

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 WASHBURN EDUCATION ASSOCIATION : Case 26
 : No. 44243 ME-428
 : Decision No. 26780
 Involving Certain Employes of :
 :
 WASHBURN PUBLIC SCHOOLS :
 :

Appearances:

Weld, Riley, Prenn and Ricci, S.C., by Ms. Kathryn J. Prenn, 715 South
 Mr. Barry Delaney, Executive Director, Chequamegon United Teachers,

Barsto
 Route

FINDINGS OF FACT, CONCLUSION OF LAW
 AND ORDER

Washburn Education Association having on June 22, 1990 filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify a voluntarily-recognized existing professional bargaining unit to determine whether the position of Tutor should be included in said bargaining unit; and hearing in the matter having been held on August 2, 1990 in Washburn, Wisconsin before Examiner Edmond J. Bielarczyk, Jr., a member of the Commission's staff, during the course of which Chequamegon United Teachers intervened on behalf of a certified, non-professional bargaining unit; and a stenographic transcript of the proceedings having been prepared and received by the Examiner on September 5, 1990, and post-hearing arguments having been received by the Examiner on October 8, 1990; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Washburn Public Schools, hereinafter referred to as the Employer, is a municipal employer maintaining its principle offices at 309 West Fourth Street, Washburn, Wisconsin.

2. That Washburn Education Association, hereinafter referred to as the Association, is a labor organization maintaining its principle offices at Route 1, P.O. Box 1055, Hayward, Wisconsin; and that the Association is the voluntarily-recognized bargaining representative of a professional bargaining unit described in the 1988-1990 bargaining agreement between the Employer and the Association as:

all certified employes of the District engaged in teaching and/or on leave under Board approval including classroom teachers, librarians and guidance counselors, but excluding the following: 1. administrators and coordinators; 2. principals, supervisors and those department heads having evaluation responsibility over other staff members; 3. office, clerical, maintenance and operating employes, or aides; 4. certified personnel contracted through a secondary agency, such as CESA #1.

3. That Chequamegon United Teachers, hereinafter referred to as the Union, is a labor organization maintaining its offices at Route 1, P.O. Box 1055, Hayward, Wisconsin; and that the Union is the certified exclusive bargaining representative of a bargaining unit described in the 1988-1990 bargaining agreement between the Employer and the Union as:

all regular full-time and regular part-time non-certified employees of the School District of Washburn excluding supervisory, managerial and confidential employees as certified by the Wisconsin Employment Relations Commission.

4. That prior to the 1989-1990 school year, the Employer contracted with Cooperative Educational Service Agency No. 12, hereinafter referred to as CESA 12, for a Jobs Target Program (JTPA) Tutor; that a JTPA Tutor works with students having learning deficiencies in grades seven through twelve and has the following job description:

GENERAL: The position of tutor within the CESA #12 Agency is generally a part-time position during the school year. The tutor's job function is structured based upon the needs of under-achieving youth within the schools served by the Jobs Target Program. The general job duties and objectives of a tutor shall

focus on assisting students within the school districts to develop sufficient academic skills necessary to complete their assigned course work, as assigned to the student by the school's instructional staff.

SPECIFIC: To implement a successful tutoring program, tutors must cooperate closely with the student's instructors throughout the school year. Tutoring may be conducted either one-on-one or group basis, but shall provide the following instructional services for the student:

- Provision of study skills instruction including explanations of how to study for a course, how to study a text, how to study notes, etc.
- Review of course outlines and objectives, class assignments, etc.
- Checking student's work for errors and suggesting to the student ways to improve work.
- Assisting the student to identify major topics, concepts and kinds of information in the course which are important to understand the subject.
- Explain difficult concepts, methods, or information in the course.
- Assisting students to prepare for examinations and tests by utilizing techniques such as question and answer, drilling, practice sheets, and review.
- Giving students make-up exams and tests, basic skills assessments, and other test instruments or interest surveys as assigned by the instructor.
- Actively listening to student problems and referral of students to appropriate staff within the school system when problems are identified.
- Provide feedback and program reports to the classroom teacher and monitoring student progress in the regular classroom.
- Assuring that students assigned to the tutor are in regular attendance in the tutoring room and abide by the tutoring schedule.

LINE AND STAFF RESPONSIBILITIES: The tutor is directly responsible to the Jobs Target coordinator and building principal. However, all tutors must be in close contact with and cooperate with, the teaching staff of the school district concerning classroom assignments, homework, and testing.

CERTIFICATION REQUIREMENTS: Teacher certification is desired, but not necessary depending upon the specific assignment, number of students to be served, length of service, and content of curriculum. At a minimum, it is recommended that applicants for tutorial positions should possess a teacher's aide or substitute teacher's license or other license which would allow the applicant to work with students in a school building.

SALARY: Wages or salary are negotiated with the applicant, based upon each school's recommendations as it pertains to the school's contractual arrangement with its employees and the applicant's certification status.

5. That at the commencement of the 1989-1990 school year, Acting District Administrator Kenneth Kasinski determined that the number of hours CESA 12 was willing to contract with the Employer for a JTPA Tutor was insufficient to meet the Employer's needs; that Kasinski recommended to the Employer's School Board that the Employer directly hire a JTPA Tutor; that upon the School Board's approval, the JTPA Tutor position was created and posted; that on or about October 2, 1989, Kasinski hired Rodney Dymesich for the JTPA Tutor position; that when Kasinski interviewed Dymesich for said position, Kasinski was aware that CESA 12 had hired Dymesich to be the JTPA Tutor at Ashland School District and the Ondossagon School District; that Dymesich was informed by Kasinski he was to perform the same duties as he performed as the

JTPA Tutor at Ashland School District and Ondossagon School District; that Dymesich was hired for thirty-six (36) days at forty-five dollars (\$45.00) per day, and was scheduled to work primarily Fridays; that Dymesich, on several occasions, requested an individual contract and that on October 6, 1989 Kasinski gave Dymesich a contract for the 1989-1990 school year; that the contract signed by Dymesich is the same type of contract issued to teachers employed by the District and specifically identifies him as the JTPA Tutor; and that Dymesich is certified by the Wisconsin Department of Public Instruction as an Elementary Teacher, first through eighth grade.

6. That Dymesich met with seventh through twelveth grade students, either individually or in groups, to improve their skills in specific areas; that students were either referred to Dymesich by teachers or volunteered for tutoring; that Dymesich neither assigned grades to students nor did he develop any lesson plans; that Dymesich did develop mock tests for students to take, drilled students on facts, and reviewed educational material with students; that Dymesich's job required him to consult with teachers about student needs and appropriate tutorial service; that Dymesich generally chose not to consult with teachers about student needs and appropriate tutorial service; and, that for ninety-five (95) percent of the students tutored by Dymesich, he determined what materials would be used to tutor the student, evaluated the student's needs, and determined what methods he would use to tutor the student.

7. That at its August 20, 1990 School Board meeting, the Employer decided to contract with CESA 12 for the JTPA Tutor position for the 1990-1991 school year; and that the Employer does not presently employ a JTPA Tutor.

8. That the Employer contends, contrary to the Union and the Association, that because it no longer employs a JTPA Tutor, the question of whether the position of JTPA Tutor should be included in the bargaining unit represented by the Union or Association is moot; that if the Commission concludes the question is not moot, then Employer contends that the JTPA Tutor position is a non-professional position and should be included in the bargaining unit represented by the Union, while the Association claims that the JTPA Tutor position should be included in the professional bargaining unit represented by the Association because the JTPA Tutor position is filled by a certified employe engaged in teaching who was issued a teacher's contract.

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

CONCLUSION OF LAW

That since the Washburn Public Schools does not presently employ a JTPA Tutor, the question of whether such a position should be included in the bargaining unit represented by the Association or the Union is moot.

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

ORDER 1/

That the petition filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 8th day of February,
1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

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 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

(Footnote 1/ continues on page 5.)

(Footnote 1/ continues from page 4.)

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES:

Union/Association:

The Union/Association believes the petition is not rendered moot by the Employer's decision not to employ a Tutor during the 1990-1991 school year. The Union/Association argues the bargaining unit status of the JTPA Tutor position for the 1989-1990 school year should be resolved so that the following disputes can be determined retroactively: what should the wages for the position have been for the 1989-1990 school year, and did the incumbent of the position have transfer rights to any full-time vacant positions for the 1990-1991 school year. The Union/Association points out that wages and individual transfer rights differ between the two involved bargaining units. Consequently, the Union/Association argues, it is necessary to determine which unit the position belongs in and which labor organization has the legal responsibility to represent the incumbent for his service during the 1989-90 school year. The Union/Association also contends the issue is not moot because a Commission decision will identify which labor organization has the responsibility for: filing a prohibited practice complaint over the unilateral decision by the Employer to subcontract the position; and determining whether the subcontract violated an existing bargaining agreement.

As to the merits of the dispute, the Union/Association asserts the Tutor was a professional employe performing the same basic duties as a classroom teacher (i.e., evaluating student needs, selecting teaching materials, teaching students and evaluating their work.)

Employer:

The Employer contends that since it no longer employs a JTPA Tutor, the question of whether the position should be accreted to the bargaining unit represented by the Union or the Association is moot and should be left unanswered. The Employer believes that any ruling on the merits would be a disservice to the parties as such a decision would be speculative, particularly in light of the fact that the record is silent regarding when, if ever, the position will again be filled by the Employer and whether the position would again be assigned duties and responsibilities similar to those assigned during the 1989-1990 school year.

As to the merits of the dispute, the Employer argues that the Tutor was not a professional employe, noting that a degree is not required for the position and asserting that the work was not predominantly intellectual and varied and did not involve the consistent exercise of judgment or discretion. The Employer thus contends that the position would be properly placed in the non-professional unit represented by the Union.

DISCUSSION:

In a unit clarification proceeding, we determine whether an existing position should be included or excluded from an existing bargaining unit and thus obtain or lose union representation. As in election proceedings where a union's representative status begins or ends effective with our Certification of election results, 2/ the inclusion or exclusion of the position through a unit clarification takes effect with the date of our decision. Where we include a position in a unit, the parties then have a duty to bargain over the position's wages, hours and conditions of employment unless the parties' contract already covers same. Thus, provisions of any existing agreement do not apply to the position unless bargaining has or will produce such a result.

2/ See Sec. 111.70(3)(a)4, Stats. and Gateway VTAE, Dec. No. 20209-B (WERC, 8/84) aff'd 84-CV-1306 (Cir. Ct. Kenosha, 12/85).

Given the foregoing, where, as here, it is undisputed that the employe is no longer employed by the municipal employer, 3/ our decision would not have practical effect. Thus, we have dismissed the petition. 4/ Our dismissal should not be viewed as expressing any opinion on the outcome of any prohibited practice or grievance arbitration proceedings.

Dated at Madison, Wisconsin this 8th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

3/ Further, there is no basis for concluding that the District will employ such a Tutor in future years.

4/ We hereby deny the District's February 6, 1991 motion to reopen the record as the existing evidence provides a sufficient basis for us to resolve the dispute.