

STATE OF WISCONSIN
BEFORE THE
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Petitioners,

and

STATE OF WISCONSIN,

WERC Case Nos. 821-824

Employer,

and

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

REPLY BRIEF OF THE BOARD OF REGENTS
IN SUPPORT OF THEIR MOTION TO DISMISS

The Board's motion rests on two fundamental premises: (1) the Commission's jurisdiction in unit clarification proceedings is unambiguously limited to classified staff; and (2) there is no basis or precedent for the Commission to change the service designations of unclassified staff through unit clarification. Petitioners' briefs present no authority contrary to either premise.

A. PETITIONERS' READING OF SELRA WOULD NEGATE THE BOARD'S
EXPLICIT STATUTORY AUTHORITY UNDER CHAPTER 36, WIS. STATS.

Petitioners agree, as the Commission recently explained, that "administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the *statute under which the agency proceeds.*" *Thiel v. Wis. Dept. of Trans.*, Decision Nos. 31725 & 31726-A (WERC

12/16/2009) (emphasis added) (quoting *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358 (1970), *vacated and remanded on other grounds by Farrell v. Schmidt*, 408 U.S. 915 (1972)). In unit clarification, WERC proceeds under SELRA which is expressly limited to classified

employees. Recognizing this, petitioners argue that the Commission nevertheless has implied and exclusive jurisdiction to review and overturn the service designations of unclassified UW employees because “employee” is defined in SELRA with reference to the “classified staff” as defined in Wis. Stat. § 230.08, which in turn defines the classified staff with reference to, among numerous other statutes, the definition of “academic staff” set forth in Wis. Stat. § 36.05(1).

This statutory leap-frogging has no logical stopping point. By the same reasoning, the Commission would also have exclusive jurisdiction in a unit clarification proceeding to construe every other statute – and there are many-- referenced in Wis. Stat. § 230.08 to determine whether employees of the agencies referenced therein are SELRA “employees.” That is not the law.

More importantly, petitioners’ argument disregards the Board’s explicit authority to appoint academic staff “under policies and procedures established by the board” and to establish, together with OSER, the 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).” Wis. Stats. §§ 36.15(2), 36.09(1)(i). Reading SELRA in a way that negates the Board’s explicit authority under Chapter 36 is contrary to black letter principles of statutory construction that require harmonizing statutes to give each its full force and effect. *E.g. State v. Fischer*, 2010 WI 6 at ¶ 24 (2010).¹

Petitioners assert that they are not seeking to overturn the Board’s designation of academic staff as unclassified staff in this proceeding, but that is precisely what would have to

¹ WSEU argues that the Board’s service designations of academic staff pursuant to its explicit authority should be given no weight because the meaning of Wis. Stat. § 36.05(1) is clear on its face. (WSEU Br. at 4). This argument misstates the issue. The relevant issue is the scope of the Board’s and the Commission’s authority. The Board’s position is that the Commission should recognize and defer to the Board’s authority to appoint academic staff under Chapter 36. Whether Wis. Stat. § 36.05(1) is clear on its face does not bear on the issue.

happen before a unit clarification proceeding under SELRA could proceed. Petitioner's claim that the Commission is empowered to clarify classified staff bargaining units to include academic staff because they are improperly designated puts the cart before the horse. No

member of the academic staff is an "employee" within the meaning of SELRA unless the Board and OSER, operating pursuant to their statutorily-mandated policies (*see* Wis. Stat. 36.09(1)(i)), determine that he or she in fact holds a position that should be in the classified service. In citing the Personnel Commission decisions in the *WSEU v. University of Wisconsin* cases, the Board was simply drawing attention to the Personnel Commission's recognition of the Board's statutory authority and its deference to the Board in matters relating to the service designation of academic staff and faculty. In construing SELRA, it is similarly appropriate for the Commission to recognize rather than disregard the Board's authority.

Finally, the Board does not claim that it has the authority to determine who is an "employee" under SELRA, nor does it dispute the Commission's authority to determine whether individual employees are "supervisors" or "management" in the context of unit clarification, as illustrated in the decisions cited by petitioner WSEU. (WSEU Br. At 5). That determination does not require the Commission to venture outside SELRA, the statute under which it proceeds, because both terms are defined in SELRA. Wis. Stat. §§ 111.81(13) and (19). Similarly, the Board's authority to appoint academic staff in the unclassified service is entirely within Chapter 36, and the exercise of the Board's authority in no way impinges on the Commission's under SELRA.

B. UW EMPLOYEES HAVE A FORUM WITHIN THE UW SYSTEM TO PROTECT THEM FROM IMPROPER SERVICE DESIGNATION.

Without any supporting authority, petitioners claim that the academic staff grievance procedures at UW System institutions, which were implemented according to Ch. UWS 13, Wis. Adm. Code, and by which decisions on employee grievances are subject to judicial review, are nevertheless not sufficiently specific to constitute an adequate remedy for employees aggrieved by their service designations. Petitioners are mistaken. Institutional grievance procedures provide employees redress for all sorts of issues, and decisions on grievances are subject to multiple layers of review, including judicial review pursuant to Wis. Stat. § 227.52. The court's review of UW-Madison's decision on a grievance in *Meyer*² (cited in the Board's Motion to Dismiss at p. 13) is but one example of the complex issues (in that case, an allegation that the institution had failed to properly implement salary "decompression" procedures) that may be the subject of an employee grievance and of the substantial process afforded to employees who file a grievance. Indeed, petitioners have not cited a single instance in which the University's academic staff grievance policy has been deemed inadequate for any relevant purpose.

Moreover, petitioners do not deny that, through the 1992 and 1993 MOAs (Motion Exhibits 5 and 6), the Board and OSER have developed a system for determining the service designations of UW employees and a mechanism for conversion of positions from unclassified to classified staff in appropriate circumstances. (WSEU Br. at 6). That system establishes a UW System Position Conversion Appeals Panel to review requests for conversion of classified staff positions to unclassified staff where the position is occupied at the time the request is made. Although, as indicated in UPG #7, such requests are rare, and accordingly, so are appeals to the

² *Meyer v. UW-Madison*, No. 91-0217, 170 Wis. 2d 732 (Ct. App. 1992) (unpublished decision), review denied by *Meyer v. UW-Madison*, 494 N.W.2d 210 (1992).

UW System Position Conversion Appeals Panel, the Panel has been convened on occasion to examine the service designations of particular employees. For example, in the attached decision (Exhibit 1), the Panel found that an editor's position at UW-Stevens Point was properly

designated as classified staff, contrary to the institution's and employee's assertion that the position belonged in the unclassified staff. This procedure also would provide a forum for employees who believe they are improperly designated.

Petitioner WPEC finds it telling that several of the positions identified in the petitions are among those subject to conversion from academic staff to classified staff as the positions become vacant. (WPEC Br. at 11). That fact is significant, but not for the reason advanced by WPEC. Rather, it indicates that there is a functioning procedure for conversion of academic staff to classified staff in appropriate circumstances which protects the contractual and due process rights of the incumbents. Forcing the incumbent employees immediately into the classified service would violate those rights.

More broadly, the subtext of petitioners' argument is that all of the employees occupying the positions identified in the petitions are aggrieved by being designated as academic staff, and that the Commission must step in to correct inequities resulting from the Board's determinations. While the Board is unaware of any academic staff member who has come forward with a grievance regarding his or her designation to the unclassified staff, the lack of any such grievances is more an indication of employees' satisfaction with being in the unclassified service and with the protections the Board affords incumbents in unclassified positions that may be subject to conversion. But if there were particular employees with such a grievance, the Board's internal procedures would afford a forum and a decision process by which experts at the

institutional and UW System levels could review an employee's unclassified staff designation and any resulting effects on the employee's terms and conditions of employment.

C. THE NEW FACULTY AND ACADEMIC STAFF BARGAINING LEGISLATION IS IRRELEVANT TO A DETERMINATION OF THE COMMISSION'S JURISDICTION IN A UNIT CLARIFICATION PROCEEDING UNDER SELRA.

Petitioner's lengthy argument (WPEC Br. at 12-23) based on the new collective bargaining legislation for faculty and academic staff, Wis. Stats. Chapter 111, Subchapter VI (FASLRA) is misguided and internally inconsistent. On the one hand petitioners argue that FASLRA confers jurisdiction in this case because, unlike in SELRA, faculty and academic staff are "employees" within the meaning of FASLRA. On the other hand, petitioners argue that FASLRA, particularly in light of the Governor's veto message, confirms the Commission's alleged long-standing jurisdiction under SELRA to assign faculty and academic staff to classified staff bargaining units.³ In fact, FASLRA does neither.

There is simply no support in either statute for the petitioners' theory that the Commission has the authority to assign members of the academic staff to the civil service. The question of an administrative agency's jurisdiction is clearly one of statutory construction. *Board of Regents of University of Wisconsin System v. Wisconsin Personnel Commission*, 103 Wis.2d 545, 552-53, 309 N.W.2d 366 (Ct. App. 1981). When construing a statute, if the process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning. *Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 663, 681 N.W.2d 110. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.*

³ Petitioners do not dispute that the present unit petitions are the first to attempt to clarify classified staff bargaining units to include academic staff. If the Commission truly had the authority all along to assign academic staff to classified bargaining units it is curious that petitioners have waited so long to appeal to it.

The petitioners invite the Commission to consult hearsay evidence of long ago conversations and cherry-pick (out of context) from the Governor's FASLRA veto message to ascertain the meaning of SELRA.⁴ But they do so in clear violation of *Kalal* without first demonstrating that SELRA is ambiguous as to whether it authorizes the Commission to assign members of the UW academic staff to the civil service:

The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute to determine whether 'well-informed persons should have become confused,' that is, whether the statutory ... language reasonably gives rise to different meanings. Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.

Kalal, ¶ 47, citing *Bruno v. Milwaukee County*, 260 Wis.2d 633, ¶¶ 19-21, 660 N.W.2d 656 (2003).

There is no ambiguity in SELRA, FASLRA, or Wis. Stat. ch. 230 that has been or can be construed as granting the Commission authority to assign members of the academic staff to classified staff bargaining units under the guise of unit clarification or any other theory.⁵ Without such a demonstration, the Commission may not seek to establish its authority through veto messages, conversations among state employees, or any other extrinsic sources.

⁴ Petitioners' extrinsic evidence as to the meaning of agreements between the State and the University is also inadmissible under the well-established parol evidence rule. See e.g. *Conrad Milwaukee Corp. v. Wasilewski*, 30 Wis.2d 481, 488, 141 N.W.2d 240, 244 (1966) ("Oral testimony to be admissible under the parol-evidence rule must clarify an existing ambiguity and cannot establish an understanding in variance with the terms of the written document. . . . If oral testimony is offered as a part of the entire agreement, then the oral part of the agreement cannot contradict the written part.") (internal citations omitted).

⁵ Petitioner WPEC's statement that, in moving to dismiss the unit clarification petitions, the Board is in fact challenging the Commission's jurisdiction in a representation proceeding under FASLRA (WPEC Br. at 10) is perplexing. If academic staff members choose to organize, they may do so under FASLRA, and the Commission would have the authority granted to it under FALSRA to conduct attendant representation proceedings.

Conclusion

Petitioners accuse the Board of hypocrisy in arguing that dismissal of the unit

clarification petitions is necessary to preserve academic staff employees' choice in deciding whether to join a union. Regardless of what petitioners seek to accomplish through the present petitions, it is undisputed that, under their theory, the affected employees would have no choice and no voice in becoming a member of a classified staff bargaining unit. This is contrary to the elemental principle that employees have the right choose whether to be represented by a labor organization, and if so, by which one. See Wis. Stats. §§ 111.82 and 111.97 ("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* ...") (emphasis added).


For the all the foregoing reasons, the petitions should be dismissed.

Dated: February 26, 2010

Respectfully Submitted,

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM

Patricia A. Brady
General Counsel



Christopher L. Ashley
Senior System Legal Counsel
1856 Van Hise Hall
1220 Linden Drive
Madison, WI 53562

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The University of Wisconsin System

Office of General Counsel
1738 Van Hise Hall, 1220 Linden Drive
Madison, Wisconsin 53706
(608) 262-2995

Charles J. Stathas (608) 262-6166
John B. Tallman 262-0747
Patricia B. Hodulik 262-6497

May 15, 1989

TO: President Shaw

FROM: Patricia B. Hodulik, Chair *Patricia B. Hodulik*
Position Conversion Appeals Panel

RE: Appeal from Denial of Request for Position Conversion,
UW-Stevens Point

On April 12, 1989, the UW System Position Conversion Appeals Panel ("Panel") met to consider an appeal from the decision of the University Personnel Relations Office denying a request for the conversion of a position at UW-Stevens Point from Publications Editor 4 in the classified civil service, to Editor in the academic staff. The incumbent in the position involved is Marilyn Thompson. She appeared at the meeting, together with her supervisor, John Anderson. Charles McConnell appeared on behalf of University Personnel Relations. The Panel heard argument from both parties. Based on its consideration of the record in this matter, and the arguments presented by the parties, the Panel concludes that Ms. Thompson's position is properly designated as Publications Editor 4 in the classified civil service, and that conversion of the position to the academic staff would not be consistent with Unclassified Personnel Guideline (UPG) #7.

UPG #7 provides that assignments to academic staff positions may 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 which require close peer relationships with members of the faculty and academic administrators.

In support of the request for the conversion of Mrs. Thompson's position, it is argued that her work is separate and distinct to higher education, and further that the position requires close peer relationships with faculty and academic administrators. Analysis of the duties of the position, however, fails to support these contentions. Both the position description and the discussion at the hearing indicate that the majority of the duties performed by Mrs. Thompson's position involve functions related to printing: preparing specifications and bidding printing jobs, consulting with staff members concerning their printing needs, and

Exhibit 1

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief was mailed, first-class, postage prepaid, this 26ⁿ day of February, 2010 to:

Tom Ellett
Staff Representative
6602 Normandy Lane
Madison, WI 53719

and to:

Richard Thal
Lawton & Cates, S.C.
10 East Doty Street, Suite 400
Madison, WI 53703

and to:

Cari Ann Renlund
Chief Legal Counsel
Department of Administration
101 E. Wilson Street
Madison, WI 53703



Christopher L. Ashley