STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of :

MADISON TEACHERS, INC. :

Case 1

Involving Certain Employes of : No. 40525 ME-262

Decision No. 6746-G

MADISON METROPOLITAN SCHOOL DISTRICT :

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Appearances:

Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, 121 East Wilson Street, Madison, Wisconsin 53703, appearing on behalf of Madison Teachers, Inc.

Ms. Susan Hawley, Labor Contract Manager, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703-1967, appearing on behalf of the Madison Metropolitan School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DISMISSING PETITIONS TO CLARIFY BARGAINING UNIT

Madison Teachers, Inc. having, on October 22, 1987, filed a grievance alleging that the Madison Metropolitan School District had violated the parties' collective bargaining agreement by refusing to recognize non-faculty employes who taught summer school or worked in extra-duty positions as members of the bargaining unit; and Madison Metropolitan School District having refused to process the grievance to arbitration; and Madison Teachers, Inc. having, on January 22, 1988, filed a prohibited practice complaint over the Madison Metropolitan School District's refusal to proceed to arbitration; and the Madison Metropolitan School District having, on March 14, 1988, filed a petition to clarify bargaining unit with the Commission, along with a motion asking that the above-noted complaint be held in abeyance pending the Commission's decision on said petition; and the Commission having, on April 26, 1988, denied the motion to hold complaint in abeyance and instead, held the petition in abeyance pending disposition of the complaint and any arbitration proceeding; and the parties' thereafter having proceeded to arbitration before Morris Slavney who issued a decision on January 13, 1989, holding that non-faculty summer school teachers and non-faculty employes filling extra-duty positions were not included in the bargaining unit set forth in the parties' collective bargaining agreement; and Madison Teachers, Inc. having, on January 23, 1989, filed two petitions to clarify bargaining unit, the first to include non-faculty summer school

teachers in the bargaining unit, and the second to include non-faculty extra-duty employes in the bargaining unit; and hearing in these matters having been held on May 22 and 23, 1989 in Madison, Wisconsin before Examiner Lionel L. Crowley, a member of the Commission's staff; and a stenographic transcript having been made of the hearing and the parties having filed post-hearing briefs which were exchanged on September 6, 1989; and the Commission, having considered the evidence and the arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Madison Teachers, Inc., hereinafter referred to as MTI, is a labor organization and has its offices located at 821 Williamson Street, Madison, Wisconsin 53703.

2. That Madison Metropolitan School District, hereinafter referred to as the District, is a municipal employer and has its offices located at 545 West Dayton Street, Madison, Wisconsin 53703.

3. That MTI is the exclusive bargaining representative for employes of the District in collective bargaining unit(s) 1/ described in pertinent part in the parties' 1987-1989 contract as follows:

> a. All regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District including psychologists, psychometrists, social workers, school nurses, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, Title I coordinator, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding supervisor - cataloging and processing, on-call substitute teachers, interns and all other

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1/ The unit was originally certified by the Commission in 1964. See Madison Metropolitan District, Dec. No. 6746 (WERC, 6/64). The unit has subsequently been amended by the Commission by unit clarifications, including Dec. Nos. 6746-C and 14161-A (WERC, 1/77); Dec. Nos. 6746-D and 13735-A (WERC, 4/77); Dec. Nos. 13735-B and 14814-C (WERC, 8/78); and Dec. Nos. 20836-A and 21200 (WERC, 11/83). The unit has also been amended by agreement of the parties.

employees, principals, supervisors and administrators.

b. All staff, including paraprofessionals and teaching assistants employed at Shabazz and City High School, but excluding regularly contracted "teachers" and supervisors as defined in Section 111.70, Wis. Stats.

c. All employees identified as therapy assistants, interpreters and science materials specialists.

4. That the District conducts a summer school program for elementary, middle and high school students; and that the District staffs this program with individuals who have a teacher certification, some of whom are employed by the District during the regular school year and sane of whom are not so employed.

5. That the District employs individuals to fill various extra-duty positions, such as athletic coaches and activity advisors; and that some of the persons so employed by the District are not certified teachers and are not otherwise employed by the District.

6. That MTI and the District proceeded to contractual grievance arbitration before Morris Slavney over the issue of whether the summer school teachers who were non-faculty teachers and/or the non-faculty employes who filled extra-duty positions were included in the bargaining unit as set forth in Finding of Fact 3; that Arbitrator Slavney issued an award dated January 13, 1989 wherein he concluded that neither the non-faculty summer school teachers nor the non-faculty employes who filled extra-duty positions were included in the bargaining unit set forth in the agreement; and that said award stated in pertinent part:

. . .

The Issue Pertaining to Summer School Teachers

While to date the District has not applied any provisions of the bargaining agreement to summer school teachers who are not employed as regular term staff teachers, the agreement does contain provisions applicable to summer school, and in the past the District has applied said provisions to regular staff who have performed summer school teaching. Said provisions are set forth in Section III(I)(2), (6), and (7), and in Section VI(A)(1) and (2). Except for the fact that the District has paid summer school teachers, who are not recruited from the regular teaching staff, the same rate as is set forth as "Base 1 rate" in Section III(I)(2) of the agreement, which rate is applicable to regular teacher staff who teach summer school, the District has not applied any provision of the bargaining agreement to the non-regular staff teachers who teach summer

school.

MTI emphasizes that the term "teacher" in the bargaining agreement refers to anyone in the collective bargaining unit. (Section I(B)(2)), and that subsection (2)(a) of Section I(B) requires that instructional duties requiring to be performed by a certificated teacher must be performed only by 'teacher'. Therefore, according to MTI, said provisions establishes (sic) that non-regular staff summer school teachers are included in the bargaining unit. During the hearing, it indicated that the instant proceeding did not involve the issue of contracting out unit work.

Prior to the decision rendered by the WERC accreting "teachers under temporary contract", said employees were not considered by the parties to be included in the existing unit, despite the fact that said teachers were certified, were employed under contract, earned sick leave, were entitled to life and health insurance benefits, and deductions were made from their earnings for social security and teacher retirement. Non-regular staff summer school teachers, except for being certificated, are not employed under contract, nor do they earn sick leave, are not entitled to life and health insurance benefits, nor are deductions made for social security and teacher retirement.

This Arbitrator has no jurisdiction to determination whether non-regular staff summer school teachers are "casual, temporary or seasonal employees" to such an extent as to establish that they are, or should be, included or excluded from the unit involved. Such jurisdiction lies with the WERC, especially here, where the description of the unit does not contain any reference to whether such characterized employees are either excluded or included in the unit.

The significance of the memorandum of Understanding executed by the parties on March 20, 1986 cannot be overlooked. In that document both parties acknowledge that summer school classes may be taught by other than bargaining unit members, as indicated in paragraphs 1, 2, and 3(g)(1) of said memorandum. It should be noted that neither party make (sic) reference thereto in their briefs.

Despite the clear language in the memorandum, MTI argues that there exists no clearly established past practice to conclude that the parties intended to exclude the non-regular staff summer school teachers from the coverage of the bargaining agreement. The MTI

disregards the fact that the District has never applied any of the provisions of the agreement to the non- regular staff summer school teachers. The Arbitrator is satisfied that the past practice is supportive of the conclusion that neither the WERC, nor the parties, intended to include such summer school teachers in the bargaining unit.

Non-Regular Staff Extra Duty Employees

The bargaining unit described in Section I(B)(1)(a) of the agreement consists of only professional employees; some of whom are teachers, some of whom are not; and some of whom are employed under individual contracts of employment, and same of who (sic) are not. There was no claim made by MTI that any of the non-regular staff extra duty employees were qualified as professional employees who would be included among the "other related professional personnel who are employed in a professional capacity to work with students and teachers', (sic) in the classifications set forth in the remainder of that mit description. The gist of MTI's argument for their inclusion in the unit, and thereby bargaining agreement coverage, is that, since non-regular staff extra duty employees are performing the same duties as are performed by professional employees, said extra duty employees are included in the unit.

The fact that the non-regular staff extra duty employees perform duties also performed by professional employees included in the professional bargaining unit does not establish that they have been included in said unit.

With respect to the MTI contention that the bargaining agreement covers non-certified employees as well as non-professional in the units set forth in Section I(B)(1)(b) and (c), it is noted that the description of the employees included in said units are clear and succinct, and the Arbitrator concludes that the non-regular staff extra duty employees cannot be deemed to be included in either of said units. It is further concluded that there exists a past practice of not applying the provisions of the collective bargaining agreement to non-regular staff extra duty employees, which past practice also supports the conclusion that said employees are not included in any of the units covered by the collective bargaining agreement.

The work performed by the non-regular staff summer school

> teachers, as well as that performed by non- regular staff extra duty employees, is identical to the work performed by regular staff teachers when they are teaching summer school and when performing their extra duty activities. However, there is no provision in the bargaining agreement which reserves the performance of either summer school teaching or the performance of exclusively extra duty activities to "bargaining unit" employees. The participation of regular staff employees in summer school teaching and in extra duty activities is voluntary, and the record establishes that the District employs non-regular staff employees to perform said duties when there are insufficient volunteers from the regular staff to fill said positions. While it may be argued that the non-regular staff summer school teachers and extra duty employees perform "bargaining unit work", the Arbitrator concludes that the employees filling such positions are not in any bargaining unit covered by the terms of the bargaining agreement.
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> . . .

7. That on January 23, 1989, MTI filed the instant petitions seeking to include the non-faculty summer school teachers and non-faculty who fill the extra-duty positions in the bargaining unit(s) set forth in Finding of Fact 3; and that the District opposes MTI's petitions on the grounds that: (1) summer school teachers who are non-faculty teachers do not share a community of interest with faculty teachers; (2) said summer school teachers are not regular part-time employes; (3) MTI is precluded from expanding the bargaining unit that it voluntarily agreed to in the parties' collective bargaining agreement; and (4) the persons who are non-faculty employes and fill the extra-duty positions are not professional employes.

On the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

1. That the bargaining unit(s) set forth in Finding of Fact 3, as interpreted by Arbitrator Slavney, exclude non-faculty summer school teachers and non-faculty employes who fill extra-duty positions; that this exclusion is not based on statutory grounds; that the existing bargaining unit(s) is not repugnant to the Municipal Employment Relations Act (MERA), and that there are no material changes in circumstances affecting the unit status of the disputed positions.

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

ORDER 2/

That the petitions to clarify the bargaining unit filed by MTI with the Commission on January 23, 1989, be, and the same hereby are, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

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(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

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(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the commission.

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF
LAW AND ORDER DISMISSING PETITIONS
TO CLARIFY BARGAINING UNIT

MTI'S POSITION

MTI contends that the summer school teachers who are non-faculty teachers are appropriately included in the existing bargaining unit. It points out that all summer school teachers must be licensed, i.e. certified, to be eligible to teach. It notes that the non-faculty summer school teachers are employed for the summer and are seasonal employes. It concurs with the District that none of the summer school teachers, either those who are faculty teachers or the non-faculty, have any right to continued summer school employment, but argues the employes do have a reasonable expectation of continued summer employment. MTI refers to the 1988 summer session where 16 non-faculty teachers were employed, of which seven had been employed in the 1987 summer school and one employe, Signe Knutson, had taught summer school in 1985, 1986, 1987 and 1988. MTI submits that the summer school teachers who are non-faculty teachers are seasonal employes with a reasonable expectation of continued employment and must be considered regular part-time employes with a sufficient community of interest to be included in the same unit as other regular full-time and part-time employes.

MTI argues that even if these non-faculty summer school teachers do not have a reasonable expectation of continued employment, then these employes are temporary employes rather than casual employes, and temporary employes have the same rights to collective bargaining as other municipal employes. MTI insists that the non-faculty summer school teachers perform work identical to bargaining unit employes and may appropriately be included in the bargaining unit. MTI notes that the District has bargained over the wages applicable to regular staff and has agreed to a Work Assignment Clause which makes this bargaining unit work. MTI claims that the evidence shows that the work performed by faculty and non-faculty in summer school is the same. MTI maintains that the location of work, supervision., and wages, hours and conditions of work are essentially identical for both groups, with the exception of the earning of one sick day. MTI argues that the non-faculty summer school teachers are, thus, temporary employes who perform identical work as bargaining unit employes and are appropriately included in the bargaining unit. It submits that establishing two units would result in undue fragmentation and Sec. 111.70(4)(d)2.a., Stats., requires, whenever possible, that fragmentation be avoided, so there is no rational basis for splitting professional summer school teachers into two groups.

With respect to the non-faculty extra-duty employes, MTI insists that these employes are seasonal employes in that once employed in an extra-duty position, the employe continues in that position and has a reasonable expectation of continued employment, such that they must be considered regular part-time employes with a sufficient community of interest with other regular full-time and part-time employes to be appropriately included in the existing bargaining unit. MTI

argues that even if these employes have no reasonable expectation of being reemployed, these employes are temporary employes with the same bargaining rights as other municipal employes. It submits that the work and skills required of non-faculty extra-duty employes when compared with faculty extra-duty employes are the same. MTI refers to the agreement which contains provisions for extra-duty positions and maintains that the supervision, work place and hours are identical for all extra-duty employes. It asserts that the extra-duty employes, whether faculty teaching staff or not, have similar interests in that they participate in a shared purpose of supervising and teaching students in the extra-duty programs, and thus, they have a community of interest which warrants including them all in the same bargaining unit. It maintains that there is no rational basis to split the two groups of employes and that including them in one unit would avoid fragmentation as mandated by Sec. 111.70(4)(d)2.a., Stats. It concludes that the appropriate unit for all extra-duty employes is the bargaining unit involved.

DISTRICT'S POSITION

The District contends that the unit description is the result of both voluntary recognition and certification and the unit description should be considered as a voluntarily recognized unit. It requests the Commission not to clarify the unit. It argues that Arbitrator Slavney's Award makes it clear that the summer school teachers who are non-faculty teachers have never been part of the professional bargaining unit. It claims that MTI is attempting to expand the voluntarily recognized unit over the objection of the District. Citing City of Cudahy 3/, the District points out that non-faculty summer school teachers have been around well before the recent rounds of voluntary amendment of the unit description, the original exclusion was not based on statutory requirements, the unit is not repugnant to MERA, and there have been no changed circumstances justifying a review of the unit description. The District claims that MTI is attempting to achieve through this proceeding what it failed to achieve in bargaining, and it requests the Commission to honor the parties' agreement and refrain from entertaining MTI's request to clarify the bargaining unit.

The District further argues that the non-faculty summer school teachers are seasonal employes that lack a reasonable expectation of continued employment and, therefore, are not regular part-time employes and should not be included in the bargaining unit. It notes that these non-faculty teachers work a minimum of three weeks or a maximum of six weeks (29 days) for six hours a day and have virtually no reasonable expectation of being reemployed the following summer. It refers to the evidence which demonstrates that at the high school level, the majority of non-faculty teachers serve only a single summer and at the elementary level where, in the past five years, none have been employed for more than one season. The District claims that this high turnover rate and brevity of employment cannot support a conclusion that these are regular part-time employes who should be included in the bargaining unit. The District also argues that these employes are not temporary and therefore were not included when the Commission clarified

3/ Dec. No. 19451-A (WERC, 12/82).

the unit to include temporary contract teachers some twelve years ago. 4/ The District claims that the factors considered to include the temporary contract teachers, for example, individual teaching contracts, receipt of same pay and fringe benefits, similar hiring procedures and fair share deductions, and the length of the contracts, are not applicable to the non-faculty summer school teachers who have no individual contract, different employment selection, no benefits, no dues or fair share deductions and shorter employment with little or no expectation of continued employment. The District insists that the non-faculty summer school teachers lack a sufficient community of interest with existing bargaining unit members, such that inclusion in the bargaining unit is not appropriate. It submits that the only contact with the District and the faculty teachers is the few weeks in the summer, for most a once-in-a-lifetime experience, and the summer school is part of an educational experience or a summer sojourn from their regular employment. The District takes the position that these employes have little opportunity to develop common interests with the faculty employes. The District notes that there are differences in hiring, supervision, pay and evaluation, and these employes have never been regarded as members of the bargaining unit. The District questions whether summer school teaching is bargaining unit work at all because it is voluntary and the District cannot require members of the bargaining unit to perform it. The District concludes that the non-faculty summer school teachers do not qualify as regular part-time employes, do not belong to this bargaining mit and should not be accreted to it.

With respect to the non-faculty extra-duty employes, the District notes that Arbitrator Slavney found that they were not covered by the recognition clause. The District also maintains that the bargaining mit is a voluntarily recognized unit and that it cannot be expanded by a unit clarification petition as argued above in respect to summer school teachers. In addition, the District maintains that the non-faculty extra-duty employes are not professional employes. It asserts that the extra-duty work does not require knowledge of an advanced type customarily acquired through a prolonged course of study, and the work does not require a degree or certification for the positions. It submits the extra-duty positions do not require the intellectual demands necessary for professional employment and the positions are filled by persons who are familiar with the activity but are only two or three years out of high school. The District emphasizes that the more demanding jobs, such as head coach, are filled by faculty teachers, and the positions that require lesser skill are filled by non-faculty. It argues that while faculty teachers fill about one-half of the jobs, these jobs don't make the teacher a professional. The District contends that it is the primary function as a classroom teacher that makes them professional, and that a job may consist of professional and non-professional duties. The extra-duty work, according to the District, is merely ancillary to a teacher's main function as the time requirements and compensation reflect. The District also notes that the extra-duty work is voluntary. It contends that extra-duty work is not transformed into professional work merely because a professional teacher performs it. It insists that the record fails to provide any basis for concluding that the extra-duty work is professional in nature or that the non-faculty personnel who perform this work are professional. It argues that these positions cannot be accreted to the professional mit absent an election by the professionals voting to

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4/ Madison Metropolitan School District, Dec. Nos. 6746-C, 14161-A (WERC, 1/77).

include non-professionals in the unit. The District further asserts that the non-faculty extra-duty employes lack a sufficient community of interest with regular bargaining mit employes because of the difference in focus, i.e., developing well-educated, well-rounded students, as opposed to teaching a sport or activity to students. The District also relies on the professional/non-professional dichotomy, as well as the difference in pay, hours and working conditions, as establishing that there is no community of interest. The District takes the position that none of the extra-duty work is bargaining unit work and regardless of the status of this work, the non-faculty personnel who perform it are not professionals and may not be accreted to the existing unit. The District requests that both of MTI's petitions for unit clarification be dismissed in their entirety.

DISCUSSION

The Commission has held that where the parties have agreed to exclude certain positions fran a collective bargaining unit, it will honor that agreement and will not allow a party to the agreement to pursue expansion of the bargaining mit through a unit clarification petition unless:

1. The position(s) in dispute did not exist at the time of the agreement; or

2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential etc.; or

3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; or

4. The existing unit is repugnant to the Act. 5/

Here, Arbitrator Slavney's award concludes that the disputed positions are not included within the contractually specified unit description. We are satisfied that his award does not contravene any policy of MERA 6/ and reflects a determination that the parties have agreed, through their Contractual language, to exclude the disputed positions. Thus, unless one of the exceptions listed above is applicable, we will dismiss the instant petitions.

5/ City of Sheboygan, Dec. No. 7378-A (WERC, 5/89); See generally City of Cudahy, Dec. No. 12997 (WERC, 9/74); Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76), West Allis-West Milwaukee Schools, Dec. No. 16405 (WERC, 1/89).

6/ Found on page 13.

A review of the evidence fails to establish that any exception applies. The positions have been in existence at least since 1974 and, most likely, earlier than that time. Additionally, there was no evidence that the positions were excluded because the parties agreed they were supervisory, confidential, etc., and, thus, excluded from the unit as a matter of law. There have not been any changed circumstances which materially affected their mit status, and the

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6/ In an earlier order Holding Unit Clarification Petition in Abeyance, Madison Metropolitan School District, Dec. No. 6746-G, (WERC, 4/88), we quoted extensively from our decision in Stoughton Joint School District, Dec. No. 15995 (WERC, 12/77) where we held:

> Although the legislature has empowered the Commission to make unit determinations, nothing in the municipal Employment Relations Act prevents parties from voluntarily defining the appropriate unit, with certain exceptions. For example, professionals and non-professionals cannot be co-mingled in a single unit without an appropriate vote, and in no event can supervisors be included within a bargaining unit of the persons he/she supervises. It may be that the parties have in their collective bargaining agreement agreed to include the positions which the Petitioner asks the commission to exclude. The Commission's long-standing policy is to honor these agreements unless it is shown that such agreements frustrate the purposes and policies of the Municipal Employment Relations Act.
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> The first question, then, is whether the parties have so agreed to include such positions. The question goes to the interpretation of the agreement, which must be left for the arbitrator.
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> The second question is whether the inclusion of these positions in the unit frustrates some policy of the law. There is no way to prejudge that question from the face of the documents presented. Further, there may be no need to address that question if the arbitrator concludes that the positions are excluded. The policy favoring arbitration of disputes compels that the Commission abstain from intervention in the arbitral process without prejudice to the Petitioner's right to argue later that the results of the arbitration contravene the policy of the law. (emphasis added)

existing unit(s) has not been shown to be repugnant to MERA. Thus we have dismissed the instant petitions. MTI can seek representation of the disputed positions through petiton(s) for election. 7/

Dated at Madison, Wisconsin this 6th day of December, 1989.

7/ See Stevens Point Schools, Dec. No. 7713-A (WERC, 8/89).

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner