

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

-----	:	Case 27
In the Matter of the Petitions of	:	No. 35190 ME-2462
	:	Decision No. 23352
	:	
WISCONSIN COUNCIL 40, AFSCME,	:	Case 28
AFL-CIO and LABOR ASSOCIATION	:	No. 35365 ME-2481
OF WISCONSIN, INC.	:	Decision No. 23353
	:	
Involving Certain Employees of	:	Case 29
	:	No. 35448 ME-2493
MENOMINEE COUNTY	:	Decision No. 23354
(HIGHWAY DEPARTMENT, SHERIFF'S	:	
DEPARTMENT, COURTHOUSE AND	:	Case 31
HUMAN SERVICES BOARD)	:	No. 35558 ME-2503
	:	Decision No. 23355
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Appearances:

Lawton and Cates, Attorneys, 110 East Main Street, Madison, WI 53703, by
Mr. Richard V. Graylow, appearing on behalf of AFSCME.
Mr. Patrick J. Coraggio, Labor Consultant, 2825 North Mayfair Road,
Wauwatosa, WI 53222, appearing on behalf of LAW.
Lindner and Marsack, S.C., Attorneys, 700 North Water Street, Milwaukee,
WI 53202, by Mr. Eugene J. Hayman, appearing on behalf of the
Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING PETITION
AND DIRECTING ELECTIONS

Labor Association of Wisconsin, Inc. (herein LAW) having filed four petitions requesting the Wisconsin Employment Relations Commission to conduct elections pursuant to Sec. 111.70(4)(d) of the Municipal Employment Relations Act in the bargaining units set forth below in Findings of Fact 4, 5, and 6 and in the voting groups set forth in Finding of Fact 8 and Wisconsin Council 40, AFSCME, AFL-CIO (herein AFSCME) having also filed an election petition with respect to the Human Services Board employee voting groups set forth in Finding of Fact 8, and intervened with respect to the other three bargaining units at issue herein; and AFSCME and its affiliated Local Union 2062 having, on August 7, 1985, filed a complaint of prohibited practices with respect to the bargaining units set forth in Findings of Fact 4, 5, and 6; and a consolidated hearing on all matters raised by the complaint and election proceedings having been held on September 25, 1985 in Keshena, Wisconsin before Examiner Christopher Honeyman, a member of the Commission's staff at which AFSCME amended its complaint to include reference to the voting groups set forth in Finding of Fact 8; and all parties having filed briefs, and the record having been closed on November 5, 1985; and AFSCME having not waived the potential effects on the instant election proceedings of the conduct alleged in the pending prohibited practice complaint; and decision on the election proceedings having been deferred pending resolution of the prohibited practice complaint; and the Commission having on March 10, 1986, affirmed Examiner Honeyman's dismissal of the prohibited practice complaint; the Commission, being fully advised in the premises, now makes and issues the following

FINDINGS OF FACT

1. That Labor Association of Wisconsin, Inc. is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal office at 2825 North Mayfair Road, Wauwatosa, WI 53222.
2. That Wisconsin Council 40, AFSCME, AFL-CIO and its affiliated Local 2062 are labor organizations within the meaning of Sec. 111.70(1)(h), Stats., and have their principal office at 5 Odana Court, Madison, WI 53719.
3. That Menominee County is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices at Menominee County Courthouse, Keshena, Wisconsin.

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4. That the parties stipulated at the hearing that the appropriate collective bargaining unit of Highway Department employees is: all the employees of the Highway Department except the Highway Commissioner, General Foreman, and part-time employees that are paid only from subsidies provided by State or Federal government for specific jobs created to ease the relief rolls; and that the petition for an election in said unit was filed by LAW on June 17, 1985.

5. That the parties stipulated that the appropriate bargaining unit of employees in the Sheriff's Department is: all regular part-time and regular full-time employees of the Menominee County Sheriff's Department who have powers of arrest, excluding supervisory, managerial, confidential and executive employees; and that the petition for an election in said unit was filed by LAW on July 18, 1985.

6. That the parties stipulated that the appropriate bargaining unit of employees in the Courthouse is: all full-time and regular part-time employees of the Menominee County Courthouse, except professional employees, elected officials, managerial, supervisory and confidential employees; and that the petition for an election in said bargaining unit was filed by LAW on August 22, 1985.

7. That AFSCME has been at all material times exclusive bargaining representative of the bargaining units described above in Findings of Fact 4 and 5, and of a bargaining unit consisting of all employees of the Courthouse and Town Sewer and Water Department, except elected officials; that the 1985 bargaining agreements in said units between the County and AFSCME expired on December 31, 1985; and that the reopening date for negotiations for a successor agreement to each of the three said agreements was August 1, 1985.

8. That the parties stipulated that in the Human Services Board the appropriate groups for voting are:

Group Number 1: All regular full-time and regular part-time professional employees of the Menominee County Human Services Board, excluding all supervisory, managerial, and confidential employees and all other employees.

Group Number 2: All regular full-time and regular part-time non-professional employees of the Menominee County Human Services Board, excluding all supervisory, managerial, confidential and professional employees.

That AFSCME's petition for election with respect to said groups was filed August 6, 1985; and that LAW's petition for election with respect to said groups was filed August 16, 1985.

9. That AFSCME was the exclusive representative of a bargaining unit of all employees in the Social Services Department except the Director; that in or about December, 1983, the County reorganized such that the Social Services Department employees were merged into the same organizational subdivision with a larger group of Human Services Board employees; and that AFSCME thereafter made no attempt to bargain a collective bargaining agreement covering the former Social Services Department employees by themselves or the merged Human Services Board.

10. That LAW contends that the position of Chief Deputy in the Sheriff's Department, of which the incumbent is Richard Moses, is not supervisory; that the County contends to the contrary; that AFSCME takes no position with respect to this issue; that Moses has never hired, fired, laid off, adjusted a grievance of, promoted, transferred or rewarded any employee, or effectively recommended such action; that Moses spends approximately 35 hours per week investigating crimes; that Moses works most of his hours at the same time as the Sheriff; that there are eight deputy sheriffs in the Department; that Moses stands in for the Sheriff when the Sheriff is absent; that the predominant part of such absences consists of weekends other than the one out of three on which the Sheriff is on-call; that Moses works one weekend out of every three on-call in charge of the Department; that the third weekend of every three is filled for the same purposes by the Department's sole sergeant, who is in the bargaining unit; and that Moses does not possess or exercise supervisory duties and responsibilities in sufficient combination and degree to render him a supervisory employee.

11. That the petition of LAW in the Courthouse bargaining unit described above in Finding of Fact 6 was filed after the reopening date for negotiations on a successor agreement to the 1985 agreement between AFSCME and the County; and that the petitions of LAW in the Highway Department unit and Sheriff's Department unit described above in Findings of Fact 4 and 5, respectively, were filed during the 60-day period immediately preceding the reopening date in each of the respective 1985 collective bargaining agreements between AFSCME and the County.

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

CONCLUSIONS OF LAW

1. That the petitions filed in the Highway Department, Sheriff's Department and Human Services Board bargaining units and voting groups referred to above in Findings of Fact 4, 5 and 8 are timely filed.

2. That the petition filed in the Courthouse bargaining unit described above in Finding of Fact 6 is not timely filed.

3. That the bargaining units set forth in Findings of Fact 4 and 5, and the voting groups set forth in Finding of Fact 8 are appropriate collective bargaining units within the meaning of Sec. 111.70(4)(d) of the Municipal Employment Relations Act.

4. That questions concerning representation presently exist within the bargaining units and voting groups set forth in Findings of Fact 4, 5 and 8 above.

5. That Richard Moses, the occupant of the position of Chief Deputy in the County's Sheriff's Department, is not a supervisor within the meaning of Sec. 111.70(1)(o) Stats., and is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER OF DISMISSAL AND DIRECTION OF ELECTIONS

IT IS ORDERED that the petition filed in the Courthouse unit described in Finding of Fact 6 be, and the same hereby is, dismissed. 1/

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.

(Footnote 1 continued on Page 4)

(Footnote 1 continued from Page 3)

(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.

IT IS DIRECTED that elections by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within 45 days from the date of this directive in the following collective bargaining units and voting groups, for the purposes stated:

Voting Group No. 1

All the employees of the Highway Department except the Highway Commissioner, General Foreman, and part-time employees that are paid only from subsidies provided by state or federal government for specific jobs created to ease the relief rolls, who were employed on March 10, 1986, 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 Wisconsin Council 40, AFSCME, AFL-CIO, or by Labor Association of Wisconsin, Inc., or by neither of said organizations for the purpose of collective bargaining with Menominee County on wages, hours and conditions of employment.

Voting Group No 2

All regular part-time and regular full-time employees of the Menominee County Sheriff's Department who have powers of arrest, excluding supervisory, managerial, confidential and executive employees, who were employed on March 10, 1986, 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 Wisconsin Council 40, AFSCME, AFL-CIO, or by Labor Association of Wisconsin, Inc., or by neither of said organizations for the purpose of collective bargaining with Menominee County on wages, hours and conditions of employment.

Voting Group No. 3

All regular full-time and regular part-time non-professional employees of the Menominee County Human Services Board, excluding all supervisory, managerial, and confidential employees, and conditionally excluding professional employees, who were employed on March 10, 1986, 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 Wisconsin Council 40, AFSCME, AFL-CIO or by Labor Association of Wisconsin, Inc., or by neither of said organizations for the purpose of collective bargaining with Menominee County on wages, hours and conditions of employment.

Voting Group No. 4

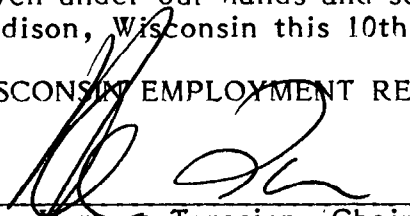
All regular full-time and regular part-time professional employees of the Menominee County Human Services Board, excluding all supervisory, managerial, and confidential employees, and all other employees, who were employed on March 10, 1986, except such employees as may prior to the election quit their employment or be discharged for cause for the purposes of determining (a) whether a majority of the eligible employees in Voting Group No. 4 desire to be included in a single bargaining unit with the non-professional employees of the Human Services Board described above as Voting Group No. 3, and (b) whether a majority of such employees voting desire to be represented by Wisconsin Council 40, AFSCME,

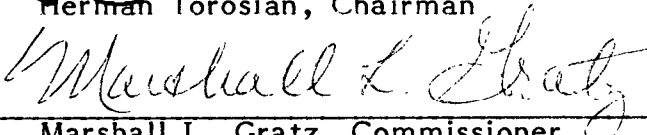
AFL-CIO, or by Labor Association of Wisconsin, Inc., or by neither of said organizations for the purpose of collective bargaining with Menominee County on wages, hours and conditions of employment.

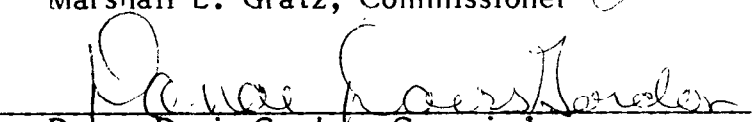
Given under our hands and seal at the City of Madison, Wisconsin this 10th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

MENOMINEE COUNTY (HIGHWAY DEPARTMENT, SHERIFF'S DEPARTMENT,
COURTHOUSE AND HUMAN SERVICES BOARD)

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

Nature of Proceeding and Positions of the Parties:

Petitioner, Labor Association of Wisconsin, Inc. filed four petitions requesting the Commission to direct elections among employees in the Menominee County Sheriff's Department, Highway Department, Courthouse, and Human Services Board to determine whether said employees desire to be represented by LAW for purposes of collective bargaining. Wisconsin Council 40, AFSCME, AFL-CIO filed a petition for election among employees in the Human Services Board, and intervened in the other proceedings on the basis of its status as the exclusive bargaining representative of the employees involved. AFSCME also filed a prohibited practice complaint alleging that the County had refused to bargain with AFSCME over changed terms of employment for 1985. At a consolidated hearing concerning all of these matters, all of the parties agreed with respect to the descriptions of the bargaining units and voting groups involved, 2/ and also with respect to the positions which are included therein, with one exception. LAW contends, and the County disputes, that the Chief Deputy in the Sheriff's Department is a non-supervisory employee.

AFSCME contends, and the County and LAW dispute, that all four of these matters are subject to contract bar and are untimely filed.

Timeliness of the Petitions:

AFSCME contends that a collective bargaining agreement effectively bars an election, provided that it is for a definite term, is in writing, describes the unit involved, substantially describes all of the wages, hours and conditions involved, and is signed by all parties. AFSCME contends that the 1985 collective bargaining agreements in these units comply with all of these requirements. 3/

We reject AFSCME's contract bar claim as to the Human Services Board employees as inconsistent with its own petition and unavailing as a consequence of the December, 1983 reorganization described in Finding of Fact 9. Thus an election petition as to these presently unrepresented employees is timely at any time.

Timeliness of the remaining petitions is determined by the date of filing of those petitions, in accordance with the Commission's "modified Wauwatosa" rule. 4/ That rule requires that a petition to replace or remove an existing collective bargaining representative be filed, where a contract is in effect, during the 60-day period prior to the date by which the collective bargaining agreement must be reopened for negotiations over a successor. We have determined in the parallel complaint proceeding 5/ that a collective bargaining agreement is in effect in

2/ AFSCME's prior collective bargaining agreement with the County in the "Courthouse" unit included one part-time employee of the Town of Menominee; the parties agreed to restrict this unit for purposes of the election to employees of the County.

3/ AFSCME's argument in the complaint case that the contracts were not extended into 1985, and that the County improperly refused to bargain concerning their replacements, would be material herein had we found a violation of the statute by the County in the parallel complaint proceeding. Because no violation is found therein, however, we find for reasons explained in that decision that the County and AFSCME were party to contracts in the Highway, Sheriff's and Courthouse Departments extending through 1985. Dec. No. 22872-C, (WERC, 3/85).

4/ See Wauwatosa Board of Education, Dec. No. 8300-A, (WERC, 2/68), as modified by City of Milwaukee, Dec. No. 8622, (WERC, 7/68); City of Brillion (Police Department), Dec. No. 18945, (WERC, 9/81).

5/ Supra, Note 3.

each of the Highway Department, Sheriff's Department, and Courthouse bargaining units through December 31, 1985, by virtue of AFSCME's failure to reopen these contracts for negotiation of changed terms of employment in 1984. Because the contracts were extended for a year pursuant to their terms, the duration clause in each of these agreements required that the agreement be reopened by notification to the other party by August 1 of an intent to negotiate changes. The 60-day period provided for in the rule is therefore the sixty days immediately preceding August 1, 1985. LAW's petition in the Highway Department bargaining unit was filed on June 17, 1985, within the 60-day period, and is timely. The petition in the Sheriff's Department was filed on July 18, 1985, also within the 60-day period, and it is also timely. LAW did not file its petition in the Courthouse bargaining unit, however, until August 22, 1985. This petition post-dated the close of the "window period" for filing of petitions, and is not timely. It is therefore dismissed. 6/

Supervisory Status of Chief Deputy (Sheriff's Department):

The WERC considers the following factors in determining if a position is supervisory in nature:

1. The authority to effectively recommend 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 is 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 exercised in the supervision of employees. 7/

. . .

Richard Moses has been Chief Deputy in the Sheriff's Department for three years, and was previously employed there as Investigator. The record shows that Moses' functions have changed little since he was Investigator, though he now has certain privileges not extended to those in the bargaining unit. Specifically, he has his own office, and does not have to record his comings and goings on a time sheet kept in the Department office. He works for 40 hours or more in each week, but is not paid overtime above 40 hours, unlike other employees. On every third weekend, Moses is in charge of the Department on call, a function filled during the other two weekends by the Sheriff and by the Department's Sergeant, who is in the bargaining unit. There is no dispute that Moses has never hired, fired, laid off, adjusted the grievance of, promoted, transferred or rewarded any employee. Moses testified that he had been advised on the morning of the hearing that he had the authority to fire employees, but in view of the small size of the Department (which has eight deputy sheriffs) and the timing of this announcement we find this

himself led to the discharge of an employee, and Sheriff James Tourtillott testified that he relied on Moses's investigation in that matter, but Tourtillott also testified that the officer in question was actually discharged before the investigation began, and that the investigation was started after the error of this action became apparent. The results of that investigation were also turned over to the district attorney for prosecution, and we find nothing in the record to indicate that the suspension or possible discharge of that employee depended effectively on the recommendation, as opposed to the professional investigative work, of the Chief Deputy. Moses testified that he does not assign hours of employees, although the Sheriff consults him with respect to scheduling; has not evaluated employees; and cannot grant vacation time. Moses testified that he has the authority to assign investigative work to officers, but conceded that standard police procedure is to assign such work to the officer who happened to be on the scene originally, and that he follows this rule. Moses testified that he is in charge of deputies when they work with him, but the record does not indicate any decisions of a labor relations nature which are made by Moses in this context. Prior to Moses' promotion from investigator, there was an under-sheriff, who was excluded from the unit; upon the retirement of the under-sheriff, he was not replaced, but at that time Moses was made Chief Deputy, a new position. Moses testified that the Chief Deputy pay rate is the same as the under-sheriff's would be.

Taken together, the evidence indicates that Moses has little real authority beyond that exercised by the Sergeant, when acting as replacement for the Sheriff. The small size of the Department and the presence of the Sheriff on the same work shift as the Investigator indicate that few decisions concerning assignments are likely to be made by the Chief Deputy acting alone, and indeed the record is devoid of instances of notable labor relations-related decisions made by Moses. The single investigation resulting in discharge conducted by Moses, on which the County heavily relies, does not clearly show that Moses effectively recommended any action; not only is it apparent that the discipline was applied in the first instance before Moses began to investigate, but it is also apparent that at least two other high-level officials of the County (the Sheriff and the District Attorney) were involved in deciding what was to be done about the facts uncovered. Moses' role in that connection therefore appears to be related primarily to his investigative function rather than to any supervisory responsibilities. Similarly, such authority as Moses has exercised over sheriff's deputies appears to be related primarily to the activity of investigating, rather than supervision in the employment relations sense.

Comparison of the factors customarily considered in determining supervisory questions with the facts in the findings as discussed above shows that few if any of the factors militate in favor of finding that Moses is a supervisor within the statute's meaning. At best, Moses is a lead worker with little authority beyond that of the Sergeant of the Department, and he has relatively little supervisory responsibility over other employees. We conclude that he does not possess authority or responsibilities in the necessary combination or degree to constitute a supervisor.

Human Services Board Voting Groups:

When in an election proceeding a request is made to include professional employees in a single unit with non-professional employees, Section 111.70(4)(d) of the Municipal Employment Relations Act requires that the professional employees be given an opportunity to vote to determine whether they desire to be so included. In order to be so included, a majority of eligible professional employees must vote in favor of such inclusion. Therefore, in this proceeding, the professional employees of the Human Services Board (Voting Group No. 4) will be given two ballots, (a) to determine whether they desire to be included in a single unit with the non-professional employees of the Human Services Board (Voting Group No. 3) and, (b) whether they desire to be represented by Wisconsin Council 40, AFSCME, AFL-CIO, or by Labor Association of Wisconsin, Inc., or by neither of said labor organizations. The unit determination ballot will be a separate colored ballot and the professional employees will be instructed to deposit their unit determination ballots in the ballot box. The professional employees who appear to vote will be instructed to place their representation ballots in a furnished blank envelope and to seal such envelope and deposit same in the ballot box.

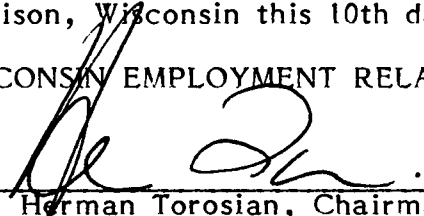
The unit determination ballots cast by the professional employees will be initially counted and should a majority of the eligible professional employees vote in favor of being included in a single unit with the non-professional employees, the sealed envelopes, containing the ballots of the professionals with respect to representation, will be opened and such ballots will be co-mingled with the representation ballots cast by the non-professional employees, and thereafter the tally will include the representation ballots cast by both professional and non-professional employees.

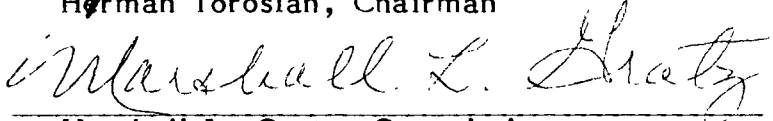
Should a majority of the professional employees eligible not vote in favor of being combined in a unit with the non-professional employees, then the professional employees shall constitute a separate unit, and their representation ballots will not be co-mingled with the representation ballots cast by the non-professional employees, and, as a result, the representation ballots cast by the non-professional employees will be tallied separately from those of the professional employees to determine separately their respective choices as to bargaining representative.

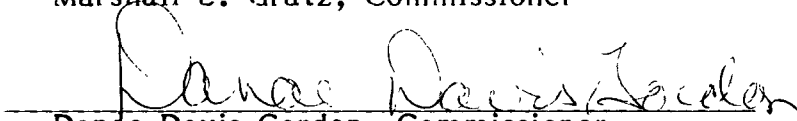
Given under our hands and seal at the City of
Madison, Wisconsin this 10th day of March, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner