

In the Matter of the Petition of
OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION,
LOCAL NO. 9, AFL-CIO-CLC
Involving Certain Employees of
OZAUKEE COUNTY

Appearances:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

FINDINGS OF FACT

- Group No. 1 All full-time and regular part-time employees of Ozaukee County, excluding elected officials, supervisors, administrative, managerial, casual, and confidential employees (including but not limited to Register in Probate, Bailiffs, Jury Commissioners, Emergency Government employees,

employees of other certified or recognized bargaining units), employees of the Lasata Nursing Home, and conditionally excluding professional employees.

Group No. 2 All full-time and regular part-time professional employees of Ozaukee County, excluding elected officials, supervisors, administrative, managerial, casual and confidential employees, and employees of other certified or recognized bargaining units, employees of Lasata Nursing Home, and all other non-professional employees of Ozaukee County.

5. That the County contends, contrary to the Petitioner and Intervenor, that the 18 drivers referred to in Finding of Fact 6, below, should be included in Voting Group No. 1 as regular part-time employees; and that the Petitioner and Intervenor contend that said employees are casual employees who do not share a community of interest with the full-time and regular part-time employees constituting the balance of the voting groups.

6. That prior to 1983, the County's Commission on Aging subcontracted the work of driving elderly residents of the County from place to place, but in that year the agency assumed those functions and the former employees of the subcontractor directly; that there are, at present, 18 individuals classified as drivers for the Commission of Aging (as distinguished from its van drivers and meals drivers); that the work functions of the drivers include taking elderly residents to and from their homes at the residents' request; that the drivers live in various parts of the County and work out of their homes using their own vehicles; that drivers are paid between \$4.00 and \$4.15 per hour, are eligible for workers compensation, but receive no fringe benefits; that the drivers are reimbursed for mileage on their vehicles from portal to portal; that the drivers are paid monthly, while full-time employees of the County are paid bi-weekly; and that the recruitment methods used by the County in hiring the instant drivers are similar to those used for filling full-time positions.

7. That since approximately January 1985, the County has required newly hired Commission on Aging drivers, as a condition of hire, to commit themselves to two days per week or more of availability for driving assignments; and that some but not all of the drivers hired before that time have also committed themselves to two days per week or more of availability for driving assignments.

8. That the available work for the drivers as a group varies from week to week; that the employees receive assignments primarily by calling in by 4 P.M. the weekday before the day(s) they have committed to be available; that when work is available, the County allocates assignments to the available driver nearest the assignment; that the drivers who repeatedly fail to call in for assignments for days they have agreed to be available for work are thereafter allocated fewer assignments; that except to the extent described above, there is no clearly established order in which drivers are assigned work; that drivers are not assured of receiving work even on the days they hold themselves available and properly call in; and that instead, as a group, the drivers receive an assignment on roughly 75 to 80 percent of the days held available for work and called in.

9. That during the period from September 15, 1984, to February 15, 1985, the hours worked by 13 of the 18 drivers varied between an average of 14.65 and an average of 44.19 per month; that the balance of the drivers worked fewer hours on average than that; that each of those 13 employees (and Jean Breitweiser who is returning from an injury leave during most of 1984) has committed to being available for driving assignments on at least two days per week, and none has a pattern of not calling in after having committed to do so.

10. That drivers Margaret Severson and Nancy Sullivan have committed themselves to be available for driving assignments on only one day per week; that while Sullivan received no hours in the December 15 to January 15 period and only eight hours from January 15 to February 15, Severson has worked 25 to 29 hours per month as recently as January and February of 1985, exceeding the average hours worked of several of the other drivers who have committed themselves to be available two days or more per week.

11. That the drivers referred to in Finding 6 above are not regular part-time employees, but rather are casual employees; and that said drivers lack a sufficient community of interest with the employees in Voting Group No. 1 to warrant inclusion in that group.

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

CONCLUSIONS OF LAW

1. That a question concerning representation exists within the voting groups described in Finding of Fact 4, above.

2. That the voting groups described in Finding of Fact 4, above, constitute appropriate collective bargaining units under Sec. 111.70(4)(d)2.a., Stats., whether separately or (if the conditions noted in the Direction of Election, below, are met) combined.

3. That under Sec. 111.70(4)(d)2.a., Stats., the 18 drivers referred to in Finding 6, above, (as distinguished from van drivers and meals drivers) working for the County's Commission on Aging are not regular part-time employees and do not share a community of interest with the employees in Voting Group No. 1, above; and that, therefore, said employees' positions are not properly included in that voting group and said employees shall not be eligible to vote in the election.

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

DIRECTION OF ELECTION

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission, within 45 days from the date of this direction, in the following voting groups for the following stated purposes:

Voting Group 1

All full-time and regular part-time employees of Ozaukee County, excluding elected officials, supervisors, administrative, managerial, casual, and confidential employees including but not limited to Register in Probate, Bailiffs, Jury Commissioners, Emergency Government employees, employees of other certified or recognized bargaining units, employees of the Lasata Nursing Home, who were employed on May 16, 1985, 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 Office and Professional Employees International Union, Local No. 9, AFL-CIO-CLC, or by Wisconsin Council 40, AFSCME, AFL-CIO, or by neither of said organizations, for the purposes of collective bargaining with Ozaukee County on questions of wages, hours and conditions of employment.

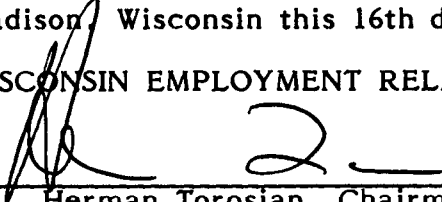
Voting Group 2

All full-time and regular part-time professional employees of Ozaukee County excluding elected officials, supervisors, administrative, managerial, casual, and confidential employees, and employees of other certified or recognized bargaining units, and employees of Lasata Nursing Home, who were employed on May 16, 1985, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining: (1) whether a majority of the employees in said voting group desire to be included in the bargaining unit described as Voting Group 1; and (2) whether a majority of such employees voting desire to be represented by

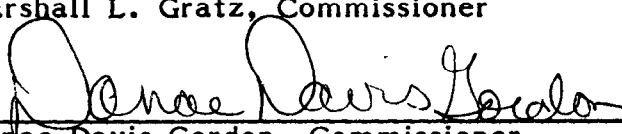
Office and Professional Employees International Union, Local No. 9, AFL-CIO-CLC, or by Wisconsin Council 40, AFSCME, AFL-CIO, or by neither of said organizations, for purposes of collective bargaining with Ozaukee County on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

OZAUKEE COUNTY

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

Nature of Proceeding and Positions of the Parties

The Petitioner filed a petition requesting the Commission to direct an election among employees in various courthouse departments of the County to determine whether said employees, who are currently unrepresented, desired to be represented by the Petitioner for purposes of collective bargaining. During protracted discussions over the eligibility of various classifications, the Intervenor requested to intervene in this proceeding, and when the parties agreed on the description of the appropriate voting groups as set forth in the Findings of Fact, there remained a dispute as to whether the 18 drivers employed by the Commission on Aging were eligible to vote in the election. The County maintains that all of the drivers share a community of interest with other employees and are regular part-time employees; both the Petitioner and the Intervenor maintain that the drivers are irregular part-time, or casual, employees who have little or no community of interest with other County employees.

Commission Precedents Regarding Regular Part-Time vs. Casual Status

The WERC has previously held that regular part-time status does not depend on a certain minimum number of hours of work; 1/ that variation and flexibility as to working time does not automatically determine that an employee is a casual employee; 2/ and that on-call status does not always render a position casual rather than regular part-time. 3/

In City of Milton, Dec. No. 13442-A (WERC, 6/83) at 5, we commented as follows:

In determining whether less than full-time employees share a sufficient community of interest with regular full-time employees to be included in the same bargaining unit, the commission has considered a variety of factors including commonality of supervision, similarity of duties and responsibilities, similarity of wages, benefits and working conditions, frequency and regularity of employment, and whether the employee has the right to reject the work the employer makes available.

While "on-call" and other employees free to accept or reject the work offered them by their employer have frequently been held to be casual employees lacking a sufficient community of interest with regular full-time employees performing the

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- 1/ E.g., Ashland Schools, Dec. No. 18085 (WERC, 10/80); and Tomah Schools, Dec. No. 8209-A, (WERC, 5/78) (stating that regularity of employment rather than number of hours worked has long been determinative in deciding whether an employee is casual).
 - 2/ See, City of Onalaska, Dec. No. 20509 (WERC, 4/83) (custodians) and Town of Grand Chute, Dec. No. 19870 (WERC, 9/82).
 - 3/ Compare City of Onalaska (parks laborer) (held noncasual an on-call laborer required to perform all work assigned and worked on a highly regular basis) with Sawyer County (Sheriff's Department), (held casual 5 on-call matrons who worked only when female prisoners were being held and were free not to accept work when it was offered, without adverse consequences), Montello Schools, Dec. No. 17829 (WERC, 5/80) (held casual substitute bus drivers who worked on call and only as needed to fill in for absentees), and Manitowoc County, Dec. No. 18351-A (WERC, 3/83) (held casual reserve deputies working on call with right to refuse work, despite increase in average hours worked to 5.54 hours per week).

same work under similar working conditions 1/ there are circumstances in which such employees will be held to be regular part-time employees properly includable in the same unit as the full time personnel.

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- 1/ Compare Sawyer County (19219) 12/81, and Door County (29920) 10/82 (excluded as casuals) with Mt. Horeb, (19188) 12/81, and Town of Grand Chute, (19870) 9/82 (included as regular part-time).

The WERC went on in that case to conclude that certain of the City's part-time police officers shared a community of interest with the full-time officers despite the absence of a uniform schedule of hours worked each day or week by the part-time employees involved and despite the fact that the part-time employees were "on-call" or otherwise free to accept or reject the work opportunities involved. However, it was specifically noted in that case that "the employer week in and week out makes a regular schedule of work available to the group."

In City of Onalaska, Dec. No. 20509 (WERC, 4/83), the Commission held that two custodians with flexible and somewhat unpredictable hours and an on-call laborer were all regular part-time employees. One of the custodians raised and lowered the flag daily. He also opened and closed the building, albeit at different times depending on whether the building happened to be in use in the evening. The other custodian also had an established set of tasks to perform daily, though she had considerable flexibility in determining when she would undertake and complete them each day. The parks laborer, while working only after being called and while called only as needed, had understandings with management that when the work became available he would be called to perform it and that he was not free to decline the work so assigned. He worked 26 to 93 hours per two-week period throughout the preceding calendar year.

Finally, in Town of Grand Chute (Police Department), Dec. No. 19870 (WERC, 9/82) the Commission held that all 11 of the Town's part-time officers were regular part-time despite the fact that many of them had neither a set number of hours nor a set shift which they worked on a weekly basis. In so holding, the Commission noted that the Town "does attempt to distribute the available hours in each week among the part-time officers on a regular and equal basis"; that the employees involved each averaged approximately two eight hour shifts per week; that their duties paralleled those of full-time employees; that they were paid monthly, worked under the same conditions as the full timers (of which there were only two); and that, like the full-time employees, they participated in the Wisconsin Retirement Fund.

DISCUSSION

When all of the facts of this case are taken into account in light of the foregoing, we conclude that the drivers at issue herein are casual employees rather than regular part-time and that they lack a community of interest with the balance of the nonprofessional voting group.

Findings of Fact Nos. 6-11 reflect much of the evidence detailing the nature of the instant positions, and it need not be repeated in its entirety here.

It is true that the substantial majority of the 18 drivers (including Jeanne Breitweiser 4/) have both committed themselves to being available for work on a set number of days each week and can be said to have honored that commitment by working a substantial number of assignments over a reasonable measuring period.

However, the drivers work essentially on an on-call basis. Whether a given driver will work at all on a particular day (or how much) is not known prior to their actual receipt of a assignment the day before, even though they have committed themselves to be available and have called in appropriately. Single

4/ Jeanne Breitweiser has returned to work after being off on an injury leave during much of 1984, so in her case we refer to the period prior to her injury.

trips can range from one to three hours of work each. Moreover, it is not clear that the County is attempting to distribute the assignments or the hours worked equally among the drivers. Rather, the locations of the work and the drivers' residences also appear to bear heavily on the allocation of assignments, and the results of assignments over time indicate that there is no policy of equal distribution in effect. In sum, then, the drivers at issue here do not have a fixed schedule of work hours or a set number of hours of work per week or month or even an assurance that work, when available, will be reserved for him or her on an equalized basis.

While most of the drivers have committed to being available at least two days per week, there is no assurance of being called with an assignment for a day so committed; in fact, the drivers receive no assignment on an estimated average of 20-25 percent of the days so committed.

It also appears that the drivers have considerable freedom to effectively refuse work assignments since drivers who have repeatedly failed to call in for or to be available for assignments on days previously committed are merely allocated assignments less often thereafter.

When the working conditions of the disputed drivers are compared with those of the balance of Voting Group No. 1 they differ considerably from those of the vast majority of employees in Voting Group No. 1. While there are certain similarities of duties and working conditions with "meals drivers" and "van drivers" employed by the Commission on Aging (and included by agreement in Voting Group 1 5/), the above noted irregularity and uncertainty of work and work hours, among other factors, differentiates them from even the van and meal drivers.

We find the disputed drivers to be casual rather than regular part-time employees. They are essentially working on an on-call basis. They do not, even as a group, perform a schedule of work that is uniform in nature, unlike part-time officers in City of Milton, supra. Given the County's method of allocation of work assignments, the instant drivers cannot be said to have work reserved for them, unlike the employees in City of Onalaska, supra. Nor can they be said to have any assurance of a relatively equal portion of the available work reserved for them, unlike the officers in Town of Grand Chute, supra. Finally, the instant drivers enjoy substantially greater opportunities to refuse work offered them than did, for example, the on-call parks laborer in City of Onalaska, supra.

CONCLUSION

For the foregoing reasons, we have concluded that the on-call Commission of Aging drivers referred to in Finding of Fact 6 do not share a community of interest with the balance of the nonprofessionals in Voting Group No. 1. Hence, we have declared that said drivers are not included in that Voting Group 1, that they shall not be eligible to vote in the election we are directing herein, and shall not be included in any resultant certified bargaining unit.

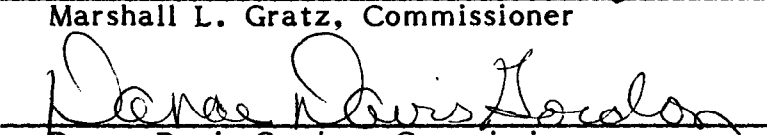
Dated at Madison, Wisconsin this 16th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

5/ Page 7 of the transcript of the hearing mistakenly shows these employees as being agreed to be excluded. It is in error and is inconsistent with the list of employee voters agreed on at the hearing, and it is hereby deemed corrected to conform to the agreed upon list.