

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
ROYALL SCHOOL DISTRICT
Involving Certain Employees of
ROYALL SCHOOL DISTRICT

Case 19
No. 46831
ME-3192

Decision No. 27147-B

Appearances:

Gerald Roethel, Executive Director, Coulee Region United Educators, 2020 Caroline Street, LaCrosse, Wisconsin 54603, appearing on behalf of the Royall Educational Support Personnel Association.

Fred D. Hollenbeck, Attorney, Curran, Hollenbeck & Orton, S.C., 111 Oak Street, Mauston, Wisconsin 53948, appearing on behalf of the Royall School District.

**FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNIT**

On February 26, 2003, the Royall School District filed a unit clarification petition with the Wisconsin Employment Relations Commission by which it sought to have the Commission exclude the newly-created position of Director of Food Service from a bargaining unit of District employees represented by the Royall Educational Support Personnel Association, an affiliate of the Wisconsin Education Association Council.

No. 27147-B

Hearing in the matter was held in Elroy, Wisconsin on May 13, 2003 before Examiner Stuart Levitan, a member of the Commission's staff. The District, contrary to the Association, asserts the Director will be a supervisor. The parties filed written argument, the last of which was received July 21, 2003.

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

FINDINGS OF FACT

1. The Royall School District, hereafter the District, is a municipal employer with offices at 1501 Academy Street, Elroy, Wisconsin. At all times material hereto, Dr. Ken Brooks has been the District Administrator. The District operates three school buildings – an elementary school and a junior/senior high school in Elroy, and another elementary school in Kendall, approximately seven miles away.

2. The Royall Educational Support Personnel Association, hereafter the Association, is a labor organization with offices in care of the Coulee Region United Educators, Wisconsin Education Association Council, 2020 Caroline Street, La Crosse, Wisconsin.

3. As reflected in the 2000-2002 contract between the District and the Association, the Association is the exclusive collective bargaining representative for “all regular full-time and regular part-time educational support personnel, but excluding supervisory employees, confidential, managerial employees and professional employees as certified by the Wisconsin Employment Relations Commission on the 25th day of February, 1992, Case 19, No. 46831, ME-3192.”

That agreement also contains Article XIV, as follows:

The employer shall maintain job descriptions setting forth the job duties for all categories and classifications covered by this Agreement in accordance with the duties customary to such categories and classifications. The District reserves the right to determine any changes in job descriptions, and shall provide the Union with reasonable notice of same, subject to negotiations provided such change shall modify any working conditions which constitute mandatory subjects of bargaining. Upon request, copies of such job descriptions shall be made available to the employee(s).

4. Among its other services, the District provides about 400 lunches per day to its 680 students, prepared and served by cooks belonging to the bargaining unit identified in Finding of Fact 3. The lunches are prepared at the junior/senior high school in Elroy, then taken in a District van for delivery to the elementary schools. The District also provides about 30 breakfasts per day in each of its three school buildings, prepared and served by teachers and other staff, rather than the cooks.

Over the past three years, the District has operated its food service program at an annual deficit of about \$25,000.

As of January 2003, the District employed eight workers involved in food service, seven Cooks and one Head Cook. Pursuant to the collective bargaining agreement, the Head Cook is paid \$0.59 per hour more than a Cook, at any step on the wage schedule. In addition to food preparation, the Head Cook performs various administrative duties such as menu preparation, food ordering, applications for subsidies, and completion of paperwork. The Head Cook does not exercise significant supervisory authority. Because the Head Cook is a bargaining unit employee, duties such as hiring, disciplining and directing the food service employees fell to the Administrator.

Upon the death in January 2003 of the former incumbent Head Cook, Terri Brand, Cook Alice Leis assumed the position of interim Head Cook. After about two weeks in that position, Leis withdrew her application for permanent status in that position because she was frustrated with her lack of supervisory authority. On at least one occasion, when a Cook refused her direction to clean up a work area after food preparation, Leis had to call the Administrator to come to the kitchen, which then led to the Cook's compliance.

In the foregoing factual context, the District unsuccessfully sought the Association's agreement to convert the Head Cook to a non-unit supervisory position and then created the position of Director of Food Services to direct its food service operation and supervise the food service employees. If the position is found to be supervisory, the District would abolish the position of Head Cook and the interim Head Cook would return to a bargaining unit food service position.

In its February 26, 2003 unit clarification petition, the District stated:

In order to raise the level of performance of the workers in the cafeteria, the supervisor needs to be outside the union to supervise the people, rather than a colleague worker. The District needs the Director of Food Service to be supervisory in nature. The position will be managerial in administrative nature

because it will have budgetary responsibilities connected with it. Therefore, the school district is requesting that the position be moved outside the union.

5. By letter dated March 31, 2003, the Administrator advised the Commission as follows:

As a follow-up to your letter dated March 3, 2003, and based upon further discussion with the Royal School District Board of Education, I am enclosing a revised job description for the Director of Food Service. I am enclosing a revised job description for the Director of Food Service, adopted by the Board of Education at the March 24, 2003, board of education meeting.

The revised job description gives the Director of Food Service the authority to hire and fire employees within the Food Service.

In an attempt to move our cafeteria program ahead with greater supervisory and financial direction, now and into the future, the board feels strongly that this position must be moved outside the union, and be implemented as a managerial position.

If you have any questions or concerns, please feel free to contact my office.

The job description attached to the letter stated:

Reports To: Superintendent

Supervises: Cafeteria Staff

Job Goal:

- To provide each school child the opportunity to receive food of high nutritious quality in an atmosphere of cleanliness, cheerfulness and personal caring. To operate the lunch program in a business like manner and within the funds allocated.

Performance Responsibilities:

- Recruit, train and supervise all cafeteria personnel and make recommendations of their employment, transfer or release to the superintendent. Responsible to check with the superintendent on all issues dealing with federal and state law, local policy and litigation, if the supervisor has questions in these areas.

- Authority to hire and fire employees in the cafeteria program, in consultation with the District Administrator.
- Standardize personnel practices, levels of cleanliness, health and safety
- Administer personnel policies and evaluates cafeteria employees in conjunction with the superintendent of schools
- Operates a program of purchasing, particularly for high-volume items, such as bread, milk and canned goods
- Make application for government surplus commodities for cafeteria use and directs its use
- Standardize cafeteria accounting procedures in cooperation with the district business office, as to cause all monies to be deposited in appropriate accounts
- Make all applications for federal subsidies
- Review and evaluate all requests and recommendations for purchase of new and replacement equipment with the superintendent
- Plan and supervise the preparation and serving of menus
- Inspect school lunch facilities and operations to insure that standards of diet, cleanliness, health and safety are being maintained
- Make recommendations for prices charged to the superintendent for various type of lunches, including the price of milk
- Standardize as much as possible, the size of portions served as related to lunch type
- Check food shipment into the school, signing or causing to be signed invoices, only after each order has been verified.
- Record all food requisitions from the storeroom and record all meals served designating with or without milk
- Provide adequate supervision of staff in the dining area
- Keep patrons and the public informed of the menus and services offered by the school cafeteria and of the health and educational benefits gained by children through participation in the school lunch program.
- Keep up to date records and inventories necessary to operate an efficient and financially sound lunch program
- Oversee the locking of the storeroom and maintain a correct monthly inventory
- Perform all other functions and duties assigned by the superintendent of schools
- Maintain a positive attitude and professional demeanor when dealing with the public, as a member of the school staff
- Attend various training workshops as requested by the district administrator

Terms of Employment: Normal nine month school year. Wages and benefits are to be established in accordance to the recommendation submitted to the Board of Education by the District Administrator.

Evaluation: performance of this job will be evaluated annually in accordance with the provisions of the board's policy on evaluation of noncertified personnel.

Adopted: March 24, 2003

6. By letter dated May 6, 2003, the District advised the Commission as follows:

Based upon further information from our legal counsel, the Royall School District Board of Education reviewed this amended job description for the Director of Food Service position at a special board meeting on February 5, 2003. I am enclosing a revised job description for the Director of Food Service position, which was adopted by the Royall Board of Education at that meeting.

This amended job description gives the Director of Food Service the authority to solely hire and fire employees. The Director will also be part of the management team when bargaining with the support staff on salaries and terms of employment within the Food Service Program.

If you have any further questions or concerns, please feel free to contact my office.

The amended job description referred to in the May 6, 2003 letter is identical to the job description contained in Finding of Fact 5 except that the phrase "in consultation with the District Administrator" has been deleted from the statement "authority to hire and fire employees in the cafeteria program, in consultation with the District Administrator."

7. At the time of hearing, the District employed one interim Head Cook (Leis), five Cooks, and one long-term substitute Cook, for a total of seven food service employees.

8. The Director of Food Service position has supervisory duties and responsibilities in sufficient combination and degree to render the occupant a supervisor.

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

CONCLUSION OF LAW

The Director of Food Services will be a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore will not be a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER

The Director of Food Service will be excluded from the collective bargaining unit identified in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

ROYALL SCHOOL DISTRICT

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

DISCUSSION

The Association first argues that Article XIV of the parties' contract does not allow creation of a supervisory job unless the Association so agrees. It contends that the Commission ought not allow the District to accomplish through a unit clarification what the District could not accomplish at the bargaining table.

Assuming that Article XIV is applicable to the creation of a supervisory position, the record establishes that the parties did meet and negotiate regarding conversion of the Head Cook into a non-bargaining unit position but that no agreement was reached. The Association would have us conclude that Article XIV requires not only negotiation but also agreement before the District can proceed. Again, assuming Article XIV is applicable, there is no statement in Article XIV to the effect that the District cannot proceed absent Association consent. Thus, we do not find Article XIV to be a persuasive basis for refusing to consider the District's unit clarification petition.

The Association next contends that allowing the District to proceed is contrary to the Commission's long standing policy of requiring that parties honor their "deal" as to the composition of a bargaining unit. The Association asserts that the Head Cook has always been understood to be part of the bargaining unit and thus that the Commission ought not let the District use a unit clarification process to modify the "deal."

Where, as here, it is alleged in a unit clarification petition that a position cannot by law be included in the unit because the incumbent is not or will not be a "municipal employee" (i.e. is or will be a supervisor or a confidential, managerial or executive employee), the "deal is a deal" doctrine has never been a basis for not reaching the merits of the petition. See RIB LAKE SCHOOLS, DEC. NO. 29625-B (WERC, 7/00). Thus, we reject this Association argument as well.

The Association also challenges the District's action as being "economically flawed," in that it is "simply ludicrous" for the District to expect to address its deficit in the food service operation by hiring a new supervisor. Whether or not there is economic wisdom to the District's actions, of course, does not affect our determination of whether the subject position meets the test of a statutory exclusion; the wisdom of a management policy is a matter properly entrusted to the school board and the electorate.

Because the position has not yet been filled, the Association lastly argues that we should discount all testimony and evidence about prospective duties of the Director. However, based on the credible documentary and testimonial evidence presented as to the need for and the authority of the new position, we conclude we can reasonably proceed to determine whether the Director will be a supervisor. As we explained in light of a similar argument in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 17009-F (WERC, 4/01):

Section 111.70(1)(o)1, Stats., speaks in terms of the “authority” of an individual to act or effectively recommend action. The statute does not require that the actual exercise of authority to be established before an employee can qualify as a supervisor. Thus, our analysis focuses on whether an individual has the authority to take or effectively recommend action. Clearly, evidence as to the actual exercise of that authority provides conclusive support for the existence of the authority itself. Similarly, where the authority is not exercised in a relevant fact situation, the asserted existence of the authority is substantially if not critically undermined. However, where there has been no occasion to exercise the authority in question, it does not follow that the authority does not exist. Rather, in the absence of factual scenarios in which the existence of authority can definitively be tested, we evaluate the existing evidence presented as to the authority of the individuals in question and make a determination. . . CITY OF MILWAUKEE, DEC. NO. 17741-B (WERC, 1/91); TOWN OF MADISON, DEC. NO. 27784-B (WERC, 8/97). If a fact situation subsequently arises that calls into question whether the authority exists, the matter can be raised again by a party.

Given all of the foregoing, we now turn to an analysis of whether the Director will be a supervisor.

Section 111.70(1)(o)1, Stats. defines a "supervisor" in pertinent part as:

. . .any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When evaluating a claim of supervisory status under Sec. 111.70(1)(o)1, Stats., we consider the following factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised, and the number of persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employees;
5. Whether the supervisor is supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97).

Not all of the above-quoted factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor. WALWORTH COUNTY, DEC. NO. 29378 (WERC, 5/98).

As to Factors 1 and 2, based on the position description attached to the District's May 6, 2003 letter, and the sworn testimony of the Administrator regarding the context in which the position was created and the authority the incumbent in the position will have, we

are satisfied the Director will have the authority to effectively recommend the hiring 1/ and disciplining of food service employees and have the clear authority to assign and direct the work of these seven employees.

1/ The Association argues with some forcefulness that the Administrator testified it would be he, not the new Director, who would interview and hire Cooks. Indeed, the transcript, pages 56-59, can certainly be read to support that conclusion. However, we are persuaded that, as the District's attorney stated at the time, the Administrator simply did not understand the Examiner's question. The Examiner was asking about the hiring of Cooks; the Administrator, however, thought that the question was about how the Director would be hired, and so his answer assigned the supervisory role to himself. Based on the Administrator's subsequent testimony, we are persuaded that it is the Director who will effectively hire the Cooks.

As to Factor 3, because the Director reports directly to the Administrator, the Administrator also has supervisory authority over the seven food service employees, but it is clearly contemplated that that authority will not be exercised on a daily basis.

As to Factor 4, the District hopes to hire a Director of Food Services for about \$12.50 per hour, or about \$2.50 per hour more than the Head Cook was paid under the 2001-2002 wage rate. The Association contends that even without any supervisory responsibilities, the District will not be able to hire an individual with an Associate's degree for that wage rate. Whether or not the District is correct about the market for such a position only time will tell; however, we conclude that the substantially higher pay is intended, in large part, to compensate the Director for the new supervisory duties.

As to Factors 5-7, the Association is correct in asserting that the Director will perform many of the same food service duties as the Cooks and will spend a majority of his/her time doing so. During that time, however, we are persuaded that the incumbent will also be engaged in ongoing and independent supervision of the employees and using independent judgment when doing so.

Considering all of the evidence and particularly in light of the Director's authority to hire and discipline and independently direct food service employees, we conclude the Director will be a supervisor.

There is ample WERC precedent to support our conclusion. In WATERTOWN SCHOOL DISTRICT (FOOD SERVICE), DEC. NO. 29694 (WERC, 8/99), we found a Cook Manager who evaluated nine employees, effectively recommended the hiring of two substitutes as permanent workers, verbally reprimanded employees, and independently authorized overtime to be a supervisor, even though she spent a substantial amount of her time cooking and serving and

was not paid at a level reflecting her supervisory status. In SCHOOL DISTRICT OF RIB LAKE, DEC. NO. 29625-B (WERC, 7/00), we found a Head Cook who had substantial authority to direct the work of five food service employees, authority to issue verbal reprimands, effective authority to recommend new hires, spent a substantial amount of time performing bargaining unit work and was paid \$.75 per hour more than other food service employees to be a supervisor.

We believe these cases support our determination of supervisory status in this proceeding, in contrast to cases where we found similarly-situated positions to be non-supervisory, including WINTER JOINT SCHOOL DISTRICT, DEC. No. 16467 (WERC, 7/78), where the Head Cook lacked authority to hire, evaluate and discipline employees; LACROSSE AREA JOINT SCHOOL DISTRICT NO. 5, DEC. No. 14653 (WERC, 5/76), wherein the role of the Building Principal in hiring, discipline and hours of employees established that Cook Supervisors and Head Cooks were not supervisory; GERMANTOWN AREA SCHOOLS, DEC. NO. 14762 (WERC, 7/86), where the role of the Principals established they were the supervisors, and not the Head Cooks; SCHOOL DISTRICT OF DRUMMOND, DEC. NO. 16614 (WERC, 10/78), where the Head Cooks did not effectively recommend the hiring or discipline of employees, and NORTHWOOD SCHOOL DISTRICT, DEC. NO. 20022 (WERC, 10/82), where the Head Cook did not hire, fire, discipline, promote or transfer employees, or effectively recommend such actions.

Given all of the foregoing, we conclude that the Director will be a supervisor. If it proves to be the case that the Director does not in fact have supervisory authority, the Association can file a unit clarification petition seeking the Director's inclusion in the unit.

Dated at Madison, Wisconsin, this 17th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

