

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

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WISCONSIN COUNCIL 40, AFSCME, AFL-CIO : Case 21

: No. 41345 ME-298

Involving Certain Employes of : Decision No. 23639-A

:

HOWARD-SUAMICO SCHOOL DISTRICT :

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Appearances:

Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2785 Whippoorwill Drive, Green Bay, WI 54304, appearing on behalf of the Petitioner.

Mr. Robert W. Burns, Mulcahy and Wherry, S.C., Attorneys at Law, 414 East Walnut Street, P.O. Box 1103, Green Bay, WI 54305-1103, appearing on behalf of the District.

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

Wisconsin Council 40, AFSCME, AFL-CIO, having filed a petition on December 1, 1988, with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit by including in that unit the position of Truck Driver; and a hearing in this matter having been conducted on April 24, 1989, in Green Bay, Wisconsin before Examiner James W. Engmann, a member of the Commission's staff; and a transcript of the hearing having been received on May 18, 1989; and the parties having filed or waived the filing of briefs and reply briefs by September 5, 1989; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization and maintains its offices at 2785 Whippoorwill Drive, Green Bay, Wisconsin.

2. That Howard-Suamico School District, hereinafter the District, is a municipal employer and maintains its offices at 2700 Lineville Road, Green Bay, Wisconsin.

3. That on May 5, 1986, the Union and the District filed a stipulation for election involving municipal employes with the Wisconsin Employment Relations Commission, hereinafter the Commission; and that, following an election, the Commission, in Howard-Suamico School District, Dec. No. 23693 (WERC, 6/86), certified the Union as the exclusive collective bargaining representative of the collective bargaining unit to which the parties had stipulated consisting of:

all regular full-time custodial employes of the Howard-Suamico School District, excluding supervisory, managerial and confidential employes, housekeepers, laundry workers and all other employes;

4. That following certification, the Union and District entered into negotiations for a collective bargaining agreement; that, as part of that initial agreement, the Union and the District agreed to the following:

Article I

RECOGNITION AND UNION REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purpose of conferences and negotiations with the Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment for the unit of representation consisting of all employes of the Employer employed as follows:

1. All custodial employes of the Board of Education, Howard-Suamico School District, excluding professional teachers, supervisors, craft employes, elected or appointed officials, cooks, clerical employes, confidential employes and all other employes.

that said recognition clause was continued unchanged in the second collective bargaining agreement, effective from July 1, 1988 to June 30, 1990; that the Union and the District have agreed to the following contractual job classifications in the bargaining unit: janitor, custodian and maintenance technician; that each member of the current bargaining unit is assigned to one of these classifications; and that a job description for each classification is contained in the Custodial Handbook approved by the District's Board of Education.

5. That at the time the parties stipulated to the description of the bargaining unit in 1986, the position of Truck Driver was held by Konraad Driesen; that Driesen was a student from Belgium who was soon to return to Belgium for mandatory military service; that the District told the Union that the position of Truck Driver was temporary; that the District told the Union that when Driesen vacated the position, the position would be terminated; that based on the District's assertions, the Union agreed to exclude the position of Truck Driver from the bargaining unit; that Driesen vacated the position on or about August 28, 1988; that the District proceeded to fill the vacancy; that on December 1, 1988, the Union filed a petition to clarify a bargaining unit of municipal employes with the Commission, requesting the Commission to include the position of Truck Driver in the bargaining unit; and that the District opposes said inclusion on various grounds.

6. That the Truck Driver position has been in existence for over 20 years; that the occupant of the position works approximately four and one-half hours per day, five days a week, during the school year; that the job consists of delivering food, mail and supplies to the various schools; that the main duty is to transport hot meals from the loading point in Bay Port to three schools in the District; that the truck is especially designed for transporting food; that the food run lasts from approximately 10:00 a.m. to 12:30 p.m.; that following the food run, the truck driver makes a mail run to all the schools; that the truck driver delivers anything else that needs to be transported within the District; that, on occasion, the truck driver will leave the District to pick up something for delivery in the District; that the duties of the, Truck Driver have not changed in 20 years; and that there is no formal job description for the Truck Driver.

7. That when Driesen vacated the truck driver position on or about August 28, 1988, the District temporarily filled the position with Randy Caelwaerts, the District's maintenance mechanic; that James Wenzel is the District's Supervisor of Buildings and Grounds, hereinafter Supervisor; that in

September, 1988, the Supervisor talked to Wayne Falk about the truck driver position; that the Supervisor told Falk the job was temporary and would end at the end of the school year; that Falk had worked for the railroad but was laid off for the winter; that Falk indicated his interest in the position and filled out an application; that the Supervisor talked to John Keller, Director of Business Services for the District, hereinafter Director, about hiring Falk; that the Director approved of the hiring; and that Falk was hired as the truck driver and began work on or about September 12, 1988.

8. That as a truck driver, Falk is paid \$4.75 per hour; that Falk is used, on occasion, as a substitute for members of the custodial unit who are absent; that from September, 1988 to January, 1989, he filled in approximately 30 times; that from January to April, 1989, he filled in less than five times; that the District has also used Dwayne Campbell as a substitute for members of the custodial unit; that Campbell filled in as truck driver once or twice when Falk was sick; that otherwise Campbell does not act as a truck driver; that Falk does building checks every weekend; that when Campbell or Falk fill in for a member of the bargaining unit, they are paid \$4.75 per hour; that as the truck driver, Falk reports to the Supervisor of Buildings and Grounds and not to the Supervisor of Food Service.

9. That the Director of Business Services has responsibility for budgeting, finance, buildings and grounds, food service, purchasing, and collective bargaining and contract administration regarding support staff; that the District currently bargains with a secretarial unit, the custodial unit and a housekeeper unit; that the housekeeper unit is a recently-formed AFSCME unit as to which the parties were in the process of negotiating a first collective bargaining agreement when the instant hearing was held; that the housekeeping unit is made up of part-time employes involved in light housekeeping or cleaning; that the custodial unit is made up of full-time employes involved in more detailed cleaning and some minor repairs; that the food service employes and the truck driver are the only municipal employes of the District who are not represented; that the Director has been reviewing District practices regarding the support staff and budgeting so as to implement sound business practices and to evaluate the job descriptions of various positions in the District; that the Director approved hiring Falk because it was a good way to fill the position so that the District was not locked into any kind of committment as it starts to review the entire staffing of buildings and grounds; that the District was to analyze the position of Truck Driver at the end of the 1988-89 school year.

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

CONCLUSIONS OF LAW

1. That as the Truck Driver position is now permanent, said position has been impacted by changed circumstances which materially affect the position's unit status.

2. The the position of Truck Drivers falls within the scope of the bargaining unit to which the parties have agreed in their collective bargaining agreement.

3. That the incumbent in the Truck Driver position is a regular part-time municipal employe.

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

ORDER CLARIFYING BARGAINING UNIT 1/

The position of Truck Driver shall be, and hereby is, included in the bargaining unit identified in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency

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1/ Continued

upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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.

HOWARD-SUAMICO SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

The Union:

At hearing, the Union argued that the truck driver position is a job that normally would have been done by the bargaining unit; that the current truck driver does building checks and works with custodians on other things; that the District told the Union the position of truck driver was a temporary position; that the District refilled the position; and that, therefore, the circumstances have changed. The Union waived the filing of a brief in chief.

On reply brief, the Union contends that the first issue is that of the recognition clause; that there is no doubt that the position falls under the custodial classification; that it is supervised by the Supervisor of Buildings and Grounds; that it is a four and one-half hour day, five day a week job; that the employe in the truck driver position delivers food, supplies and mail; and that the employe fills in for absent custodians and does building checks.

The Union also asserts that this "temporary" position has been in existence for 20 years; that it really stretches one's imagination to define this position as "temporary"; that the reason that this part-time position was not included in the unit at the time of certification was that the District said it was going to terminate the position when the occupant of the position at the time left the position; that this is unrefuted by the District; and that the District did not terminate the position.

The Union argues that the truck driver position does not fit into the teacher unit or the clerical unit; that to form an additional one-person non-professional bargaining unit is crazy; that the Commission should review the record, the certification and its anti-fragmentation rules; and that it is reasonable to accrete this position to the custodial group because it has no where else to go.

The District:

On brief, the District argues that the truck driver position is outside the unit's certification by the Commission; that the position is not a full-time position; that the employe is not a custodial employe; and that the employe falls under the category of "all other employes" expressly excluded under the Commission's certification.

The District also argues that the petition is premature as the recognition clause within the collective bargaining agreement specifically excludes "all other employes"; that the Union may seek to expand the recognition clause, but it must do so at the appropriate time with respect to the duration of the collective bargaining agreement; that as this agreement is in effect until June 30, 1990, the petition is premature; that the Commission should not disturb the agreed-upon recognized unit and go outside those positions stipulated as falling within the unit; and that none of the criteria are met in this instance that would allow the Commission to expand an agreed-upon unit over the objection of the District, citing Mid-State VTAE, Dec. No. 14526-A (WERC, 5/85) and City of Cudahy, Dec. Nos. 19451-A and B (WERC, 12/82).

In addition, the District argues that a temporary employe is defined as one who lacks an expectation of continued employment with the employer and is generally excluded from the units due to that very reason, citing Manitowoc County, Dec. No. 15250-B (WERC, 9/77); that there can be no doubt from the record in this matter that the employe was hired with no expectation of continued employment; that even though it seems incongruous that a 20-year position could be a temporary one, the Union admitted the position was temporary at the time of the unit's formation in 1986.

Finally, the District argues that there has been no change of circumstances to warrant inclusion of this position within the unit; that the truck driver duties have been handled in virtually the same manner for over 20 years; that the District has proceeded to fill the position in a temporary manner with the current employe; that there has been no change in circumstances as to the position, either as to duties or status, which would warrant inclusion now as opposed to when the position was originally excluded by stipulation of the parties; that the Union's motivation for excluding the position is not the issue; that the issue is whether the position itself has changed; and that it has not changed.

On reply brief, the District argues that the functions of the truck driver are decidedly different from those of the custodial position; that the clear language of the certification and recognition clause should not be disregarded; that the substitute work and building check work was additional work given to the employe separate and apart from the truck driver's job; that the issues before the Commission are not whether to form an additional one-person unit, as stated by the Union, but whether the instant petition is properly brought given the unit certification and recognition clause; and that the fact that the position is a temporary one should prevent inclusion as a bargaining unit position.

DISCUSSION

The District first argues that the petition for unit clarification is premature as the Union must seek expansion of the recognition clause only at the time appropriate in respect to the duration clause of the agreement. However, in unit clarification proceedings, there is no requirement that a petition be filed at any particular time and, thus, an existing collective bargaining agreement does not bar the proceeding. 2/

In a unit clarification proceeding, the Commission will not alter the voluntarily agreed-upon composition of a bargaining unit over the objection of one of the parties to said agreement unless:

1. The position(s) in dispute did not exist at the time of the agreement; or
2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, etc.; or
3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; or

2/ Milwaukee Public Schools, Dec. No. 25143 (WERC, 2/88), citing Milwaukee County, Dec. No. 14786-B (WERC, 4/80), and numerous other cases.

4. The existing unit is repugnant to the Act. 3/

No dispute exists as to whether exceptions 1, 2 or 4 stated above are at issue in this case. They are not. The Union alleges that the Commission can alter the voluntarily agreed-upon composition of this bargaining unit over the objection of the District in this case because the position in dispute has been impacted by changed circumstances which materially affect its unit status. Specifically, the Union argues that the position of truck driver, originally presented to the Union by the District as a temporary position which would be terminated and was thus outside the unit's scope, has been continued by the District so as to make it a permanent position which now should be included in the unit.

Before proceeding further, it is necessary to examine the language which the parties have themselves used to reflect their agreement on the composition of this bargaining unit. In the Stipulation for Election filed by the parties, the unit is described as:

all regular full-time custodial employes of the Howard-Suamico School District, excluding supervisory, managerial and confidential employes, housekeepers, laundry workers and all other employes.

Comparing this language with the contentions of the parties herein that it was the temporary status of the truck driver position in 1986 which led to the parties' exclusion from the unit, we conclude that the parties' language at least implicitly acknowledges that the truck driver position was "custodial" 4/ but not "regular". We acknowledge that the truck driver position's part-time nature would also appear to put the position outside the scope of the "full-time" unit to which the parties stipulated. However, the scope of this seeming inconsistency is eliminated by the parties' subsequent agreement on a new recognition clause in their bargaining agreement which eliminated the "full-time" language and read as follows:

1. All custodial employes of the Board of Education, Howard-Suamico School District, excluding professional teachers, supervisors, craft employes, elected or appointed officials, cooks, clerical employes, confidential employes and all other employes.

While it could reasonably be argued that the exclusion of the word "regular" in the new language reflects the parties' agreement to include even temporary employes holding temporary positions in the unit, such an interpretation would be at odds with the Union's apparent willingness to exclude the truck driver position as long as it remained temporary. Given all of the foregoing, we are satisfied that the agreement of the parties as to the truck driver position is that the position will continue to be excluded from the unit as long as it remains temporary. If the record supports the Union's assertion that the position is no longer temporary, a material change in circumstance affecting the unit status of the position will exist and the parties' unit agreement will warrant inclusion of the position in the existing unit as described in the parties' bargaining agreement.

3/ City of Sheboygan (Water Department), Dec. No. 7378-A (WERC, 5/89), citing numerous decisions.

4/ Such an agreement between the parties is supported by the "blue collar" nature of the truck driver and maintenance positions, the shared supervisor and work site, and the parties' presumed interest in avoiding unduly fragmented bargaining units.

The District does not dispute that the reason the truck driver was initially excluded was because the District advised the Union the position was temporary and would be terminated. Instead, the District alleges that the position continues to be temporary and excludable from the unit on that basis.

The District argues that the position continues to be temporary as it has been filled by an employe who does not have a reasonable expectation of continued employment for two reasons. First, the employe was hired while on lay-off status from his full-time job and will vacate the position when recalled to his full-time job. Second, the District hired the employe for the school year only and will reevaluate the position of truck driver at the end of the school year.

As to the first point, the fact that an employe may intend to leave a job, whether to return to a job from which he is on lay-off or for whatever reason, does not, in and of itself, make him a temporary employe. The expectation of continued employment does not go to whether the employe will want to continue to be employed but whether the employer will allow the employe to be employed. As to the second point, the record does not show that the employe would not be employed after the end of the school year; instead, the record shows that the employe was guaranteed employment until the end of the school year. At that time, the District was to reevaluate the position of truck driver. The record is not clear as to what that means. Nothing in the record states that the position will be eliminated at that time. The record does not indicate how the duties of the truck driver would be accomplished if the position was eliminated. The record does not show that the current occupant of the position would be excluded from continuing in the position if he wanted to and if the position was continued. Thus we are satisfied that at the time the instant hearing was conducted, the incumbent was a regular part-time employe.

Even if it were concluded that the incumbent truck driver is a temporary employe, such a determination would not be dispositive herein. The critical question is whether the position is permanent. The Commission has held that the finding of an employe to be temporary does not control for purposes of determining whether such positions are appropriately included in the bargaining unit. 5/ Thus, the Commission has included a position in a collective bargaining unit, even though the incumbent was ineligible to vote based on temporary status. 6/

It is clear on the record that the position itself is a permanent position. The position has been in existence for 20 years. The District has no plans to eliminate the position, no date certain when said position will not exist, only a plan to reevaluate the position. Thus the District is free to do any time. This does not make the position temporary.

But, the District argues, no change of circumstances has occurred in that the duties of the truck driver position have been handled in virtually the same manner for over 20 years. While the duties of the position have not changed, it is clear from the record that the status of the position has changed from temporary at the time of certification to permanent at the time of the instant petition. This change from temporary, and therefore excludable under the parties' agreement, to permanent, and included, certainly materially affects the position's unit status.

5/ Solon Springs School District, Dec. No. 18200 (WERC, 10/80); Cornell School District, Dec. No. 17982 (WERC, 8/80).

6/ Platteville School District, Dec. No. 21806 (WERC, 6/84).

In summary, as we are satisfied that the position in question is no longer temporary, we conclude that a material change affecting the positions' unit status has occurred and that the position falls within the scope of the parties' recognition clause. Therefore, we have included the position in the unit.

Dated at Madison, Wisconsin this 28th day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner