

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
MERRILL CITY EMPLOYEES LOCAL 332, AFSCME, AFL-CIO

Involving Certain Employees of the

CITY OF MERRILL

Case 70
No. 69691
ME(u/c)-1302

Decision No. 33290

Appearances:

John Spiegelhoff, Staff Representative, AFSCME Wisconsin Council 40, 1105 East 9th Street, Merrill, Wisconsin 54452, appearing on behalf of Merrill City Employees Local 332, AFSCME, AFL-CIO.

Dean R. Dietrich and **Terri M. Smith**, Ruder Ware, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the City of Merrill, Wisconsin.

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

On March 15, 2010, Merrill City Employees Local 332, AFSCME, AFL-CIO (Union) filed a unit clarification petition with the Wisconsin Employment Relations Commission (the Commission), requesting that the MARC custodian be included in a bargaining unit of City of Merrill employees that it represents for the purposes of collective bargaining.

The parties' attempts to reach a voluntary resolution of the matter were unsuccessful. A hearing was held on the petition on July 9, 2010, in Merrill, Wisconsin before Examiner John C. Carlson, Jr. The parties thereafter filed briefs, the last of which was received October 18, 2010. The Examiner thereafter sought clarification as to certain matters and the record was closed March 15, 2011.

No. 33290

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

FINDINGS OF FACT

1. The City of Merrill, herein the City, is a municipal employer.
2. Merrill City Employees Local 332, AFSCME, AFL-CIO, herein the Union, is the collective bargaining representative of certain City employees including those working in the Parks and Recreation Department.
3. In October 2009, the City hired Dan Szulezewski as a part-time year round custodian in the Parks and Recreation Department. When he was hired and through the date of hearing in this matter, there was/has been no discussion regarding the duration of his employment. Szulezewski is supervised by Parks and Recreation Director Wendorf.
4. Szulezewski performs his custodial work at a City run facility (the Smith Center or the MARC) which features an indoor ice rink for six months of the year (October through March) and is available for meetings/events during the remaining six months when the ice sheet has been removed. During the period October 2009-March 2010, Szulezewski worked during 24 of the 26 weeks and on average worked 4 days a week and 27 hours a week. During the first two full weeks of April 2010, he worked a total of 6 days and 36 hours and then was laid off until May 27, 2010 due to the recall of a bargaining unit employee from layoff.
5. Beginning May 27, 2010, Szulezewski's primary City work became watering flowers 3-4 hours a day at least five days out of seven each week through the growing season. He performed the same watering duties during the 2009 growing season. In addition, during the 38 days between May 27, 2010 and July 4, 2010, he performed custodial work at the Smith Center on 11 days averaging 3 hours per day worked. Parks and Recreation Director Wendorf continued to supervise Szulezewski during this period of time.

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

CONCLUSION OF LAW

Szulezewski is a regular part-time employee of the City of Merrill Parks and Recreation Department when working as Smith Center custodian and when working watering flowers.

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

ORDER CLARIFYING BARGAINING UNIT

Szulezewski (in both his position as part-time Smith Center custodian and his part-time seasonal position watering flowers) is included in the collective bargaining unit represented by Merrill City Employees Local 332, AFSCME, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

CITY OF MERRILL

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

As reflected in our Findings of Fact, Szulezewski holds two part-time City jobs-one as a custodian at the Smith Center and one watering flowers during the growing season. The parties' primary focus is on his custodial work at the Smith Center as to which the City, contrary to the Union, contends he is a temporary or casual employee who thus should not be included in the Union bargaining unit.

When determining whether an employee is temporary, the critical issue to be resolved is whether the employee has a reasonable expectation of continued employment. When determining whether there is a reasonable expectation of continued employment, we consider factors such as how long the duties in question have been performed and the likelihood that they will continue to be performed, the formal action (if any) taken by the employer to end the employment on a specific date, and the communications (if any) between the employee and employer regarding ongoing employment. KEWAUNEE COUNTY, DEC. NO. 13185-E (WERC, 3/88); SCHOOL DISTRICT OF PITTSVILLE, DEC. NO. 21806 (WERC, 6/84); MANITOWOC COUNTY, DEC. NO. 15250-B (WERC, 9/77).

Here, the Smith Center custodial work was performed before Szulezewski was hired and, particularly during the six months of ice rink operation, is work that will be performed on an ongoing basis. Thus, we are satisfied the work in question is not temporary. Turning to Szulezewski's expectation of continuing to perform that work, no termination date for his employment was established when he was hired and none has been established since. There is no contention or evidence that his work was anything but satisfactory. Thus, there is every reason to believe that Szulezewski will (and did) return for the 2010-2011 Smith Center ice season. In such circumstances, we conclude that Szulezewski has a reasonable expectation of continued employment and thus is not a temporary employee.

When determining whether an employee is casual, our focus is on the regularity with which the employee works. If an employee does not work on a regular basis because the work itself is sporadic and/or he can and does turn down opportunities to work, the employee is a casual employee. On the other hand, if the employee in fact works on a regular basis (despite the lack of a guarantee of regular work and/or the right to turn down work assignments), then the individual is not a casual employee but rather a regular part-time (or even regular full-time depending on hours worked) employee. VILLAGE OF MAPLE BLUFF, DEC. NO. 26746 (WERC, 1/91); MID-STATE VTAE DISTRICT NO. 14, DEC. NO. 14526-A (WERC, 5/85); KENOSHA UNIFIED SCHOOL DISTRICT, DEC. NO. 11293 (WERC, 9/72).

The record clearly establishes that Szulezewski works regularly (four days a week for 24 of 26 weeks during the Smith Center ice season and averaged 27 hours during the weeks that he worked) despite the lack of set schedule and his potential personal need to miss work

opportunities from time to time due to family circumstances. We acknowledge that his custodial work opportunities become more sporadic during the six months when there is no ice at the Smith Center. However, even if there were no such opportunities and Szulezewski were to be viewed as a six month seasonal employee, his regularity of employment would be sufficient to make him a regular part-time employee. TOWN OF VERNON, DEC. NO. 24967 (WERC, 4/88).

Given all of the foregoing, we conclude that Szulezewski is a regular part-time City employee when he works as the Smith Center custodian and have ordered his inclusion into the unit as to his work in said position.

We turn to consideration of Szulezewski's summer work watering flowers under the general supervision of Parks and Recreation Director Wendorf.¹ The same analysis as was applied to his custodial work is apt here. The work has been performed for the last two summers and there is no evidence to indicate that watering will stop this coming summer. Szulezewski has performed the work the last two summers and there is no evidence to indicate that he will cease doing so in the future. The work is performed for three to four hours a day for at least five out of seven days each week during the approximately three month growing season. Thus, we conclude that Szulezewski has a reasonable expectation of continued employment performing regular flower watering work and as such is a seasonal regular part-time City employee when working in that capacity. Given this conclusion, we have ordered his inclusion into the unit as to this regular part-time position as well.

Dated at the City of Madison, Wisconsin, this 29th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

¹ While not part of his Smith Center custodial duties that were identified in the unit clarification petition, the status of this work was litigated sufficiently at hearing to make it appropriate for us to consider herein.