STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**TEACHING ASSISTANTS' ASSOCIATION,
WFT/AFT LOCAL 3220, AFL-CIO**

Involving Certain Employees of

**DEPARTMENT OF EMPLOYMENT RELATIONS
(UNIVERSITY OF WISCONSIN-MADISON)**

Case 241
No. 58896
SE(u/c)-17

Decision No. 24264-A

Appearances:

Cullen, Weston, Pines & Bach, LLP, by **Attorney Shana R. Lewis**, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of Petitioner Teaching Assistants' Association, WFT/AFT, Local 3220, AFL-CIO.

Attorney David J. Vergeront, Chief Legal Counsel, 345 West Washington Avenue, Madison, Wisconsin 53707-7855, appearing on behalf of the Department of Employment Relations.

Attorney John C. Dowling, Administrative Legal Services, University of Wisconsin-Madison, 500 Lincoln Drive, No. 361, Madison, Wisconsin 53706, appearing on behalf of the University of Wisconsin-Madison.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 16, 2000, the Teaching Assistants' Association, WFT/AFT Local 3220, AFL-CIO, filed a petition to clarify bargaining unit with the Wisconsin Employment Relations Commission asking that the Commission clarify the existing University of Wisconsin bargaining unit to include all practicum students at the University of Wisconsin-Madison.

On September 20, 2000, a pre-hearing conference was held at the Commission's offices at Madison, Wisconsin, with legal counsel for the Association, Department of Employment Relations and University of Wisconsin-Madison and Examiner David E. Shaw from the Commission's staff. At the pre-hearing conference, the parties agreed upon a stipulation of facts that serve as the factual basis for their respective arguments on the State's subsequent Motion to Dismiss, as well as a timetable for filing the motion and briefs.

On October 2, 2000, the stipulation of facts signed by the parties' representatives was submitted to the Commission.

On October 26, 2000, the State filed its Motion to Dismiss and brief in support of the motion arguing that practicum students are not employees within the meaning of Sec. 111.81(7)(b), Stats. On November 27, 2000, the Association filed its brief in opposition to the Motion to Dismiss. On December 14, 2000, the State filed its reply brief.

On February 1, 2001, pursuant to Sec. 227.45(2) and (3), Stats., the Commission advised the parties of its intent to take official notice of the parties' Collective Bargaining Agreement and certain documents relating to the legislative history of AB 55 (1985). No objection was received from the parties and the Commission hereby takes such notice.

Having reviewed the record, and being fully advised in the premises, the Commission hereby makes and issues the following

FINDINGS OF FACT

1. The Teaching Assistants' Association, WFT/AFT Local 3220, AFL-CIO, hereinafter the Petitioner, is a labor organization with its offices located at 306 North Brooks Street, Madison, Wisconsin 53715. At all times material herein, Petitioner has been the certified exclusive collective bargaining representative of employees in the bargaining unit consisting of "program, project and teaching assistants of the University of Wisconsin-Madison and the University of Wisconsin-Extension, as defined in Sec. 111.81, Stats."

2. The State of Wisconsin, hereinafter the State, is the employer. The Department of Employment Relations (DER) is the statutorily-designated representative of the State for the purposes of conducting labor relations involving state employees. DER has its offices located at 345 West Washington Avenue, Madison, Wisconsin 53707-7855.

3. University of Wisconsin faculty oversee the practicum students' instruction of undergraduate students in practicum courses.

4. The course work of practicums can include practicum students instructing undergraduate students.

5. Practicum students receive no monetary compensation for their instructional activities in practicum courses.

6. Practicum students receive three (3) credits for practicum courses.

7. Practicum students are charged for three credits of course work for practicum courses.

8. Practicum students are required to enroll in their respective practicum courses.

9. Practicum students receive a grade for their performance in practicum courses.

10. Practicum students do not receive tuition remission by virtue of being enrolled in practicum courses.

11. "Instructional activities" may include, but are not limited to: the preparation of and presentation of lectures given to undergraduates, leading undergraduate discussion sections, preparing and presenting laboratory demonstrations and preparing, administering and grading exams.

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

CONCLUSION OF LAW

The practicum students are not "employees" within the meaning of Sec. 111.81(7)(b), Stats.

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

ORDER

The State's Motion to Dismiss is hereby granted and the unit clarification petition of the Teaching Assistants' Association, WFT/AFT, Local 3220, AFL-CIO, is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Commissioner A. Henry Hempe did not participate.

**DEPARTMENT OF EMPLOYMENT RELATIONS
(TEACHING ASSISTANTS/UW-MADISON)**

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

Petitioner's unit clarification petition asks that the Commission include those graduate students enrolled in "teaching practicum" courses (practicum students) at the University of Wisconsin-Madison (University) in the collective bargaining unit consisting of the program, project and teaching assistants at the University of Wisconsin-Madison and the University of Wisconsin-Extension. Petitioner asserts in its petition that the practicum students are essentially performing the same duties as Teaching Assistants (TA's) and fit the statutory definition of the latter. The State thereafter indicated it would move to dismiss the petition on the basis that the Commission has no jurisdiction over practicum students because they are not "employees" within the meaning of the State Employment Labor Relations Act (SELRA). The parties reached a stipulation of facts set forth in Findings of Fact 3-11, and thereafter the State filed its Motion to Dismiss.

POSITIONS OF THE PARTIES

State

The State takes the position that the Commission does not have jurisdiction to entertain the petition in this matter on the basis that the "practicum students" which the Petitioner seeks to accrete are not "employees" under SELRA, and that therefore, the petition must be dismissed. In that regard, the State asserts that applicable statutes and case law make clear that receiving compensation for services and the existence of an employer-employee relationship are critical elements of being an "employee" or "employed by". Section 111.81(7)(b), Stats., defines "employee" as: "teaching assistants employed by the university of Wisconsin system. . ." (Emphasis in original). Even if the statutory definition of "teaching assistants" found in Sec. 111.81(19)(m), Stats., is used in place of "employee", the operative phrase continues to be "employed by. . ." in Sec. 111.81(7)(b), Stats. Section 111.825(2)(a), Stats., provides that "Collective bargaining units for employees in the unclassified service of the state shall be structured. . .for each of the following groups: (a) The program, project and teaching assistants of the university of Wisconsin-Madison and the university of Wisconsin-extension." Thus, a teaching assistant must be an "employee of" and "employed by" the University system.

To determine what constitutes being "employed by" or an "employee of", the Commission should refer to the following universally accepted definition of "employee":

> employee – a person who works for another in return for financial or other compensation
> The American Heritage Dictionary, Second College Edition,
> (Houghton-Mifflin Co. 1982) (Emphasis in original)

The universality of that definition, which has as its core element compensation for services, is demonstrated by numerous statutory definitions of the term, all of which define the phrase in terms of performance of services for pay. That commonly accepted definition is further confirmed by the statutory definitions dealing with State employees, e.g., Sec. 111.825(2), defining TA's as "employees" in the "unclassified service of the State", along with others. The State also asserts that the Commission can take administrative notice that all of those statutorily-cited unclassified employees are compensated for their services. The State also references Sec. 230.08(2)(k), Stats., which references TA's and defines the following as unclassified employees:

> "Persons employed by the university of Wisconsin system whose employment is a necessary part of their training, student assistants or hourly help as provided under s. 36.05(6)." (Emphasis in original).

That status places TA's under the Code of Ethics found in chapter ER-MRS 24, Wis. Adm. Code., which defines "employee" as ". . .any person who receives remuneration for services rendered to the State under an employer-employee relationship in the classified service or unclassified service of the State of Wisconsin. . ." ER-MRS 24.03(4), Wis. Adm. Code.

Section 111.81(7)(a), Stats., references Sec. 230.08, Stats. The administrative rules that apply to Chapter 230 similarly define "employee" as any person who receives remuneration for services rendered. There is no doubt that unclassified employees are compensated for their services, and they are covered by the compensation plan setting forth the "provisions governing the pay of all unclassified positions. . ." Sec. 230.12(1), Stats. Further, all categories of employees found in Secs. 111.81(7) and 111.825(1) and (2), Stats., are paid for their services.

As SELRA specifically addresses the State, as an employer, and its employees, definitions in SELRA of "employees" are most instructive. Whether an employee is classified or unclassified, the preceding definitions referring to "employment", "employed by" and "employee of" unanimously have as a core requirement that an individual is compensated for his/her services in an employer-employee relationship.

It is also useful to consider Commission rulings that have dealt with identical or similar words or provisions in other sections of Chapter 111, Stats. In the absence of a contrary intent, the Commission looks to and relies on definitions of the same or similar words found in other subchapters of Chapter 111. STATE V. WERC, 122 WIS. 2D 143 (1985); PAUL WRIGHT V. AFSCME COUNCIL 24 AND STATE OF WISCONSIN, ET AL., DEC. NO. 29448-C, 29495-C, 29496-C, 29497-C (WERC, 8/00).

Section 111.02(3), Stats., defines "employee" as

> . . .any person, other than an independent contractor, working for another for hire in the State of Wisconsin. . ." (Emphasis in original).

In GENERAL TEAMSTERS LOCAL NO. 563, DEC. NO. 21695 (WERC, 5/84), the Commission concluded with regard to the phrase "for hire" that, "Thus, some form of compensation is generally understood to be a necessary element in 'for hire' relationships." There is nothing to suggest that the definition of "employee" in subchapter I of Chapter 111 (WEPA) should have a different meaning than "employee" in SELRA. Therefore, an "employee" under SELRA is an individual who is compensated for his/her services.

The parties' Collective Bargaining Agreement is consistent with that universally accepted definition of "employee" and defines "employee" as:

> "a graduate student registered at the University, who is currently appointed as a teaching assistant, project assistant or program assistant." (Emphasis in original).

Further, "department" is defined as an "administrative unit which directly employs teaching. . . assistants" (Emphasis in original). Other provisions in the Agreement make it abundantly clear that the TA's are hired for and work a significant number of hours per academic semester. The Agreement also shows that TA's are paid for their services as a result of their appointments. Thus, the only conclusion that can be reached with regard to "employees of" the State or "employees employed by" the State is that the core elements are compensation for service and the existence of an employer-employee relationship.

The State concludes that under the undisputed facts, the practicum students are not "employees". To be an employee under SELRA, one must be employed by another, i.e. there must exist an employer-employee relationship and the individual must be compensated for his/her services. It is stipulated that the practicum students are not compensated for any instructional activities they render, are not financially assisted for any of those activities, and are not in an employer-employee relationship with the University system. Instead, the practicum students who enroll in the practicum course are charged graduate tuition for that course, and receive three credits and a grade for the course. This contrasts with the TA's,

who are compensated for their instructional services, do not receive credit for their services, receive tuition remission, and are in an employer-employee relationship with the University system. Practicum students are not "employees" of the State, and are not "employed by" the State as required by SELRA. Thus, the petition must be dismissed.

Petititioner

Petitioner takes the position that the individuals classified by the University as practicum students for the purposes of this litigation are "employees" as defined by SELRA. The issue in dispute is whether practicum students are "employed" by the University.

Petitioner notes that the term "employee" is defined in a variety of ways in a variety of State and federal statutes. When charged with determining whether an individual meets the definition of "employee" provided in the applicable statute, a judicial or quasi-judicial entity should first look to the definition provided in the applicable statute. U.S. v. PALUMBO BROTHERS, INC., 145 F.3D 850, 865 (7th Cir.), cert. denied, 525 U.S. 949, 142 L.ED. 2D 310, 119 S.Ct. 375 (1998). However, if the statutory definition is ambiguous or unhelpful, the entity must look beyond the statute. NATIONWIDE MUTUAL INSURANCE CO.V. DARDEN, 503 U.S. 318, 322, 117 L.ED. 2D 581, 112 S.Ct. 1344 (1992); SECRETARY OF LABOR V. LAURITZEN, 835 F.2D 1529, 1534, 1535 (7th Cir., 1987); STATE EX. REL. SHEETS V. FAY, 54 WIS. 2D 642, 646 (1972); VILLAGE OF PRENTICE V. INDUSTRIAL COMMISSION, 38 WIS. 2D 219, 223 (1968).

The applicable statute in this case is Sec. 111.81(7)(b), Stats., which defines "employee" for the purpose of SELRA to include "program, project or teaching assistants employed by the University of Wisconsin System. . ." Section 111.81(19)(m), Stats., defines "teaching assistant", and it is undisputed that the practicum students at issue satisfy that statutory definition. Thus, the sole issue is whether the practicum students are employed by the University.

Since the definition of "employee" in Section 111.81(7)(b), Stats., is nominal and does not helpfully define the term, the Commission must look beyond the statute. In DARDEN, SUPRA, the U.S. Supreme Court faced this same task of defining the term "employee" where the applicable statute, the Employee Retirement Security Act (ERISA), does not helpfully define it. Both SELRA and ERISA effectively define an "employee" as an individual employed by an employer. The Court found that definition completely circular and relied upon its earlier decision in a similar dispute, wherein it recognized the

> well-established principle that where Congress uses terms that have accumulated settled meaning under. . .the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning

> of these terms. . .In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.
>
> DARDEN, at 322-323, citing COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID, 490 U.S. 730, 104 L. ED. 2D 811, 109 S.Ct. 2166 (1989).

Applying this principle, the Court in DARDEN remanded the case to the Court of Appeals to apply the common-law agency doctrine as to the master-servant relationship. DARDEN, 503 U.S. at 328.

The Commission must similarly examine the practicum students' work in light of the common-law agency doctrine and the master-servant relationship. Accordingly, the criteria to be considered are: the University's right to control the manner in which the work is to be performed; the practicum students' opportunity for profit or loss depending upon their managerial skill; the duration of the relationship between the parties; whether the University has the right to assign additional projects to practicum students; the extent of the practicum students' discretion over when and how long to work; and the compensation for services rendered. DARDEN, 503 U.S. at 223; LAURITZEN, at 1534-1535. Based upon the stipulation of facts and the absence of evidence to the contrary, the Commission can presume that University faculty supervise and control practicum students in the various facets of their instructing undergraduate students. It can also be presumed that the supervising faculty reserve the right to assign additional assignments to the practicum students. Thus, with regard to the control over the practicum students exercised by the University, the relationship resembles that of master and servant. The duration of the relationship between the University and practicum students, as with T.A.'s, is short. An individual in one of these positions can only hold the position while enrolled in graduate school. Petitioner notes that TA's are considered to be employees of the University despite having the same brief schedule and relationship as do the practicum students.

As to the other factors to be considered in determining whether an employee-employer relationship exists, the employee's opportunity for profit or loss depending upon his/her managerial skill and the extent of the employee's discretion over when and how long to work are not addressed by the stipulation of facts. As the State has the burden of proof with respect to its Motion to Dismiss, and it did not present any evidence to demonstrate practicum students are not employees, the Commission must resolve the issue against the State. As practicum students suffer the control, direction and supervision of the faculty of the University while performing services for the University, they satisfy a majority of the factors required to be deemed an "employee" of the University.

Petitioner asserts that compensation for services rendered is not a mandatory factor for finding that an employer-employee relationship exists. Despite the State's assertion that compensation for services is dispositive in finding the existence of an employer-employee relationship, the Court noted in DARDEN that: "The common-law test contains no shorthand formula or magic phrase that can be applied to find the answer. . ." All of the incidents of the relationship must be assessed and weighed with no factor being decisive. DARDEN, 503 U.S. at 324; LAURITZEN, at 1535. Thus, the Commission must look beyond the fact the practicum students receive no monetary compensation for services they provide to the University. That is only one factor to be considered. Further, the State concedes that an employer-employee relationship may exist separately from the receipt of compensation for services rendered, as it claims in its brief that " . . . compensation for services and an employer-employee relationship are critical elements of 'employee' or 'employed by'". Having conceded that these are separate findings, the State must believe that compensation may not be necessary to conclude that an employer-employee relationship exists.

By preparing lessons, directing discussion groups, presenting laboratory demonstrations and administering examinations the practicum students provide a valuable benefit to the University. Without the practicum students, the University would have to rely upon and pay TA's or faculty members to complete those tasks. Thus, other than not receiving monetary compensation and related benefits for services they provide, practicum students satisfy the definition of "employee". However, it would be erroneous to say that practicum students receive no compensation for the services they provide. Practicum students do derive educational benefits and professional experience from instructing undergraduates. While practicum students do not receive monetary compensation for their instructional activities, that is what they are seeking to obtain through representation by Petitioner. Similar to the legislative attempts to define "employee", the State makes a circular argument that practicum students do not receive payment and are therefore not employees entitled to representation.

With regard to any argument that the student-teacher relationship precludes the finding of an employer-employee relationship, that sort of argument has been quashed by a recent decision of the Wisconsin Supreme Court in GIESE V. MONTGOMERY WARD, INC. 111 WIS. 2D 392 (1983). In that case, the Court was charged with deciding, *inter alia*, whether a son performing a service for his father created a master-servant relationship. The Court held that despite the existence of the father-son relationship between the individuals, an employment relationship could also be found. Just as the domestic relationship is not considered a factor in determining whether an employment relationship exists, the Court's decision suggests that the student-teacher relationship should not be a factor in determining whether an employment relationship exists. Thus, it is immaterial in this dispute that practicum students are performing work for credit and receive a grade for their performance. Petitioner likens the receipt of a grade to an employee's receiving an evaluation. Further, the University provides credit to many students for life experience and work experience in other settings.

While Wisconsin courts have not specifically addressed the employment relationship when a student-teacher relationship exists, the National Labor Relations Board (NLRB) recently addressed that issue in NEW YORK UNIVERSITY v. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Case 2, RC-22-0082 (October 31, 2000). The NLRB concluded in that case that teaching assistants' student-teacher relationships did not preclude the finding of an employment relationship with the University. Also, the TA's in the current bargaining unit are students as well as employees.

Petitioner asserts that the State's citations to other statutory definitions of "employee" in State statutes are not relevant to a determination in this case. The Petitioner does not dispute the existence of a large group of University and State employees who receive monetary compensation for their labor and that, accordingly, there is a significant amount of statutory authority directly affecting those individuals. However, other than pointing out the existence of other citations, the State has done nothing to demonstrate their relevance. The difference in the underlying purposes of SELRA and those other statutes makes the use of those other statutory definitions inappropriate and unpersuasive.

That is also true of the State's reliance on STATE v. WERC, SUPRA., PAUL WRIGHT, SUPRA., and GENERAL TEAMSTERS LOCAL NO. 563, SUPRA. In PAUL WRIGHT, the Commission concluded that as the language used in the two acts (MERA and SELRA) is identical, it would be "illogical" to apply different interpretations of the two statutes. This makes clear that the relevant language for that analysis is the actual definition of "employee", and not the mere use of the word itself. Since the legislature did not define "employee" identically in WEPA and SELRA, the interpretive aids cited in PAUL WRIGHT and STATE v. WERC are inapplicable.

Petitioner also concludes that the different definitions of "employee" in WEPA and SELRA evidence a "contrary intent" operative in the two acts. WEPA applies to individuals serving another in a "for hire" relationship, while SELRA applies to those "employed by" the State. These relationships have previously been distinguished in an arbitration of a dispute between these parties.

The State's citation of the Code of Ethics, as well as Secs. 111.81(7) and 111.825(1) and (2), Stats., are also misplaced. Those statutes address situations where the legislature and administrative agencies chose to specifically require compensation as necessary to coverage under those statutory and regulatory frameworks. The State has, however, failed to cite other statutory definitions of "employee", e.g., Secs. 101.58 and 111.32(5), Stats., which do not explicitly require there to be compensation paid for services rendered.

Most importantly, SELRA includes its own definition of "employee". Where a statute includes its own definition of a term, other statutory definitions of the same term are not as persuasive. STATE EX. REL. CITY CONSTRUCTION CO. V. KOTECKI, 156 WIS. 278 (1914). Thus, arguing that the definitions of "employee" in other State statutes require that employees be compensated for services in order to be covered under SELRA is not persuasive.

Petitioner asserts that if, as in this case, the plain language of the statute is ambiguous, it is appropriate to turn to the legislative history in order to ascertain legislative intent. HEMBERGER V. BITZER, 216 WIS. 2D 509, 517 (1998). In interpreting statutory language through the use of legislative history, courts often look to language that was proposed, but rejected by the legislature, as evidence of its intent to maintain the structure and effect of the language without the effect of the rejected proposal. RUNYON V. MCCRARY, 427 U.S. 160, 174 (1976). During the drafting of AB 55 (1985), the legislation ultimately codified in Sec. 111.81, Stats., the legislature considered limiting the definition of "employee" in SELRA. Assembly Amendment 8, was offered and proposed to specifically exclude from the definition of "employee" under Sec. 111.81(7), Stats., "graduate students who engage in teaching as a degree requirement. . ." By considering and rejecting the amendment, which would have excluded teaching assistants such as the current practicum students from the definition of "employee", the Assembly could not have given a clearer indication of its intent to include such individuals.

Last, Petitioner asserts that the University unsuccessfully raised this issue in a past arbitration. The threshold issue in the arbitration centered around the meaning of the word "employed". The Arbitrator concluded that, "'Employ' is variously defined in dictionaries to mean "to make use of; to use, to make use of the services of, to engage for work, to hire, the act of engaging of persons' services for compensation,", etc. The Arbitrator noted that the dictionary also lists the word "use" as a synonym for the word "employ". The Arbitrator concluded that to require payment for services rendered in order to find the existence of an employment relationship would limit the definition of the term and that there was no mutual understanding to so limit the meaning and application of the term. Similarly, there has been no evidence presented by the State that the legislature intended to limit the term "employed by" to only those TA's paid in return for their services. As noted above, by the rejection of the proposed amendment, the legislature made clear its intent not to limit covered employment relationships solely to those who are paid for their services. Further, the arbitration decision reaffirms the critical difference between "employed by" and "for hire". Petitioner concludes that the motion to dismiss must be denied.

State's Reply

The State asserts that Petitioner erroneously leaps to the conclusion that the phrase "employed by" is ambiguous. In order for an ambiguity to arise, the language must be capable

of being reasonably construed two different ways, and a court will look to determine whether a well-informed person should be confused as to the meaning. STATE EX. REL. GIROUARD V. CIRCUIT COURT OF JACKSON COUNTY, 155 WIS. 2D 148 (1990). The mere fact that parties interpret a statute differently does not itself create an ambiguity. HARNISCHFEGER CORP. V. LABOR AND INDUSTRY REVIEW COMMISSION, 196 WIS. 2D 650 (1995). In interpreting a statute, a court first examines the language and applies the ordinary and accepted meaning of the words without resort to rules of statutory construction. IN INTEREST OF A.E. 163 WIS. 2D 270, 274 (1991). The statutory meaning of a particular word or phrase is dependent upon the sense in which it is used as ascertained from the object of the statute. SMITH V. CITY OF WHITEWATER, 251 WIS. 313 (1947). In determining the meaning of a phrase or word in a statute, a court's analysis must be in light of the entire statute. STATE V. PHILLIPS, 99 WIS. 2D 46 (1980). If a court resorts to a dictionary definition of the word or phrase, and the word or phrase has two meanings, the meaning which best fits the subject matter and text of the statute is the meaning to be adopted. NORTHWESTERN IRON CO. V. INDUSTRIAL COMMISSION, 154 WIS. 97 (1913). While dictionary definitions are instructive in determining the common and approved meaning of statutory words or phrases, the appropriate meaning must be fitted to the context of the statute. GELENCSER V. INDUSTRIAL COMMISSION, 31 WIS. 2D 62 (1966).

Petitioner claims the phrase is ambiguous because it could mean either to make use of or utilize or to hire for compensation. The assertion that the phrase "employed by" really means "used by", is patently unreasonable, as it is not a "best fit" with the subject and text of the statute in issue. Petitioner ignores the fact that the phrase is found in Chapter 111, Employment Relations, and in particular, SELRA. The term "employment" in terms of labor relations, does not mean to "use" or to "utilize", it means "service for compensation". SELRA is about employers, employees, and labor representatives. The phrase "employed by" is immediately followed by the employer, i.e., the University of Wisconsin system. Under any definition, an "employer" is "one for whom employees work and who pays their wages or salaries." Black's Law Dictionary, Fifth Edition, (1979). That is why Sec. 111.81(7)(b), Stats., identifies the University of Wisconsin system as the employer of the TA's. Further support for this position is found throughout SELRA, including Sec. 111.80, Stats., "Declaration of Policy", which states: "The public policy of the State as to labor relations and collective bargaining in state employment . . ." (Emphasis in original). It is absurd to contend that "state employment" means "state use".

All of the employees in the different collective bargaining units listed in Secs. 111.825 (1) and (2), Stats., are compensated for their services, and all were compensated, including the TA's, prior to being represented by a union; in contrast to the practicum students, who have never been compensated for services. Even those types of employees excluded from the definition of "employee" are compensated for their services. Further, use of the phrase "affecting the employer-employee relationship" in Sec. 111.81(7)(b), Stats., reinforces the

conclusion that "employed by" means engaging a person's services for compensation. Thus, examined in the context of its surroundings, there is no doubt that "employed by" means "engaging a person's services for compensation."

Even if the phrase "employed by" is found to be ambiguous, when viewed in the context of its surroundings, it clearly entails compensation for services. If a statute is deemed ambiguous, the court must ascertain legislative intent from the language of the statute in relation to its context, subject matter, scope, history and object intended to be accomplished. KELLY COMPANY, INC., V. MARQUARDT, 172 WIS. 2D 234 (1992). When language of a statute is at issue, a court should consider the statute itself and related sections. CHERNETSKI V. AMERICAN FAMILY MUTUAL INSURANCE CO., 183 WIS. 2D 68 (Ct.App., 1994). Further, words and phrases in statutes are to be construed to give direct and reasonable meaning which conforms to the purpose of the statute. MILWAUKEE V. PSC, 259 WIS. 30 (1951). The use of similar words and phrases in other statutes which deal with employment are appropriate extrinsic aids and instructive in construing the statute. Thus, the State's earlier reference to other statutory and administrative rule definitions of "employee" is appropriate.

Another rule of statutory construction is that the meaning given a term must be reasonable and make sense. STATE V. BARNES, 127 WIS. 2D 34 (Ct.App., 1985). Petitioner's assertion that "employed" means "used by" or "utilized by", in the context of a statute and subchapter specifically dealing with employer-employee relations, is not only unreasonable, but absurd. Also, the phrase "employed by" is in the midst of a chapter and subchapter dealing with employers, employees, labor relations, employment, and terms and conditions of employment. Construing the phrase in the light of the object and subject matter of the entire statute, it is clear that "employed by" means compensation for services.

The State also disputes Petitioner's reliance on the decision in DARDEN, SUPRA, asserting that the Court did not state that there can be an employer-employee relationship without compensation. All the Court's statement stands for is that compensation is an element of the relationship. The State disputes the claim that it conceded there can be an employer-employee relationship without compensation. The State's position is that "employed by" involves an employer-employee relationship where the employee is compensated for his/her services. Petitioner's claim that practicum students receive compensation for the services they provide because of their opportunity to develop their skills, experience, etc., is contrary to the stipulated fact that they are not compensated. The argument also ignores the fact that the parties are dealing with a phrase found within SELRA, the subchapter dealing with employment and labor relations, and terms and conditions of employment, including wages. Practicum students can also be contrasted with TA's in the sense that the overwhelming emphasis in their enrolling in the course and instructing students for credits and grade is the educational experience they receive. They have no duties or responsibilities unless they enroll in the course, as opposed to TA's who enter into a contract to perform services for

compensation and whose duties arise because of the employer-employee relationship. "Compensation" means monetary compensation and the fact that the practicum students do not receive any distinguishes them from the TA's, and they are not "employees".

The State also disputes Petitioner's reliance on Sec. 101.58, Stats., asserting that Petitioner fails to cite other sections of Chapter 101, which make clear that when the term "employee" is considered in the context of those statutes, it is one who performs services for gain or profit, i.e. compensation.

The State also asserts that the GENERAL TEAMSTERS UNION LOCAL NO. 563, SUPRA, is valuable precedent. The Commission has held that even if provisions under SELRA and MERA are not identical, but rather, are "substantively identical", the precedent value of one subchapter will apply to that of the other. STATE V. WERC, SUPRA, 143; WSEU V. STATE OF WISCONSIN, DEC. NO. 28196-A (6/96); and WSEU V. STATE OF WISCONSIN, DEC. NO. 28961-A (12/98). Thus, it is appropriate to consider the statutes in subchapter I of Chapter 111, Stats. and the cases decided thereunder, as both subchapters I and V deal with the same subject matter, i.e employer-employee relationships and terms and conditions of employment. There is nothing in either subchapter which makes a substantive distinction between an "employee" under the respective subsections.

The State asserts that the legislative history cited by Petitioner also does not support a finding that "employed by" means "used by". Section 111.81(7)(b), Stats., specifically includes project assistants, program assistants and TA's and contains no reference to practicum students or research assistants, thus reflecting an intent that they are not "employees". There is nothing to indicate that the legislature intended a different definition of "employee" in SELRA, than in MERA or WEPA. Further, DER's March 1, 1985 fiscal estimate contained in the legislative history, indicates at paragraph 5(a), "TA's are hired to work . . ." and references the rate of pay earned. This makes clear that the TA's principal role is to help teach, consistent with "regularly-assigned teaching and related responsibilities" in Sec. 111.81(19)(m), Stats. Conversely, a practicum student's principal role is as a student, who as part of the coursework, instructs students. The State also questions why if practicum students are TA's or their equivalent, did it take the TA's 15 years to realize that was the case.

With regard to the arbitration award cited by Petitioner, the State asserts the award provides no guidance in this matter. The award involved the phrase "employed to", rather than "employed by", and dealt with a contractual, rather than a statutory, term. The phrase in issue in the award appeared only once, while the phrase in issue here appears many times in an environment dealing exclusively with the employer-employee relationship. The phrase "employed to" in the contract is followed by the TA's teaching responsibilities, while the phrase "employed by" in Sec. 111.81(7)(b), Stats., is followed by the name of the employer –

the University of Wisconsin system. Last, while it might make sense to construe "employed to" to mean "used to" in the contract, it makes no sense to construe "employed by" to mean "used by" in SELRA.

DISCUSSION

The State asserts that the petition to include the practicum students in the TA bargaining unit at UW-Madison and UW-Extension must be dismissed because the practicum students do not meet the statutory definition of "employee" under Sec. 111.81(7)(b), Stats., and therefore the Commission does not have jurisdiction over them. For the following reasons, we agree.

The applicable statute is Sec. 111.81(7)(b), Stats. In interpreting a statute, it is necessary to apply the rules of statutory construction. Our Supreme Court has summarized these rules as follows:

> The goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. . . To achieve this goal, we first resort to the plain language of the statute itself. . . In the absence of statutory definitions, the court construes all words according to their common and approved usage, which may be established by dictionary definitions. . . In addition, it is a basic rule of statutory construction that effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous. . . It is also a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided. . If the meaning of a statute is clear from its language, we are prohibited from looking beyond such language to ascertain its meaning. . .However, if a statute does not clearly set forth the legislative intent, we must look at the history, scope, context, subject matter, and object of the statute.
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> LAKE CITY CORP. V. CITY OF MEQUON, 207 WIS. 2D 155, 162-163 (1997), (citations omitted).

Looking first to the language of the statute, the statute provides its own definition of "employee" and therefore it would be inappropriate to initially rely on other definitions of the term, be they statutory or otherwise. Section 111.81(7)(b), Stats. defines "employee" to include:

> (b) Program, project or teaching assistants employed by the University of Wisconsin System, except supervisors, management employees and individuals who are privy to confidential matters affecting the employer-employee relationship.

As the parties have recognized, the key phrase is "employed by." The statute itself does not further define that phrase. The State asserts that the phrase "employed by" clearly means individuals whom the State pays in return for their services. Petitioner asserts the phrase explains nothing and is ambiguous. The dictionary provides several definitions for the term "employ":

> **1.** To make use of; use **2.** To keep busy or occupied; to take up the attention, time, etc. of; devote [to *employ* oneself in study] **3.** To provide work and pay for **4.** To engage the services or labor of for pay; hire – n. **1.** The state of being employed. Esp. for pay; paid service; employment. **2**. [Now Poet.] work or occupation – ***SYN***. see USE.
>
> Webster's New World Dictionary, Second College Edition (1970), p. 459.

In BEARD V. LEE ENTERPRISES, INC., 225 WIS. 2D 1 (1999), the Court concluded that,

> "A statutory provision is ambiguous if reasonable minds differ as to its meaning. SWEAT, 208 WIS. 2D at 416. "Ambiguity can be found in the words of the statutory provision itself, or by the words of the provision as they interact with and relate to other provisions in the statute and other statutes." Id. When construing a statute, the entire section and related sections are to be considered in its construction or interpretation. Id.; STATE V. CLAUSEN, 105 WIS. 2D 231, 244, 313 N.W.2d 819 (1982)."
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> (At pp. 10-11.)

In this case, the term "employed" can reasonably be interpreted to mean either "used to" provide such services or "hired" to provide such services for pay. Being susceptible of two meanings, we find the phrase "employed by" to be sufficiently ambiguous that it is necessary to look beyond the words of the statute to determine the legislature's intent as to who is to be included under Sec. 111.87(7)(b), Stats.

The question then is whether the legislature, in defining the term "employee" to include "Program, project or teaching assistants employed by the university of Wisconsin system. . .", intended to include any individuals who perform the same or similar duties performed by program, project, or teaching assistant, regardless of whether or not they are paid, or intended to include only those who are paid for perform such services. To answer that question, we turn first to the legislative history of Act 42, the 1985 law which amended SELRA to include program, project and teaching assistants under SELRA's coverage. The bill was introduced in the Assembly as Assembly Bill 55 (AB 55). The analysis of AB 55 by the Legislative Reference Bureau (LRB) includes, in relevant part, the following description of who would be included in SELRA's coverage under the bill:

> This bill extends the state employment labor relations act to cover graduate student assistants employed by the university of Wisconsin system, including teaching assistants, project assistants and program assistants. These persons perform paid teaching, research and other related academic responsibilities under the supervision of members of the UW faculty and academic staff. Excluded from coverage are research assistants (performing paid research for their own benefit in connection with a degree program), as well as management, supervisory and confidential employees.
>
> Under the bill, UW graduate students are expressly guaranteed the right of self-organization. Collective bargaining is expressly authorized and required with recognized or certified representative organizations in relation to specific subjects of bargaining. Mandatory subjects of bargaining include wage rates as related to general scheduled salary adjustments, fringe benefits, hours and conditions of employment. . .

In the Department of Employment Relations (DER) March 1, 1985 fiscal estimate of AB 55 at paragraph 5, a., DER states the following:

> a. A wide diversity exists between the types of Graduate Assistants' conditions of employment. While classified employes are subject to greater structuring of conditions of employment, certain Graduate Assistants have extremely unstructured conditions of employment. For example, the Teaching Assistant's role is to help teach, and they are hired to work up to 50% of full time. Usually a different rate of pay is earned by experienced TA's than those without experience. On the other hand, Project Assistants and Program Assistants have no limit on percent of time worked, and they are hired on different bases, such as an hourly rate for as long as it takes to complete a particular task that may be associated with the terms of a specific grant.

. . .

Evident in both the LRB's analysis and DER's fiscal estimate is the assumption that the subjects of AB 55 are those individuals paid by the University to provide such services. We cannot find anything in the legislative history to indicate that the assumption was unwarranted or erroneous or that the legislature disagreed.

Petitioner points to the rejection of Amendment 8 to AB 55 as evidence that the legislature did not intend to exclude practicum students. That amendment would have added as an exception in Sec. 111.81(7)(b) "graduate students who engage in teaching as a degree

requirement." The instructions for the drafting of that amendment read: "deny those students who must teach in order to earn their degree the right to join the collective bargaining unit." The rejection of Amendment 8 would indicate that the Assembly did not intend to exclude such graduate students from coverage solely because they were required to teach as part of their degree requirement and regardless of whether they were being paid to teach any courses. Rejection of the amendment does not, however, tell us the legislature's intent with regard to a graduate student who is enrolled in a practicum course and not being paid to teach or assist in that or any other class, i.e., the circumstances before us. 1/

1/ We would also note that it is not their student status that is the issue, i.e., the State is not claiming practicum students are excluded on that basis.

Next, we look at the scope and object of the statute and the context in which the phrase, "employed by" is used. Section 111.81(7)(b), Stats., is an attempt to define a class of employees covered by SELRA. SELRA was enacted by the legislature to protect and promote the interest of the public, the State's employees, and the State as the employer by, among other things, establishing certain rights and responsibilities in the employee management relationship in State employment. Sec. 111.80 Declaration of Policy, (1) and (2), Stats. In other words, SELRA deals with the employment relationship between the State and its employees. For the purposes of SELRA, it was necessary to delineate who among the State's "employees" would be covered by the Act, e.g., employees in the classified service of the State are included in the Act's coverage, while supervisory, managerial and limited-term employees are not. The delineation is between classes or types of employees of the State. The term "employee" is commonly defined as "a person who works for another in return for financial or other compensation." American Heritage Dictionary, New College Edition (1981), p. 428. See also, Webster's New World Dictionary, Second College Edition, SUPRA. There is nothing apparent in SELRA that would indicate an intent by the legislature to go beyond that common meaning in defining an "employee". Rather, it appears that common meaning was understood and the purpose of defining the term was to narrow the definition to certain classes of employees within that broad group of persons paid to work for the State.

It is true that the term "employee" has been defined differently at various times and in various statutes; however, as the examples offered by the parties illustrate, the manner in which it has been defined has depended upon the purpose for which it was being defined. The courts often turn to the common law agency doctrine to define the term "employee" where the legislature has not done so. However, in many of those instances, the fact that the person is being compensated for their work is assumed and the attempt is to determine whether the person hired is an "employee" or an "independent contractor." See e.g., NATIONWIDE MUTUAL INSURANCE CO., ET AL V. DARDEN, SUPRA, and the case upon which it relies,

COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID, 490 U.S. 730 (1989). The courts also often look to the common law agency doctrine and apply the criteria for determining whether a master-servant relationship exists. We would note that the test generally applied by the courts in order to determine if such a relationship exists assumes payment of compensation by the hiring party 2/ and that one of the criterion is "method of payment", not whether there is payment. DARDEN, SUPRA, 503 U.S. at 323, REID, SUPRA, 490 U.S. at 751.

2/ While it is possible for the master-servant relationship to exist without compensation, that situation most often arises in the context of determining liability for injuries caused to or by the alleged servant, a purpose not applicable under SELRA. RESTATEMENT AGENCY, 2D, Sec. 225.

Petitioner also cites a prior arbitration award involving these parties and a dispute as to the meaning of the word "employed" in the parties' 1979 Collective Bargaining Agreement. Regardless of whether we would agree with the arbitrator's reasoning, we note that the wording and the provision in dispute in that arbitration is no longer contained in the parties' Agreement. Further, the arbitration occurred prior to the passage of AB 55 and the definitions now contained in Sec. 111.81(7)(b), (15m) and (19m), Stats. Those definitions have since been incorporated into the parties' Agreement. More importantly, an arbitration award defining a contractual term ("employed to") provides little illumination on the legislature's intent in enacting a statute using a similar term ("employed by").

For the foregoing reasons, we conclude that the phrase "employed by the university of Wisconsin system" in Sec. 111.81(7)(b), Stats., is intended to include only those persons who are paid by the University of Wisconsin system to provide the services of a program, project or teaching assistant. While the practicum students may well provide such services in the course of completing the practicum courses in which they are enrolled, they do so for a grade and for credit toward their degree, and are not employed (hired and paid) by the State to provide such services. Thus, practicum students do not meet the definition of an "employee" within the meaning of Sec. 111.81(7)(b), Stats., and are not eligible to be included in Petitioner's bargaining unit. Therefore, we have granted the State's Motion to Dismiss and dismissed the petition.

Dated at Madison, Wisconsin this 28th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Commissioner A. Henry Hempe did not participate.
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