

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of  
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO  
Involving Certain Employees of  
OREGON SCHOOL DISTRICT

Case 21  
No. 52109 ME-749  
Decision No. 28110-B

Appearances:

Mr. Michael Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Douglas E. Witte, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the District.

ORDER DENYING MOTION TO DISMISS

On January 23, 1995, Wisconsin Council 40, AFSCME, AFL-CIO (herein the Union) filed a petition for unit clarification with the Wisconsin Employment Relations Commission, asking that five positions (four Secretary positions and one Printer position) be included in a bargaining unit of certain secretarial employees employed by the Oregon School District. Dennis P. McGilligan, a member of the Commission's staff, was assigned as Examiner in the matter on February 7, 1995. On February 21, 1995, the Union filed a pre-hearing brief in support of its petition for unit clarification. On March 28, 1995, the District filed with the Commission a Motion to Dismiss the petition, a brief in support of the Motion to Dismiss the unit clarification petition, and an Affidavit of Douglas E. Witte. The parties completed their briefing of the Motion on April 24, 1995. The Commission has considered the matter and concluded the Motion to Dismiss should be denied.

NOW, THEREFORE, it is

No. 28110-B

ORDERED

The Motion to Dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin,  
this 11th day of August, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/  
Herman Torosian, Commissioner

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

Oregon School District

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

Background and Positions of the Parties

The Union filed the instant unit clarification petition asserting that the Secretary to the Director of Instruction, the Secretary in the District Office, the Secretary to Jan Bonsett-Veal and the High School Secretary, along with the District's Printer should be included in an existing certified bargaining unit consisting of "all regular full-time and regular part-time secretarial employes of the Oregon School District, excluding supervisory, managerial, confidential, casual and all other employes." 1/ Thereafter, the District filed a Motion to Dismiss the petition as to the four secretaries "who were specifically excluded as confidential and/or supervisors by agreement of the parties via stipulation in June 1994" as part of the election proceeding noted in footnote 1 below. The District believes the Union should be estopped from attempting to include the four individuals it specifically agreed to exclude a short time earlier because the Union acted in bad faith, and never had any intention of honoring its prior agreement. The District also argues that the Commission should re-examine its policy of not forcing parties to abide by stipulations regarding the so-called statutory exemptions (thus honoring its general policy that in a unit clarification proceeding, the Commission will not alter the voluntarily agreed upon composition of a bargaining unit over the objection of one of the parties to said agreement) in order to protect employes in the exercise of their rights under the Municipal Employment Relations Act to decide for themselves if they want to be represented. The Union, on the other hand, argues that it did not act improperly when it stipulated to said employes' exclusion as confidential employes as proposed by the District during the prior election proceeding. The Union also argues that its unit clarification petition is consistent with the Commission's case law.

Discussion

The Commission has held that where the parties have agreed to include or exclude certain positions from a collective bargaining unit, it will honor that agreement and will not allow a party to the agreement to pursue alteration of the bargaining unit's scope through a unit clarification petition unless:

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1/ Oregon School District, Dec. No. 28110-A (WERC, 9/94).

1. The position(s) in dispute did not exist at the time of the agreement; or
2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, managerial or executive (the so-called "statutory exemptions"); or
3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; or
4. The existing unit is repugnant to the Act. 2/

Thus, as reflected in (2.) above, existing Commission precedent allows either the Union or the District to litigate whether employees included in the existing unit by the parties' agreement should now be excluded as supervisors, confidential, managerial or executive employees or whether employees excluded from the existing unit by the parties' agreement as supervisors, confidential, managerial or executive employees should now be included in the unit.

Asserting our precedent has "no basis in law or policy," the District asks that we re-examine that precedent and make appropriate changes.

We have reviewed our precedent and find ample support for its continued existence.

The Municipal Employment Relations Act gives certain rights to "municipal employees" as defined in Sec. 111.70(1)(i), Stats. 3/ We have the statutory jurisdiction to determine whether

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2/ Edgerton School District, Dec. No. 18856-A (WERC, 5/90); City of Sheboygan, Dec. No. 7378-A (WERC, 5/89); see generally City of Cudahy, Dec. No. 12997 (WERC, 9/74); Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76); West Allis-West Milwaukee Schools, Dec. No. 16405 (WERC, 1/89).

3/ Section 111.70(1)(i), Stats., defines a "municipal employe" as "any individual employed by

individuals are or are not "municipal employes." Because this determination is such a critical one in terms of an individual's rights or lack thereof under the Municipal Employment Relations Act, we have been and continue to be available to resolve disputes as to an individual's "municipal employe" status. Thus, while we are generally willing to allow unions and

employers to voluntarily agree to the "municipal employe" status (or lack thereof) of employes, we are not willing to cede our ultimate jurisdiction and statutory responsibility to any such agreement. Put another way, if the parties choose to agree on the "municipal employe" status (or lack thereof) of certain employes in an election proceeding, we do not insist that we nonetheless will independently determine the employes' status. However, both parties to any such agreement know that we stand ready to decide such issues anytime either of them ask us to assert our jurisdiction. Our forbearance where no one is asking us to assert our jurisdiction does not provide a persuasive basis for us to refuse to exercise our jurisdiction over this critical issue when we are asked to assert same.

Given the foregoing we have denied the Motion to Dismiss. In our ultimate decision on the status of the disputed employes, we may comment further if we think it appropriate.

Dated at Madison, Wisconsin this 11th day of August, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/  
Herman Torosian, Commissioner

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

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a municipal employer other than an independent contractor, supervisor or confidential, managerial or executive employe."

