

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
TOMAHAWK EDUCATION ASSOCIATION
Involving Certain Employees of
SCHOOL DISTRICT OF TOMAHAWK

Case 26
No. 34169 ME-2408
Decision No. 22495

Appearances:

- Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, 25 East Rives Street, Rhinelander, Wisconsin 54501, appearing on behalf of the Association.
- Mr. Robert E. Stirn, District Administrator, Tomahawk School District, East Washington Avenue, Tomahawk, Wisconsin 54487, appearing on behalf of the District.

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

The Tomahawk Education Association, having on November 27, 1984, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify an existing collective bargaining unit of certified teaching personnel to include two positions, Pool Director and Homebound Tutor/Instructor and by an additional petition filed on December 13, 1984, requesting the Commission, in the alternative, to include the Pool Director position in a unit of support staff personnel; and the two petitions having been consolidated for hearing; and the hearing in the matter having been held on January 29, 1985, at Tomahawk, Wisconsin before Examiner Mary Jo Schiavoni, a member of the Commission's staff; and letter briefs having been received by February 7, 1985; and a transcript of said proceeding having been prepared and received on February 18, 1985; 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, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That the School District of Tomahawk, hereinafter referred to as the District, is a municipal employer operating a public school system having its offices at East Washington Avenue, Tomahawk, Wisconsin.

2. That the Tomahawk Education Association, hereinafter referred to as the Association is a labor organization representing certain employees of the District for the purposes of collective bargaining; and that its offices are located at 25 East Rives Street, Rhinelander, Wisconsin.

3. That the Association is the exclusive bargaining representative of certain employees of the District in the two following separate bargaining units:

a) All certified teaching personnel including classroom teachers, special teachers, guidance counselors, librarians, part-time teachers, teachers and teaching principals who teach more than 50 percent their time, but excluding the administrators, elementary coordinator, principals teaching less than 50 percent of their time, nurses, clerical, substitute teachers, and maintenance personnel.

b) All regular full-time and regular part-time aides, clerical, secretarial, custodians and food service personnel employees of the School District of Tomahawk, excluding the bookkeeper/secretary to the School Board, secretary to the superintendent, executive, managerial, supervisory and confidential employees.

4. That on November 27, 1984, the Association filed a petition with the Wisconsin Employment Relations Commission requesting that the positions of Pool Director and Homebound Tutor/Instructor be unconditionally included in the existing bargaining unit described in paragraph (a) of Finding of Fact 3, above; that in the event the Commission finds that the inclusion of the Pool Director would be inappropriate in the professional unit, the Association, through a petition filed on December 13, 1984, requests that this position be included in the existing bargaining unit described in paragraph (b) of Finding of Fact 3; and that the District opposes the inclusion of these positions in either unit contending that the Pool Director is a supervisory employe and the Homebound Tutor/Instructor has a work schedule which is sufficiently irregular to warrant exclusion from the professional unit.

5. That Bonnie Kahn holds the part-time position of Pool Director at the District's swimming pool; that said position does not require teacher certification or a college degree but does require certification as a water safety instructor; that Kahn is responsible for the day-to-day operation of the pool; that she teaches swimming and water safety classes, schedules community use of the pool, handles all advertising for the pool schedule and special events at the pool, coordinates adult vocational courses with the Coordinator of Nicolet College's water safety program, serves as chairperson of the District's Pool Committee and is responsible for all monies collected at the pool, the billing for group rentals of the pool and the maintenance and submission of financial reports involving the pool; that Kahn is responsible for the direct supervision of three lifeguards at the pool who she hired; that she possesses the authority to discharge them or to refuse to rehire them for the next school year; that she has exercised this authority by deciding not to rehire one of the lifeguards for the next school year; that she schedules hours for the lifeguards, assigns them tasks, and signs and submits their time cards; and that she serves as the direct supervisor for the three lifeguards and reports to the Pool Administrator/Elementary School Principal as her own supervisor.

6. That Kahn exercises supervisory responsibilities in sufficient combination and degree so as to make her a supervisory employe.

7. That Charlotte Heikkinen holds the part-time position of Homebound Tutor/Instructor for the District's students who become ill during the school year; that said position requires a college degree and teacher certification; that Heikkinen is responsible for teaching any District student, grades K through 12, who is at home or in the hospital for medical reasons; that she is assigned these students by the director of special education, who is her immediate supervisor; that Heikkinen has been regularly employed by the District with the hours she actually works each pay period varying according to the actual number of students in need of homebound instruction; that from the commencement of the 1980-81 school year, through the first semester of the 1984-1985 school year, Heikkinen has been employed during every two week pay period except for five (four during the 1981-82 school year and one during the 1982-83 school year); that a recent change in the law which requires a student to be placed into a special education program before said student receives homebound instruction may reduce Heikkinen's caseload to some extent in the future; and that Heikkinen's pay in the past has been based upon the monetary settlements agreed to by the professionals and the District.

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

CONCLUSIONS OF LAW

1. That the occupant of the position of Pool Director is a supervisor within the meaning of Sec. 111.70(1)(o)1 of the Municipal Employment Relations Act, and is accordingly excluded from either unit set forth in Finding of Fact 3.

2. That the occupant of the position of Homebound Tutor/Instructor is a regular part-time employe who enjoys a community of interest with the employes in the professional bargaining unit set forth in paragraph (a) of Finding of Fact 3.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT1/

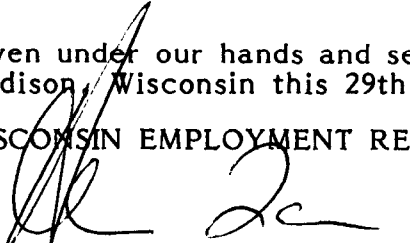
1. That the occupant of the position of Pool Director be, and the same hereby is excluded from either bargaining unit represented by Tomahawk Education Association.

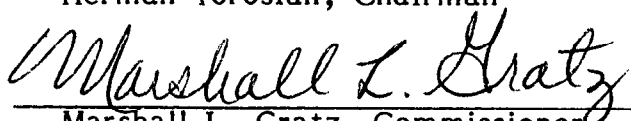
2. That the occupant of the position of Homebound Tutor/Instructor be, and the same hereby is, included in the unit set forth in paragraph (a) of Finding of Fact 3 above.


Given under our hands and seal at the City of
Madison, Wisconsin this 29th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

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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

(Footnote 1 continued on Page 4)

(Footnote 1 continued)

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.

SCHOOL DISTRICT OF TOMAHAWK

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

The Association seeks to include the positions of Pool Director and Homebound Tutor/Instructor in the existing professional unit. If, however, the Commission determines that the occupant of the Pool Director position is not a professional employee, the Association requests that the Pool Director be included in the voluntarily-recognized support staff unit.

The District, however, argues that the Pool Director should be excluded from either unit as a supervisor. With respect to the Homebound Tutor/Instructor, the District maintains that she is a casual employee, who is called in to work on an as-necessary basis, and that she should not be included in either unit because she does not enjoy a community of interest with said employees.

Pool Director

The initial question to be addressed by the Commission is whether or not the position of Pool Director, occupied by Kahn, is held by a supervisory employee. Obviously any discussion as to the inclusion of Kahn in either bargaining unit must be premised upon a finding that she is, in fact, a municipal employee within the meaning of MERA, and not a supervisor.

Section 111.70(1)(o)1 provides 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, lay off, 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 a merely routine or clerical nature, but requires the use of independent judgment.

The Commission, in determining whether the statutory criteria of Sec. 111.70(1)(o)1 are present in sufficient degree or combination to warrant the conclusion that the position is supervisory, considers the following criteria:

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; and
7. The amount of independent judgment and discretion exercised in the supervision of employees. 2/

2/ City of Milwaukee, Dec. No. 6960 (WERC, 12/64); City of Manitowoc, Dec. No. 18590 (WERC, 4/81);

Not all of the above factors considered by the Commission in determining supervisory status need be present, but if they appear in a sufficient combination and degree the Commission will find an employee to be a supervisor. 3/

A review of the record regarding the duties and responsibilities of the Pool Director convinces us that the factors are present in sufficient combination and degree to warrant the conclusion that Kahn is a supervisor. She possesses the authority to hire the lifeguards as well as the authority to discharge and/or refuse to rehire them for the next school year. She schedules the lifeguards' hours and assigns them specific tasks. She also signs and submits their time cards. She reports directly to the Pool Administrator/Elementary Principal and there is no other on-premises supervisor, other than Kahn, for the three lifeguards. Moreover, the record evidence demonstrates that she exercises a significant degree of independent judgment and discretion with respect to the supervision of the lifeguards. Accordingly, based upon the totality of facts, we find that the Pool Director is a supervisory employee and properly excluded from either unit.

Homebound Tutor/Instructor

With respect to the Homebound Tutor/Instructor, the District makes two major arguments against Heikkinen's inclusion in either bargaining unit. It argues that the unpredictable pattern of her employment, premised strictly upon student need for her services, likens her to a substitute teacher who is called to work based upon need at certain times. This unpredictability, it argues, should make her ineligible for inclusion in a unit. The District also argues that the hours Heikkinen works will be reduced somewhat due to a recent change in state law which requires certain students to be placed in a special education program before receiving homebound services. According to the District, this is further support for its contention that she does not belong in the unit with professional employees.

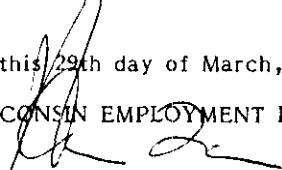
The record demonstrates that the Homebound Tutor/Instructor works on an as-needed basis. The record evidence also establishes that for the last five years the District's need for her services has been regular. While the number of hours per two-week pay period varied from 4.5 hours to 75 hours, Heikkinen consistently worked some hours during this time period with the exception of five payroll periods. Thus, while in theory Heikkinen's work could be very sporadic, the facts demonstrate regularity. We also note that Heikkinen is not substituting for an unavailable regular teacher when she performs her function and is not free to reject assignments. Thus she differs substantially from conventional substitute teachers who are typically able to reject work opportunities and who are replacing absent teachers. Given the foregoing, we conclude that Heikkinen must be considered a regular part-time teacher.

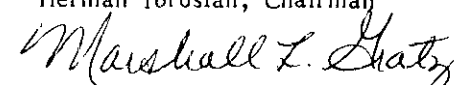
With respect to the District's argument that Heikkinen's hours may be reduced at some future time, we note that the extent of such a reduction is speculative at this time. If the District can demonstrate that a reduction in the hours worked substantially affects the regularity of her employment, it may again raise the issue.

Dated at Madison, Wisconsin this 29th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

3/ Dodge County, Dec. No. 17558-C (WERC, 2/81); City of Lake Geneva, Dec. No. 18507 (WERC, 3/81).