

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
OCONOMOWOC EDUCATION ASSOCIATION
Involving Certain Employees of
OCONOMOWOC SCHOOL DISTRICT

Case 33
No. 63181
ME(u/c)-1094

Decision No. 31059

Appearances:

Rebecca Ferber Osborn, Staff Counsel, Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield, WI 53005-3058, appearing on behalf of the Oconomowoc Education Association.

Mark L. Olson, Davis & Kuelthau, S.C., Attorneys at Law, 111 E. Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202, appearing on behalf of the Oconomowoc School District.

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

The Oconomowoc Education Association (Association) filed a unit clarification petition on January 8, 2004, with the Wisconsin Employment Relations Commission seeking to include the position of Permanent Substitute in an existing unit of professional employees employed by the Oconomowoc Area School District (District) and represented by the Association.

The District opposes the petition because it believes: (1) there is not a sufficient community of interest; (2) continued exclusion does not create a risk of undue fragmentation; and (3) the contractual recognition clause does not permit inclusion.

Hearing in the matter was held on April 29, 2004 in Oconomowoc, Wisconsin, before Commission Chair Judith Neumann. Both parties submitted written briefs on or before June 15, 2004. On July 28, 2004, at the request of the Commission, the parties supplemented the record with an additional stipulation, at which time the record was closed.

Dec. No. 31059

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

FINDINGS OF FACT

1. The Oconomowoc Area School District, herein the District, is a municipal employer having its principal offices at 7077 Brown Street, Oconomowoc, Wisconsin.

2. The Oconomowoc Education Association, herein the Association, is a labor organization that represents a bargaining unit described in the Recognition Clause of the most recent District/Association collective bargaining agreement as: "all full-time and all part-time certificated teaching personnel employed by the Oconomowoc Area School District (see Appendix A)." In addition to regular classroom teachers, the bargaining unit includes the positions of guidance counselor, school psychologist, physical therapist, speech pathologist, gifted and talented development coordinator, nurse, library media specialist, technology integrator, special education program support, and district librarian. Appendix A defines "regular full-time teacher" as follows:

1. A full-time teacher is a salaried person who holds a teacher's certificate or license issued by the State Superintendent whose legal employment requires said certificate or license.
2. A full-time teacher is a salaried person who has been issued a valid contract by the legally constituted authority of the Oconomowoc Area School District.
3. A full-time teacher is a salaried person whose contractual time commitment on a continuing basis is at least equal to the full daily schedule specified for the particular school(s) and/or subject(s)/level(s).

3. The bargaining unit also includes a position entitled "Replacement Teacher," which is held by certificated teachers who are employed for 18 weeks or longer on a non-continuing contract to replace another teacher who is on leave or who has resigned or is otherwise unavailable for an extended period of time.

4. Other than the positions at issue in this case, all of the District's regular professional municipal employees are included in the bargaining unit described above in Finding of Fact 2.

5. In addition to the professional employee bargaining unit, the District has a collective bargaining relationship with Teamsters Local Union No. 695 for three bargaining units of non-professional employees: the custodians; the administrative assistants; and the teacher assistants.

6. For approximately six school years, the District has employed individuals in a position entitled "Permanent Substitute Teacher." During the 2003-04 school year, the District employed two such individuals at the high school and one at the middle school. At the time of the hearing in the instant matter, one had been in the position for nearly six years. Each of these individuals had a signed annual contract or "Letter of Agreement" with the District, which obligated the individuals to report for work at the high school or middle school, respectively, every student attendance day for a salary of \$115 per day - the same daily rate of pay that the District provided its long-term per diem substitute teachers. Unlike any per diem substitute teachers, Permanent Substitutes also received five days (40 hours) of sick leave to be used during the school year. The Permanent Substitutes are not eligible for inclusion in the District's health insurance plan, but they and the District contribute to the Wisconsin Retirement System. Annualized, the Permanent Substitutes received \$21,850 in comparison with a base pay for regular classroom teachers of \$32,085.

7. Permanent Substitutes are required to hold state certification, either a "Substitute teacher" certification or another program area certification (such as Elementary, English 9-12, etc.). State regulations permit substitute teachers to work no more than 20 consecutive school days in an area in which they are not subject-matter certified.

8. Permanent Substitutes are expected to work only during the hours that students are in attendance, unlike regular classroom teachers, whose work day begins somewhat earlier and ends somewhat later than the student day. Generally, however, the Permanent Substitutes arrive early in order to obtain and review their assignment(s) for the day. Otherwise, Permanent Substitutes are assigned classroom responsibilities on essentially the same schedule as classroom teachers, i.e., they teach during three "blocks" at the high school, during five class periods and one study center period in 7th grade, and for four "base" periods plus one study center period in the 8th grade. Regular high school classroom teachers are assigned a fourth block for a preparation period; Permanent Substitutes are assigned supervision or other duties during ½ of the 4th block. Like regular classroom teachers, the Permanent Substitutes receive additional compensation if they are assigned to teach an additional class.

9. Permanent Substitutes usually receive a new assignment from the school secretary each day when they report to work at their assigned buildings - most commonly an assignment to handle an absent teacher's full schedule. Sometimes the Permanent Substitutes work more than one day in the same assignment. Infrequently, a Permanent Substitute works for a week or two in the same position.

10. On occasion a Permanent Substitute may handle portions of more than one teacher's schedule during a given school day (e.g., first period in English, second period in Art, etc.). On the rare occasions when there are insufficient substitute teacher needs in the building to fill an assigned schedule, the Permanent Substitute may be asked to travel to a different building or to assist in other tasks, including clerical tasks, at the assigned building.

11. Permanent Substitutes generally do not prepare lesson plans, but rather implement the lesson plans that have been prepared by the regular classroom teacher. An exception could and has occurred if the assignment is for an extended period of time. For example, one Permanent Substitute handled a science class for about two weeks at the beginning of the 2003-04 school year and developed a project as an assessment tool at the end of a unit of study. Permanent Substitutes generally do not grade student work, unless such assessment is part of the lesson left by the regular teacher. It would be rare for a Permanent Substitute to handle duties outside of the regular school day, such as parent-teacher conferences, as such duties would normally be handled by the regular classroom teacher. Unlike the regular classroom teachers, Permanent Substitutes generally do not attend department meetings (though the middle school Permanent Substitute generally did attend both staff meetings and the daily team meetings in place of the teacher for whom she was substituting). Permanent Substitutes do not participate in the mentoring and professional development required of regular classroom teachers, nor do they engage in advising clubs or other co-curricular and extra-curricular activities pertaining to the regular teachers. Unlike regular classroom teachers, Permanent Substitutes are not responsible for identifying students with special needs. They are required to provide instruction and supervision to students and otherwise manage the classrooms in which they are substitute teaching.

12. Permanent Substitutes are supervised by the building principals. However, they have not been subject to the formal observation and evaluation system that applies to regular classroom teachers and in general have not received written evaluations.

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

CONCLUSIONS OF LAW

1. The Recognition Clause in the most recent contract between the Association and the District is not an agreement that bars inclusion through unit clarification of Permanent Substitute Teachers in the bargaining unit identified in Finding of Fact 2.

2. The Permanent Substitute Teachers have a sufficient community of interest to be included with the other regular professional employees of the District in the bargaining unit identified in Finding of Fact 2.

3. Inclusion of the Permanent Substitute Teachers in the bargaining unit identified in Finding of Fact 2 is consistent with the statutory directive of Sec. 111.70(4)(d)2.a., Stats., that there be “as few collective bargaining units as practicable in keeping with the size of the total municipal work force.”

4. Inclusion of the Permanent Substitute Teachers in the bargaining unit without a vote does not violate their rights under Sec. 111.70(2), Stats.

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

ORDER

That the Permanent Substitute Teacher position is included in the bargaining unit identified in Finding of Fact 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of August, 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

Oconomowoc School District

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

We begin with the District assertion that the Recognition Clause in the collective bargaining agreement shows that the parties have voluntarily agreed to exclude the Permanent Substitute Teachers from the Association unit and that the Commission should follow its longstanding practice in unit clarification cases of honoring such voluntary bargaining unit structures by dismissing the unit clarification petition.

The Commission has recently reaffirmed that it will honor voluntary agreements as to unit composition. FOND DU LAC COUNTY, DEC. NO. 22758-B, 22811-C (WERC, 2/04) at 13-14.

However, we have consistently held as a threshold matter that unless the meaning of an agreement is clear, we will proceed to decide the merits of the unit clarification petition. DEPERE SCHOOL DISTRICT, DEC. NO. 25712-A (WERC, 10/90); WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92); SAUK COUNTY, DEC. NO. 17343-C (WERC, 11/02) In this case, the parties dispute whether the position of Permanent Substitute Teacher meets the definitional criteria set forth in the Recognition Clause and Appendix A and thus whether the Recognition Clause is an agreement to exclude (or include) this position. There is reasonable support in the contract language itself for each side's position and there is no circumstantial evidence that provides clarity as to application of the Recognition Clause to Permanent Substitute Teachers. Thus, we conclude that the requisite clarity of meaning is not present and we therefore proceed to the decide the merits of the petition.

The parties do not dispute that the Permanent Substitutes are regular full time school district professional employees within the meaning of Secs. 111.70 (1)(L) and (ne), Stats. As the Association has argued, the Commission's longstanding and consistent precedent generally warrants the inclusion of all school district professional employees in a single bargaining unit: "[A]ll occupants of professional positions in a K through 12 school setting, who work with students and teachers, whether certified or not certified, by the Department of Public Instruction shall, absent special circumstances, be included in a unit consisting primarily of teachers." NORTHLAND PINES SCHOOL DISTRICT, DEC. NO. 27154 (WERC, 2/92) at 28 and n.10, and cases cited therein.

The District contends, however, that it would be inappropriate to include these employees in the existing professional bargaining unit because: (1) they do not share a community of interest with the other employees in that unit; and (2) the record lacks any indication that these employees desire to be represented by the Association.

As the parties have noted, the Commission with Court approval looks to seven factors in determining whether it is appropriate to include employees in an existing bargaining unit: a general “community of interest,” such that the employees participate in a “shared purpose” in their employment; a commonality of duties and skills; a similarity in wages, hours, and working conditions; a commonality of supervision; a shared work place; whether excluding the employees would offend the statutory directive against unit fragmentation; and bargaining history. *ARROWHEAD UNITED TEACHERS ORGANIZATION V. WERC*, 116 Wis.2d 580, 591-92 (1984); *MARATHON COUNTY, DEC. NO.19129-G (WERC, 5/04)* These factors differ in weight, combination, and significance depending on the circumstances of each particular case. *MARATHON COUNTY, SUPRA*, and cases cited therein.

While the District draws distinctions between the Permanent Substitutes and the regular classroom teachers on each of the foregoing elements, the District’s major focus is on the difference in duties and skills between the Permanent Substitutes and the regular classroom teachers. The work day, work schedule, and work location are essentially the same for both groups, albeit the District has some expectations of regular teachers outside the normal work day that it does not impose upon the Permanent Substitutes (such as parent conferences). Certainly these employees participate in the “shared purpose” of providing classroom supervision and instruction to the District’s students. While the District likely does demand higher qualifications for its regular classroom teachers, all teachers in the District, including the Permanent Substitutes, must hold State certification, which includes at least a Bachelor’s degree and some background or training in pedagogy. On the other hand, the District is largely accurate in portraying the instructional work of the Permanent Substitutes as generally less comprehensive than that of the regular classroom teachers who routinely devise lesson plans, participate in mentoring and professional development programs, evaluate and grade students, maintain communication and relationships with parents, and supervise extra curricular activities. These differences, however, cannot be dispositive of bargaining unit status, since the existing bargaining unit already includes several other professional positions that do not plan lessons or grade students - e.g., the guidance counselors, physical therapists, and nurses.

While the wages and benefits of the Permanent Substitutes differ substantially (likely in part simply because of their non-unit status) from those of the employees in the unit, this factor does not outweigh the fundamentally common purpose, duties and skills, work hours, supervision and work location which these individuals share with employees in the unit. Thus, we conclude that the Permanent Substitute Teachers have a substantial community of interest with the other regular professional employees in the unit.

As to the impact of the statutory directive in Sec. 111.70(4)(d)2.a., Stats., that there “be as few collective bargaining units as practicable in keeping with the size of the total

municipal work force”, it is clear that inclusion of the Permanent Substitute Teachers in the existing unit is consistent with that directive. 1/ Inclusion places all regular professional employees in a single unit and avoids the potential for fragmentation.

1/The record does not reveal how many per diem substitute teachers the District employs or the regularity with which they are called to work. Thus there is no basis for concluding that there is a potentially viable unit of substitute teachers into which these Permanent Substitutes could be included. We further note that the right of the per diem substitutes to turn down work (in contrast to the requirement that the Permanent Substitutes report for work each day students are present) would potentially be a significant consideration when assessing whether inclusion of Permanent Substitutes in any such unit would be appropriate.

Given all of the foregoing, it is apparent that community of interest and anti-fragmentation considerations 2/ strongly support inclusion. However, there remains the District argument that inclusion is inappropriate because there is no evidence that the employees in question want to be so included and thus that inclusion conflicts with these employees’ statutory right to refrain from engaging in concerted activity and to be represented by a labor organization of their own choosing.

2/ The bargaining history factor does not impact on our analysis.

We view the District argument as akin to a contention that employees have a right under Sec. 111.70(2), Stats., to vote as to whether they wish to be included in the Association unit. We have consistently rejected that contention in the context of unit clarification proceedings unless the number of employees being added calls into question the collective bargaining representative’s continuing majority status. MADISON SCHOOLS, DEC. NO. 12654-E (WERC, 1/02); CITY OF CUDAHY, DEC. NO. 21887-B (WERC, 1/90); DANE COUNTY, DEC. NO. 15696-A (WERC, 12/88); PORTAGE COUNTY, DEC. NO. 18792 (WERC, 6/81); DODGE COUNTY, DEC. NO. 8733-B (WERC, 7/79). We do so for several reasons. First, a negative vote by the employees creates the future potential for a fragmented unit (in this case consisting of only three employees). Second, once a union has acquired the status of the exclusive collective bargaining representative (typically through a secret ballot election), that union has an ongoing presumption that it continues to enjoy majority support among the represented employees. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 25143 (WERC, 2/88).

Given this presumption, just as a new employee hired into a bargaining unit position is not entitled to vote on whether he or she wishes to be represented by the union, employees added to a bargaining unit through a unit clarification proceedings have no such entitlement unless the number added calls into question the union's continuing majority status. 3/ Here, it is apparent that the addition of three employees to the existing unit does not call into question the Association's continuing majority status. Thus, we reject the District contention that a vote be conducted.

3/ Like all unit employees, the Permanent Substitute Teachers will have the periodic Sec. 111.70(2), Stats. right to test that presumption of majority status by timely petitioning us to conduct an election to determine if the unit employees wish to continue to be represented by the Association.

Accordingly, we have concluded that the Permanent Substitute position belongs in the existing professional employee bargaining unit represented by the Association and we have ordered the three incumbents to be accreted into the bargaining unit without a vote.

Dated at Madison, Wisconsin, this 27th day of August, 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

