

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
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OUTAGAMIE COUNTY ATTORNEY'S	:	
ASSOCIATION	:	Case 107
	:	No. 36299 ME-61
Involving Certain Employes of	:	Decision No. 21143-A
	:	
OUTAGAMIE COUNTY (DISTRICT	:	
ATTORNEY'S OFFICE)	:	
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Appearances:

- Mr. Michael J. Balskus, Assistant District Attorney, Outagamie County Courthouse, 410 S. Walnut Street, Appleton, Wisconsin 54911, appearing on behalf of the Association.
- Lindner and Marsack, S.C., Attorneys at Law, 700 N. Water Street, Milwaukee, Wisconsin 53202, by Mr. Roger E. Walsh, appearing on behalf of the County.
- Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Intervenor Union.

FINDINGS OF FACT AND CONCLUSION OF LAW

Outagamie County Attorney's Association having, on December 16, 1985, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify an existing collective bargaining unit by determining whether the position of Victim/Witness Assistance Coordinator is professional or nonprofessional in nature; and hearing in the matter having been held on March 25, 1986, at Appleton, Wisconsin, before Examiner Mary Jo Schiavoni, a member of the Commission's staff at which time Outagamie County Social Services Professionals Local 2416, Wisconsin Council 40, AFSCME, AFL-CIO was granted permission to intervene; and a transcript of said proceeding having been made and received on April 21, 1986; and the parties having completed their briefing schedule on July 9, 1986; and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1. That Outagamie County, hereinafter referred to as the County, is a municipal employer with offices at 410 South Walnut Street, Appleton, Wisconsin 54911.
2. That Outagamie County Attorney's Association, hereinafter referred to as the Association, is a labor organization and has its offices located at 410 South Walnut Street, Appleton, Wisconsin 54911; and that the Association is currently the exclusive collective bargaining representative for a unit consisting of all regular full-time and part-time Assistant District Attorneys employed by the County in the Office of the District Attorney.
3. That Outagamie Social Services Professionals Local 2416, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as Local 2416, is a labor organization, and has its offices located at 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901; and that Local 2416 is currently the exclusive collective bargaining representative for a unit consisting of all professional employes of Outagamie County in the Social Services Department, but excluding department heads, elected and appointed officials, supervisors, confidential employes and all other employes.
4. That the Association and Local 2416 contend that the Victim/Witness Assistance Coordinator position is professional in nature; that the County maintains that the position is properly classified as nonprofessional; that the parties are in dispute as to which bargaining unit is appropriate should the position be found to be professional in nature; and that at hearing all parties

requested the Commission to limit its decision to the issue of the professional vs. nonprofessional status of the position in controversy at this time, and retain jurisdiction as to the appropriate placement of said position should it be found to be professional.

5. That the Outagamie County Employee's Union Local 2046, WCCME, AFSCME, AFL-CIO, hereinafter Local 2046, is a labor organization which is not a party to this proceeding and is currently the exclusive collective bargaining representative for a bargaining unit of nonprofessional employees employed by the County described as follows:

All regular, permanent full-time and regular permanent part-time maintenance, custodial, clerical, income maintenance and homemaking employees of the County of Outagamie employed in the County Courthouse, Social Service Department, Highway Department (Clerical Employees), Airport and Safety Building, Plamann Park, but excluding elected officials, other professional employees, Sheriff's Department employees, Highway Department employees (excluding Highway Clericals), County Health Center Riverview Health Center employees, department supervisors and confidential secretaries for County Executive, Corporation Counsel and Highway Commission, and all other supervisory, confidential and managerial employees.

6. That Sheila Carmichael has been employed in the position of Victim/Witness Assistance Coordinator for the County since 1983; that her position is currently in the bargaining unit set forth in Finding of Fact 5 represented by Local 2046; that as Victim/Witness Assistance Coordinator, Carmichael directs the County's Victim/Witness Assistance Program and assures the delivery of statutorily guaranteed services to victims and witnesses of crime and other appropriate parties; that she advocates for victims and witnesses of crime and survivors of homicide victims within the context of the criminal justice system, including police, probation and parole matters; that she prepares and files Victim Impact Statements and objections to parole; that she coordinates agency and John Doe investigations arising from victim issues and monitors compliance with Deferred Prosecution Agreements; that she investigates and prepares necessary documents for prosecution of wage claims; that Carmichael also investigates, determines and asserts restitution claims on behalf of victims; that she gives advice to the public via public inquiry, speaking engagements, radio, newspaper, and television contacts, and participates in the development and delivery of training programs for victim/witness specialists at the request of the Wisconsin Department of Justice; that she also maintains records, the program budget and files monthly and annual reports regarding the program while supervising the activities of student interns and volunteers; that Carmichael is directly responsible to the District Attorney and attends staff meetings along with other Assistant District Attorneys; that she consults with or is consulted by the District Attorney, other Assistant District Attorneys, and social workers with respect to cases involving victims and witnesses; that she drafts lists of witnesses to be subpoenaed in certain cases; that she drafts motions, which are argued by Assistant District Attorneys, prepares witnesses for trial and in certain matters argues the victim's interests in court; that she works with the Social Services Department social workers in child sexual and physical abuse cases, and has responsibilities in the supervision/monitoring of juveniles adjudicated delinquent; that she keeps witnesses apprised of the status of their cases and assists them with support prior to and at court hearing; and that she makes the same kinds of judgments a social worker makes in conducting investigations, making referrals to other agencies and providing assistance to victims.

7. That Carmichaels' employment and training background includes high school graduation, three years as a Wisconsin law firm legal secretary including one or two years of paralegal training, one year as an interviewer-caseworker determining eligibility and needs for loans from a Rhode Island relief agency, one year as a ward clerk-clinic clerk at a Maine community hospital, two years of "reading the law" in a Virginia law office (a minimum of three years of reading the law is one means of attaining eligibility for taking the Virginia Bar exam), several years as an independent writer including newspaper stringer work and publication of several booklength works of fiction and nonfiction, and approximately one year as a Wisconsin law firm paralegal assistant.

8. That Petitioner's Exhibit 5 which Carmichael considers her official job description and which was prepared by the District Attorney in 1985 and submitted to the County Personnel Department in support of a successful request for reclassification of the instant position contains the following statements regarding qualifications for the position:

KNOWLEDGE, ABILITY & SKILLS:

Knowledge of criminal, juvenile and civil law, including new laws and revisions; knowledge of courtroom procedures; ability to deal swiftly and judiciously with complex decisions in crisis and non-crisis situations; skill in understanding and working with people; skill in writing and public speaking.

DESIRABLE QUALIFICATIONS:

Bachelor's Degree; paralegal training and/or 5 years experience; social services experience; or any equivalent combination of education, training and experience which provides the necessary knowledge, skills and abilities.

that County Personnel Administrator Brenda Keller testified that Employer's Exhibit 13, approved by the County Board on November 3, 1982, was and continues to be the only official job description for Carmichael's position; and that Exhibit 13 specifies the following regarding qualifications for the position:

Education and Experience:

Required

High School diploma

A Bachelor's Degree is desired in the field of criminal justice, social service, sociology, political science, urban affairs and psychology, or other related degrees.

Two years college, or two years experience in a social service or criminal justice or community resources service agency.

Familiarity with available community resources; familiarity with the criminal justice system and its procedures; ability to communicate well with others.

9. That the duties of Victim/Witness Assistance Coordinator are predominantly intellectual and varied in character involving the consistent exercise of discretion and judgment in their performance, that the character of the work and results accomplished cannot be standardized in relation to a given period of time; and that said position requires knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction and study in an institute of higher education.

CONCLUSION OF LAW 1/

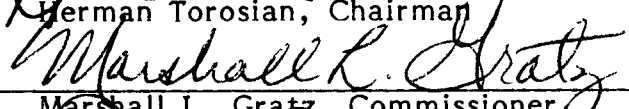
That the occupant of the position of Victim/Witness Assistance Coordinator is a professional employe within the meaning of Sec. 111.70(1)(L), Stats.

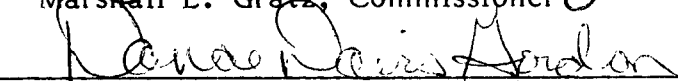
Given under our hands and seal at the City of Madison, Wisconsin this 14th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

1/ See Footnote One on Page 4.

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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 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.

OUTAGAMIE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT AND CONCLUSION OF LAW

The parties at hearing jointly requested that the Commission limit its determination herein to the issue of the Victim/Witness Assistance Coordinator's professional or nonprofessional status while retaining jurisdiction as to the appropriate placement of the position in one of two existing bargaining units should she be found to be a professional employe.

POSITION OF THE PARTIES

The Association

Both Local 2416 and the Association contend that the Victim/Witness Assistance Coordinator position is professional in nature. 2/ The Association argues that the employe's official job description (Petitioner's Exhibit 5) as well as the testimony of both the affected employe and her previous supervisor establish the nature and responsibilities of the disputed position. The Association asserts that Petitioner's Exhibit 5 accurately reflects the duties and responsibilities of the incumbent's position. As samples of the great discretion afforded the Victim/Witness Assistance Coordinator, the Association points to such responsibilities as "evaluating individuals for appropriateness to participate in deferred prosecution agreements and making recommendations with respect thereto", "handling anything that is a civil action involving the District Attorney's Office, e.g. wage claims, sanitation code violations, etc.", and investigating and maintaining restitution claims by providing expert testimony at restitution hearings. It argues that these duties cannot be standardized in relation to a given period of time.

The Association further notes that although Carmichael, the current occupant of the Victim/Witness Assistance Coordinator position, does not possess a bachelor's degree, the requirement that said knowledge be of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning is met here also, especially considering Carmichael's prior paralegal training and the fact that she authored a published work: ADJUDGED, ORDERED and DECREED.

The Association argues that the instant position is different from positions in other counties with the same or a similar title. These similarly titled positions, it asserts, do not possess the same duties and responsibilities as the position in dispute.

In its reply brief, the Association stressed that Carmichael's two years paralegal training and two years of legal studies preparatory for the Virginia Bar examination are both "prolonged" and "specialized" by any reasonable standard. The Association contends that Carmichael's duties perscribed in Sec. 950.055(2)--authorizing her to bring certain motions in criminal proceedings (e.g., video-taped depositions and speedy trial)--and as set forth in the County's program plan, are clearly professional duties.

As for comparable counties, the Association argues that the County failed to note that the Victim/Witness Assistance Coordinator in Waukesha County heads a separate department of county government and that the Commission's decision that the Victim/Witness Coordinator was a municipal employe in Waupaca County, Dec. No. 20854-C (WERC, 9/85) was reversed by the trial court.

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2/ Local 2416 declined to file a brief in this matter but succinctly stated its position on this issue at the hearing of this matter.

## The County

The County, on the other hand, argues that the position is nonprofessional. It maintains that the position does not require knowledge of an advanced type or learning customarily provided by a prolonged course of specialized instruction. Citing the original job description attached to the then District Attorney's request for the position (Employer Exhibit 13), it argues that there is no educational requirement which would warrant the conclusion that the disputed position is a professional one. This description, it asserts, is the only official job description and not the newer job description developed by the District Attorney when requesting a pay increase for the position. Even on the newer job description, the County points out that a "Bachelor's Degree" is listed as a desirable but not required qualification and that no specialized course of study or specific type of paralegal training or experience is necessary. The County maintains that the job duties, especially those outlined in Sec 950.04, Stats., are insufficient to make the position professional alleging that many of these duties become routine after a short period of time. It also asserts that other nearby counties have a similar job classification and the occupants are assigned to nonprofessional bargaining units. In fact, the Commission found a similar position to be nonprofessional, citing Waupaca County, supra.

As regards Carmichael specifically, the County contends that her educational background and training is neither prolonged nor specialized in relation to her duties as Victim/Witness Assistance Coordinator. Thus, her background does not warrant a finding that she has the equivalent of formal education in experience and training.

In its reply brief, the County points to discrepancies between Carmichael's resume and her testimony at hearing, and argues that her resume sheds little light on her employment background, particularly for years 1972-74. The County also notes that the issue of whether the Commission erred in finding the Victim/Witness Assistance Coordinator to be nonprofessional was not raised or addressed by the Court in Waupaca County.

## DISCUSSION

Section 111.70(1)(L), Stats., defines the term "professional employe" as follows:

1. Any employe engaged in work:
  - a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
  - b. Involving the consistent exercise of discretion and judgment in its performance;
  - c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
  - d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or
2. Any employe who:
  - a. Has completed the courses of specialized intellectual instruction and study described in subd. 1.d;
  - b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

All the criteria found either in subsection 1 or subsection 2 must be present in order to find that a particular employe is professional. 3/ However, the above definition of "professional" employe is not limited to employes personally possessing college degrees. 4/

At the outset we note that the parties herein disagree as to whether the position description in Petitioner's Exhibit 5 or the one attached to Employer's Exhibit 13 more accurately describes the duties, responsibilities and desired education and training for the Victim/Witness Assistance Coordinator position.

While the contents of a job description may be relevant as to the nature of the work performed and qualifications and experience desired/required to do the work, job descriptions, in and of themselves, are not dispositive. Here, we agree with the County that the desired educational attainments listed in Exhibit 5 are of little, if any, significance since they have neither been approved nor used by the County in any hiring for the position. Nevertheless, we are persuaded that since being hired, Carmichael has been assigned the broader and more responsible duties set forth on Petitioner's Exhibit 5 rather than the more limited duties described in Employer's Exhibit 13.

In deciding whether a position is professional within the meaning of Sec. 111.70(1)(L), Stats., we not only look to written job descriptions, if they exist, but also any other evidence of the actual duties and responsibilities and knowledge and skills required for the position.

Here, based on the record evidence--including Carmichael's and former District Attorney Gage's uncontroverted testimony regarding the incumbent's actual duties--we have found that Carmichael's work is predominantly intellectual and varied in nature as opposed to routine mental, manual, mechanical or physical. Carmichael directs the County's Victim/Witness program. Within the realm of her responsibilities as set forth in Finding of Fact 6, some of which are statutorily prescribed, Carmichael advocates for victims and witnesses of crime and survivors of homicide victims; she coordinates John Doe investigations; she monitors compliance with Deferred Prosecution Agreement's; she investigates wage and restitution claims; she prepares motions and witnesses for trial, sometimes testifying or arguing on behalf of victims in court actions and she has responsibility for monitoring/supervising certain juveniles adjudicated as delinquent. Carmichael often coordinates with assistant district attorneys and social workers. In fact, she makes the same kinds of judgments that social workers make as regards conducting investigations, making referrals to appropriate agencies and providing services to victims and witnesses (Tr. 61-63). Carmichael also supervises the activities of student interns and volunteers.

Although Carmichael is directly responsible to the District Attorney, her duties require the consistent exercise of discretion and independent judgment in performance and appear to be such that her work output cannot be standardized in relation to a given period of time. We find the work performed by the Victim/Witness Assistance Coordinator herein to be quite similar to the work of degreed social workers whom we have previously held to be professional employes. 5/ While it may be true that the duties of other Victim/Witness Coordinators in other counties are not professional in nature, the record herein shows that the incumbent performs additional and materially different duties than those prescribed by Statute.

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3/ Dane Co., Dec. No. 10492-D (4/85); Milwaukee County, Dec. No. 14786-B (WERC, 4/80). See generally, City of Wauwatosa, Dec. Nos. 12032-C, 17241-17244 (WERC, 8/79); City of Cudahy, Dec. No. 19507 (WERC, 3/82); Blackhawk VTAE, Dec. No. 13460-A (WERC, 9/75) and Dane County, Dec. No. 21397 (WERC, 2/84), aff'd, Dane County v. WERC, Dec. No. 84 CV 1409 (CirCt Dane, 1/85).

4/ Dane Co., supra; Milwaukee County, Dec. Nos. 8765-E, 14786 (WERC, 7/76).

5/ Rock County (Health Care Center), Dec. No. 13131 (WERC, 11/74); Brown County, Dec. No. 12381 (WERC, 1/74).

Thus, it appears that Carmichael was hired for a job as described in Exhibit 13 but that she has come to be assigned the materially broader and more responsible duties described in Exhibit 5--making use of the breadth and depth of her wide range of prior experiences and training noted in Finding 7.

The County argues that Carmichael's educational background and training do not meet the requirements of Sec. 111.70(1)(L)l.d., Stats., in that they are neither "prolonged" nor "specialized" in relation to the duties of her position. Assuming that the County's assertions in those respects are correct, that would not be determinative under the language of l.d., however. While an incumbent's actual credentials and an employer's actual hiring requirements/preferences are relevant in determining whether the work of a position falls within the meaning of l.d., that issue ultimately depends upon the nature of the work involved and the means by which the knowledge required to perform it can be said to be customarily acquired. As we said in City of Kenosha, Dec. No. 14191 (WERC, 12/75);

. . . While aware that the incumbent lacks significant formal education the Commission notes that Section 111.70(1)(L)(1)(d)'s definition of a "professional" focuses on the knowledge required to perform the job responsibilities of the position in question as opposed to the personal qualifications of the incumbent. As the Commission is satisfied that the position requires knowledge of an advanced type customarily acquired through formal higher education, it concludes that the position . . . is professional in nature and thus should be excluded from the existing collective bargaining unit.

While Carmichael does not possess a college degree and the County has never specified a college degree (specialized or otherwise) as required or desirable for the position in question, on balance, an analysis of the nature of the work of the instant Victim/Witness Assistance Coordinator position leads us to conclude that it nevertheless meets the l.d. requirement. In our view, the work involved appears quite comparable to that performed by professional social workers. As Carmichael testified at Tr. 61-63:

- Q. Sheila, I would like you, for the record, to describe how you see your job as it relates to a job that might be performed by a social worker.
- A. There are a number of similarities and areas of cross interest. For example, monitoring compliance with deferred prosecution agreements and even the evaluations prior to recommending those agreements is very similar to what social workers do in terms of supervising juvenile delinquents as well as those social workers who are probation agents in dealing with adults. In the child protection unit, I probably have the most in common with those workers when I have a conflict. For example, two major trials at the same time. I have so far been very fortunate that at least one of those trials involved a child victim and a social worker was available to literally take over my entire role, right down to preparing the witnesses, staying with them in the courtroom, doing a lot of the second chairing, investigating issues that would come up during trial, that type of thing. We've traded roles back and forth in that area.
- Q. And what social worker was that again, what unit?
- A. That's in the child protection unit. Tami Pelishek, Amy Hendrick and Ann LaCombe has all done that for me.
- Q. Are there any other units other than social workers that you have worked closely with besides child protection agency?
- A. Welfare fraud. We find that we share an awful lot of the same client, and frequently in investigating allegations of welfare fraud, the investigator has come up with other criminal matters in which these clients have been victims and has referred them through that way, and we have, as a result,



worked fairly closely together on those specific cases. The one that most prominently comes to mind is X \_\_\_\_\_, allegation of welfare fraud led to charges of sexual assault which in turn led to witness intimidation charges which he was recently convicted and sentenced.

The customary means of acquiring the knowledge involved in social work of that kind is through the sort of educational regimen required by I.d. On that basis, we conclude that the knowledge required by Carmichael's position is customarily acquired in the manner specified in I.d.

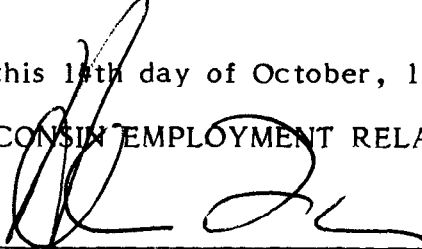
For the foregoing reasons we conclude that Carmichael's is a professional position.

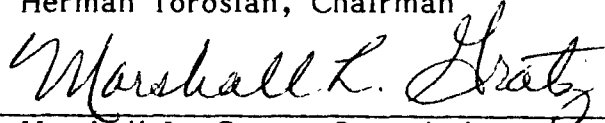
If after discussing the appropriate unit placement of the instant position the parties are in need of further hearing on this matter, they should so inform the Commission in writing.

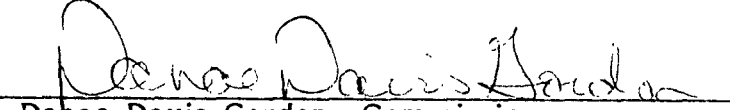
Dated at Madison, Wisconsin this 14th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Dahae Davis Gordon, Commissioner