitute a supervisor, nor possesses sufficient authority to commit the Employer's resources to achieve managerial status.

6. That Karen Ritter and Deborah Saupe, each occupying the classification of waitress, are scheduled to, and do work, on a regular basis; and, that said two individuals are employed by the Employer on a regular part-time basis.

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

CONCLUSIONS OF LAW

1. That the Employer's rate of employee turnover is not a sufficient basis either to set a date different than the date of this Directive, as the date establishing eligibility for participation in the election directed herein, or, to alter the Commission's policy of establishing the election date; and that, accordingly, the date of this Directive will be the date establishing eligibility to participate in the election directed herein, and, the date of the election will be scheduled in accordance with the Commission's normal election procedures.

2. That Raymond Burgett, occupying the position of janitor, Kay Dricken, occupying the position of Head Cook, and Karen Ritter and Deborah Saupe, each occupying the position of waitress, are employees within the meaning of Sec. 111.02(3) of the Wisconsin Employment Peace Act, and therefore, are eligible to vote in the election directed herein.

3. That all regular full-time and regular part-time employees, including waiters, waitresses, bartenders, cooks, dishwashers, buspersons and janitors in the employ of The Eggplant, Inc., but excluding clerical, professional, managerial, irregular part-time and casual employees, bookkeepers, guards and supervisors, constitutes an appropriate collective bargaining unit within the meaning of Sec. 111.02(6) of the Wisconsin Employment Peace Act.

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

DIRECTION OF ELECTION

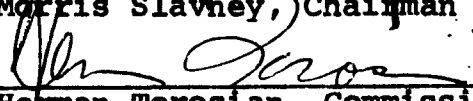
That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within 30 days of the date of this Directive in the appropriate collective bargaining unit consisting of all regular full-time and regular part-time employees, including waiters, waitresses, bartenders, cooks, dishwashers, buspersons and janitors in the employ of The Eggplant, Inc., but excluding clerical, professional, managerial, irregular part-time and casual employees, bookkeepers, guards and supervisors, who were employed by the Employer on August 25, 1978, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees voting desire to be represented by Madison Independent Workers Union for the purpose of collective bargaining with The Eggplant, Inc., with respect to wages, hours and conditions of employment.

Given under our hands and seal at the
City of Madison, Wisconsin this 25th
day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

The petition filed by the Union contained the following bargaining unit description:

"All regular full time and all regular part time employees including waiters, waitresses, bartenders, cooks, dishwashers, buspersons and janitors, excluding clerical employees, bookkeepers, professional employees, managerial employees, guards and supervisors."

During the course of the hearing, the parties agreed to amend the aforementioned unit by adding to the exclusions the phrase "irregular part time and casual employees." The parties agreed that the resultant unit would be appropriate except that, the Employer would exclude from the bargaining unit both the janitor position as an independent contractor, and the head cook position as a supervisory and managerial position. Further issues arose with respect to whether or not three waitresses were irregular part-time employees, the eligibility date for participation in the election, and the date of the election.

Eligibility Date

The Employer contends that, in order to be eligible to vote in an election, an employee must be on the payroll on the most recent pay day preceding the date of the election. The Employer bases said contention on its high rate of employee turnover. The Employer has a work force of approximately nineteen employees. During the time period of March 1 through June 8, 1978, sixteen new employees were hired while twelve employees quit or were terminated. The Union argues that the eligibility date should be the date on which the Commission directs the election.

It has long been established by the Commission that the eligibility date to participate in an election is ordinarily the date on which the Commission directs the election unless mutually agreed otherwise by all parties. ^{1/} The Commission is not persuaded that the Employer's rate of employee turnover justifies a departure from said policy. Accordingly, all employees who were employed on the date of this Directive, who do not prior to the election quit or become discharged for cause, shall be eligible to vote.

Date of the Election

The Employer proposes that the election be conducted on an employee pay day to enhance voter turnout. The Union requests that the election be held on the first available date.

The Commission will seek to schedule the election at a time which best serves the needs of the parties in accordance with its statutory mandate consistent with the administrative constraints normally involved in the scheduling of such elections.

Janitor

During various periods of time in the past, the Employer has utilized cleaning firms to perform its janitorial services, consisting of cleaning the floors and carpets, cleaning the rest rooms, taking out the trash, etc. Said duties are of a very routine nature. More recently, the Employer has

^{1/} E.g., W. H. Krantz Co. (4135) 1/56.

turned to arranging with individuals to do the janitorial work. At the time of the hearing, Raymond Burgett was performing the janitorial work. Regardless of the number of hours spent doing the work, Burgett is paid a flat dollar amount every two weeks, from which the Employer does not make any deductions for taxes or social security. The Employer purchases all of the cleaning supplies used by Burgett. Burgett also receives a free meal from the Employer for each day he works, which is the Employer's practice with all of its employees. Burgett receives no direct supervision, but rather, he is contacted by the Employer only when new duties, or a problem, arise.

In the instant proceeding, the Commission is satisfied that the janitor is not an independent contractor, but rather that an employee-employer relationship exists between Burgett and the Employer. Although Burgett receives fixed compensation for his varying hours of janitor duties, he works on a regular basis, does not provide his own supplies, and receives a benefit common to the Employer's other employees, i.e., a free meal for each shift worked. Accordingly, the position of janitor is included in the bargaining unit, and, Burgett is eligible to participate in the election directed herein.

Head Cook

The position of Head Cook has been occupied by Kay Dricken since August, 1977. Dricken is responsible for overseeing the operation of the kitchen when she works, which is normally from 7:15 a.m. to 4:00 p.m., Monday through Friday. Said responsibility involves the division of food preparation tasks between herself and the other cook so that the work gets done. Dricken spends the majority of her hours of work on cooking and food preparation. Dricken orders most of the food supplies used in the kitchen, i.e., meats, vegetables, canned goods and cheese. Basically such ordering is of a routine nature. On occasion Dricken has accomplished certain economic savings to the Employer by ordering larger quantities of vegetables, by changing cheese suppliers and by ordering different grades of meat. Other kitchen employees have performed the ordering of the food supplies in Dricken's absence. Dricken neither prepares a budget for the kitchen, nor purchases kitchen equipment without the Employer's approval. While on two occasions the Employer has followed her recommendations concerning the purchase of kitchen equipment, it made the final determinations on whether or not the purchases would be made. Dricken has been employed longer than any other employee and, whenever possible, new kitchen employees are assigned to her shift for training. However, some training is also performed on other shifts by other cooks. Similarly, while Dricken has recommended some of her acquaintances for employment, so have several other employees. Dricken is not otherwise involved in the interviewing or employment process. The Employer terminated one employee after discussing said employee's performance with Dricken and other cooks. One employee received a wage increase following Dricken's recommendation to the Employer for such. Dricken's hourly wage rate is \$4.00. The next highest wage rate received by a kitchen employee is \$3.25 per hour. During part of Dricken's hours of work, another cook, and sometimes a dishwasher, is present in the kitchen. The Employer does not designate any employee to be in charge of the kitchen during the evening hours, but rather, asserts that through scheduling it accomplishes the work assignments which Dricken handles during her hours of work.

The Commission is satisfied that Dricken, as Head Cook, performs duties customarily associated with a lead worker position. We conclude that Dricken's duties and wage differential recognize her experience rather than her supervisory responsibilities. Further, Dricken's authority to make expenditures, by ordering food supplies, is ministerial in nature and does not constitute managerial authority to commit the Employer's resources. Therefore, the position of Head Cook, presently occupied by Kay Dricken, is included in the bargaining unit.

Part-time Waitresses

During the hearing, the Employer contended that three waitresses, i.e., Theresa Coughlin, Karen Ritter and Deborah Saupe, were irregular part-time or casual employes, and therefore, they should be ineligible to vote in the election. Said contention is based on the Employer's belief that these employes work so few hours in a week as to eliminate a measurable community of interest with the regular employes. Subsequent to the hearing, Theresa Coughlin quit her employment with the Employer and was replaced by Marvin Felton. In its post-hearing brief, the Employer stated that it had no objection to Felton's inclusion in the bargaining unit.

Saupe was hired as a waitress on January 1, 1978 and was scheduled to work two shifts 2/ per week. After approximately six weeks, Saupe was regularly scheduled to work one shift per week, which schedule was in effect at the time of the hearing herein. Saupe receives \$1.85 per hour plus tips.


Ritter has been employed as a waitress by the Employer since February 15, 1977. Her wage rate is \$2.00 per hour plus tips. Ritter has been regularly scheduled to work one shift per week, except that she will be scheduled to work two or three shifts per week during the summer season. Ritter has obtained substitute employes to work her scheduled shifts frequently, but has also worked the scheduled shifts of other employes.


The Commission has never adopted a policy of requiring part-time employes to work a specified number of hours in order to be included among those eligible to participate in an election. If an employe is regularly employed, regardless of the number of hours worked, such an employe has a definite interest in the wages, hours and working conditions governing his employment. 3/ Based on the facts that Ritter and Saupe are scheduled to, and do work on a regular basis -- though for a limited number of hours -- the Commission is satisfied that they are regular part-time employes and eligible to participate in the election directed herein.

Dated at Madison, Wisconsin this 25th day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Marshall L. Gratz, Commissioner

2/ A waitress shift is normally four to five hours in length.

3/ The Pad, Inc. (13751) 6/75.