

STATE OF WISCONSIN
BEFORE THE
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL
PROFESSIONAL EMPLOYEES IN RESEARCH, STATISTICS & ANALYSIS
WISCONSIN PHYSICIAN & DENTIST ASSOCIATION
WISCONSIN STATE EMPLOYEES UNION,

Petitioners,

and

STATE OF WISCONSIN,

Employer,

and

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,
Appointing Authority.

MOTION TO DISMISS

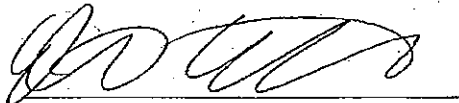
Pursuant to ss. ERC 27.05 and 18.06(2)(e), Wis. Admin. Code, the State of Wisconsin, by the Office of State Employment Relations (OSER), hereby moves to dismiss the unit clarification petitions of Wisconsin Professional Employees Council; Professional Employees In Research, Statistics & Analysis; Wisconsin Physician & Dentist Association; and Wisconsin State Employees Union (Petitioners) for lack of subject matter jurisdiction. Moreover, no evidentiary hearing is required because the pleadings, viewed in the light most favorable to Petitioners, permit no interpretation of the facts that would make dismissal inappropriate. Wis. Admin. Code s. ERC 18.06(2)(e).

WHEREFORE, OSER respectfully requests the Commission to dismiss
the petitions.

Dated: 1/8/10

Respectfully Submitted,
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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

In legislation passed only months ago, academic staff members gained the right to decide whether they will be represented by a labor organization and if so, which organization will represent them. The State of Wisconsin, by the Office of State Employment Relations (OSER), supports the rights granted in the new legislation.

Petitioners, however, have requested the Commission to order 304 unclassified academic staff positions into bargaining units for classified positions – bargaining units that are already represented by Petitioners. While the Commission has authority under s. 111.825(3), Wis. Stats., to order classified employees into bargaining units, that provision does not allow the Commission to order unclassified academic staff into bargaining units. The Commission does not have authority to convert the positions from unclassified

academic staff to the classified service. Therefore, the Commission does not have jurisdiction to hear these petitions.

OSER respectfully requests that the Commission dismiss the petitions for lack of subject matter jurisdiction. To hear the petitions would be to place unclassified academic staff under representation by labor organizations that they have not chosen for themselves, undermining their new collective bargaining rights.

ARGUMENT

I. The Commission has authority under s. 111.825(3), Wis. Stats., to assign employees to collective bargaining units if the employees are part of the classified service.

The Commission is authorized to assign "employees" to bargaining units under s. 111.825(3)¹, Wis. Stats. (referred to herein as "the unit clarification statute"). The unit clarification statute is part of the State Employment Labor Relations Act (SELRA, subch. V, ch. 111). SELRA defines "employee" as "any state employee in the classified service of the state, as defined in s. 230.08," excluding limited term employees, supervisors, etc. Wis. Stats. s. 111.81(7)(a).² Therefore, the unit clarification statute allows the Commission to assign employees to bargaining units if the employees are in the classified service.

II. The Board of Regents, under guidelines developed with OSER, determines whether a University of Wisconsin position is classified or unclassified, and OSER alone makes that determination for all other state positions.

The unclassified service is separated from the classified service in state statute:

¹ All statutory citations are to the 2007-2008 edition of the Wisconsin Statutes, unless otherwise noted.

² SELRA's definition of "employee" also includes teaching assistants, assistant district attorneys, and certain instructional staff at charter schools, none of whom are academic staff. Wis. Stats. s. 111.81(7).

230.08. Classification of civil service. (1) CLASSES. The civil service is divided into the unclassified service and the classified service.

(2) UNCLASSIFIED SERVICE. The unclassified service comprises positions held by: . . .

(d) All faculty and academic staff, as defined in s. 36.05 (1) and (8), in the University of Wisconsin System . . .

(3) CLASSIFIED SERVICE. The classified service comprises all positions not included in the unclassified service.

Wis. Stats. s. 230.08. Positions listed in s. 230.08(2), Wis. Stats., including academic staff, are part of the unclassified service. *Id.* As such, they are not classified positions. *Id.*

A position may be converted from the unclassified service to the classified service. "When positions in the unclassified service . . . are determined to be more appropriately included in the classified service, the affected positions shall be included in the classified service." Wis. Stats. s. 230.15(1m). An academic staff position will always be part of the unclassified service unless it is converted to a classified position.

A. For most of state service, OSER determines whether positions are classified or unclassified.

In general, the Director of OSER is responsible for assigning state positions to the classified service or the unclassified service and for converting them from one to the other. The Director of OSER has authority to take any action necessary to effectively administrate ch. 230 that is not specifically vested by statute in a different person or entity:

230.04 Powers and duties of the director. (1) The director is charged with the effective administration of this chapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the commission, the division of equal rights, the administrator [of the

Division of Merit Recruitment and Selection] or appointing authorities, are reserved to the director.

Wis. Stats. s. 230.04(1). The duty to assign and convert positions between the classified and the unclassified service is part of ch. 230. It is not specifically vested by ss. 230.08 or 230.15(1m), or any other statute, in the Commission, the Equal Rights Division, or the Administrator of the Division of Merit Recruitment and Selection. Other than University of Wisconsin (UW) positions (see discussion below), the duty is not vested by statute in appointing authorities. Therefore, under s. 230.04(1), OSER has exclusive authority to assign all non-UW positions to the classified or the unclassified service.

- B. The Board of Regents, under guidelines developed with OSER, determines which positions are unclassified academic staff and which are classified.

The Board of Regents of the UW System (the Board) employs both classified employees and academic staff and faculty, who are unclassified. "Academic staff" is statutorily defined as "professional and administrative personnel with duties, and subject to types of appointments, that are primarily associated with higher education institutions or their administration." Wis. Stats. s. 36.05(1).

1. *The Board makes the initial determination that a position should be unclassified academic staff.*

The Board is responsible for determining whether a UW position meets the definition of unclassified academic staff, or whether the position would be more appropriately assigned to the classified service. The Board makes the determination using guidelines developed with OSER, in accordance with a statutory mandate:

Upon recommendation of the president [of the UW System] and the administrator of the division of merit recruitment and selection in the office of state employment relations, the board [of Regents] and the director of the office [of State Employment Relations] shall jointly adopt general policies governing the designation of positions to be exempt

from the classified service as academic staff as defined in s. 36.15 (1) (a) and (b). No position in the classified service may be designated as an academic staff position under the general policies unless the director of the office of state employment relations approves the designation.

Wis. Stats. s. 36.09(1)(i).

Academic staff appointments . . . shall be made by the board, or by an appropriate official authorized by the board, under policies and procedures established by the board and subject to s. 36.09 (1) (i).

Wis. Stats. s. 36.15(2).

Pursuant to their obligations under s. 36.09(1)(i), OSER's predecessor and the Board jointly adopted policies to designate positions as unclassified academic staff versus classified positions. In 1975, Regent Policy Document 75-3, titled *Academic Staff Appointments*, was adopted. Regent Policy Document 75-3 has been renumbered 20-3 and is available online at <http://www.uwsa.edu/bor/policies/rpd/rpd20-3.htm>. It provides:

1. Assignments to academic staff positions, which are exempt from the classified service and subject to personnel rules defined in UWS 8 through 13, shall be made when: (a) the position involves teaching, research, public service responsibilities, academic support activities, or academic program administration; or (b) the position is separate and distinct to higher education; or (c) the position involves assigned duties that require close peer relationships with members of the faculty and academic administrators.
2. In no instance may an employee be appointed to the academic staff when it is anticipated that application will subsequently be made for transfer of the position to the classified service.
3. No person holding an academic staff appointment prior to the adoption of this policy may be transferred to the classified service without his or her consent.
4. The chancellor of each institution shall appoint a committee or committees that will be given responsibility for advising the campus administration on matters pertaining to: (a) assuring compliance with this policy, (b) developing appropriate institutional guidelines and procedures for appointments to the academic staff, and (c) reviewing and approving all applications for transfer between the academic staff and the classified service.

5. Nothing in this policy or in the institutional guidelines adopted pursuant to this policy shall be interpreted to permit assignment to the academic staff of positions normally found in clerical, technical, blue collar, crafts, security and public safety occupations.

In addition, Unclassified Personnel Guideline #7 (UPG #7) interprets and expands upon the guidance in Regent Policy Document 20-3. UPG #7 is available online at <http://www.uwsa.edu/hr/upgs/upg07.pdf>. The Board and OSER (then the Department of Employment Relations) also entered into two Memoranda of Agreement in 1992 and 1993 (MOA's) which provide further direction. (The MOA's have been filed as Exhibits to the Board's Memorandum in Support of Motion to Dismiss the petitions).

2. *The Board determines whether an unclassified academic staff position should be converted to the classified service.*

The 1992 MOA describes the mechanism to convert unclassified academic staff positions that would more appropriately be designated as classified:

An academic staff position identified as potentially classified will be converted to classified service when vacated unless the incumbent agrees to the conversion at an earlier date. If the incumbent wishes to be considered for accretion into the classified service, the requirements of s. 230.15(1), Wis. Stats.,³ and the procedures outlined in UPG #7, at 7.03(3) shall apply.

The referenced section of UPG #7 provides:

In the event System Administration or the institution determines that a position designated in the unclassified civil service as academic staff should be included in the classified service, and the incumbent is unwilling to transfer to the classified service, the position shall be converted to the classified service upon expiration of the fixed term contract in effect at the time of such determination (providing that due notice of non-renewal is given pursuant to s. UWS 10.05(1), Wis. Adm. Code). If the incumbent holds an indefinite appointment or the academic staff position has been occupied by the same incumbent prior to April 11, 1975, the position shall be converted to the classified service upon vacancy of the position.

³ Accretion of unclassified staff into the classified services is currently addressed in Wis. Stat. 230.15(1m). Prior to its amendment by 1989 Act 31, s. 230.15(1) included the accretion provision. Presumably, the correct reference in UPG #7 is to s. 230.15(1m).

In other words, UPG #7 authorizes the Board to determine that a position initially designated as unclassified academic staff in fact belongs in the classified service. UPG #7 also gives an incumbent employee in such a position the option of remaining in the unclassified service for the duration of the fixed term contract he or she holds, or in the case of an indefinite appointee, for as long as the employee holds the appointment. Moreover, an unclassified employee who believes he or she has been wrongly designated as such could challenge the designation through the internal institutional grievance procedure pursuant to Chapter UWS 13, Wis. Adm. Code.

Thus, the Board of Regents, under guidelines developed with OSER pursuant to s. 36.09(1)(i), determines whether an unclassified academic staff position should be converted to a classified position.

III. The Commission has no express or implied statutory authority to determine whether positions are classified or unclassified.

The Commission has statutory authority to hear appeals of certain OSER decisions. However, the determination that a position is unclassified is not appealable to the Commission. Section 230.44(1), Wis. Stats., outlines the decisions that may be appealed to the Commission:

(a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator [or his or her designee]. . .

(b) *Decision made or delegated by director.* Appeal of a personnel decision under s. 230.09 (2) (a) or (d) or 230.13 (1) made by the director [or his or her designee] . . .

(c) *Demotion, layoff, suspension or discharge.* If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

(d) *Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.⁴

Under par. (a), the Commission may hear appeals of personnel decisions made by the Administrator under subch. II of ch. 230. The decision whether a position is classified or unclassified is not a duty that is specifically assigned to the Administrator, and so it is not appealable to the Commission under s. 230.44(1)(a).

Paragraphs (b), (c), and (d) only apply to positions that have already been determined to be part of the classified service. Under par. (b), the Commission may hear appeals of personnel decisions made by the Director, but only if they are made under s. 230.09(2)(a) (division of classified service into class titles) or (d) (regrading of classified positions) or s. 230.13(1) (release of records pertaining to classified employees). Under par. (c), only "employees with permanent status in class" may appeal demotions, layoffs, suspensions, or discharge to the Commission. Under par. (d), the Commission may hear appeals of hiring decisions "in the classified service." The unit clarification petitions are not covered by any of these provisions.

The Commission does not have authority under any other statute to convert an unclassified position to the classified service, to convert a classified position to the unclassified service, or to determine whether a new position should be assigned to the classified or unclassified service. As discussed in further detail below, the Commission has consistently recognized that it does not have authority over those decisions, but rather, "the authority to determine what positions shall be academic staff in the

⁴ Pars. (dm), (e), and (f) are regarding hiring of veterans, discretionary performance awards, and appointment to the parole commission; none of which are at issue in the current petitions.

unclassified as opposed to the classified service, is vested in the Board of Regents.”

WSEU v. University of Wisconsin, Case No. 74-100 (Personnel Commission 2/15/80).

IV. The Commission does not have jurisdiction to hear the petitions because the positions at issue are not in the classified service.

State agencies have only such powers as are expressly granted by statute or necessarily implied as incidental to carrying out the duties and powers expressed in the statutes. *See e.g. American Brass v. State Board of Health*, 245 Wis. 440 (1944); *Ford v. Wisconsin Real Estate Examining Board*, 48 Wis. 2d 91 (1970); *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358 (1970); *Racine Fire and Police Comm'n v. Stanfield*, 70 Wis. 2d 395, 399 (1975). The positions at issue are not part of the classified service. The Commission does not have express or implied authority under any statute to convert unclassified positions to the classified service. To assign these unclassified positions to bargaining units under the unit clarification statute would be to convert the positions to the classified service. Because the Commission does not have authority to convert the positions, it does not have jurisdiction under the unit clarification statute.

The Commission and its predecessors have a long history of regularly dismissing cases involving unclassified academic staff for lack of jurisdiction under SELRA. In *Teaching Assistants' Association v. University of Wisconsin-Madison*, Dec. No. 9261-A (WERC 10/20/1969), the Commission dismissed an unfair labor practice complaint brought on behalf of teaching assistants for lack of jurisdiction. The Commission held that, at that time, teaching assistants were excluded from classified service and thus did not meet SELRA's definition of "employee." *Id.*

In *Sears v. UW System*, Decision No. 30794 (March 3, 2004), the Commission dismissed an appeal of a layoff of an individual holding an unclassified UW position.

The Commission held that SELRA “does not provide for review of a layoff of an employee from the unclassified service. Separate administrative rules apply to appointments to the unclassified service,” including chs. UWS 2-13, Wis. Admin. Code. *Id.*

In *Gawenda v. University of Wisconsin System*, Decision No. 31149 (November 18, 2004), the Commission dismissed an appeal of a decision not to hire an individual for an unclassified academic staff position. The Commission held that it could not hear the appeal because the position was not in the classified service. In *Teaching Assistants' Association, Sears, and Gawanda*, the Commission consistently concluded that it did not have authority to hear a matter regarding an unclassified academic staff member when the matter was brought under a statute using SELRA's definition of “employee.”

Further, the Commission has explicitly recognized that it does not have authority to designate a position as part of the classified service or as unclassified academic staff. In rejecting a request to convert two newly-created unclassified academic staff positions to the classified service, the Personnel Commission (predecessor to the Employment Relations Commission) held that “[c]learly the authority to determine what positions shall be academic staff in the unclassified as opposed to the classified service, is vested in the Board of Regents.” *WSEU v. University of Wisconsin*, Case No. 74-100 (Personnel Commission 2/15/80).

The Commission declined to hear an appeal of a decision to convert classified positions to unclassified academic staff in *WSEU v. University of Wisconsin*, Case No. 80-0149-PC (Personnel Commission 8/19/80). In that appeal, WSEU relied upon s. 230.44(1)(b) and (d) to challenge the decision. *Id.* The Personnel Commission held:

2. Neither Section 230.44(1)(b) or 230.44(1)(d), nor any other section, gives the Personnel Commission the authority to hear appeals of actions by the UW Board of Regents in designating positions in the University of Wisconsin System as academic staff positions.

3. The Commission lacks jurisdiction over the subject matter of this appeal and it must be dismissed.

Id.

In addition, in *Buckley v. Department of Employment Relations*, No. 91-0018-PC (Personnel Commission 5/1/1991), the appellant challenged the denial of her request to convert from classified employment to unclassified academic staff. The Personnel Commission dismissed the case for lack of jurisdiction, holding:

The basis for the Commission's jurisdiction over appeals from personnel transactions is found in §230.44(1), Stats. . . None of the statutory references relate to decisions by DER [OSER's predecessor, the Department of Employment Relations] designating positions as academic staff versus classified civil service under §36.09, Stats., thereby indicating a legislative intent that the Commission does not have the authority to review such transactions.

Id. This holding from *Buckley* was cited by the Commission as recently as 2004 in its decision in the *Sears* appeal. Decision No. 30794.

Unlike the appellants in *WSEU v. UW* and *Buckley v. DER*, the current petitions are not expressly challenging the decision to designate the 304 individuals at issue as unclassified academic staff. Rather, the petitions are brought under s. 111.825(3), seeking to have the Commission assign the individuals to bargaining units for classified positions. Because the Commission would lack jurisdiction over a direct appeal of the service designations of the positions, the Commission cannot infer any jurisdiction to accomplish the same result through a SELRA unit clarification petition. There is no way that the Commission can act under s. 111.825(3) to assign individuals who have already been designated as unclassified academic staff. The unit clarification petitions are facial

challenges to the Commission's long-standing recognition that SELRA does not grant it jurisdiction over academic staff.

V. Unclassified academic staff have recently obtained the right to form their own bargaining units and vote on whether to be represented.

Prior to 2009, unclassified academic staff did not have the right to collectively bargain. They were excluded from SELRA's definition of "employee," and no other statutory collective bargaining provision covered them.

However, the 2009 Budget Act created the statutory provision titled "University of Wisconsin System Faculty and Academic Staff Labor Relations." 2009 Wisconsin Act 28, s. 2255; Wis. Stats. ch. 111, subch. VI (referred to herein as the "UW Labor Relations Law"). It is separate from SELRA and gives unclassified academic staff collective bargaining rights comparable to classified employees. Unclassified academic staff can now vote on whether they will be represented by a labor organization and if so, which organization will represent them.

Notably, the new law does not convert unclassified academic staff positions to the classified service, nor does it give the Commission authority to do so. That authority remains with the Board.

Assigning unclassified academic staff to bargaining units for classified employees would be to place academic staff under representation that they have not chosen for themselves. Academic staff members have publicly expressed concern that unit clarification petitions would take away their right to vote:

[S]ome academic staffers who found out about the unions' plans [to file unit clarification petitions] said they were opposed to being forced into a union without a vote. The union has always supported the right of employees to decide whether they want to be part of the union or not," said Carol Weidel, a programming analyst at UW-Madison who is an academic staff member. "It's not something that's imposed on you."

Weidel is a treasurer for the United Faculty and Academic Staff, an American Federation of Teachers local on the UW-Madison campus that currently [as of the June 26, 2009 date of publication of the article] has no collective bargaining powers but plans to organize once the budget passes.

Erica Perez, *Some UW Staff Could Face Placement Into Unions*, Milwaukee Journal Sentinel, June 26, 2009, at A1. AFT-Wisconsin President Bryan Kennedy has also expressed the desire to allow academic staff the right to choose whether they want to be represented. At a March 3, 2009 public hearing, he testified:

This basic right, the right to decide whether or not we would even like to have a union, is denied to the faculty and academic staff. . . . [T]here are members of AFT on every single UW campus who want to have the right to be able to decide for themselves whether or not we can have a union.

Joint Committee on Finance Public Hearing from Racine, Part 1, available online at http://www.wiseeye.org/wisEye_programming/ARCHIVES-jointcommittees.html.

Academic staff are not classified employees and cannot be assigned to bargaining units for classified employees. Rather, they have the right to vote under the new UW Labor Relations Law.

CONCLUSION

The 304 positions at issue are currently designated as unclassified academic staff. Only the Board of Regents, under guidelines developed with OSER, has authority to convert the positions to the classified service. If there is a dispute as to whether the individuals perform duties more characteristic of the classified service, it is not for the Commission to hear.

Because the positions are not in the classified service, the Commission does not have authority under SELRA's unit clarification statute to assign them to bargaining units that are already represented by Petitioners. To do so would undermine the new right of

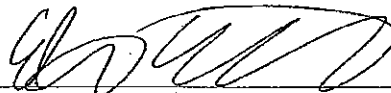
academic staff to decide whether to be represented by a labor organization, and if so, which organization.

No interpretation of the facts would make dismissal inappropriate. Therefore, OSER respectfully requests that the Commission dismiss the petitions for lack of subject matter jurisdiction.

Dated: 1/8/10

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OFFICE OF STATE
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