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News for School Clients

Composition of the Professional Staff Bargaining Unit

Under the Municipal Employment Relations Act (MERA), Wis. Stat. § 111.70 *et seq.*, the composition of a professional staff bargaining unit may be established or modified by voluntary agreement of the parties, or as the result of a determination by the Wisconsin Employment Relations Commission (WERC). A decision regarding the composition of a bargaining unit generally occurs shortly before an election to determine who will serve as the bargaining unit members' exclusive representative for purposes of collective bargaining, or when the circumstances are such that it is necessary to determine whether a specific position(s) should be included in, or excluded from, an existing bargaining unit. When the WERC is asked to issue a decision concerning the composition of the bargaining unit, the process is called a "unit clarification."

On August 27, 2004, the WERC issued a decision in the unit clarification case of *Oconomowoc School District*, Dec. No. 31059 (WERC, 8/04), which concerned whether the school district's Permanent Substitute Teachers should be added to the existing professional staff bargaining unit. This case arose when the Oconomowoc Education Association asserted that the position of Permanent Substitute Teacher met the definitional criteria set forth in the collective bargaining agreement for a regular-full time teacher, due to the regularity with which Permanent Substitute Teachers worked for the District, as well as the similarity of duties between Permanent Substitute Teachers and the

other regular professional staff members. Accordingly, the Association requested that the WERC add the Permanent Substitute Teachers to the professional staff bargaining unit.

To determine whether it was appropriate for the Permanent Substitute Teachers to join the other regular professional staff employed by the school district in the professional staff bargaining unit, the WERC considered the following seven factors: (1) whether the employees share a community of interest distinct from that of other employees; (2) the duties and skills of employees as compared with the duties and skills of other employees; (3) the similarity in wages, hours and working conditions of employees as compared to wages, hours and working conditions of other employees; (4) whether the employees have separate or common supervision with all other employees; (5) whether the employees have a common workplace with the employees in the desired unit or whether they share a workplace with other employees; (6) whether the unit composition would result in undue fragmentation of bargaining units; and (7) whether bargaining history supports the unit composition. The WERC explained that the most important factors in the *Oconomowoc School District* case were the well-established preference that all school district professional employees be in a single bargaining unit and the statutory directive that there be as few collective bargaining units as practicable in keeping with the size of the total municipal work force.

The WERC examined the duties and responsibilities of the Permanent Substitute Teachers, as compared to the other regular professional staff employed by the district, including all full-time and all part-time certificated teaching personnel employed by the school district, such as regular classroom teachers, guidance counselors, school psychologists, physical therapists, speech pathologists, gifted and talented development coordinators, nurses, library media specialists, technology integrators, special education program support teachers, and district librarians. The WERC noted that, unlike typical substitute teachers, the Permanent Substitute Teachers signed annual contracts with the district, were required to report for work on every student attendance day, and earned a salary of \$115 per day and five sick days, annually.

The WERC explained that the work day, work schedule and work location were essentially the same for the Permanent Substitute Teachers and the regular professional staff. Additionally, the regular professional staff and the Permanent Substitute Teachers enjoyed the shared purpose of providing classroom supervision and instruction to the District's students. Furthermore, the District required the same or similar certifications and licensure from both groups. Notwithstanding these similarities, the WERC acknowledged that the Permanent Substitute Teachers performed less comprehensive instructional work than that of the regular classroom teachers who routinely devised lesson plans, participated in mentoring

and professional development programs, evaluated and graded students, maintained communications and relationships with parents, and supervised extracurricular activities. Moreover, the wages and benefits of the Permanent Substitute Teachers differed substantially from those of the employees in the unit. Yet, the similarities outweighed the differences. Accordingly, the WERC ordered the District to incorporate the Permanent Substitute Teachers into the professional staff bargaining unit.

The WERC's decision in *Oconomowoc School District* does not render the recognition clauses in collective bargaining agreements meaningless. Nor does this case stand for the requirement that all school districts must add substitute teachers to the professional bargaining units. To the contrary, recognition clauses explicitly excluding substitute teachers and other positions will continue to be honored by the WERC. However, if the WERC discovers that the employment of certain substitute teachers and other casual employees is consistent or routine, the WERC may conclude that such employees are not truly employed on a substitute or casual basis, and as such, it is not appropriate to exclude such employees from the bargaining unit. As a result, school districts and other municipal employers should consider evaluating the regularity with which substitute teachers and other casual employees are employed to determine whether such regularity could be used to argue that these employees should be incorporated into one of the existing bargaining units.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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