

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**TEACHING ASSISTANTS ASSOCIATION,
LOCAL 3220 OF THE WISCONSIN FEDERATION OF
TEACHERS, AFT**

Involving Certain Employees of

**STATE OF WISCONSIN,
UNIVERSITY OF WISCONSIN-MADISON**

Case 647
No. 63867
SE(u/c)-21

Decision No. 31007-A

Appearances:

Aaron N. Halstead and **Kathleen M. Lounsbury**, Shneidman, Hawks & Ehlke, S.C., 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Teachings Assistants Association, Local 3220 of the Wisconsin Federation of Teachers, AFT.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, University of Wisconsin-Madison.

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

On July 30, 2004, Examiner David E. Shaw issued Proposed Findings of Fact, Conclusions of Law and Order in this matter, concluding that the position held by graduate student Thomas Pedroni during the relevant period of time was not a Project Assistant (PA) position within the statutory or contractual scope of the bargaining unit of State of Wisconsin

Dec. No. 31007-A

Wisconsin/University of Wisconsin-Madison's (University's) employees represented by the Teaching Assistants Association, Local 3220 of the Wisconsin Federation of Teachers, AFT (TAA). 1/ On August 19, 2004, the TAA filed timely objections to the Examiner's proposed decision, followed by written arguments from both parties, the last of which was received on November 1, 2004, at which time the record was closed.

1/ On October 1, 2002, the TAA had filed an unfair labor practices complaint alleging that the University had unlawfully refused to arbitrate a grievance that the TAA had filed on behalf of Mr. Pedroni challenging his termination from employment. The University had countered that complaint with a claim that it had no duty to arbitrate the grievance because it disputed Mr. Pedroni's bargaining unit status and the TAA had not complied with the contractual requirement that it pursue a unit clarification petition with the Commission to determine Mr. Pedroni's bargaining unit status. The parties subsequently stipulated (in substance) that, should the Examiner conclude in the unfair labor practice proceeding that a unit clarification proceeding was contractually prerequisite to the University's duty to arbitrate in this situation, then the Commission would have jurisdiction to treat the proceeding as a unit clarification proceeding and determine Mr. Pedroni's status. After a hearing, the Examiner dismissed the unfair labor practice complaint, on the ground that the University had no duty to arbitrate unless and until the Commission determined in a unit clarification proceeding that Mr. Pedroni was a member of the unit. DEC. NO. 30701-A (SHAW, 7/04). The Commission has affirmed the Examiner's decision in all respects. DEC. NO. 30701-B (WERC, 12/04). Accordingly, the instant matter is before us as a result of the parties' stipulation.

Having considered the evidence and the arguments of the parties, the Commission now makes and issues the following

FINDINGS OF FACT

1. The TAA is a labor organization with its principal office located at 306 North Brooks Street, Madison, Wisconsin. At all times material herein, the TAA has been recognized as the exclusive collective bargaining representative for "all program, project and teaching assistants employed by the University of Wisconsin-Madison and the University of Wisconsin-Extension. . ."

2. The University is an employer with its principal offices located at 500 Lincoln Drive, Madison, Wisconsin. Since 1987, Michael Rothstein has been employed by the University as the Contract Administrator for the collective bargaining agreement between the University and the TAA.

3. At all times material herein, the TAA and the University have been parties to a collective bargaining agreement setting forth the wages, hours and conditions of employment for the employees in the bargaining unit represented by the TAA. Said agreement contains the following provisions, in relevant part:

ARTICLE II

Recognition and Union Security

Section 1. Union Recognition

The Employer recognizes the Teaching Assistants Association (TAA) as the exclusive collective bargaining agent for all program, project and teaching assistants employed by the University of Wisconsin-Madison and the University of Wisconsin-Extension. Nothing in this Agreement shall be construed as a grant by the Employer of exclusive jurisdiction over types of duties or work assignments to teaching, program or project assistants or to the Union.

Program assistant or project assistant (PA) means a graduate student enrolled in the University of Wisconsin system who is assigned to conduct research, training, administrative responsibilities or other academic or academic support projects or programs, except regular preparation of instructional materials for courses or manual or clerical assignments, under the supervision of a member of the faculty or academic staff, as defined in s. 36.05(1) or (8), Wis. Stats., primarily for the benefit of the University, faculty or academic staff supervisor or a granting agency. Project assistant or program assistant does not include a graduate student who does work which is primarily for the benefit of the student's own learning and research and which is independent or self-directed.

. . .

Should a dispute arise between the parties as to whether an employee(s)/position(s) is appropriately included in or excluded from the bargaining unit, the party raising the issue shall notify the other and a meeting will be scheduled within thirty (30) days in an attempt to reach agreement. If no agreement is reached, the exclusive remedy shall be that either party may request that the Wisconsin Employment Relations Commission to decide the appropriate bargaining unit status of the employee(s)/position(s) pursuant to Wisconsin Statutes.

. . .

ARTICLE V

Appointments

Section 1. Term of Appointment

An appointment of a teaching, program, or project assistant shall be for a period up to one year. Nothing within the terms of this Agreement precludes the University from making financial support guarantees to graduate students for a period longer than one year, and such guarantees may include a teaching program, or project assistantship.

Sections 4., 5., 6., 7., 8./B., C., F., G., and 9. of this Article do not apply to hourly Project Assistant Appointments.

. . .

Section 2. Employment Criteria

Departments that employ Teaching Assistants and Program/Project Assistants shall establish criteria for use in making appointments to Teaching Assistants and Program/Project Assistants. These criteria may include but are not limited to such factors as academic record, letters of recommendation, previous relevant experience, and factors related to the academic mission of the department.

Copies of departmental criteria shall be sent to the Union as established or revised. Established criteria will be available on request to employees.

Section 3. Letters of Appointment

All newly appointed employees shall receive a letter of appointment which specifies the employment title, experience classification (if any), appointment percentage, effective dates, salary level, length of probationary period (if any), hours of work or work assignment if known, and for eligible employees notification that insurance including health insurance and other benefits may be available and have deadlines for enrollment; the letter will also indicate a person or office to contact for information regarding benefits associated with the appointment.

In addition, reappointed employees shall receive a letter of appointment which specifies the appointment title, experience classification (if any), appointment percentage, effective dates, salary level, and hours of work or work assignment, if known.

All letters of appointment will also indicate that the employment relationship is governed by, and subject to, the provisions of a collective

bargaining agreement negotiated by the Teaching Assistants Association. A copy of the current collective bargaining agreement shall accompany the letter of appointment for all newly appointed employees.

. . .

4. Thomas Pedroni, hereinafter Pedroni, is an individual currently residing at 243 West 1140, North Logan, Utah. Pedroni received a Master's Degree in Curriculum and Instruction from the University of Wisconsin-Madison in December of 2001 and was enrolled in the Ph.D. program in Curriculum and Instruction at the University. Pedroni had completed his doctoral coursework in 1999.

5. The University hires its students to work in various capacities in the various departments and research centers. Student employees fall into three categories: Teaching Assistants (TA's), Program or Project Assistants (PA's) and Student Hourly. TA's and PA's make up the bargaining unit represented by Complainant. Student Hourly employees are not included in the bargaining unit, however, there are "hourly" PA's, who are included in the bargaining unit.

The Wisconsin Center for Education Research (WCER) is a research center that is part of the University's School of Education conducting research on aspects of elementary education. PA positions at the WCER are generally posted on a bulletin board on the ground floor of the Educational Sciences Building and on the WCER website. The postings set forth the qualifications, which include graduate student status, and a description of the work to be performed. Pursuant to the parties' collective bargaining agreement, TA's and PA's are issued a letter of appointment when hired which includes the stipend to be paid and the duties and responsibilities of the position. The parties' agreement also sets forth the minimum annual amounts to be paid for TA's and PA's, and also provides for hourly paid PA's. All TA's and PA's are graduate students at the University and PA positions must be approved before they can be filled by a department and are generally posted.

For the hiring of Student Hourly employees, a "Person Appointment Request Form" is completed which sets forth the amount of the stipend to be paid in terms of an hourly wage, whether the position is "student hourly", information about the position, duties, whether a degree is required and the qualifications being required, if stated. The form also identifies the "Principal Investigator" or "Project Director" who is approving the hiring. Both as to a PA and to a Student Hourly position, the student is required to complete a "Student Academic Year Enrollment Verification" on which it is indicated whether the position is PA or Student Hourly and whether the individual is a graduate student. The form is then forwarded to the University's Business Services office.

For at least the past 16 years, it has been the practice at WCER to make the determination of whether a position is to be a PA position or Student Hourly based upon

whether a degree is required to perform the tasks in the research project. If a degree is not required and/or clerical duties are involved, the position will be considered Student Hourly and the process for hiring and appointing a Student Hourly will be followed. 2/

2/ In response to the TAA's objection, we have modified the first sentence of the foregoing paragraph to remove the underlined portion in the Examiner's proposed finding: ". . . it has been the practice at WCER, and the University, to make the determination . . ." While University representative Michael Rothstein testified that he employed a similar standard when advising University departments how to categorize employees, it is not clear from the record how long or how frequently he has been called upon to provide that advice, or whether all or any departments have adhered to it. More importantly, we agree with the TAA that neither the WCER's nor the University's practices in this regard are relevant to the Commission's interpretation of the statutory definition of "program assistant" or "project assistant" in Sec.111.81(15m), Stats., which in turn determines bargaining unit status under Sec. 111.825(2)(a), Stats. As indicated in the Conclusion of Law, below, which recapitulates the Examiner's proposed conclusion, the decision regarding Pedroni's unit status ultimately does not rely upon the need for a graduate degree and/or graduate student skills, but rather upon whether the work in question is "clerical" in nature and hence excluded from the statutory definition of PA work.

The University issues an annual "Student Employment Wage Plan" which sets forth the specific minimums and maximums for Student Hourly employees. The wage plan also establishes three levels of job classifications with the specific wage amounts for each: Basic, Intermediate and Advanced. The 2001-2002 Student Employment Wage Plan included the following descriptions of the three levels and wage rates for each:

Basic Level

Work is done under close supervision; procedures are well established; employees are not usually required to make decisions which are not enumerated in well defined policies and procedures.

Examples of this type of work:

. . .

Routine clerical work such as Library Page, simple filing, incidental typing, routine data entry, messenger work, duplicating machine operation, reading room attendant, desk clerk.

Intermediate Level

Work that requires, for a major portion of the time, some independent judgment or initiative; and/or requires special knowledge, skills or abilities; and/or

requires a major amount of heavy physical exertion; and/or involves adverse hours or working conditions; and/or involves supervisory responsibilities for an activity of limited size.

Examples of this type of work:

Typing or data entry that requires some decision making.
Routine word processing.
Clerical work such as Library General Bibliography Searcher, or schedulers for human research projects.
Stenographic work involving taking and transcribing dictation.

. . .

Advanced Level

Work that requires, for a major portion of the time, advanced specialized knowledge, skills, or abilities; or involves supervisory responsibilities for large or complex activities, usually involving a number of concurrent activities.

Examples of this type of work:

Advanced word processing.
Technical typing and foreign language typing.
Library special bibliography searcher.
Library public catalog information assistant.

. . .

UW-Madison
Student Hourly Rates

August 19, 2001 through August 17, 2002

<u>Level</u>	<u>Minimum</u>	<u>Maximum</u>
Basic:	\$6.75	\$10.05
Intermediate:	\$7.35	\$10.95
Advanced:	\$8.05	\$18.50

6. In August of 1999 Pedroni became employed by the University as a Teaching Assistant (TA) in the Department of Curriculum and Instruction and continued in that position through the Spring semester of 2003.

7. In July of 2001, Pedroni was hired by Professor Nystrand to do orthographic (verbatim) transcription of audiocassettes. A "Person Appointment Request Form" was completed and indicated Pedroni was hired as a Student Hourly at \$15.00/hour for the period July 30, 2001 – August 15, 2001. Pedroni did not receive a "Letter of Appointment" for the position. Pedroni worked 7 hours during that period. Professor Nystrand offered Pedroni a PA position and to roll the 7 hours of transcription work into the position. Pedroni rejected the offer as he was unaware that PA positions could be hourly as well as salaried and was unwilling to have the 7 hours of transcription work that he had already performed rolled into what he believed would be a stipend, but rather wanted to be paid for the those 7 hours on an hourly basis. 3/

3/ In response to the TAA's objection, we have modified the Examiner's proposed finding to state explicitly what we believe the Examiner had implied, i.e., that Pedroni rejected the stipend offer because he was concerned he would lose the hourly pay for the seven hours already completed. However, we also agree with the TAA that Mr. Pedroni's reasons for rejecting the position and/or his understanding of the nature of his position are not relevant to our determination of the statutory issue of his bargaining unit status.

8. On or about September 17, 2001, Pedroni contacted a PA at WCER, Youl-Kwan-Sung, regarding employment doing transcription work. Pedroni had heard about the position through a friend and arranged to meet on September 18, 2001 with Sung, who was a PA working for Professor Sharon Derry on the Secondary Teacher Education Project (STEP). Pedroni and Sung were well acquainted with each other's experience and education, as they had the same academic advisor, shared mutual friends, had taken some of the same courses, and were in the same weekly reading group. When they met to discuss the position, Sung explained the transcription work to Pedroni, telling him that he would be using "TRANSANA", a transcription software, to transcribe digital audio/visual (MPG files) related to the STEP project. Sung told Pedroni that he was hired and that he would be paid \$16.00/hour for his transcription work. 4/ Sung also introduced Pedroni to several other people and explained their roles on the project and what Pedroni's relationship to them would be. One of those individuals was Nancy Calamari, another PA on the STEP project.

4/ The TAA objected to the foregoing sentence in the Examiner's proposed finding on the ground that it implies that Sung was Pedroni's supervisor. We do not see any such implication in the Examiner's proposed finding, which merely relates factually that Sung was the individual who relayed the information to Pedroni that he was hired. The Examiner reached no factual or legal conclusions about who supervised Pedroni, finding it unnecessary inasmuch as the work itself did not meet the statutory definition. We concur with the Examiner, as discussed in the Memorandum, below.

There was no posting for the position, and when Pedroni was hired, he did not receive a "Letter of Appointment" for the position; rather, a "Person Appointment Request Form" was completed which indicated he was being hired as a Student Hourly at a stipend of \$16.00/hour. Pedroni also completed a "Student Academic Year Enrollment Verification" form on which he indicated under "Appointment Type" that it was "Student Hourly", rather than "TA" or "PA," thinking that was the appropriate choice because he was unaware that a PA position could be paid on an hourly basis. 5/ The "Person Appointment Request Form" also stated, in relevant part:

5/ In response to the TAA's objection, we have added to the Examiner's proposed finding the phrase beginning with the word "thinking," as the finding thus modified more accurately reflects the context of Pedroni's testimony. However, we agree with the TAA that Pedroni's view of the nature of his appointment is not relevant to our determination of his statutory bargaining unit status.

**IF A NEW POSITION OR REVISED DUTIES, INCLUDE A DETAILED
JOB DESCRIPTION AND LIST QUALIFICATIONS ON BACK.**

SUPPLEMENTARY INFORMATION: Transcriber for audio/video classroom footage for use in the on-line learning STEP project. Will transcribe full audio text for data collection and storage purpose. Final cut video segments are then produced for use on our instructional website.

DUTIES: Transcribe audio from A/V segments using transcription equipment and coding according to Jeffersonian conventions. The text from the classroom video will be plugged into a web tool that allows us to index and perform multiple searches for the purpose of video editing.

DEGREE REQUIRED:

QUALIFICATIONS: Experienced academic transcriber. Must know Jeffersonian convention. Study of educational psychology helpful.

Derry signed the form as the Principal Investigator on STEP. Derry is also the Project Director and in charge overall of the project. Professor Derry is a professor in the School of Education's Educational Psychology department, and also does grant work through WCER. It has been Derry's practice to hire both graduate students and undergraduates to do transcription work as Student Hourlies.

Pedroni's prior experience as a transcriber included working on his own transcriptions, some informal work for individuals, one year for Wisconsin Telecommunications Relay System transcribing conversations in real time to allow hearing impaired, speech impaired and visually impaired individuals to use the telephone system, and the transcription work for

Professor Nystrand. Pedroni had also taken a doctoral level course on discourse analysis from Professor Gee, which included addressing practical and theoretical issues regarding transcription as a component of research and discourse analysis. Discourse analysis involves the analysis of verbal and non-verbal elements of communication. In Professor Gee's course, Pedroni also learned Jeffersonian convention, a notation system for transcription used in research to report verbal and non-verbal nuances of speaking, as well as visual characteristics of the speaker. Pedroni had also previously taken coursework in educational psychology in pursuing an earlier undergraduate degree he received from Tulane University in 1996.

It does not require a college degree to learn the Jeffersonian convention, nor is it such that only a graduate student would know how to use it. The individual Pedroni replaced in September, 2001, and who had been using the Jeffersonian convention in the transcription work, was not a graduate student and had been hired as a Student Hourly. 6/ A degree was not required for the position when Pedroni was hired into the position.

6/ In response to the TAA's objection, the foregoing sentence has been modified to reflect that the record is ambiguous as to whether the individual Pedroni replaced was an undergraduate or had graduated at the time she was employed by Professor Derry as a transcriptionist. However, there is no evidence suggesting that she had been enrolled as a graduate student at the University at the time. To the extent the TAA is objecting to the Examiner's finding that a college degree is not required to learn Jeffersonian convention, we note that Pedroni himself, who was well acquainted with the Jeffersonian convention, testified quite clearly that it did not require a college education.

9. Pedroni worked 1.25 hours on September 18 and 1.25 hours on September 21, 2001 for Professor Derry. While Pedroni received assignments and instructions from Sung as to what he was to do, e.g., what data to select, Calamari was his immediate supervisor and was responsible for approving his timesheets in that capacity. 7/ Pedroni worked an additional 8 hours in the position between the Fall of 2001 until March of 2002. Pedroni was given a short video clip to transcribe in January of 2002 from Sung and told the transcription needed to be "100% perfect". At the instruction of Calamari, Pedroni reported those hours as 8 hours worked on March 5, 2002. The transcription work Pedroni performed during that period was primarily to transcribe the words that were spoken, in both individual and group settings, and Pedroni was not required to utilize the Jeffersonian convention in this work. 8/

7/ The TAA objects to the foregoing sentence in the Examiner's proposed finding, on the ground that it implies that Sung was Pedroni's supervisor. We see no such implication in the Examiner's proposed finding and, as noted earlier, the Examiner did not render any finding or conclusion regarding Pedroni's supervisors for purposes of Sec. 111.81 (1) (15m), Stats.

8/ In response to the TAA's objection, we have modified the Examiner's proposed finding to more specifically reflect that the transcription work involved both individual "monologues" and group dialog or conversation. However, the TAA also objected that Pedroni had been hired and assigned to perform Jeffersonian academic transcription. TAA Brief at 15. While it is true, as set forth in the above findings, that the job description sought an individual who knew Jeffersonian

convention, the record clearly supports the Examiner's proposed finding, which we have adopted, that Pedroni was not actually assigned transcription work requiring the use of the Jeffersonian convention.

10. In early April, 2002, Pedroni was contacted by Andrew Garfield, who had been hired in March of 2002 as the Video Production Manager at WCER for Professor Derry, regarding doing transcription work for Professor Derry. At that time, WCER only had one transcriber working there, an undergraduate student, Jamie Olson. Olson informed Garfield about Pedroni when he complained he needed more transcribers. No new "Person Appointment Request Form" was completed for Pedroni at this time, and he continued to receive \$16.00/hour for his work, as Garfield had been informed by Calamari that this was what Pedroni was paid. Pedroni was informed by Garfield that all they wanted was a lot of transcription as fast as possible. Derry considered this to be a new job at WCER and believed that to be Pedroni's understanding as well. 9/

9/ The Examiner's proposed finding had stated that "Both Derry and Pedroni considered this to be a new job at WCER." The TAA correctly objected that the record lacked substantial evidence to support a conclusion that Pedroni considered it to be a new job and we have modified the finding to conform more closely to the testimony. However, since we, like the Examiner, ultimately conclude that none of the transcription work that Pedroni performed met the statutory criteria for PA work, it is unnecessary to decide whether the work he performed in the spring was a different job from the work he performed in the fall. No finding in that regard is intended to be implied in the text, above.

Pedroni received training on April 15, 2002, from David Wood, an Associate Researcher at WCER, in the use of TRANSANA for approximately two hours. Two hours is the maximum amount of time Wood normally spends on training someone on TRANSANA, and the training is the same for graduate students or undergraduates. Pedroni also met with Garfield and Calamari and was given instructions in the protocol to be followed and what they wanted him to do. This consisted of instructions as to what to do if more than one person is speaking at a time, how to designate who was speaking, and he was told who would be using his work. Garfield directly supervised Pedroni at this point. Olson had been hired in February of 2002 and was already performing the transcription work Pedroni would be doing. Olson was hired as a Student Hourly, and had been trained in, and was using TRANSANA. Other undergraduate students, as well as a graduate student, Sameer Deshpande, were subsequently hired as Student Hourlies to do the same transcription work. No qualifications were listed on the "Person Appointment Request Form" completed for those students' hires, as well as the form completed for the hire of Olson. The form for Deshpande and an undergraduate student who was hired, Calvin, stated as duties "transcription of data from MPG materials for use in educational research project." The work was basically to type the words that were spoken and noting who was speaking, and Pedroni did not utilize the Jeffersonian convention in performing this work. 10/ At times, PA's and Research Assistants, as well as Professor

10/ The TAA has objected to the foregoing sentence on the ground that it understates the sophistication and skill involved in doing the transcription work and should indicate that Pedroni had been instructed regarding the purpose of the research, the protocol to follow, and what elements he should select from the "audiovisual context" in transcribing. TAA Br. at 15. In fact, however, the Examiner's proposed finding, which we have adopted, adequately addressed all of these facets of Pedroni's two-hour training at the outset of the spring transcription work. The Examiner did not label the work "rote typing" and accurately assessed the level of skill needed to use the TRANSANA software in transcribing the recorded material.

11. On May 17, 2002, Pedroni was called at home by Garfield, and informed that he was terminated. In the course of attempting to challenge his termination, Pedroni was informed by the University's representatives that he had no rights under the collective bargaining agreement between the State and the Association, because he had been employed in his position at WCER as a Student Hourly, and therefore was not covered by that agreement. Pedroni subsequently sought the assistance of the Association to grieve his termination under the agreement. In the course of doing so, on June 13, 2002 the following second step grievance was filed on Pedroni's behalf, asserting, in relevant part:

Describe the grievance – state all facts, including time, place of incident, names of persons involved:

Mr. Pedroni was hired on April 9, 2002, by Mr. Garfield to do transcription work. He was inappropriately classified as a Student Hourly instead of a Project Assistant (Violation of Article II, Section 1.)

On May 17, 2002, Mr. Pedroni was terminated without just cause (Violation of Negotiating Note #5.)

Relief sought:

1. Reclassify position as Project Assistant.
2. Compensation for work hours lost due to termination.
3. Return to transcription job at same pay and hours.
4. Formal apology letter from WCER.

12. Subsequent to his termination from his position at the WCER, Pedroni was issued a "Letter of Appointment" on July 5, 2002 as a PA in the University's Department of Educational Psychology to do transcription work similar to the work he had performed at the WCER.

13. The State refused to process Pedroni's grievance to arbitration on the basis that his was a Student Hourly position, and therefore he was not covered by, and had no rights

On October 1, 2002, the Association filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the State had committed an unfair labor practice by refusing to proceed to arbitration on Pedroni's grievance. In response, the State raised as affirmative defenses that where there is a dispute as to a position's bargaining unit status, the exclusive procedure under the parties' agreement for resolving such a dispute is a unit clarification determination by the Commission, and that Pedroni's position was not included in the bargaining unit covered by the parties' agreement, and therefore, he had no rights under that agreement.

Prior to hearing on the unfair labor practice, the parties entered into the following stipulation regarding the manner in which to proceed:

STIPULATION

WHEREAS, the Complainant, the Teaching Assistants Association, Local 3220, WFT, AFT (the "TAA"), has filed a complaint with the Commission, alleging that the Respondent, State of Wisconsin, UW-Madison (the "University"), engaged in prohibited practices by refusing to arbitrate a grievance alleging that Thomas Pedroni was fired without just cause, and

WHEREAS, the University alleges, in response to said Complaint, that the position in which Pedroni was employed at the time of his termination was not covered by the parties' collective bargaining agreement, and that said agreement requires that the TAA file a petition for unit clarification in order to resolve that issue before the parties proceed to grievance arbitration, and

WHEREAS, the TAA disputes that it is required to petition for unit clarification as a condition precedent to arbitrating Pedroni's discharge,

NOW THEREFORE, subject to the Commission's order approving same, the parties stipulate to have the Commission's Examiner, David Shaw, hear the TAA's prohibited practices complaint and the unit clarification issue in the same proceeding and, further, stipulate to have the Examiner issue a final decision on both issues, subject to any right to normal Commission review.

Dated this 13th day of May, 2003.

By: Aaron N. Halstead /s/
Aaron N. Halstead
Shneidman, Hawks & Ehlke, S.C.
222 W. Washington Avenue, Ste. 705
Post Office Box 2155
Madison, Wisconsin 53701-2155

By: David J. Vergeront /s/
David J. Vergeront
Department of Employment Relations
345 W. Washington Avenue
Post Office Box 7855
Madison, Wisconsin 53707-7855

The Examiner modified the stipulation to provide for a “proposed decision” should he determine it was necessary to decide a unit clarification. Both parties subsequently assented to that change.

In a decision issued this same day in the unfair labor practice case (Case 530), the Examiner concluded that the parties’ agreement required that where there is a dispute as to the bargaining unit status of an employee or position, the exclusive procedure for resolving such a dispute is a unit clarification proceeding before the Commission.

14. The transcription work Pedroni was hired to do on the STEP project at WCER, both in September of 2001 and April/May of 2002, did not require him to exercise his judgment as to what data he should record or as to the system he should use to record such data or as to how such data was to be used. The qualifications for the position did not require that the person hired be a graduate student, nor were they such that only a graduate student would possess them. The work Pedroni was hired to perform, and did perform, in his position at WCER, was essentially clerical in nature, and therefore constituted a “clerical assignment.” 11/

11/ The TAA objected to this finding, alleging that Pedroni was hired to use Jeffersonian convention, which does require the exercise of judgment in the selection of data, and that Pedroni had never been told that his position no longer required those skills and qualifications. As noted earlier, the Examiner’s proposed findings accurately reflect that Pedroni was not assigned to work that required Jeffersonian convention. Assuming arguendo that one criterion for PA status is whether the work required the knowledge or skills of a graduate student, we, like the Examiner, have found that Jeffersonian convention in and of itself did not require such knowledge or skill. Accordingly, we adopt the Examiner’s finding in the foregoing paragraph.

15. Pedroni was properly classified as a Student Hourly in his position doing transcription work at WCER. 12/

12/ The TAA objected to this ultimate proposed finding on the basis of its objections to the preceding findings, upon which it depends. As we have adopted the Examiner’s proposed findings in all material respects, we also adopt the ultimate finding reflected in the foregoing paragraph.

Based upon the foregoing Findings of Fact, the Commission makes the following

CONCLUSION OF LAW

Thomas Pedroni’s position doing transcription work at the Wisconsin Center for Education Research from September of 2001 until his termination in May of 2002 was

properly classified as Student Hourly, and does not meet the definition of “Project Assistant” set forth in Sec. 111.81(15m), Stats., and in Article II, Sec. 1, of the parties’ agreement, as the work he Page 15
Dec. No. 31007-A

was hired to perform, and did perform in that position, constituted a “clerical assignment” and is expressly excluded from that definition. Therefore, the position would not properly be included in the bargaining unit represented by the Teaching Assistants Association.

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

ORDER CLARIFYING BARGAINING UNIT

The position held by Thomas Pedroni doing transcription work at the University of Wisconsin-Madison’s Wisconsin Center for Education Research is not included in the bargaining unit of Teaching Assistants, Project Assistants and Program Assistants represented by the Teaching Assistants Association.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of December, 2004.

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

State of Wisconsin, University of Wisconsin-Madison

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

The Examiner comprehensively set forth the positions of the parties in his proposed decision and, as the parties have taken no exception, we need not restate them here, except to note that, in furtherance of its objections to the Examiner's proposed decision, the TAA argued that the Examiner erroneously emphasized the duties Pedroni actually performed, rather than the duties the University had originally designed for the position.

As the Examiner properly noted, the analysis begins with the statutory definition of "program assistant" or "project assistant" as set forth in Sec. 111.81(15m), Stats.:

a graduate student enrolled in the University of Wisconsin system who is assigned to conduct research, training, administrative responsibilities or other academic or academic support projects or programs, except regular preparation of instructional materials for courses or manual or clerical assignments, under the supervision of a member of the faculty or academic staff, as defined in s. 36.05(1) or (8), primarily for the benefit of the University, faculty or academic staff supervisor or a granting agency. Project assistant or program assistant does not include a graduate student who does work which is primarily for the benefit of the student's own learning and research and which is independent or self-directed.

The Examiner also properly set forth the issues: (1) Whether Pedroni was "assigned to conduct research . . . or other academic or academic support projects or programs, except . . . clerical assignments"; and (2) whether he was working under the supervision of "a member of the faculty or academic staff. . . ."

As to Pedroni's work, the Examiner found it unnecessary to determine whether the relevant duties are those for which he was hired (as argued by the TAA) or instead the duties that he actually performed, because the Examiner concluded that there was no significant difference in those duties. The TAA asserts that the job as designed and posted required knowledge of the Jeffersonian convention, which, according to the TAA, raises the level of skill and sophistication beyond what the clerical level. Furthermore, the TAA argues that it would be improper to exclude a graduate level position from the bargaining unit simply because the University subsequently chose not to assign the person the duties set forth in the position description.

We do not find it necessary to conclude that all transcription work is clerical in nature. It is conceivable that some forms of transcription, perhaps strict adherence to Jeffersonian convention in combination with sophisticated research protocols, might fall outside the clerical

realm. However, the statute explicitly defines bargaining unit work in terms of duties that are “assigned” to a graduate student. Besides adhering to the statutory language, focusing on assigned duties as opposed to a position description is consistent with the Commission’s traditional approach in unit clarification cases, 13/ and represents sound policy. While in this case the TAA finds the position description advantageous to Pedroni, it is just as likely that an individual will be assigned duties that warrant a higher pay classification or bargaining unit status than his or her position description, in which case the equities would mitigate against relying on the position description. Accordingly, the Examiner properly examined Pedroni’s actually assigned duties in determining his unit status.

13/ ARROWHEAD UNITED TEACHERS V WERC, 109 WIS. 2D 371, 377 (CT. APP. 1982) REV'D ON OTHER GROUNDS, 116 WIS. 2D 580 (1984)

We also agree with the Examiner that the transcription work Pedroni was actually assigned – in the fall and the spring – did not exceed the sophistication required of a skilled clerical worker. He was not:

Required . . . to sift through the data and to exercise his discretion as to what data he would transcribe, as to the manner in which he was to record the data, or as to how it would be used in the final product. It appears from Pedroni’s own testimony that the protocol he was told to follow was to type what he heard on the audio portion of the classroom segments, what to do when more than one person was talking at a time, to note the length of pauses, and, as to some work, to be perfectly accurate . . . There were no examples of Pedroni’s work offered that indicated otherwise.

Dec. No. 31007 at 24-25. Indeed, as the Examiner noted, Pedroni’s job by and large was “essentially to type the words that were spoken as fast as possible.” Id. Use of the TRANSANA software program, which included some relatively simple notational symbols to for certain purposes selected by the software designer, did not require the transcriber to exercise judgment beyond following directions.

We also adopt the Examiner’s analysis of the import of Pedroni’s relatively higher rate of pay (\$16.00/hour). “While higher than the other students performing transcription work at the WCER, [Pedroni’s rate] is within the hourly rates for “advanced level” work under the University’s ‘Student Hourly Wage Plan’ for 2001-2002, i.e., \$8.05 (minimum) to \$18.50 (maximum). Regardless of whether he was in fact an “experienced” academic transcriber, Pedroni was hired as such, and paid more than the other less experienced transcribers. The work itself would also appear to fit within the category of work “Technical Typing” listed as an example of “advanced level” work.” Id.

We also agree with the Examiner that it is relevant, but not dispositive, that the University had hired many undergraduates to perform the same work as Pedroni. Work that

required a degree, as the Examiner stated, would be “indicative of the level of sophistication of the work to be performed.” *Id.* In this regard, however, we emphasize that the statutory definition could encompass work that is performed by both undergraduate and graduate students. The University could hire undergraduate student Hourlies as well as graduate students to “conduct research, training, administrative responsibilities . . .,” within the scope of Sec. 111.81(15m), Stats. The graduate students performing that work would be PA’s within the TAA’s bargaining unit, despite the fact that undergraduates are performing similar work. That said, both Pedroni and the undergraduates performing the transcription work at issue here were performing essentially clerical work, as the Examiner found.

As to Pedroni’s subsequent appointment to a PA position in the University’s Department of Educational Psychology to do transcription work, we agree with the Examiner that this suggests some ambiguity in the demarcation between clerical transcription work and transcription work that meets the University’s standard for PA work. However, as noted earlier, it is conceivable that transcription work could reach a level of sophistication that would bring it within the statutory definition. The status of the work that the University subsequently assigned to Pedroni is not before us in this case, nor is the record sufficient for us to determine whether it is similar to the work that is at issue here. 14/

14/ To the extent the Examiner relied even in part on evidence that Pedroni himself may have viewed his work as outside of the bargaining unit, we do not endorse the Examiner’s reasoning. An employee’s subjective view regarding his bargaining unit status has no bearing on the statutory contours of the bargaining unit.

Finally, we concur with the Examiner that, having concluded that Pedroni was assigned work that was essentially clerical in nature, albeit at a relatively skilled level, it is not necessary to determine whether Pedroni was working under the supervision of a faculty member or academic staff within the meaning of Sec. 111.81(15m), Stats., and Article II, Section 1, of the parties’ agreement.

Dated at Madison, Wisconsin, this 30th day of December, 2004.

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