

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

SCHOOL DISTRICT OF AUGUSTA

Involving a Unit of Employees
Represented By

WEST CENTRAL EDUCATION ASSOCIATION

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Case III
No. 25040 ME-1718
Decision No. 17944

Appearances:

Mr. Delton J. Thorson, Attorney, 101 E. Lincoln Street, Augusta, Wisconsin, appearing for the Municipal Employer/Petitioner.
Mr. Roland F. Gilligan, Executive Director, West Central Education Association, 105 - 21st Street North, Menomonie, Wisconsin, appearing on behalf of the Association.

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

The School District of Augusta, having filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit of certain of its employees; and a hearing having been held on April 18, 1980 in Augusta, Wisconsin before Examiner Christopher Honeyman; and the Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. That the School District of Augusta, hereinafter referred to as the District, has its offices at Augusta, Wisconsin.

2. That the West Central Education Association, hereinafter the Association, is a labor organization and has its offices at 105 - 21st Street North, Menomonie, Wisconsin.

3. That on November 30, 1979, following an election conducted by it on November 20, 1979, the Commission certified the Association as the exclusive collective bargaining representative of the following employees of the District:

All regular full-time and all regular part-time cooks, bus drivers, secretaries, custodial and maintenance employees, including employees on leave, but excluding all managerial, supervisory and confidential employees, and all other District employees currently represented.

4. That prior to the election referred to above the parties agreed that two individuals holding the positions of Director of Transportation and Food Service Manager could vote in the election subject to challenge, and that said individuals did vote in the election but were not challenged by any party.

5. That on March 14, 1980 the District filed the instant petition requesting that the Commission determine whether the positions of Food Service Manager and Transportation Director should be excluded from the unit described above.

6. That the positions of Food Service Manager and Director of Transportation involve the effective supervision of employees of the District.

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

CONCLUSION OF LAW

That the positions of Food Service Manager and Director of Transportation are supervisory within the meaning of Section 111.70(1)(o)1 of the Municipal Employment Relations Act and therefore the occupants thereof are not municipal employees within the meaning of Section 111.70 (1)(b) of the Municipal Employment Relations Act.

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

ORDER CLARIFYING BARGAINING UNIT

That the positions of Food Service Manager and Director of Transportation shall be, and hereby are, excluded from the unit of employees described above in Finding of Fact No. 3.

Given under our hands and seal at the
City of Madison, Wisconsin this 15th
day of July, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney /s/
Morris Slavney, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

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

The District contends that the positions of Food Service Manager and Director of Transportation are both supervisory and managerial. The Association argues that said positions are occupied by "employees". The District raised this contention at the pre-election hearing, at which no evidence was taken, but subsequently failed to challenge either voter at the election. The Association argues, in effect, that the District is estopped in this proceeding because of its failure to exercise the challenges, and because, the vote having been unanimous in favor of representation, a decision holding the individuals involved herein to be excluded from the unit could allegedly expose them to jeopardy. The District argues that its failure to challenge was an error, resulting from an assumption that the challenge had been fully exercised by raising it at the pre-election hearing, and that it is still appropriate to raise the underlying issues. We cannot agree with the Union's contention here. MERA specifically proscribes the inclusion of certain types of employees in any bargaining unit, and, as distinguished from other grounds for inclusion or exclusion of a given classification, a party cannot waive or be estopped from its right to question the statutory standing of any classification as, for example, supervisory or non-supervisory. Nor can this rule be varied according to the happenstance of how the vote in a given election turns out; the occasional circumstance of a unanimous vote is simply an inescapable limitation on the secrecy of ballots and cannot operate to force the inclusion in a unit of a classification which may be excluded by statute.

Section 111.70(1)(o)1, MERA, defines the term "supervisor" as follows:

As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The Commission, in order to determine whether the statutory criteria are present in sufficient combination and degree to warrant the conclusion that the position in question is supervisory, considers the following factors:

1. The authority to recommend effectively the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skills or for his supervision of employees;
5. Whether the supervisor is primarily supervising an activity or primarily supervising employees;

6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees;

7. The amount of independent judgment and discretion exercised in the supervision of employees. 1/

The Commission has defined managerial employees as those who participate in the formulation, determination and implementation of management policy or possess effective authority to commit the employer's resources. 2/

Food Service Manager

Mary Zook, the District's Food Service Manager, had held that position for twelve years. Zook's functions include planning menus, ordering groceries, assigning jobs to cooks and following up on their work. Zook works a seven-hour day and spends the largest component of the day ordering groceries; she spends less than two hours a day cooking. When questioned as to her involvement with the kitchens' budget, Zook testified that she does not prepare it and does not keep track of it. She can order replacement equipment on her own authority up to approximately \$200 in value; more expensive items must be approved by the Board.

A total of fifteen employees work under the Food Service Manager, in two kitchens several hundred yards apart. There are four full-time and two part-time cooks, three aides and the remainder are special education students who work one to two hours a day; these last are paid 50 cents per hour plus a free meal and are selected by Zook from a larger group of special education students periodically referred to her by the special education teacher. Zook testified that with respect to regular employees, she interviews applicants for a job, and submits what she considers the three best to the Board together with a recommendation in favor of one of the three, and that the Board regularly hires the applicant thus recommended. Zook evaluates the food service employees annually and has rated some markedly higher or lower than average, but no change in their wages has resulted. All the full-time cooks are paid \$449 per month; Zook is paid \$556 but receives retirement and no other fringe benefits, the same as the cooks. One employee is designated assistant manager and is paid slightly more than the cooks; Zook selected the individual for that job. The full-time cooks all work seven hours per day, but start and end at different times; Zook sets their shifts and occasionally changes them. Zook also can and does grant permission to leave early, and has also called in employees early on occasion, on her own authority. She reports directly to the District Administrator for most purposes. Zook has never laid off or discharged anyone and occasions of discipline are limited to a few instances in which she orally reprimanded employees.

It is clear that Zook has essentially complete control of the day-to-day work decisions affecting about 15 employees, including shift scheduling and work assignments. Although she has had little authority over wage rates, her recommendations in hiring have been effective and on at least one occasion she has promoted an individual. Based on these factors, 3/ we conclude that the position of Food Service Manager possesses the statutory criteria of supervision in sufficient combination and degree to warrant our finding that it is supervisory, and thus excludable from the unit.

1/ City of Milwaukee (6960) 12/64; City of Merrill (14707) 6/76.

2/ City of Milwaukee (Library) (16483) 8/78.

3/ See Mid-State VTAE District (16094-D) 6/78.

Director of Transportation

Dayle Sell has been the District's Director of Transportation for two years, and is paid a yearly salary of \$8250. Sell has a separate employment contract as a bus driver, and is paid \$3300 for this, the same as the other bus drivers. 4/ The largest component of Sell's job, as Director of Transportation, is the work of performing routine maintenance on the buses; Sell also schedules substitute drivers as necessary (approximately one or two of the nine regular drivers is absent each day) and arranges coverage of bus trips necessitated by school extracurricular activities. For most of the day Sell works alone in the bus garage. Sell works year round and largely sets his own hours; he receives the same holidays and fringe benefits as the District's janitors, but frequently works during holiday periods in order to keep up with necessary bus maintenance. There has been no turnover among the permanent drivers since Sell has been employed; he testified that in the event that there was he would recommend an individual to District Administrator Hudson for hire. Turnover among the 6-7 person group of substitute drivers, however, has been so rapid that Sell has hired ten substitutes in two years. No one but Sell interviews a substitute-driver applicant and Sell hires them on his own authority. Sell testified that the supply/demand situation for substitutes was such that "I'll take anyone I can get." Sell has no effective involvement in the setting of wage rates for drivers, but a permanent driver was once laid off as a result of a rescheduling and reduction of rates done by Sell but requested by Hudson; the driver laid off was the lowest in seniority. The record is unclear as to exactly the manner in which Sell evaluates drivers, but the evaluations have had no effect on their wage rates or other terms of employment. Sell has never disciplined any employee except by "talking to" one. He keeps driving and medical records for each driver but there is no evidence that these have had any bearing on any driver's employment terms.

Sell testified that when a regular driver does not want to work he calls Sell and tells him, that this is common, and that as a result the substitutes each drive about once a week. Sell testified that he does not refuse these "requests".

The District has a budget of approximately \$18,000 for bus maintenance; the heavier jobs are contracted out and Sell must present purchase orders for these and any other expenses to Hudson. The purchase orders are never disapproved. Sell's judgment is followed as to whether, for example, an engine overhaul is required. One new bus is purchased each year and the Board asks Sell's advice as to body type, etc.; the actual purchase is made by lowest bid, however, and Sell has no control over the make of bus purchased.

In Shawano County (Sheriff's Department) 5/ we stated:

In making . . . determinations (of managerial status) the Commission must consider the degree to which the individuals in question participate in the formulation, determination and implementation of management policy and possess the

4/ At the hearing the parties stipulated that if the position of Director of Transportation were found to be supervisory the question of Sell's continued service as a unit bus driver would be resolved in negotiations.

5/ Decision No. 15257, 8/77.

authority to commit the employer's resources.

The power to commit the employer's resources involves the authority to establish an original budget or to allocate funds for differing program purposes from such an original budget. By comparison the authority to make expenditures from certain accounts to achieve those program purposes is ministerial, even though some judgment and discretion are required in determining when such expenditures should be made. Thus, the authority to spend money from a certain account for a specified purpose is not a managerial power, even though managerial employees also have that authority.

In this instance it is apparent that the job of Director of Transportation is, first and foremost, that of a mechanic, and such purchasing authority as Sell has falls well within the "ministerial" category quoted above. In terms of supervisory authority, however, the fact that Sell works alone for the vast majority of his time is outweighed by other factors: Sell has on his own authority chosen and hired numerous substitute drivers, he has, and has exercised authority to change routes, and he is the sole person, below the District Administrator, in charge of fifteen employees. In view, particularly, of Sell's authority to hire substitute drivers, we find that these factors make the position of Director of Transportation supervisory, and we therefore exclude it from the unit. 6/

Dated at Madison, Wisconsin this 15th day of July, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney /s/
Morris Slavney, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

6/ Cf. Winter Joint School District No. 1 (16467) 7/78.