STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of RACINE UNIFIED SCHOOL DISTRICT Involving Certain Employes of RACINE UNIFIED SCHOOL DISTRICT	Case 1 No. 50377 ME-684 Decision No. 7053-E

Appearances:

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, and Mr. Douglas E. Witte, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Blvd., P.O. Box 1664, Madison, Wisconsin 53701-1664, on behalf of the District.

Mr. Anthony L. Sheehan, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, WI 53708-8003, on behalf of the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

On January 14, 1994, the Racine Unified School District filed a petition to clarify bargaining unit with the Wisconsin Employment Relations Commission. In its petition, the District asserted that an existing collective bargaining unit represented by the Racine Education Association should be clarified to exclude those employes who were not "school district professional employes" within the meaning of Sec. 111.70(1)(ne), Stats. The parties thereafter executed a stipulation of fact and filed briefs and reply briefs, the last of which was received on June 9, 1994.

Having considered the matter and being fully advised on the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Association was certified as the exclusive bargaining representative for all regular full-time and regular part-time certified teaching personnel employed by the District, but excluding on all substitute teachers, interns, supervisors, administrators, and directors by the Wisconsin Employment Relations Board on April 28, 1965.

2. Over the years the District and Association have agreed to expand the certified unit to include the following classifications of employes: physical therapists, guidance counselors, school social workers, school psychologists, occupational therapists, audiologists, A-V specialists, exceptional education community vocational instructors, diagnosticians, speech helping clinicians, exceptional education media teachers, program support teachers, at-risk coordinators, building coordinators, bilingual coordinators, early childhood curriculum specialists, multi-cultural coordinators, work experience coordinators, research associates, and wellness coordinators.

3. The District and the Association have been parties to a series of collective bargaining agreements which govern the wages, hours and other working conditions of the employes in the bargaining unit for approximately 20 years. The most recent agreement expired on August 24, 1992.

4. There are approximately 1,631 employes currently in the bargaining unit.

5. Approximately 1,625 employes in the bargaining unit have a license issued by the State Superintendent of Public Instruction under Sec. 115.28(7), Stats., and their employment requires that license.

6. Approximately 6 employes currently in the bargaining unit are not required to have a license from the Department of Public Instruction. The following classifications are not required to have a license (number of persons in each position are in parenthesis): research associates (5), wellness coordinators (1).

7. The District and the Association have been engaged in negotiations for a successor to the agreement which expired on August 24, 1992. The parties have met to bargain on at least 9 occasions.

8. The District filed for interest arbitration, pursuant to Sec. 111.70(4)(cm), Stats., in January, 1993.

9. Prior to 1993 Wisconsin Act 16 being implemented, the Association had a good faith belief that the unit as it is currently constituted was an appropriate unit for collective bargaining and the District voluntarily bargained with said unit.

10. The sole issue to be resolved in this unit clarification proceeding is whether or not 1993 Wisconsin Act 16 requires the existing bargaining unit to be clarified.

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

CONCLUSIONS OF LAW

1. Given Act 16's amendment of Sec. 111.70(1)(b), Stats., and creation of Sec. 111.70(1)(ne), Stats., the District is not barred from litigating the question of whether the bargaining unit represented by the Association continues to be appropriate for the purposes of collective bargaining.

2. A collective bargaining unit that includes both municipal employes of a school district who hold and whose employment requires that they hold a license issued by the state superintendent of public instruction under Sec. 115.28(7), Stats., and municipal employes of a school district who do not hold and whose employment does not require that they hold such a license is not an appropriate unit for the purposes of collective bargaining within the meaning of Sec. 111.70(1)(b), Stats.

3. The collective bargaining unit of District employes described in the Finding of Fact 2 is no longer appropriate for the purposes of collective bargaining within the meaning of Secs. 111.70(1)(b) and (4)(d), Stats.

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

ORDER CLARIFYING BARGAINING UNIT 1/

1. The positions identified in Finding of Fact 6 are excluded from the existing bargaining unit.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

(Chairman A. Henry Hempe did not participate)

By Herman Torosian /s/

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

(footnote 1 begins on page 4 and continues to page 5)

1/ 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.

(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.

(footnote 1 continues on page 5)

(footnote 1 continued from page 4)

(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.

. . .

(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.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER CLARIFYING BARGAINING UNIT

POSITIONS OF THE PARTIES

The District

The District contends that the existing collective bargaining unit is now repugnant to the Municipal Employment Relations Act as amended by Act 16 and therefore must be clarified to exclude those employes who are not "school district professional employes." The District argues that the plain meaning of amended Sec. 111.70(1)(b), Stats., requires this result.

When a statute is amended to render an existing collective bargaining unit inappropriate, the District asserts that a petition for unit clarification is the appropriate manner in which to bring the prior unit into conformity with the law.

The District argues that the result it seeks is not contrary to the anti-fragmentation policy set forth in Sec. 111.70(4)(d)2.a., Stats. The District contends in this regard that the avoidance of fragmentation is only a policy guideline set forth in the statute which, in any event, cannot override specific statutory language mandating the exclusion of the employes in question. The District further notes that the fragmentation avoidance policy remains in effect when the Commission determines the appropriate unit for employes who are not "school district professional employes."

The District acknowledges the historical context in which the existing unit has existed but asserts that the statutory change mandates a change in the bargaining unit.

Given all the foregoing, the District asks that the unit be clarified to exclude the six positions held by employes who are not "school district professional employes."

The Association

The Association contends that the existing unit remains appropriate despite the amendments to the Municipal Employment Relations Act contained in Act 16. The Association argues that it is possible to harmonize the various provisions in question if Act 16 is only applied prospectively to new bargaining units and not to existing units. In this regard, the Association contends that the intent of Act 16 was to restrict the rights of "teacher" bargaining units to proceed to interest arbitration and not to require the reformation of hundreds of

bargaining units. The Association asserts that such an interpretation of the statute would be absurd and strike a "deadly blow" to orderly and peaceful labor negotiations.

The Association alleges that the interpretation Act 16 sought by the District runs afoul of the provisions of Sec. 111.70(4)(d)2.a., Stats., requiring that fragmentation of bargaining units be avoided. Viewing the statute as a whole, the Association asserts that the existing unit remains appropriate.

If the Commission were to erroneously conclude that as a general matter bargaining units cannot include employes who are and who are not "school district professional employes," the Association then argues that where the parties have engaged in substantial collective bargaining, it is inappropriate and unfair to sever the existing unit. The Association contends that the District should not be allowed to use the unit clarification process to undercut the ability of the Association to engage in meaningful collective bargaining and to block access to interest arbitration.

The Association further contends that if the existing unit is clarified, such a clarification should not allow the District to apply Act 16 to the portion of a successor agreement which is not governed by Act 16.

Lastly, the Association argues that the District is barred from pursuing the unit clarification petition by the circuit court decision in Madison Teachers, Inc. v. Madison Metropolitan School District. The Association further argues that the Commission is bound by the decision in Madison Teachers.

Given all the foregoing, the Association asks that the District's petition for unit clarification be dismissed.

DISCUSSION

Initially, we are confronted with the Association argument that we should not proceed to address the merits of the District petition because the filing of the petition constitutes a refusal to bargain in good faith and/or is contrary to existing precedent in Madison Schools. In Racine Unified School District, Dec. No. 27982-B (WERC, 6/94) we addressed these arguments as follows:

> In effect, Complainant asks us to conclude that a party engages in bad faith bargaining when it asks an administrative agency (the WERC) a question (through filing a unit clarification petition) which if resolved in the questioners favor will give that party access to statutory rights which will enhance the party's bargaining position. We do not find such a scenario

constitutes bad faith bargaining. As argued by Respondents, engaging in activity whereby a party seeks to exercise a statutory right is not bad faith bargaining. 5/

Complainant argues we must reverse the Examiner because we are bound by the holding in Madison. 6/ Complainant did not cite any judicial opinion in support of its position. The judicial authority of which we are aware holds that we are not required to follow a circuit court decision. In West Bend Education Association v. WERC, Dec. No. 81-CV-294 (Cir Ct Washington, 4/83) Circuit Judge Dancey held in pertinent part:

> An unreversed circuit court decision in this state rules only the particular case in which it was rendered. Neither statute nor case law nor custom nor Supreme Court rule give it precedential value as to other cases; nor is the Commission required to follow such a decision in other matters particularly where, as here, it has been appealed from.

Thus, even assuming that the Madison holding could not be factually distinguished from the facts herein, we conclude we are not bound by the holding in Madison in this proceeding.

5/To the extent it is argued Respondents should have sought their statutory advantage sooner and that the delay demonstrates bad faith, we would note that the need to seek to clarify the existing unit to gain the benefit of Act 16 only became apparent in December 1993 when Madison was decided and that the District filed its petition in January 1994.

6/Complainant correctly points out that in Madison, Judge Nichol's Conclusions of Law include the following:

> 4(f) Such conduct by the District constitutes a failure to bargain in good faith and is a prohibited practice in violation of sec. 111.70(3)(a)4, Stats.

> Nor do we find Madison to be persuasive precedent. The law defining "collective bargaining units" and the scope of interest arbitration rights changed while the parties in Madison and Racine were bargaining a contract. The change in the law raised bona fide questions as to whether the existing units continued to be appropriate and what interest arbitration procedures applied. Change in the law in the midst of a bargain is inherently disruptive. However, the disruption was caused by the legislature, not the employer. Under such circumstances, the employer can hardly be faulted for asking the agency responsible for administering the new law whether the change impacts on the parties' existing unit.

Given the foregoing, we reject the Association argument and proceed to the merits of the case.

In Grafton School District, Dec. No. 28093 (WERC, 6/94) we addressed the question of whether it continues to be appropriate to have collective bargaining units which consist of employes who are and who are not "school district professional employes." We held as follows:

> Prior to 1993 Wisconsin Act 16, Sec. 111.70(1)(b), Stats. provided:
>
> (b) "Collective bargaining unit" means the unit determined by the commission to be appropriate for the purpose of collective bargaining.
>
> When determining whether a bargaining unit was appropriate, Sec. 111.70(4)(d)2.a., Stats. directed the Commission as follows:
>
> 2. a. The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employes concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit. The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes, unless a majority of the

professional employes vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and non-craft employes unless a majority of the craft employes vote for inclusion in the unit. Any vote taken under this subsection shall be by secret ballot.

The determination of whether the employe of any municipal employer was a "professional employe" was based on the following definition contained in Sec. 111.70(1)(L), Stats.:

(L) "Professional employe" means:
1. Any employe engaged in work:
a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
b. Involving the consistent exercise of discretion and judgment in its performance;
c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or
2. Any employe who:
a. Has completed the courses of specialized intellectual instruction and study described in subd. 1.d.;

b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

Given the foregoing statutory provisions, prior to Act 16, the only substantive requirement created by Sec. 111.70(1)(b), Stats. regarding the composition of a bargaining unit was that the unit be "appropriate." Section 111.70(4)(d)2.a., Stats. provided the Commission with direction as to what it should consider when deciding whether a unit was "appropriate" and further provided that a unit consisting of professional and non-professional employes could be "appropriate" if the required vote occurred.

1993 Wisconsin Act 16 amended Sec. 111.70(1)(b), Stats., left Secs. 111.70(1)(L) and 111.70(4)(d)2.a., Stats. intact, and created a definition of a "school district professional employe." Section 111.70(1)(b), Stats. now provides:

(b) "Collective bargaining unit" means a unit consisting of municipal employes who are school district professional employes or of municipal employes who are not school district professional employes that is determined by the commission to be appropriate for the purpose of collective bargaining.

Newly created Sec. 111.70(1)(ne), Stats. provides:

(ne) "School district professional employe" means a municipal employe who is employed by a school district who holds a license issued by the state superintendent of public instruction under s. 115.28(7), and whose employment requires that license.

Although 1993 Wisconsin Act 16 became law August 12, 1993, Section 9320 of Act 16 specifies that amended Sec. 111.70(1)(b), Stats. and new Sec. 111.70(1)(ne), Stats. first take effect:

. . . with respect to collective bargaining agreements entered into on the effective date of this subsection, . . .

Having considered the new statutory language defining a "collective bargaining unit" and a "professional school district employe," we are satisfied that with respect to collective bargaining agreements entered into on or after August 12, 1993, a collective bargaining unit cannot include both "professional school district employes" and employes who are not "professional school district employes." In our view, the clear meaning of the phrase "consisting of" in Sec. 111.70(1)(b), Stats. compels this result.

The phrase "consisting of" does not have a statutorily established definition. Black's Law Dictionary, Revised Fourth Edition (1968), defines "consisting" as:

> Being composed or made up of. This word is not synonymous with "including;" for the latter, when used in conjunction with a number of specified objects, always implies that there may be others which are not mentioned.

"Consist" is defined in a similar manner. 3/

From the definition of the phrase "consisting of," we conclude that Sec. 111.70(1)(b), Stats. clearly provides that "school district professional employes" cannot appropriately be included in same bargaining unit as "employes who are not school district professional employes . . ."

Our interpretation does not render meaningless any other relevant statutory provisions. All the provisions of Sec. 111.70(4)(d)2.a., Stats. remain operative when we are determining the appropriate unit of "employes who are not school district professional employes . . ." including the ability of "professional employes" as defined in Sec. 111.70(1)(L), Stats., to elect to be included in a unit with non-professional employes. The directive to "avoid fragmentation" remains operative even for "school district professional employes."

3/ American Heritage Dictionary, Second College Edition, 1985, defines "consist" as "To be made up or composed:".

> Applying our interpretation of the amended statutes to the instant proceeding, the parties here agree that the existing unit represented by the Association includes both "school district professional employes" and non-professional employes of the District. As the parties do not presently have a contract, the previously quoted language from Section 9320 of Act 16 makes our interpretation immediately applicable to the parties. 4/ Thus, we conclude the existing unit is no longer "appropriate for the purpose of collective bargaining."

> 4/In our view, Section 9320 generally provides that where there is an existing bargaining agreement entered into prior to August 12, 1993, covering a "mixed" unit of professional and non-professional school district employes, the unit continues to be "appropriate" until the agreement expires. Prior to reaching a new agreement, the parties need to have agreed on how to conform their "mixed" unit to Sec.111.70(1)(b), Stats, or to have brought that issue to us for resolution.

We remain persuaded by our decision in Grafton. Thus, we have ordered the clarification of the existing bargaining unit to exclude the six positions held by employes who are not "school district professional employes."

Dated at Madison, Wisconsin this 11th day of August, 1994

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

(Chairman A. Henry Hempe did not participate)

By Herman Torosian /s/
Herman Torosian, Commissioner

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

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