

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**RACINE EDUCATION ASSOCIATION**  
Involving Certain Employees of  
**RACINE UNIFIED SCHOOL DISTRICT**

Case 168  
No. 55820  
ME-3640

**Decision No. 29450**

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Appearances:

Weber & Cafferty, S.C., by **Attorney Robert K. Weber**, 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Douglas Witte**, 119 Martin Luther King Jr., Boulevard, Suite 600, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DIRECTION OF ELECTION**

On November 24, 1997 and May 8, 1998, the Racine Education Association (REA) submitted a petition and an amended petition, respectively, to the Wisconsin Employment Relations Commission seeking a representation election in a bargaining unit of substitute teachers employed by the Racine Unified School District.

The parties agree that the appropriate bargaining unit consists of all substitute teachers, but disagree as to how eligibility to vote should be established.

A hearing in the matter was scheduled for June 25, 1998, in Racine, Wisconsin. Due to a miscommunication, the Association did not appear at the hearing, but was

afforded the opportunity to supplement or object to the record, which it declined to do. The parties agreed to submit the issue on documentary evidence and briefs. The Association submitted written arguments on July 17 and August 24, 1998; the District submitted written arguments on August 14 and August 26, 1998.

The Commission, being fully advised in the premises, hereby makes and issues the following

### **FINDINGS OF FACT**

1. The Racine Education Association, herein the Association, is a labor organization with offices at 1201 West Boulevard, Racine, Wisconsin.

2. The Racine Unified School District, herein the District, is a municipal employer engaged in the operation of a public school system with offices at 2220 Northwestern Avenue, Racine, Wisconsin.

3. Substitute teachers in the Racine Unified School District are able to place restrictions on what assignments they will accept without loss of employment eligibility. These restrictions can include the refusal to accept assignments based on day, time, subject, administrator, or building. Substitute teachers generally inform the central administration of their restrictions, but such advance notice is not required.

4. Records prepared for this proceeding indicate, as of June 30, 1998, the following:

Total Number of Active Substitute Teachers	273
Teachers Working Less than 10 days 1997-98	80
Teachers Explicitly Placing Restrictions on Availability	77
Teachers Implicitly Placing Restrictions on Availability	55
Teachers Working 10 Days or More 1997-98	193 (70.7% of 273)
Teachers Working 10 Days or More 1997-98, Without Explicit Restrictions	116 (42.5% of 273)

Teachers Working 10 Days or More 1997-98, Without Either Explicit or  
Implicit Restrictions 61 (22.3% of 273)

5. Substitute teachers who taught ten (10) or more days in the 1997-1998 school year have sufficient interest in wages, hours and conditions of employment to be found eligible to vote in the election directed below.

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

### **CONCLUSIONS OF LAW**

1. A question concerning representation exists within the following collective bargaining unit deemed appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats.:

All substitute teachers employed by the Racine Unified School District excluding supervisors and confidential, managerial or executive employees.

2. To ensure that the vote is representative of the choice of the largest possible number of substitutes without including individuals with insufficient interest in wages, hours and conditions of employment, only those substitute teachers who taught at least ten (10) days during the 1997-98 school year are eligible to vote in the election directed below.

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

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five days from the date of this Direction in the voting group consisting of all substitute teachers of the Racine Unified School District excluding supervisors and confidential, managerial and executive employees who were employed on September 24, 1998, and who worked at least ten (10) days during the 1997-1998 school year, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose

of determining whether a majority of said employees voting desire to be represented by the Racine Education Association for purposes of collective bargaining with the Racine Unified School District on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin this 24<sup>th</sup> day of September, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**RACINE SCHOOL DISTRICT**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DIRECTION OF ELECTION**

**POSITIONS OF THE PARTIES**

**Initial Briefs**

**The Association**

The Association desires to exclude from voting eligibility those substitute teachers who have restricted their hours and working conditions by refusing to work on certain days, at certain schools, in certain classes or for certain administrators. The Association claims that substitute teachers who have articulated an interest in maintaining an exclusive workplace, avoiding common supervision and limiting their hours of employment do not have a sufficient community of interest with other substitutes to be eligible to vote.

The Association argues that the District's call-in practice evidences the fact that certain employees do not have a commonality of interest with the majority. The inclusion of individuals who have predetermined schedules and work sites will simply cause such individuals to opt out of District employment when the Association bargains uniform transfer rights, work site assignment and schedule language into a contract.

**The District**

The District argues that all substitute teachers who work at least ten (10) days demonstrate sufficient commonality of interest to be eligible to vote in the representation election. The District asserts that such an eligibility standard would be consistent with prior Commission decisions which favored having the largest possible number of substitute teachers deemed eligible to vote, consistent with the requirement for sufficient interest with regard to wages, hours and conditions of employment.

Analyzing the records of substitute teacher work histories and assignment requests, the District states that using the criterion previously approved by the Commission – ten days work to set voting eligibility – would result in 70.7% of the substitutes so eligible. Using the more restrictive standards as proposed by the Association, the District states, would leave no more than only 42.5%, and possibly as few as 22.3% of the active substitutes eligible to vote. Thus, the District states, the

Association's proposed eligibility criteria impose far too great a restriction on the employees' right to determine whether they want to be represented and does not permit voting by the largest possible number of substitute teachers with sufficient interest.

The proposed criterion also fails to acknowledge that, notwithstanding any limitation on assignment, all substitutes who meet the ten day threshold still do have similar shifts, duties, wages, hours and working conditions.

The District states that the Association has failed to show how its voting eligibility proposal is a reasonable interpretation of the Municipal Employment Relations Act (MERA), or that it will further the interests of MERA; rather, the only known result of that proposal is disenfranchising a significant number of substitute teachers. The District believes its proposed eligibility criterion allows the greatest number of substitutes to vote, while still meeting the requirements that they have some employment interest with the District.

### **Reply Briefs**

#### **The Association**

The Association acknowledges that the appropriate bargaining unit would consist of all substitute teachers, and any implications or statement to the contrary in its initial brief should be disregarded. The Association also asserts that, because of the probability that substitutes who have placed restrictions on their assignment will opt out of a unit which does not allow them to engage in individual bargaining, such employees should be excluded from the voting group at the outset.

The District's only argument of substance is that exclusion of individuals who have expressed interests inimical to the bargaining unit as a whole will reduce the voter eligibility. The Association notes, however, that the 42.5% eligibility figure which the District asserts would result is close to the 53.1% figure approved by the Commission in a prior case involving these parties. The Association believes that the commonality of interest considerations (or lack thereof) outweigh the minimal percentage differences that would exist if certain teachers are excluded from the election process.

#### **The District**

Contrary to the Association, the District contends that there is an enormous difference in the percentage of eligible voters between its proposed voting group and that of the Association. The District states that the Association's proposed group would

consist of no more than 42.5% of the full bargaining unit, and possibly as few as 22.3% of the total unit membership. The District submits that any criteria which result in less than 50% of a bargaining unit being eligible to vote is too restrictive.

Further, the District states, the Association's restrictions would only apply to substitute teachers who had been forthright in stating a restriction, but would not affect those who applied, but did not publicize, such restrictions.

The District believes the Association's proposed criteria will not result in the largest possible number of substitute teachers being deemed eligible to vote consistent with the requirement that they have a sufficient interest in wages, hours and working conditions. Therefore, the District states, the Commission should determine that only those teachers who have taught fewer than ten days in the most recent school year should be excluded from voting.

### **DISCUSSION**

Issues regarding representation of substitute teachers have been before the Commission on several occasions over the years.

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 8901 (WERC, 2/69), the union sought to represent a bargaining unit of "all regularly employed substitute teachers." We held that substitutes were not independent contractors, but rather municipal employees. We then faced the "problem ... of defining the sufficiency of the interest which will permit an employee" to be included in the "regularly" employed unit and to vote in the representation election. It was our judgment, under all the circumstances, that 30 days of teaching in the school year established "a fair measure of the interest which should be required" to be included in the unit and to become eligible to vote in a representation election.

We maintained the 30-day eligibility threshold for unit inclusion and voting eligibility in JOINT SCHOOL DISTRICT NO. 6, CITY OF MADISON, ET AL., DEC. NO. 12747 (WERC, 6/74); JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, ET AL., DEC. NO. 13734-B, 13781-A (WERC, 9/75).

In KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, DEC. NO. 14908 (WERC, 9/76), we concluded that all substitute teachers should be included in the unit but that "only those substitute teachers who meet some minimal standards of prior and present employment status" should be allowed to vote.

In KENOSHA, we determined that “the largest possible number of substitute teachers should be deemed eligible to vote consistent with the requirement that they have sufficient interest in wages, hours and working conditions.” In that case, we calculated that applying a 30-day rule would leave 58.7% of the prospective bargaining unit eligible; a 20-day rule would leave 67.4% eligible, and a ten-day rule would make 75.5% of the prospective bargaining unit eligible. On those facts, the Commission concluded that, “in order to insure that the vote is representative of the wishes of the substitute teachers,” a ten-day rule was appropriate.

The Commission explicitly rejected establishing a fixed rule, preferring to decide voting eligibility among substitute teachers on a case-by-case basis, with the 75 per-cent and ten-day factors as “guides to our decision making process and not as absolutes.”

In 1984, in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 21690 (WERC, 5/84), we used the 10-day eligibility rule for voting eligibility in a proposed unit of all substitute teachers which produced eligibility of roughly 53% or 65% of the unit, depending on whether the Association’s or District’s records were correct.

Here, the parties agree that all substitutes should be included in the bargaining unit but disagree as to who should be eligible to vote.

In the case now before us, we conclude the District’s 10-day standard provides a more appropriate voting group. The Association’s proposed voting group would allow no more than 116, or 42.5% of the 273 substitute teachers to vote. Thus, even if every eligible voter supported representation, that would still represent less than half of the total unit. And depending on how tightly the Association’s definitions were applied, the voting group could be as small as 61, or 22.3% of the bargaining unit. Thus, depending on turnout, a voting bloc of as few as two dozen could determine the representational status for a unit of almost 300.

In contrast, the District’s voting group of substitutes who have taught 10 or more days consists of 193 voters, or 70.7% of the potential total unit. Clearly, the District’s group is more in keeping with our need to determine “the largest possible number of substitute teachers should be deemed eligible to vote consistent with the requirement that they have sufficient interest in wages, hours and working conditions.” Accordingly, we have directed an election for this voting group.



In reaching this conclusion, we have considered the Association's view that an eligibility standard based solely on the number of days of employment is an inadequate measure of whether a substitute teacher has a "sufficient interest in wages, hours and working conditions" to be eligible to vote. Assuming *arguendo* that there may be additional ways to measure an employee's "sufficient interest" other than how often the employee has worked, we do not concur with the Association's view that employees who chose to restrict the assignments they will accept from the District have demonstrated an insufficient interest in their wages, hours and working conditions to be eligible to vote. First and most important, there is no evidence in the record to support such a proposition. Second, to the extent the Association suggests that such employees are less likely to support the Association because they prefer "individual bargaining", such a suggestion is an irrelevant consideration when considering eligibility standards. The question for us is do employees have a sufficient stake in their wages, hours and conditions of employment – not how will they likely vote. Thus, even if the Association's proposed additional eligibility criterion did not have the effect of unacceptably restricting the number of employees eligible to vote, we would not adopt same.

Given all of the foregoing, we are satisfied that the 10-day eligibility standard is appropriate in this case and we have directed an election using this standard.

Dated at Madison, Wisconsin this 24<sup>th</sup> day of September, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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B. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

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