

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
PROFESSIONAL EMPLOYEES IN RESEARCH, STATISTICS & ANALYSIS

Involving Certain Employees of

STATE OF WISCONSIN

Case 821
No. 69332
SE(u/c)-23

Decision No. 33169

In the Matter of the Petition of
WISCONSIN PHYSICIAN & DENTIST ASSOCIATION

Involving Certain Employees of

STATE OF WISCONSIN

Case 822
No. 69333
SE(u/c)-24

Decision No. 33170

In the Matter of the Petition of
WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL

Involving Certain Employees of

STATE OF WISCONSIN

Case 823
No. 69334
SE(u/c)-25

Decision No. 33171

In the Matter of the Petition of
WISCONSIN STATE EMPLOYEES UNION

Involving Certain Employees of

STATE OF WISCONSIN

Case 824
No. 69348
SE(u/c)-26

Decision No. 33172

No. 33169
No. 33170
No. 33171
No. 33172

Appearances:

Timothy E. Hawks and **B. Michele Sumara**, Attorneys at Law, Hawks Quindel, S.C. 700 West Michigan Street, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Wisconsin Professional Employees Council, Professional Employees in Research, Statistics & Analysis and Wisconsin Physician & Dentist Association.

Peggy A. Lautenschlager, Attorney at Law, Bauer & Bach, LLC. 123 East Main Street, Suite 300, Madison, Wisconsin, 53703-3360. appearing on behalf of Wisconsin State Employees Union.

Patricia A. Brady, General Counsel, and **Christopher L. Ashley**, Senior System Legal Counsel, Board of Regents of the University of Wisconsin System, 1856 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin, 53562, appearing on behalf of the Board of Regents of the University of Wisconsin System

Cari Anne Renlund, Chief Legal Counsel and **Elisabeth Dieterich**, Assistant Legal Counsel, Wisconsin Department of Administration, 101 East Wilson Street, Madison, Wisconsin, 53703, appearing on behalf of the Office of State Employment Relations, State of Wisconsin.

ORDER DENYING MOTIONS TO DISMISS

On November 13, 2009, the Wisconsin Professional Employees Council (WPEC) filed a Petition to Clarify Bargaining Unit with the Wisconsin Employment Relations Commission pursuant to Section 111.825(3) of the State Employment Labor Relations Act (SELRA) requesting that the Commission include certain State of Wisconsin (State) employees/positions currently designated as academic staff in the unclassified civil service at the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Platteville, University of Wisconsin-Stevens Point and University of Wisconsin-Superior in an existing SELRA Professional Fiscal and Staff Services bargaining unit of State employees in the classified civil service represented by WPEC.

On November 13, 2009, the Professional Employees in Research, Statistics & Analysis (PERSA) filed a Petition to Clarify Bargaining Unit with the Wisconsin Employment Relations Commission pursuant to Section 111.825(3) of SELRA requesting that the Commission include certain State employees/positions currently designated as academic staff in the unclassified civil service at the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Platteville, University of Wisconsin-Stevens Point and University of Wisconsin-Superior in an existing SELRA Professional Research, Statistics and Analysis bargaining unit of State employees in the classified civil service represented by PERSA.

On November 13, 2009, the Wisconsin Physician & Dentist Association (Association) filed a Petition to Clarify Bargaining Unit with the Wisconsin Employment Relations Commission pursuant to Section 111.825(3) of SELRA requesting that the Commission include certain State employees/positions currently designated as academic staff in the unclassified civil service at the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Platteville, University of Wisconsin-Stevens Point and University of Wisconsin-Superior in an existing SELRA Professional Patient Treatment bargaining unit of State employees in the classified civil service represented by the Association.

On November 20, 2009, the Wisconsin State Employees Union (WSEU) filed a Petition to Clarify Bargaining Unit with the Wisconsin Employment Relations Commission pursuant to Section 111.825(3) of SELRA requesting that the Commission include certain State employees/positions currently designated as academic staff in the unclassified civil service at the University of Wisconsin-Eau Claire, University of Wisconsin-Green Bay, University of Wisconsin-La Crosse, University of Wisconsin-Platteville, University of Wisconsin-Stevens Point and University of Wisconsin-Superior in existing SELRA Administrative Support, Technical and Professional Social Services bargaining units of State employees in the classified civil service represented by WSEU.

On January 8, 2010, the State and the Board of Regents of the University of Wisconsin System (Board) filed separate motions to dismiss all of the above-noted petitions asserting that the Commission lacks subject matter jurisdiction to determine whether employees currently designated as academic staff in the unclassified service are improperly so designated.

The parties thereafter filed written argument in support of and in opposition to the motions to dismiss-the last of which was received on April 9, 2010.

The State and Board assert that the composition of the bargaining units in question is limited to employees in the classified civil service; that the employees covered by the above-noted petitions are all academic staff and thus in the unclassified civil service; that only the Board has the authority to review the civil service status of the employees in question; and that the Commission therefore lacks the authority to determine whether the employees are eligible for inclusion in a classified employee bargaining unit. WPEC, PERSA, the Association and WSEU contend that the Commission has jurisdiction to determine whether an employee is covered by SELRA; that the employees in question do not meet the applicable statutory requirements for academic staff; and therefore that the employees are eligible to be included in classified employee bargaining units.

Having considered all matters filed by the parties, the Commission makes and issues the following

ORDER

The motions to dismiss are denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/

Terrance L. Craney, Commissioner

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTIONS TO DISMISS

The State Employment Labor Relations Act (SELRA) gives certain employees of the State the following statutory rights:

111.82 Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in mutual aid or protection. Employees shall also have the right to refrain from any and all such activities

The Commission has the statutory responsibility to administer SELRA. See Secs. 111.80(2) and (4), 111.81(3), 111.825(3), 111.83, 111.84(4), 111.85, 111.88, 111.89, 111.935, and 111.94, Stats. Section 111.825(3), Stats., provides:

The commission shall assign employees to the appropriate collective bargaining units set forth in subs. (1), (1m), (2) and (2g).

Through their unit clarification petitions, WPEC, PERSA, the Association, and WSEU ask us to administer Section 111.825(3) of SELRA by determining whether certain State employees have SELRA rights and thus should be included in existing SELRA bargaining units.¹

¹ The State argues that the Governor's veto message as to Section 2255 of 2009 Wisconsin Act 28 (and the underlying legislative history) establishes that we lack the authority to clarify the SELRA bargaining units as sought by the four labor organizations. The veto message states:

I am partially vetoing this provision because it requires assistants who have formed into collective bargaining units to be initially represented by the Teaching Assistant Association **and allows the Wisconsin Employment Relations Commission (WERC) to assign faculty and staff to bargaining units. I object to these provisions because employees who form bargaining units should be allowed to select the labor organization that will represent them.** The provision that allows WERC to assign faculty and academic staff to bargaining units is unnecessary since it is redundant with WERC authority under current law. (emphasis added).

The State asserts that the bolded portion of the veto message indicates an intent to prevent the Commission from assigning positions designated by the Board as unclassified academic staff to bargaining units of classified employees. To the contrary, however, the bolded sentence beginning "I object" refers to the provision in Act 28 that, before being vetoed, required teaching assistants to be represented by the Teaching Assistants Association without the assistants having "selected" which union, if any, would represent them. It is the last sentence of the veto message that is potentially relevant and informative. On its face, that sentence indicates that the portion of the provision that "allows the Wisconsin Employment Relations Commission (WERC) to assign faculty and staff to bargaining units is unnecessary since it is redundant with WERC authority under current law." Because the only "current law" that existed at time of the veto was SELRA, it can be argued that the veto indicates that SELRA gives the Commission the right to assign faculty and academic staff to SELRA bargaining units.

We begin by acknowledging that, as argued by the State and Board, the Commission only has power expressly granted by statute or necessarily implied as incidental to carrying out the duties and responsibilities expressed in the statutes. However, the Commission has consistently concluded that it has the statutory power to make an independent assessment of an employee's SELRA status. Thus, in *THE UNIVERSITY OF WISCONSIN-MADISON*, DEC. NO. 9261-A (WERC, 10/69), when the State moved to dismiss a complaint alleging that the employees in question lacked SELRA protection because they held "unclassified" civil service positions, the Commission examined the duties of the employees in the context of the applicable statutory definitions to determine whether or not the employees were covered by SELRA. Consistent with that decision, in *STATE OF WISCONSIN*, DEC. NO. 18696 (WERC, 5/81), the Commission independently examined an employee's duties for the purpose of determining whether SELRA rights had been violated and therein stated the following as to the Commission's jurisdiction:

We recognize the right of the State Personnel Board to establish classifications of State employees, including those covered by SELRA. However, the fact that the Personnel Board determines a particular classification to be "confidential", and so describes said classification, does not constitute a determination that the individuals occupying same are excluded from a collective bargaining unit established in SELRA. Such a determination is made by the Commission, pursuant to the authority vested in it by Sec. 111.81(3)(b) of SELRA which provides, "The commission shall assign eligible employees to the appropriate statutory bargaining units", and therefore the Commission is not bound by the Personnel Board's determination that a classification is "confidential."

. . .

The Commission is the only State agency which has the authority and jurisdiction to determine "employee" status, for the purposes expressed in SELRA, and no other State agency, including the Personnel Board has such

However, we think the better view of the impact of the veto is the one expressed by the Legislative Fiscal Bureau in its July 6, 2009 Summary as follows:

The Governor's partial veto deletes the provision to authorize WERC to assign faculty and academic staff to the appropriate bargaining units established under either Subchapter V or Subchapter VI of Chapter 111. Under current law, WERC has the authority to assign employees to the appropriate collective bargaining unit under Subchapter V. Under the veto, WERC would not have explicit authority under Subchapter VI.

"Subchapter V" is SELRA. "Subchapter VI" is the newly created University of Wisconsin System Faculty and Academic Staff Labor Relations Act (FASLRA). In this case, we are proceeding under SELRA. Thus, the Fiscal Bureau Summary confirms that, when, as here, proceeding under "Subchapter V," we had and continue to have authority to proceed.

More recently, in UNIVERSITY OF WISCONSIN SYSTEM, DEC. NO. 32354-B (WERC, 10/08), where an employee alleged that her SELRA rights had been violated by the State, the Commission held in pertinent part:

However, Judge also alleges that effective July 16, 2007, as a result of the State's changing her job duties, she no longer functioned as academic staff and instead began to fill what had become (at least constructively) a position within the classified service of the State. If Judge is correct in her allegation, she became an "employee" within the meaning of SELRA on July 16, 2007 and acquired its protections on that date.

The Commission ordered an evidentiary hearing to allow Judge the opportunity to prove that she had become a classified employee.

By their petitions, WPEC, PERSA, the Association, and WSEU raise the same issue that was presented in the three case discussed above, i.e., are the employees in question covered by SELRA? In their motions to dismiss, the State and Board assert that we lack jurisdiction to resolve that issue because the employees in question are currently in the unclassified civil service and can only have SELRA rights (and be eligible for bargaining unit inclusion) if they are in the classified civil service.² Consistent with the cases discussed above, and most particularly with our October 1969 and October 2008 decisions, we continue to conclude that we have SELRA jurisdiction to determine *de novo* whether any, some, or all of the employees in question are truly "academic staff" within the meaning of Sec. 36.05(1), Stats.,³ and thus properly in the unclassified service, or whether, instead, any, some, or all of the employees are (by virtue of Sec. 230.08(3)(a), Stats.) classified employees with SELRA rights who are eligible to be included in a classified employee bargaining unit. Thus, we have denied the motions to dismiss.

The State does not quarrel with our *de novo* review of issues of confidential,

² Section 230.08(1), Stats., divides the civil service into two mutually exclusive categories: "classified" and "unclassified." Pursuant to Sec. 230.08(2)(d), Stats., "All faculty and academic staff, as defined in s. 36.05(1) and (8), in the University of Wisconsin System" are in the unclassified category. Pursuant to Sec. 230.08(3)(a), Stats., all positions not included in the unclassified service are "classified." Contrary to an argument of the State and, to a lesser extent, the Board, our unit clarification authority under SELRA is not limited to employees in the classified service. As reflected in Secs. 111.81(7)(b)(c)(e) and (f), and 111.825(2), Stats., SELRA covers some bargaining units of employees in the unclassified service as well. However, those unclassified employee bargaining units are not at issue herein.

³ Section 36.05 (1), Stats. provides: "Academic staff" means professional and administrative personnel with duties, and subject to types of appointments, that are primarily associated with higher education institutions or their administration, but does not include faculty and staff provided under s. 16.57." Secs. 36.15 (1) (a) and (b), Stats., define "administrative" and "professional" personnel for purposes of the foregoing definition of "Academic staff."

“supervisor,” unlike the terms “classified” and “unclassified.” are defined within SELRA itself. We acknowledge the distinction the State seeks to make, but ultimately reject its significance. By virtue of the newly created University of Wisconsin System Faculty and Academic Staff Labor Relations Act (FASLRA), the term “academic staff” has now been given a specific definition within a statute over which we have jurisdiction. See Sec. 111.96(1), Stats. The State and Board cannot persuasively quarrel with our *de novo* right to determine who meets the FASLRA definition of “academic staff” when we are administering FASLRA. For instance, if a labor organization wanted us to conduct an election to decide whether the academic staff of UW-Madison and the University of Wisconsin System administration (see Sec. 111.98(1)(j), Stats.) wanted to be represented for the purposes of collective bargaining by said organization, we would need to decide who is eligible to vote in the election. Employees who do not meet the FASLRA definition of “academic staff” would not be eligible to vote nor have FASLRA protection. If an employee does not meet the definition of “academic staff,” it follows that they are part of the classified service by virtue of Secs. 230.08(2)(d), Stats., and 230.08(3)(a), Stats., as explained in footnote 2. As employees in the “classified service”, they would have SELRA protection and be eligible for inclusion in those SELRA bargaining units that consist of employees in the classified service.

In denying the motions to dismiss, we acknowledge that, pursuant to Secs. 36.09(1)(e) and (i), Stats. , and policies approved by the predecessor to the current OSER, the Board has the initial authority to decide whether a position/employee falls within the statutory definition of “academic staff.” Further, pursuant to a 1992 Memorandum of Understanding between the State and the Board, the Board may unilaterally reconsider its own initial designation of a position/employee as “academic staff.” However, we view this statutory authority as an unremarkable reflection of the need any employer has to initially determine and periodically review the status an employee will have from the employer’s perspective (i.e., supervisor or not, confidential employee or not, management employee or not, included in a bargaining unit or not, or, in this case, academic staff or not). Thus, in our view, the existence of the Board’s statutory authority and/or Memorandum of Understanding do not provide significant support for the claim that we are precluded from exercising our statutory jurisdiction for the purpose of deciding if an employee has SELRA protection.

We further acknowledge that Board policies provide procedures by which the classified or unclassified designation of a position can be changed by the Board, including a grievance procedure through which an individual employee (but not a labor organization) can ask the Board to change the designation of their position. However, for the reasons expressed above, the existence of an internal review procedure by which the Board (not an impartial third party) reviews its own initial designation – even with the presumed right to seek some judicial review of the Board’s own review decision – does not preclude the Commission from exercising its statutory jurisdiction under Sec. 111.825(3), Stats.

We also acknowledge, as argued by the State/Board, that decisions of the former

Personnel Commission (and now by this Commission) have held that the Board's designation of a position/employee as "academic staff" is not a decision which can be reviewed under Sec.

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230.44(1), Stats. However, the absence of jurisdiction to review such a decision under state civil service statutes cannot persuasively be equated with the absence of jurisdiction under SELRA. The two statutes have separate purposes and grant separate rights.⁴ It is also

⁴ SELRA's policies are set forth in Sec. 111.80, as follows:

[Sec. 111.80]. The public policy of the state as to labor relations and collective bargaining in state employment, in the furtherance of which this subchapter is enacted, is as follows:

- (1) It recognizes that there are 3 major interests involved: that of the public, that of the employee and that of the employer. These 3 interests are to a considerable extent interrelated. It is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.
- (2) Orderly and constructive employment relations for employees and the efficient administration of state government are promotive of all these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee management relations in state employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise. It is recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding state employment relations, neither party has any right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business.
- (3) Where permitted under this subchapter, negotiations of terms and conditions of state employment should result from voluntary agreement between the state and its agents as employer, and its employees. For that purpose an employee may, if the employee desires, associate with others in organizing and in bargaining collectively through representatives of the employee's own choosing without intimidations or coercion from any source.
- (4) It is the policy of this state, in order to preserve and promote the interests of the public, the employee and the employer alike, to encourage the practices and procedures of collective bargaining in state employment subject to the requirements of the public service and related laws, rules and policies governing state employment, by establishing standards of fair conduct in state employment relations and by providing a convenient, expeditious and impartial tribunal in which these interests may have their respective rights determined.

The policy and purpose of Chapter 230 is set forth in Sec. 230.01, Stats., as follows:

[Sec. 230.01] (1) It is the purpose of this chapter to provide state agencies and institutions of higher education with competent personnel who will furnish state services to citizens as fairly, efficiently and effectively as possible.

(2) It is the policy of the state and the responsibility of the director and the administrator to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards. It is the policy of this state to provide for equal employment

noteworthy that Sec. 230.01 (3), Stats., provides: “Nothing in this chapter shall be construed to either infringe upon or supersede the rights guaranteed state employees under subch. V or VI of ch. 111.” SELRA is “subch. V ... of ch. 111.” Most importantly, as previously discussed, we have always firmly held that under SELRA we have *de novo* authority to review the status of employees for the purpose of determining whether they have SELRA rights.⁵

The Board and the State correctly point out that academic staff as defined in Secs. 36.05 and 111.96(1), Stats., now have rights under the newly-enacted FASLRA that largely parallel those of employees covered by SELRA. The State argues that inclusion of employees by unit clarification into SELRA units will improperly deprive the employees of rights under the new Act. First, we note that our exercise of jurisdiction may or may not result in the inclusion of any employee into a SELRA unit. At this juncture, we do not know whether any of the employees in question will fall outside the relevant statutory definitions of “academic staff.” Second, whatever the outcome of these unit clarification proceedings, no employees will be deprived of any statutory rights under the new Act. If an employee meets the relevant statutory definition of “academic staff,” the employee will not be included in a SELRA unit and will retain FASLRA rights. By the same token, if an employee does not meet the relevant statutory definitions of “academic staff,” then the employee has no rights under FASLRA and cannot be deprived of same.⁶

opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to the particular position without regard to age, race, creed or religion, color, disability, sex, national origin, ancestry, sexual orientation or political affiliation. It is the policy of this state to take affirmative action which is not in conflict with other provisions of this chapter. It is the policy of the state to ensure its employees opportunities for satisfying careers and fair treatment based on the value of each employee's services. It is the policy of this state to encourage disclosure of information under subch. III and to ensure that any employee employed by a governmental unit is protected from retaliatory action for disclosing information under subch. III. It is the policy of this state to correct pay inequities based on gender or race in the state civil service system

⁵ The State points out the under Sec. 111.998(2)(a) of FASLRA, “the rights of appointment provided academic staff under s. 36.15” are included in the list of prohibited subjects of bargaining and asserts that “. . . if the Board cannot give away [through bargaining] its right to designate positions as unclassified academic staff, the Commission cannot take it away.” By our decision today, we take nothing away from the Board. The Board retains the right to designate positions as unclassified academic staff. We only conclude that, if such employees/positions do not meet the statutory definition of academic staff, then they are not unclassified employees, but rather pursuant to Sec. 230.08 (3)(a), Stats., they are classified employees who are eligible to be placed into classified employee bargaining units. However, it bears noting that we have held that our jurisdiction does not extend to legislatively authorized judgments by the Board as to whether to create permanent or project positions. STATE OF WISCONSIN, DEC. NO. 11884-O (WERC, 1/86).

⁶ The Board argues that placement of employees in SELRA units will deprive employees of non-FASLRA statutory and contractual rights related to job security, pay and benefits. The impact of any SELRA placements is speculative at this juncture and beyond the scope of the issue before us. Nonetheless, we note that any such rights may well be capable of being honored/protected through the collective bargaining process and/or Sec.

Given our denial of the motions to dismiss, the petitions will now proceed to hearing.

Dated at Madison, Wisconsin, this 10th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Terrance L. Craney /s/

Terrance L. Craney, Commissioner

230.15(1m), Stats. We further note that by virtue of Sec. 111.93 (3), Stats., the Legislature has generally indicated that any such potential losses are mandated where there is a conflict between the terms of a collective bargaining agreement “and other applicable statutes, as well as rules and policies of the board of regents of the University of Wisconsin System. . . .”