



STATE OF WISCONSIN
BEFORE THE
WISCONSIN EMPLOYMENT RELATIONS COMMISSIONS 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.

RESPONDENT STATE OF WISCONSIN'S REPLY IN SUPPORT OF MOTION TO
DISMISS

INTRODUCTION

Respondent State of Wisconsin, by its attorneys, submits the brief in reply to the briefs of Petitioners WPEC, PERSA, WPDA and WSEU. Petitioners have raised no arguments in their briefs that would provide the Commission with jurisdiction over the petitions under the State Employment Labor Relations Act (SELRA), Faculty and Academic Staff Labor Relations Act (FASLRA), or any other law.¹

¹ Respondent believes the affidavits of Jim Bakken and Art Foeste, in which they relate conversations they had with James Pankratz, are wholly irrelevant to the issue of statutory interpretation before the Commission and should therefore be disregarded. Motions to dismiss are to be decided on the pleadings. Wis. Admin. Code s. ERC 18.06(2)(e). They challenge the legal sufficiency of the complaint. *Mayers v. Bayer AG*, 2007 WI 99 ¶ 81, 303 Wis.2d 295, 735 N.W.2d 448 (Roggensack, J., dissenting). It is appropriate to include historical, official records with a motion to dismiss. *Id.* However, if the Commission relies on the non-documentary evidence in the affidavits, Respondent is entitled to notice that its motion to dismiss has been converted to one for summary judgment and should be given a reasonable opportunity to present pertinent material in response to the affidavits. *See Heling v. Village of Howards Grove*, 2010 WL 174114; Wis. Stat. s. 802.06(3).

ARGUMENT

I. The legislature has not conferred the Commission with express or implied authority to hear the petitions.

Petitioners' consistent refrain that the Commission must have the authority to define who an employee is for purposes of SELRA ignores the fundamental fact that the legislature, not the Commission, defined the term "employee" in both SELRA and FASLRA. The Commission's job is to interpret those sections consistent with their clear meaning, not to rewrite them as the Petitioners urge.

The petitions were brought under Wis. Stat. s. 111.825(3)², which provides that "[t]he commission shall assign employees to the appropriate bargaining units set forth in subs. (1), (1m) and (2)." SELRA defines an "employee" as, *inter alia*, "an employee in the classified service of the state as defined in s. 230.08." Wis. Stat. s. 111.81(7). The legislature did not authorize the Commission to define "classified" in Wis. Stat. ss. 111.81(7) or 111.825(3), or by reference to s. 230.08. Likewise, nowhere in Wis. Stat. s. 230.08 did the legislature authorize the Commission to determine whether a position is classified.

Rather, the legislature granted OSER express authority to assign non-UW positions to the unclassified service, and the Board of Regents authority to assign UW positions to the unclassified service. Wis. Stat. ss. 230.04(1), 36.15(2). Contrary to the assertion of Petitioners WPEC, PERSA, and WPDA, there is no reason to "rewrite" the definition of "employee." (WPEC, PERSA, and WPDA Brief at 15).

² All statutory citations are to the 2007-2008 edition of the Wisconsin Statutes, unless otherwise noted.

II. None of the statutes discussed by Petitioners grant the Commission authority to assign the positions in question to bargaining units.

Petitioners all but concede that the language of the applicable laws does not give the Commission jurisdiction in this case. Instead, they argue that such jurisdiction “necessarily flows,” is implied, or is “a condition predicate” to the Commission’s functions. (WPEC, PERSA, and WPDA Brief at 15-17). These arguments are unconvincing. They are simply an attempt to grant the Commission powers beyond that which are “expressly conferred or necessarily implied” under current law.

A. The Commission’s authority to hear unfair labor practice complaints and conduct elections concerning “employees” is irrelevant to the issue at hand.

Petitioners assert that because the Commission has authority under SELRA to hear unfair labor practice complaints concerning “employees” and to conduct elections by “employees,” it must have authority under Wis. Stat. s. 111.825(3) to assign the unclassified positions at issue to bargaining units for classified employees. (WPEC, PERSA, and WPDA Brief at 12 -17). OSER agrees that the Commission has authority under SELRA to hear unfair labor practice complaints and conduct elections concerning “employees.” Wis. Stat. ss. 111.81(6), 111.84(1). However, positions designated as unclassified do not meet SELRA’s definition of “employee.” Therefore, the Commission would not have authority under SELRA to hear unfair labor practice complaints or conduct elections concerning positions designated as unclassified academic staff. The use of the term “employee” in other SELRA statutes does not bring unclassified academic staff under the Commission's SELRA jurisdiction.

- B. The Commission's authority to interpret the terms "management," "supervisor," and "confidential" does not infer authority to determine whether a position has been properly designated as unclassified.

Petitioner WSEU cites *Wisconsin Federation of Teachers v. State of Wisconsin*, Dec. No. 11885-M (WERC, Nov. 23, 1982) and *District 1199W/United Professionals for Quality Health Care v. State of Wisconsin*, Dec. No. 26758 (WERC, Jan. 24, 1991), in which the Commission analyzed whether positions were confidential, management, or supervisory. (WSEU Brief at 5). WSEU appears to assert that since the Commission can determine whether an individual is a manager, supervisor, or confidential employee, it can also determine whether a position is properly designated as unclassified.

Supervisory, management, and confidential positions are excluded from SELRA's definition of "employee," and thus excluded from the Commission's jurisdiction. Wis. Stat. s. 111.81(7)(a). However, unlike the determination of whether a position should be classified, the Commission has been given statutory authority to determine whether a position is confidential, management, or supervisory. The legislature defined "confidential" directly in Wis. Stat. s. 111.81(7), "management" in s. 111.81(13), and "supervisor" in s. 111.81(19). Therefore, the legislature expressly charged the Commission with the authority to interpret those terms.

The Commission's decision in *District 1199W* is instructive. In that case the Commission recognized that the definition of management "specifically lists certain positions which, by virtue of their placement in the organization structure, are per se management positions." *District 1199W* at 20, (citing *Wisconsin State Attorneys Association v. State of Wisconsin*, Dec. No. 11640-C (WERC, January 31, 1986)) (emphasis in original). Those positions include division administrators and bureau

directors. *Id.* The Commission acknowledged that it does not have authority to decide whether a person appointed to be a division administrator or bureau director is actually a division administrator or bureau director.

Likewise, unclassified employees are *per se* excluded from the definition of an “employee” under SELRA. Section s. 230.08, Wis. Stat., lists positions that are part of the unclassified service. The list includes division administrators. Wis. Stat. s. 230.08(2)(e). Again, the Commission cannot decide that a person appointed as a division administrator is really not a division administrator. These cases and statutes demonstrate that when the legislature incorporated Wis. Stat. s. 230.08 into SELRA’s definition of “employee”, it did not intend to provide the Commission with authority to interpret s. 230.08. Because Wis. Stat. s. 230.08 excludes academic staff positions from the classified service, SELRA’s definition of “employee” will never include them, and the Commission cannot use SELRA to assign them to bargaining units.

C. Petitioners’ reading of the statutes creates a conflict.

Contrary to the assertion of Petitioners WPEC, PERSA, and WPDA, Wis. Stat. s. 111.17 regarding conflicting laws is inapplicable. (WPEC, PERSA, and WPDA Brief at 14-15). If both the Board of Regents and the Commission were given authority to designate UW positions as classified, the statutes would conflict. However, the Commission has not been granted such authority, and so there is no conflict in the statutes regarding the authority to determine whether a position is classified.

D. Petitioners' reliance on the legislature's enactment of FASLRA and the Governor's veto of s. 2255 of 2009 Wisconsin Act 28 is misplaced; their attempt to accomplish what they were unable to obtain in the legislative process should be denied; and FASLRA explicitly reserves for the Board of Regents the right to assign UW staff to the classified or unclassified service.

1. *Per each subchapter's definition of "employee," FASLRA covers unclassified academic staff, and SELRA covers classified employees.*

Petitioners' references to the Commission's authority over "employees" under FASLRA do not support their case. The petitions were brought under SELRA, which uses a different definition of "employee" than FASLRA. Wis. Stats. s. 111.96(7).

2. *The Governor's veto and legislative history show an intent to prevent the placement of unclassified academic staff into already-represented bargaining units for classified employees.*

Read in its entirety, the Governor's veto message clearly shows an intent to prevent the Commission from assigning positions designated as unclassified academic staff to bargaining units for classified employees. The goal was to provide those individuals the right to choose whether to be represented and by whom in the first instance:

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 staff to bargaining units is unnecessary since it is redundant with WERC authority under current law. (emphasis added).

(WPEC, PERSA, and WPDA Brief, App. 5 at 41).

Petitioner's interpretation of the last sentence is wholly at odds with the preceding sentence. If the Governor believed the Commission had existing authority to force unclassified academic staff into already-represented bargaining units, an objection on the basis of allowing the individuals the right to choose would be futile.

Moreover, a complete review of the relevant legislative history reveals that the effect of the veto was to prevent precisely what the Petitioners urge the Commission to do in this proceeding. As originally introduced on February 17, 2009, the bill included the following in s. 111.98 of the proposed FASLRA:

(3) The commission shall assign employees to the appropriate collective bargaining units described under sub (1) or (2).

2009 Assembly Bill 75 (Exhibit 1). Under the original bill, the Commission would have been able to assign unclassified academic staff to bargaining units established under FASLRA for unclassified academic staff.

On May 28, 2009, the Joint Committee on Finance offered the following amendment to the bill:

(3) The commission shall assign employees to the appropriate collective bargaining units described under sub. (1) or (2) or under s. 111.825(1) or (2).

Assembly Substitute Amendment 1, to 2009 Assembly Bill 75 (Exhibit 2).

The Legislative Fiscal Bureau described the difference between the original 2009 Assembly Bill 75 and the Joint Finance version. Legislative Fiscal Bureau, *Comparative Summary of Budget Recommendations* at 830 (October 2009) (Exhibit 3). The Fiscal Bureau correctly stated that the Joint Finance version of the bill provided the Commission “with the authority to assign UW academic staff employees to the appropriate collective bargaining unit established under **either Subchapter V or Subchapter VI of Chapter 111.**” *Id.* (emphasis added). In other words, the Joint Finance version would have allowed the Commission to assign unclassified academic staff to **either** bargaining units for classified staff or bargaining units for unclassified academic staff.

The Fiscal Bureau also described the difference between the vetoed version and the prior versions.

The Governor's partial veto deletes the provision to authorize WERC to assign faculty and academic staff to the appropriate collective 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 this explicit authority under Subchapter VI.

Legislative Fiscal Bureau, *Summary of Partial Vetoes of 2009 Wisconsin Act 28* at 42 (July 6, 2009) (Exhibit 4). Thus, the veto removed the Commission's proposed authority to assign unclassified academic staff to already-represented bargaining units for classified employees.

3. *FASLRA expressly protects the Board of Regents' right to designate positions as academic staff.*

Petitioners ignore the fact that FASLRA made bargaining on "the rights of appointment provided academic staff under s. 36.15" a prohibited subject of bargaining.

Wis. Stat. s. 111.998(2)(a). Section s. 36.15(2), Wis. Stat., provides:

Appointments made under this section [titled "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) [the provision directing OSER and the Board to develop policies regarding designation of positions as unclassified versus classified].

Therefore, the Board of Regents cannot bargain away its right to designate or convert a position between unclassified academic staff and the classified service.

"A prohibited subject of bargaining is one that would violate a law." *City of Janesville v. Wisconsin Employment Relations Commission*, 193 Wis.2d 492, 500, 535 N.W.2d 34 (Ct. App. 1995). If a bargaining proposal that attempts to intrude on the Board's authority under Wis. Stat. s. 36.15 is illegal, so too would a Commission order

that does the same. Stated differently, if the Board cannot give away its right to designate positions as unclassified academic staff, the Commission cannot take it away.

III. The Commission has routinely denied jurisdiction over unclassified academic staff positions and Petitioners fail to refute this fact.

Petitioners attempt to distinguish the cases cited by OSER and the Board of Regents by pointing out that they were not brought in the context of unit clarification petitions. (WPEC, PERSA, and WPDA Brief at 22-23; WSEU Brief at 9-10). To the contrary, these cases are on-point because they show that the Commission has consistently refused to question a designation that a position is unclassified.

In *WSEU v. University of Wisconsin*, Case No. 74-100 (Personnel Commission 2/15/80), the union sought to have the Commission hold that positions designated as unclassified academic staff should have been designated as classified instead. The Commission refused, holding 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.” *Id.* at 5.

In the current petitions, WSEU and the other Petitioners are again asking the Commission to determine that positions designated as unclassified academic staff should have been designated as classified instead. There is no other way to bring the positions into the definition of “employee” and thus into the Commission’s jurisdiction under Wis. Stat. s. 111.825(3). As stated in OSER’s Motion, because the Commission would lack jurisdiction over a direct appeal of the service designations of the positions, the Commission cannot infer any jurisdiction to do the same through a unit clarification petition.

In *WSEU v. University of Wisconsin*, Case No. 80-0149-PC (Personnel Commission 8/19/80) and *Buckley v. Department of Employment Relations*, No. 91-0018-PC (Personnel Commission 5/1/1991), the Commission expressly refused to determine whether a position was properly designated as unclassified or classified. In *Sears v. UW System*, Decision No. 30794 (March 3, 2004) and *Gawenda v. University of Wisconsin System*, Decision No. 31149 (November 18, 2004), the Commission recognized that it did not have jurisdiction over unclassified employees. It is irrelevant that those cases were brought under Wis. Stat. s. 230.44 rather than SELRA. In order for the Commission to have jurisdiction to hear a matter under Wis. Stat. ss. 230.44(1)(b), (c), or (d), the positions at issue must be classified. Similarly, in order for the Commission to have jurisdiction under Wis. Stat. ss. 111.825(3), the positions at issue must be classified. In both *WSEU* cases, *Buckley*, *Sears*, and *Gawenda*, the Commission recognized that if a position has been designated as unclassified, it does not have jurisdiction to question that determination. Therefore, wherever the Commission's jurisdiction is dependent on a position being classified, as in Wis. Stat. s. 111.825(3), and the position at issue has been designated as unclassified, the Commission consistently concludes that it lacks jurisdiction.

Petitioner WSEU asserts that in *Teaching Assistants' Association v. University of Wisconsin-Madison*, Dec. No. 9261-A (WERC 10/20/1969)("TAA"), the Commission looked to the definition of "classified service" in determining that teaching assistants were not "employees" under SELRA. (WSEU Brief at 9). In that decision, there is no indication that the Commission was asked to change the designation of positions from unclassified to classified, as the Commission would have to do to hear the current

petitions. The Commission's decision in *TAA* cannot be read to indicate that the Commission could create jurisdiction over unclassified positions by re-designating them as classified.

Petitioners WPEC, PERSA, and WPDA question OSER's and the Board of Regents' reliance on cases decided before FASLRA. (WPEC, PERSA, and WPDA Brief at 21). Because FASLRA did not grant the Commission authority to change the service designation of UW positions, the significance of the decisions is not diminished.

IV. Petitioners' public policy arguments and analogies do not allow the Commission to rewrite the law.

Petitioners argue that, as a matter of public policy, the Commission must have jurisdiction. They assert that employees are entitled to a neutral agency to hear disputes over whether they have been properly designated as unclassified academic staff. (WPEC, PERSA, and WPDA Brief at 10).

OSER recognizes the policy interest in favor of a neutral decision-maker. However, the law does not grant that decision-making authority to the Commission in this instance. Rather, as explained in the Board of Regents' Brief, an unclassified UW employee who believes he or she has been wrongly designated may challenge the decision through UW's grievance procedure. (Board of Regents Brief at 13). The final outcome of the grievance procedure is subject to judicial review under ch. 227, Wis. Stats. See *Meyer v. UW-Madison*, No. 91-0217, 170 Wis. 2d 732 (Ct. App. 1992) (unpublished decision) (involving judicial review of salary related grievance under internal UW-Madison academic staff grievance procedures). Thus, the law already provides for a neutral decision-maker to hear disputes regarding a designation as unclassified academic staff.

Petitioners WPEC, PERSA, and WPDA also appear to argue that because congressional districts may be redrawn, the Commission should have similar authority to assign positions to already-represented bargaining units. (WPEC, PERSA, and WPDA Brief at 24-25). However, the laws governing congressional districts are not remotely analogous to the statutes at issue and certainly do not govern the Commission's authority.

CONCLUSION

While concerns about fairness and public policy have their place in advocacy, they cannot be used to supplant or contravene the plain language of the law. For the foregoing reasons, and those presented in their brief-in-chief, Respondents respectfully request that their Motion to Dismiss be GRANTED.

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Respectfully Submitted,
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