

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of
**MILWAUKEE PUBLIC SCHOOLS and
MILWAUKEE TEACHERS' EDUCATION ASSOCIATION**

Involving Certain Employees of
MILWAUKEE PUBLIC SCHOOLS

Case 3
No. 58091
ME-991

Decision No. 6021-A

and

Case 370
No. 56856
ME-963

Decision No. 11165-F

Appearances:

City Attorney Grant Langley, by **Assistant City Attorney Donald L. Schriefer**, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of Milwaukee Public Schools.

Perry, Lerner, Quindel & Saks, S.C., by **Attorney Richard Saks**, 823 North Cass Street, P.O. Box 514005, Milwaukee, Wisconsin 53203-3405, and **Ms. Cheryl Barczak**, Assistant Executive Director, appearing on behalf of the Milwaukee Teachers' Education Association.

Mr. Steve Cupery, Union Representative, Service Employees International Union, Local 150, AFL-CIO, CLC, 8021 West Tower Avenue, Milwaukee, Wisconsin 53223-3215, appearing on behalf of Service Employees International Union Local 150, AFL-CIO, CLC.

No. 6021-A
No. 11165-F

Mr. Robert A. Klaus, Staff Representative, Milwaukee District Council 48, AFSCME, AFL-CIO, 3427 West Saint Paul Avenue, Milwaukee, Wisconsin 53208, appearing on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO.

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

Milwaukee Public Schools, hereinafter the District, filed a petition with the Wisconsin Employment Relations Commission on October 11, 1999, wherein it requested that the Commission clarify the existing bargaining unit consisting of "Food Service Managers, Food Service Manager Trainers, Food Service Assistants, Child Care Assistants, Central Kitchen Managers and On-Call Substitutes" represented by Service Employees International Union Local 150, AFL-CIO, CLC, hereinafter SEIU, to include those individuals holding the newly-created position of Child Care Worker. By letter of October 22, 1999, the Milwaukee Teachers' Education Association, hereinafter the Association, opposed the District's petition and asserted that the employees in question should be included in an Association-represented unit of Educational Assistants. By letter of October 27, 1999, SEIU also opposed the District's petition and concurred with the Association as to the issue of unit placement. SEIU did not participate further in the proceedings.

On November 3, 1999, the Association filed a petition with the Commission requesting that the Commission clarify the existing District Educational Assistants bargaining unit represented by the Association to include the Child Care Workers.

Hearing was scheduled for February 24, 2000 before Examiner David E. Shaw, a member of the Commission's staff, in Milwaukee, Wisconsin. Prior to the start of the hearing on that date, the Association indicated it was also claiming that some of the individuals in the Child Care Worker positions, in addition to their regular work hours, were also performing the same duties after school in the District's Recreation Program and that therefore the after-school positions should also be included in the Educational Assistants bargaining unit. Those after-school positions are currently included in the bargaining unit of "Part-Time Hourly Recreation Workers" represented by Local 1616, an affiliate of Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter AFSCME. An inquiry was made of AFSCME's Staff Representative for Local 1616, Robert Klaus, as to AFSCME's position regarding the Association's claim that the after-school Recreation Program positions should be included in the Educational Assistants bargaining unit and whether AFSCME desired to intervene in the proceeding. Klaus indicated that he was previously unaware of the Association's claims and asked that AFSCME be given time to investigate and decide whether to take a position on these proceedings. On that basis, the hearing on February 24, 2000 was adjourned to a later date.

Hearing was subsequently held on September 26 and 27, 2000 in Milwaukee, Wisconsin. At said hearing, AFSCME indicated it would not take a position in the proceedings and did not further participate in these matters. A stenographic transcript was made of the hearing and the District and the Association submitted post-hearing briefs by January 10, 2001.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Milwaukee Public Schools, hereinafter the District, is a municipal employer with its principal offices located at 5225 West Vliet Street, Milwaukee, Wisconsin. The District maintains and operates a number of school buildings in Milwaukee, Wisconsin, including Congress Elementary School which is comprised of two campuses. The main campus is referred to as Congress North and houses students in grades 1-5. Congress South is located approximately three blocks from Congress North and houses an early childhood center, Head Start program and kindergarten. At all times material herein, Mary Beth Minkley has been the Principal of Congress Elementary School, and Linda Hoganson has held the position of Assistant Principal at Congress South.

2. Milwaukee Teachers' Education Association, hereinafter the Association, is a labor organization having its principal offices located at 5130 West Vliet Street, Milwaukee, Wisconsin. At all times material herein, the Association has been the certified exclusive collective bargaining representative of the employees in the bargaining unit consisting of "All general, technical aides, lead aides and paraprofessional aides, including Deaf Interpreter and Liaisons, Parent Information Centers, in the employ of the Milwaukee Board of School Directors, excluding social work aides, supervisory aides, teachers, handicapped children's assistants, administrators, supervisors, clerical and custodial employees", hereinafter the EA unit. The unit includes approximately 1100 EA-Generals and 900 EA-Paraprofessionals. At all times material herein, Cheryl Barczak has been an Assistant Executive Director with the Association and responsible for providing bargaining and contract administration services to the EA bargaining unit.

At all times material herein, the Association and the District have been parties to a collective bargaining agreement covering the wages, hours and conditions of employment of the employees in the EA bargaining unit.

3. Service Employees International Union Local 150, AFL-CIO, CLC, hereinafter SEIU, is a labor organization having its principal offices located at 8021 West Tower Avenue, Milwaukee, Wisconsin. At all times material herein, SEIU has been the certified exclusive collective bargaining representative of a bargaining unit consisting of employees of the District in the positions and classifications of “food service managers, food service manager trainees, food service assistants, handicapped children’s assistants, and school nursing assistants.” The unit includes approximately 1200 food service workers, 200 Handicapped Children’s Assistants (HCA’s) and 30 School Nurse Associates. At all times material herein, Steve Cupery has been the SEIU representative responsible for providing bargaining and contract administration services to this bargaining unit, hereinafter the SEIU unit.

At all times material herein, the District and SEIU have been parties to a collective bargaining agreement covering the wages, hours and conditions of employment of the employees in the SEIU bargaining unit.

4. District Council 48, AFSCME, AFL-CIO, hereinafter AFSCME, is a labor organization having its principal offices located at 3427 West Saint Paul Avenue, Milwaukee, Wisconsin. At all times material herein, AFSCME has been the exclusive collective bargaining representative of the District’s “part-time hourly Recreation workers”, hereinafter Rec employees, in the bargaining unit consisting of “All employees in the employ of the Milwaukee Board of School Directors, Department No. 888J, in the classification of Per Diem Payroll (Social Center) who are employed 26 or more weeks during a 12-month period and who work 10 or more hours per week during said period.”

At all times material herein, AFSCME and the District have been parties to a collective bargaining agreement covering the wages, hours and conditions of employment of the Rec employees bargaining unit.

5. In the fall of 1999, the District implemented a child care program by opening a State-licensed Early Childhood Center at Congress South to provide licensed daycare for those children attending Congress South and their younger siblings. It is a fee-based program in which families pay a flat weekly fee based on the age of the child. Congress South also houses an experimental K-3 program, Head Start program for 3 year-olds, and on-site kindergarten classes. With the opening of the Early Childhood Center, the Child Care Worker (CCW) positions were created and filled.

There are presently CCWs only at Congress South, but other schools in the District have indicated an interest in having a similar program at their schools. There are Educational Assistants (EAs) at all of the District’s schools. There are Handicapped Children’s Assistants (HCAs) at the schools where there are handicapped students who require their services.

There were thirteen CCW positions at Congress South as of September of 2000, with one assigned to the K-3 program and the rest in the Infant, Toddler, Wraparound and after

school programs. There are approximately five EAs at Congress South working in either the Head Start or K-4 classrooms. There is one HCA position with the K-3 program at Congress-South which was vacant at the time of hearing.

6. Linda Hamburg is the Program Director at Congress South and under the direction of the Assistant Principal, Linda Hoganson, is responsible for “The planning and operation of the Wraparound Child Care Program providing service to children attending school at Congress South Campus and their families” as well as for licensing the Infant and Toddler Programs housed there. Hoganson is the immediate supervisor and responsible for the evaluation and discipline of all staff at Congress South, with the exception that Hamburg evaluates the Rec employees at the school.

7. The Program offices at Congress South are located on the first floor in the front of the building. The Infants Room (ages 6 weeks-18 months) and Toddlers Room (ages 18 months-36 months) and two K-4 (4 year-olds) classrooms are also located on the first floor. The Camp Site (Wraparound Program) and Explorer (after-school program) child care programs are located in the lower level and there are seven kindergarten and Head Start classrooms on the second floor.

There are four half-day Head Start kindergarten sessions for three-year olds each day, two in the morning and two in the afternoon. The Head Start program is a federally-funded program specifically developed for low-income families. There is also a privately-funded experimental K-3 half-day program for three year-olds, with a morning and an afternoon class. The K-4 and K-5 programs are full-day classes.

The children who attend the K-3 and Head Start half-day classes (3 year-olds) are at the Camp Site area on the lower level when they are not in class as part of the Wraparound Program. The children in the K-4 and K-5 all day classes (4 and 5 year-olds) go to the Explorer area on the lower level at the end of the school day for the after-school program. Only those students whose parents have enrolled them in the after-school program go to this area after school, and the students not in the after-school program go home. The Infants, Toddlers and the Wraparound child care programs operate from 7:00 a.m. until 6:00 p.m. The school portion of the day ends at 2:05 – 2:20 p.m. and the “after-school program” begins at 2:05 p.m. and ends at 6:00 p.m.

8. Except for Tammi Glasgow, a CCW working under the direction of a certified teacher in the K-3 program at Congress South, CCWs are required to prepare a lesson plan/schedule of activities which indicates what the children will be doing and when. Those CCWs working in the Infants and the Toddlers rooms are responsible for the diapering/toileting of the children and washing their faces and hands. The CCWs in the Infants Room are assigned to specific children and also feed those children, while the CCWs working with older children supervise the children feeding themselves and washing their hands and face.

All of the CCWs follow a lesson plan/activity schedule that is intended to stimulate the children mentally and physically through sights, sounds and physical activity in order to develop social, communication and emotional skills, thinking and sensory skills, life skills and motor skills. For the Infants Room, such activities including holding the child while dancing to music, playing a musical instrument for the child, showing the child toys or articles to test their recognition, talking to the child, showing the child articles in a bottle of water and have the child play with it to stimulate their senses, gain fine motor skills, and recognize cause and effect. The CCWs in the Toddlers Room read stories, have the children do simple art projects, sing songs, play with table top toys, play games and go outside. The CCWs in the Camp Site and Explorer programs plan and provide such activities as reading stories to the children, music, art projects, table toys activities, games, running and jumping and gym time. CCWs are expected to communicate with the childrens' parents and are referred to as "teacher" or "lead teacher".

Congress South participates in an "Early Childhood Brain Development Training Group" and encourages CCWs to attend meetings of the group and report back to the rest of the staff what they have learned and to incorporate what they have learned in their work with the children.

The job description for the CCW position lists the following as "MAJOR DUTIES AND RESPONSIBILITIES":

1. Responsible for general welfare, safety and nurture of children including feeding, cleaning and toileting.
2. Work with small groups of children in an educationally structured setting.
3. Assist in planning developmentally appropriate activities based on differences in ability and interests.
4. Assist in creating an inviting setting which enhances children's learning.
5. Maintain a clean, attractive environment (i.e. clean tables, change bedding, soiled clothes, etc.)
6. Demonstrate positive behavior management techniques.
7. Clearly, positively and effectively communicate to parents, staff and volunteers.
8. Can lift 40 or more pounds.

9. Adhere to all MPS, DHHS licensing regulations and individual child care site procedures.
10. Complete all required training. Must attend all staff meetings.
11. Perform other related duties as assigned.

Substitutes are sought if a CCW is absent and are obtained from among District employees or nurses assistants obtained through a private agency.

9. EA-Generals' duties include assisting certified teachers and administrators with regard to monitoring students and maintaining order by patrolling areas of the school building and supervising pupils in lunchrooms, on the playground, on field trips, in homeroom and in emergency situations. They also assist teachers by preparing instructional materials, typing, copying and grading tests; by aiding pupils with school work and preparing bulletin boards; by filing and distributing instructional materials; by supervising the classroom when teachers are called away; by operating audio-video equipment; and by helping maintain discipline in the classroom and assisting children with their coats. They assist department chairs, guidance counselors and office staff by making copies, checking laboratory apparatus and materials, supervising and operating audio-video equipment, acting as a receptionist, making appointments and keeping track of student attendance. They also assist teachers with extra-curricular activities and, under professional supervision, engage in activities which promote communication and understanding between school and community.

EA-Generals working in a Head Start classroom also assist the teacher by working with the childrens' educational activities. Their duties may also include assisting the children at lunch time by making sure they are eating and using the proper utensils and by making sure they wash up. Depending on the age of the children they are working with, they may also be responsible for the toileting and changing of a child.

EA-Paraprofessionals work primarily in the classroom and assist the classroom teachers by tutoring students one-on-one or in small groups, by administering make-up tests and assignments, and by assisting students with "special" or "class" projects. At the direction of teachers or department chairs, they prepare tests and study outlines. They also proctor classrooms, activities and tests, correct theme folders, written exercises and tests, provide specialized group and individual instruction in areas such as instrumental music and bi-lingual activities for Spanish speaking students, assist in developing and maintaining department libraries, and assist teachers and department chairs in locating instructional materials to use in the classroom. EA-Paraprofessionals also operate audio-video equipment in the classrooms, assist school administration in maintaining order in the building as needed, and under professional supervision, engage in activities which promote communication and understanding between school and community. They work in a wide variety of settings, with the major ones being Exceptional Education and Computer-Assisted Instruction.

EAs do not prepare lesson plans, but do follow the teacher's lesson plans. In addition to the educational activities they are engaged in, if they are working with autistic or severely handicapped students, they may also have to assist in the toileting or diapering of the child, and the changing and cleaning of the child, especially if an HCA is not available. They may also assist in the feeding of the child. The types of educational activities they are involved in vary with the age groups and type of students with which they work.

Substitutes are not sought if an EA is absent. EAs do not talk to parents unless directed to do so by a teacher or administrator.

10. HCAs work with Exceptional Education (EE) students ages 3-21 years having cognitive disabilities and/or orthopedic impairments. They provide support to the EE classroom teachers, therapists and others by assisting the EE students in boarding and deboarding buses, moving between classrooms, dressing, toileting, diapering and cleaning, and eating. They also assist the EE teacher in implementation of life skill activities as defined in the student's Individual Education Plan (IEP). They assist students in the completion of age-appropriate functional activities in the school and community environments, help maintain a clean and attractive school environment by cleaning desks, easels, brushes, changing bedding and laundering soiled clothes, and assist in crisis situations, the care of ill children, and with the general welfare and safety of the child.

Their primary role is to deliver the appropriate level of services as to life functions such as toileting, feeding and keeping the child clean. Substitutes are sought if an HCA is absent and may be obtained from a private agency providing temporary employees.

11. The minimum qualifications to be a CCW in the District are an associate degree from an approved program in child care development, or satisfactory completion of State Licensing Courses Child Care I and II (40 hours each), and prior experience of 80 workdays as a full-time assistant child care worker or 120 half-time days as a half-time assistant child care worker in a licensed day care center or a kindergarten.

The minimum qualification to be an EA-General in the District is a high school diploma or a GED. The minimum qualification to be an EA-Paraprofessional in the District is a minimum of 60 college credits.

The minimum qualification for an HCA is set by PI 3.39, Wis. Adm. Code, which requires that the person be at least 18 years of age and recommended by the district administrator in the employing school district.

12. Pursuant to the 1997-1999 collective bargaining agreement between the District and the Association covering the EAs, their work year is 184 days per year and their work day does not begin before 7:00 a.m. or end later than 4:00 p.m., inclusive of a half-hour lunch (unpaid if work is five hours or more, but less than a full day; paid if work is a full day). As

of January 1, 1999, the minimum hourly rate for EA-Generals was \$8.63. The minimum hourly rate for EA-Paraprofessionals was \$12.24.

Pursuant to the collective bargaining agreement between the District and SEIU covering the HCAs, their work year is 191 days per year, their work day is eight hours per day, 40 hours per week, although HCAs work 6, 7 and 8 hours per day schedules or work "hourly". As of July 1, 1998, the minimum hourly rate for an hourly HCA was \$8.64 and for the 6, 7 or 8-hour HCAs was approximately \$11.00.

CCWs work 6½ hours per day (includes a half-hour unpaid lunch) five days per week, 50 weeks per year. The child care programs at Congress South operate from 7:00 a.m. until 6:00 p.m. weekdays and the CCWs' individual starting and ending times are staggered in order to provide coverage throughout that day. The minimum hourly rate for the CCWs was \$8.64.

13. A head administrator in a school, i.e. principal or assistant principal, is the immediate supervisor of the EAs and HCAs who work at that school. At Congress South, Assistant Principal Hoganson is the immediate supervisor of the EAs, CCWs and HCAs with regard to discipline and evaluations, although they also work under the direction of a certified teacher.

14. The child care programs at Congress South, including the Wraparound and after-school programs, and the CCWs working in the programs, are both covered by the Wisconsin Department of Health and Family Services "Licensing Rules for Group Day Care Centers", Ch. HFS 46, Wis. Adm. Code.

EAs and HCAs are covered by the Wisconsin Department of Public Instructions' administrative rules regulating school districts.

15. CCWs and other employees who wish to work beyond their regular hours have the opportunity to do so by working for the District's Recreation Program as Rec employees in the child care programs at Congress South, including the after-school program. There are individuals employed by the District as EAs, certified teachers and CCWs who voluntarily work as Rec employees in addition to their regular employment.

The prerequisite to be a part-time Rec employee at Congress South or other schools in the District is to be at least 18 years of age, and if one stays longer than 6 months, to attend meetings on early childhood education.

Because Congress South is a licensed daycare center, State child care regulations require that as part of the Recreation Program, there must be a CCW present and working as such with each group. There are also Recreation Program "staff in charge", Lange, King and Evans, who are certified teachers at Congress South during the school day. The CCW is responsible for planning and preparing the activities and making sure they are carried out, and

for seeing that the required ratios and staffing patterns are met. The Rec employees assist the CCW in carrying out the activities. An individual who is employed as a CCW may work outside his/her regular shift as a Rec employee and could be in the same or a different room as the one they work in as a CCW and physically perform much the same duties they performed as a CCW, but they would not be responsible for the plan of activities and seeing that it is carried out. Rec employees assisting in the child care rooms only work part-time and receive an hourly rate of \$7.70 pursuant to the 1999-2001 collective bargaining agreement between the District and AFSCME covering the District's part-time Rec employees.

16. The CCW's skills and duties are more closely related to those of the EA-Generals and EA-Paraprofessionals than to those of the HCAs. While some of the CCWs perform toileting/diapering, feeding and washing duties similar to those of the HCAs, those duties are ancillary to their duties related to the educational development of the children for whom they are responsible. The CCWs view themselves as being "educators" and the CCWs and EAs participate in a shared purpose through their employment and share a community of interest.

17. While some or many of the duties CCWs might perform while working as a Rec employee are similar to those they perform as a CCW, their primary responsibilities and the qualifications for the position are significantly different in the two jobs.

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

CONCLUSIONS OF LAW

1. The employees in the Child Care Worker positions at Congress Elementary-South are most appropriately included in the Milwaukee Teachers' Education Association Educational Assistant bargaining unit.

2. The work performed as part-time hourly Recreation Program employees by those who are otherwise regularly employed as Child Care Workers is not part of the Child Care Worker position most appropriately included in the Milwaukee Teachers' Education Association Educational Assistant bargaining unit.

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

ORDER CLARIFYING BARGAINING UNIT

The Milwaukee Teachers' Education Association bargaining unit consisting of the Educational Assistants shall be, and hereby is, clarified to include the Child Care Worker positions in the Milwaukee Public Schools and to read as follows:

“All general, technical aides, lead aides and paraprofessional aides, including Deaf Interpreter, Liaisons, Parent Information Centers, and Child Care Workers in the employ of the Milwaukee Board of School Directors, excluding social work aides, supervisory aides, teachers, handicapped children’s assistants, administrators, supervisors, clerical and custodial employees.”

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

MILWAUKEE PUBLIC SCHOOLS

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

District

The District takes the position that the CCWs are most appropriately included in the SEIU bargaining unit, which includes approximately 200 HCAs.

In support of its position, the District asserts that during their regular work day, CCWs are far more closely aligned with HCAs than with the EAs. SEIU's representative noted that the common denominator for members of the SEIU unit is that they provide care for the physical and health needs of the children. A review of the job duties performed by the HCAs shows that the CCWs perform virtually the same range of duties. Like HCAs, CCWs assist students in moving from one classroom to another, assist in dressing and undressing, assist teachers in implementation of IEP's, clean up students after a toileting or feeding accident, assist teachers in implementation of life skill activities (washing hands, toilet training and drinking), assist students in the completion of age-appropriate functional activities, such as mobility training (walking children around the block, taking them on field trips or accompanying them in movements through the building), assist in feeding or with lunch, help maintain a clean, attractive environment, assist in crisis situations, assist in the care of ill children, and assist in situations involving the general welfare, safety and well-being of the child.

HCAs work with disabled children, many of whom are cognitively at the level of babies or small children, similar to those cared for by CCWs. Feeding, toileting, and working with children to develop self-care and functional skills are primary responsibilities for HCAs. CCWs also spend a significant part of their day performing the same types of duties. Those activities do no more than simulate a home environment and serve the primary purpose of helping the child grow in self-sufficiency. Thus, CCWs and HCAs share a significant community of interest that is lacking between CCWs and EAs.

EA-Generals are involved primarily in teacher support activity such as hall duty, copying and low level office-type assistance. Even the Association representative conceded that the CCW duties are not very closely aligned with the EA-Generals, but that a closer community of interest existed with the EA-Paraprofessionals. However, EA-Paraprofessionals require 60 hours of college credit as a prerequisite of the job, while CCWs require only attendance at two 40-hour classes. In that respect, CCWs compare much more closely with HCAs, who only need to be 18 years of age and have the recommendation of a school administrator as a prerequisite.

With regard to the toileting and feeding duties, which are a significant component of both the CCW and HCA functions, pursuant to a settlement agreement between the Association and the District, duties of that type will only be performed by EAs when an HCA is not available. Further, EAs are primarily engaged in traditional educational activities, supporting a teacher in a regular school curriculum with regular students, as opposed to CCWs and HCAs who care for and nurture functional self-sufficiency in fragile populations.

While CCWs prepare “lesson” or “activity” plans for their children, those plans have no connection with the lesson plans prepared by certified teachers to facilitate academic progress. CCWs are not involved in or with academics and their activity plans involve no more than ensuring that the childrens’ days are structured with feeding, napping, and play periods and activities that are meant to enhance their functional capabilities, rather than their academic capabilities.

With regard to the CCWs working as Rec employees, when doing so they are more closely aligned with the other Rec employees in the AFSCME bargaining unit, rather than with EAs. Only a few CCWs work outside their regular hours in Congress South’s Rec program, either regularly or on an occasional, as-needed basis. Those who do, do so voluntarily as a means of earning additional income. When working as a part-time Rec employee, they perform the same work performed by the school’s other part-time Rec employees. Rec employees can be drawn from employees in any classification at the school, or even from other schools, or from the community at large. Those other employees, at Congress South and every other school in the District with a Rec program, are members of the AFSCME bargaining unit.

The only requirement to be a Rec employee is that the person be at least 18 years of age and that sometime during their first six months of employment they receive some background in early childhood education. While Rec employees receive approximately 90 cents an hour less than CCWs, this is justified by the differences in their duties and responsibilities. A child care center must have a CCW in charge of each of the groups of children at all times, and this is done by staggering their starting times. When working as a CCW, they are primarily responsible for daily activity plans for the children, daily parental communications, ensuring mandatory child/staff ratios are maintained, ensuring a safe and clean environment, ensuring the well-being of the children, and are in charge of the room. When serving as a Rec employee, CCWs who volunteer for the work, like other non-CCW Rec employees, do not have primary responsibility for those duties. These factors distinguish CCWs from Rec employees, and demonstrate that the few CCWs who volunteer for Rec work are indistinguishable in terms of their duties and responsibilities from the other Rec employees. Further, not only do the responsibilities of Rec employees and CCWs differ, the children they work with as a Rec employee may be entirely different from those they work with as a CCW and may be in an entirely different part of the building.

In its reply brief, the District reiterates its assertions that the CCWs who choose to work as Rec employees outside of their regular 6½ hour day do the same work as other non-CCW Rec employees in the Congress South Rec program. Rec employees are not required to have taken the two 40-hour child care courses as required to be a CCW. Those CCWs who have worked as Rec employees have only done so on an occasional or sporadic basis, and when they do so, it is frequently with an entirely different set of children from those they work with in their CCW capacity, and their responsibilities are fundamentally different from their responsibilities while working as CCWs. The record unequivocally shows that Rec employees do not prepare lesson plans, and do not have any responsibility for monitoring the progress of children or reporting on such progress to parents.

CCWs picking up extra hours as Rec employees have duties and responsibilities that differ significantly in substance from that of the Rec employee actually working in a CCW capacity. The CCW is responsible for the preliminary planning and is in charge while the work is being performed. CCWs who choose to work as Rec employees have exactly the same duties and responsibilities as the other Rec employees who are working in a subordinate capacity to the CCW in charge.

Further, the Rec employee classification is District-wide, and the job requirements and responsibilities of Rec employees at Congress South are no different from those of Rec employees elsewhere in the District. The attempt to classify those few CCWs who pick up extra hours in a Rec employee capacity as CCWs belonging in the EA bargaining unit during this time is antithetical to the principles governing appropriate bargaining unit composition. Placement of those few CCWs who choose to work as Rec employees in the EA unit would play utter havoc with the Rec program creating a situation where the majority of the Rec employees would be in the AFSCME unit, while a handful of employees doing exactly the same work with exactly the same responsibilities would be classified as being in the Association's EA unit. Such fragmentation is to be avoided. For those reasons, the Association's argument that the CCWs should be deemed to be in the EA unit when working as Rec employees should be rejected.

Association

In its brief, the Association takes the position that the CCW positions and those part-time hourly Recreation workers (Rec employees) performing child care worker duties at Congress South should be included in the EA bargaining unit represented by the Association.

The Association asserts that in 1999 at Congress South, the District established its first early childhood educational program, including infant and toddler classes and a wraparound day care program for 3 to 5-year olds in the Head Start and kindergarten programs. The CCWs and Rec employees in the early childhood programs at Congress South provide day care services with "substantial educational components designed to facilitate cognitive, emotional

and physical development of the children.” Similarly, employees in the EA bargaining unit

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provide educational support services to all educational programs in the District, while the employees in the SEIU bargaining unit provide physical maintenance support services to the District.

In support of its position, the Association asserts that the Commission has held that expansion of an existing unit is appropriate through unit clarification proceedings if sufficient community of interest exists between the positions in the existing unit and the positions to be added thereto, and if the addition of the positions does not call into question the union’s continuing majority status. Here, there is no evidence that inclusion of the CCW positions at issue will disturb the Association’s majority status, and the District has also petitioned for a unit clarification seeking to place the CCW positions in the existing SEIU bargaining unit. Thus, the issue is whether a sufficient community of interest exists between either of these units and the CCW positions to warrant inclusion.

In determining “community of interest”, the Commission has considered whether the placing of certain employees within a particular unit of employees for representational purposes would serve “the unique interests and aspirations of the employees in said unit.” MADISON WATER UTILITIES EMPLOYEES ASSOCIATION, DEC. NO. 19584 (WERC, 5/82). In this case, in terms of nature of the work, the CCW positions share enough similarities with what has historically been the purview of EA unit to suggest that the “unique interests and aspirations” of the CCWs would be served in the EA unit. The employees presently in the EA unit share a strong bond related to their common duties involving support for the various educational programs offered throughout the District. Most EA-Paraprofessionals, like CCWs, provide classroom instruction throughout the entire day to smaller groups of children. Although EA-Generals are often assigned to non-instructional duties, they are part of the educational process at the schools. Like many EAs, CCWs are essentially the staff persons providing much of the hands-on instruction. Conversely, HCAs are not involved in the educational or instructional process, but are instead focused almost exclusively on the physical needs of the handicapped child. While HCAs are expected to provide physical maintenance services consistent with the student’s IEP, they are not primarily involved in the educational development of the child. In contrast, CCWs prepare lesson plans and monitor the child’s whole development, working on the cognitive, emotional and physical growth of the child, with particular attention to language and vocabulary skills. Further, the CCWs who testified made it clear that they consider themselves educators. Equally probative, Hoganson encourages parents and children to refer to the CCWs as “teachers”, and the policy handbook designates them as “lead teacher” and “general teacher”.

As shown by the testimony of a number of CCWs, they have common aspirations as a group to professionally advance themselves as educators, an avenue that is appropriately available within the EA bargaining unit. Probative weight should also be attached to the views of SEIU’s representative, who previously indicated that he did not believe that the CCWs should be appropriately placed in the SEIU unit with the HCAs. He also testified at hearing

that such recommendation was based upon his investigation of the CCW's duties, from which

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he concluded that they shared a far greater common interest with the EAs than with the HCAs due to their being substantially involved in the educational process.

The District's Director of Labor Relations, Deborah Ford, testified that the basis for the District's asserted community of interest between HCAs and CCWs was that the handicapped population the HCAs care for is similar to the infants to 3-year olds in the Congress South day care program. Ford essentially reasoned that since CCWs diaper and feed infants and toddlers, they share a strong community of interest with HCAs. The Association argues this approach is erroneous for several reasons. Unlike HCAs, CCWs do not spend the primary portion of their day toileting, feeding, and physically caring for the children. While they spend time on diapering and feeding, it is far from their primary duty. Further, the District holds out the CCWs to the parents as teachers who will instruct their children. Unlike the HCAs who travel between multiple classrooms attending exclusively to the needs of the handicapped students, the CCWs engage in a broad variety of planning, monitoring, instructing and caring for very small groups of young children. Their principal function is interactive, with most of their time devoted to speaking, reading, playing games, engaging in art and music, planning activities, speaking with parents, and monitoring the childrens' progress.

The District's reliance on a settlement of a prohibited practice complaint in the 1980's is misplaced. Ford erroneously believes that EAs are not assigned to educational programs where they must diaper, toilet and feed young children. Association representative Cheryl Barczak testified that the prohibited practice complaint was prompted by concerns that the District planned to eliminate the HCA position and implement a wholesale assignment of HCA duties to EA-Paraprofessionals and teachers dealing with handicapped children. The memorandum of understanding resolving the complaint provided that the administration would continue to provide HCAs for routine feeding and toileting of handicapped children. However, the notion that EAs do not perform diapering and toileting duties is belied by the testimony that within both the Head Start and generic early childhood programs, the EAs and teachers routinely diaper, toilet and feed children enrolled in those programs. Thus, it is erroneous to suggest that CCWs do not share a community of interest with EAs because they care for infants and toddlers in need of diapering and feeding.

Next, the Association asserts that the Rec employees performing child care duties at Congress South must also be placed in the EA bargaining unit. It is undisputed that any CCW who obtains work at Congress South beyond their regular six-hour day, must accept the sham classification of Rec employee at a reduced rate of pay, notwithstanding that their duties are identical because they perform as a CCW. Testimony was unequivocal that the nature of the infant and toddler day care programs remained similar throughout the day. An arbitrary determination based on the number of hours worked cannot justify such a sham transformation of employee status. Such staff must be appropriately placed in the EA bargaining unit, irrespective of how many hours they work in a day. Further, Congress South assigns CCWs to staff the Camp Site wraparound program for the half-day classes and the Explorer after-

assigned to staff each program, and other staff are assigned as Rec employees. Hoganson's testimony was emphatic that the Camp and Explorer programs are not simply "recreational time", but are licensed day care, the same as the Infant and Toddler programs. As those programs have similar content and objectives, the employees should be similarly classified regardless of how the District opts to designate them. AFSCME's representative acknowledged at the outset of the hearing that the Commission should decide the appropriate unit designation of all of these employees based upon whether or not the Camp and Explorer program was similar to the program in which CCWs worked during the day.

Further, the Camp and Explorer programs, unlike regular Recreation programs which need not be supervised by certified staff, are supervised either by Hamburg or by another certified teacher in the building. One employee is designated as a CCW in the Camp and Explorer programs and other employees, with virtually identical duties, are assigned and paid as Rec employees. While Hoganson testified that the CCW has a sole additional responsibility for reporting any problems regarding non-compliance with HFS requirements, as a practical matter, the duties of the employees in terms of interacting and caring for the children are the same. In the Explorer program, Elim arrives at noon and prepares the activities for the room. The children arrive after 2 p.m. and another CCW works with her to care for the children, but is designated as a Rec employee, even though they have similar duties, and have no other delineated responsibilities apart from reporting to the Program Director. Moreover, Elim's responsibility reporting problems to the Program Director is essentially the same responsibility given to lead teachers Brimley and Groening in the Infant and Toddler rooms. However, CCWs Gant, Sinclair, Miller, Ealey and Kiefert, who work with those lead teachers, are not primarily responsible for reporting problems to the administration. Thus, the duties of non-lead teacher CCWs in the Infant and Toddler rooms are virtually identical to those of the so-called Rec employees who work with lead teachers Elim and Robinson.

Last, the duties performed by CCW Glasgow in the experimental K-3 program are clearly the same as those performed by EAs in the 3-year old Head Start classrooms throughout the District.

In its reply brief, the Association reiterates its assertion that while the employees formally designated as the CCW in the Explorer and Camp programs have the lead person responsibilities to plan activities and report non-compliance with state regulations, that is no different than lead teacher designation in the Infant and Toddler rooms. The District suggests that Rec workers may be distinguished from CCWs "in terms of the children with whom they work." However, Hoganson testified that the individual employees working in the various childcare settings at Congress South are interchangeable and that the main concern is to ensure that there is a designated CCW in each room in order to comply with State regulations. The irrationality of the District's position in this matter is manifested by the fact that CCWs assigned to the Infant and Toddler rooms who work in excess of six hours in that same room with the same children, are nonetheless reclassified as Rec employees after their sixth hour of

work. Even if they are assigned to the Explorer programs after 2 p.m., they are still

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performing identical child care duties alongside the employee designated as CCW. The District also asserts that the CCWs who volunteer for Rec work are indistinguishable in terms of their responsibilities and duties from other Rec employees at Congress South. That statement implies that there exists a group of Rec workers at Congress South who are assigned duties but do not work directly with CCWs. Nothing in the record remotely suggests that is the case. If, however, the District is not suggesting that there are Rec employees assigned to non-child care duties, then the District is correct that nothing distinguishes the duties of those CCWs who volunteer for Rec work from other Rec employees at Congress South. Thus, these employees, irrespective of the number of hours they work during the day, share a common interest, and should all be part of the same bargaining unit for child care work performed. The Association submits that all employees working in the Congress South day care program, whether formally classified as CCWs or as Rec employees, should be part of the EA bargaining unit.

DISCUSSION

Child Care Workers

The District petitioned the Commission to clarify the existing SEIU bargaining unit to include the recently-created Child Care Worker (CCW) positions. The Association filed its own petition requesting that the Commission clarify the existing EA bargaining unit to include those same positions. In this proceeding, the Commission must determine which of the two bargaining units constitutes the most appropriate unit for inclusion of the CCW positions. In making such a determination, the Commission considers the following factors:

1. Whether the employees in the unit sought share a “community of interest” distinct from that of other employees;
2. The duties and the skills of the employees in the unit sought as compared with the duties and skills of other employees;
3. The similarity of wages, hours and working conditions of employees in the unit sought as compared to the wages, hours and working conditions of other employees;
4. Whether the employees in the unit sought share separate or common supervision with all other employees;
5. The degree to which the employees in the unit sought have a common or exclusive workplace;
6. Whether the unit sought will result in undue fragmentation of bargaining

7. Bargaining history.

We have used the phrase “community of interest” as it appears in Factor 1 as a means of assessing whether the employees participate in a shared purpose through their employment. We have also used the phrase “community of interest” as a means of determining whether employees share similar interests, usually – though not necessarily – limited to those interests reflected in Factors 2-5. 1/ This definitional duality is of long-standing, and has received the approval of the Wisconsin Supreme Court. 2/

1/ *WAUKESHA COUNTY TECHNICAL COLLEGE, DEC. NOS. 11706-C, 29564 (WERC, 2/99).*

2/ *ARROWHEAD UNITED TEACHERS v. WERC, 116 WIS. 2D 580, 592 (1984). WAUKESHA COUNTY TECHNICAL COLLEGE, SUPRA.*

It should be understood, based upon long-standing Commission precedent, that within the unique factual context of each case, not all criteria deserve the same weight. 3/ Thus, a single criterion or a combination of criteria listed above may be determinative. 4/

3/ *SHAWANO-GRESHAM SCHOOL DISTRICT, DEC. NO. 21265 (WERC, 12/83); GREEN COUNTY, DEC. NO. 21453 (WERC, 2/84); MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90).*

4/ *WAUKESHA COUNTY TECHNICAL COLLEGE, SUPRA; Common purpose, MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 20836-A and 21200 (WERC, 11/83); similar interests, MARINETTE SCHOOL DISTRICT, SUPRA; fragmentation, COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79); bargaining history, LODI JOINT SCHOOL DISTRICT, DEC. NO. 16667 (WERC, 11/78).*

Application of the first factor favors inclusion of the CCWs in the EA unit. It is apparent from the CCWs who testified that they correctly view themselves as direct participants in the educational process, with some expressing an interest in becoming a certified teacher. The District itself refers to them as “teachers” in the context of the child care program at Congress-South. Most CCWs have to prepare bi-weekly “lesson plans” that are reviewed by Program Director Hamburg, who is a certified teacher. While these “lesson plans” are more in the nature of a schedule of activities, they are in keeping with a specific theme and the activities are designed to stimulate an infant’s senses and brain development, to develop life skills, to develop motor skills, to promote communication skills, and to promote emotional and social development, depending on the age group of the children. The activities also include art projects, music and reading stories to the children. Although there is a physical maintenance responsibility, that component is significantly diminished with regard to the CCWs working with the toddlers and older children. Conversely, there is little or no direct educational component with regard to the HCA function unless the student’s IEP calls for it. Even then, the HCA’s role is essentially to deliver the developmentally appropriate service to the child with the goal of the child being able to some degree to meet specific self-care needs.

The HCA's role is to take care of the child's physical needs (feeding, toileting, cleaning) and

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getting the child whenever he/she needs to go in the school. Thus, there is a much more limited educational aspect to the HCA function than there is to the CCW's role. It is therefore concluded that the CCWs and EAs participate in the shared purpose of providing educational services and thus share a greater "community of interest" in that regard than do the CCWs and the HCAs.

Similarly, application of the second factor also favors inclusion in the EA unit. While the duties of the CCWs in the Infants room necessarily entail taking care of the physical needs of the child, unlike the HCAs, they also involve engaging in activities to stimulate the child's senses and thus stimulate brain development in the child. As noted above, the educational aspect of the CCW's duties, as opposed to their caretaker duties, grows in proportion to the increase in the age of the groups of children with which they are assigned to work. In many respects, the duties of the CCWs working outside of the Infant's room are similar to the duties of the EAs working in the generic early childhood program or the Head Start classrooms. 5/

5/ *It is also noted that while the CCWs working with infants share many of the caretaking duties the HCAs have, the same can be said of the EAs working with the EE students. Despite a memorandum of understanding resulting from the settlement of a prohibited practices complaint, the record indicates that the EAs assist EE students with toileting, especially in the absence of an HCA.*

The required qualifications to work as a CCW are also closer to those required of an EA than of an HCA. The CCWs are required to have either an associate degree in child care development or completion of State licensing courses in child care (80 hours) and the equivalent of 80 workdays experience as an assistant child care worker in a licensed day care center or a kindergarten. That is higher than what is required to be an HCA (18 years of age or older and recommendation of a District administrator) or an EA-General (high school diploma or GED), and less than the qualifications to be an EA-Paraprofessional (60 college credits).

Factors 3-5 are not significant in this case. As to Factor 3, the District set the CCW wage rate where it felt it should be, i.e. at the minimum HCA starting rate. The CCWs' hours and conditions of employment equally differ from, or are equally similar to, those of both the HCAs and the EAs. The CCWs' workday and work year differ equally from both the HCAs' and EAs'. CCWs' are covered by Health and Family Services regulations, while both the HCAs' and EAs' are covered by Department of Public Instruction regulations. The same can be said as to Factors 4 and 5. The CCWs, HCAs and EAs all work in classrooms or rooms under the direction of a certified teacher and all have the building administrator as their immediate supervisor.

Factors 6 and 7 have no application in this case. As to fragmentation, no additional unit will be created by either result. As to bargaining history, there is none because this

proceeding will decide the initial unit placement of the CCWs.

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Based on their greater participation in a shared purpose with the EAs and a greater similarity of duties and skills, it is concluded that the CCW positions are more appropriately placed in the EA bargaining unit.

Recreation Workers

We limit the inquiry on this issue to the CCWs who also work as Rec employees. 6/

6/ This position is considerably broader than the scope of the unit clarification originally filed by the Association, as well as the position it took at hearing (i.e. that the CCW positions, including the hours they worked outside of their 6½ hour CCW position as "Rec employees", should be included in the EA bargaining unit). The present record is insufficient as far as responding to the Association's broader requested clarification to include all Rec employees working at Congress South. Further, it is apparent from the record (no Rec employees at Congress South who are not also CCWs testified at hearing) and from the District's post-hearing briefs that no one but the Association was aware it was raising an issue as to the appropriate bargaining unit for the non-CCWs working as Rec employees at Congress South. That being the case, the Commission's determination in these matters will be confined in its scope to the issues raised by the Association on February 24, 2000 and which were litigated by the parties.

There is concededly a similarity between the duties physically performed by some of the CCWs when working as a CCW and the duties they perform when working as a Rec employee at Congress South. There are, however, several critical distinctions between working as a CCW and working as a Rec employee. First, the qualifications for the position differ. The only qualification required to be a part-time Rec employee at Congress South or elsewhere in the District is to be at least 18 years of age. Further, not all of the Rec employees at Congress South are also CCWs. They may be an EA or a certified teacher during the school day, or they may be an individual not otherwise employed by the District. Second, the record indicates that the hours are voluntary, varying with the individual's desire to work extra hours, and that the individual is not always employed in the same room that they work in as a CCW. Third, the responsibilities of CCWs with regard to "lesson plans", being in charge of the room or group, and making sure the required staffing ratios are met, are not shared by a Rec employee, even one who is at other times employed as a CCW. Last, because Congress South's Wraparound and after-school programs are also licensed child care programs, a CCW must be present in the room pursuant to the HFS regulations.

The record indicates that other schools in the District also house after-school programs (end of the school day until 6 p.m.) utilizing Rec employees presumably performing duties similar to those performed by the Rec employees at Congress South. The Association's request is essentially to remove the time a CCW might work as a Rec employee, i.e. time performing work that is the same or similar to that performed by Rec employees at other schools, from the AFSCME Part-Time Hourly Recreational Workers Unit and make it part of the individual's CCW position in a different bargaining unit. Such placement of employees performing the same work in different bargaining units is inconsistent with the purposes of Municipal Employment Relations Act.

Despite the similarity of duties that might exist between a person working as a CCW and one working as a Rec employee, for the reasons set forth above, we have concluded that work performed as a Rec employee without the concomitant responsibilities and requisites of the CCW position is not properly considered to be part of the CCW position. Thus, a part-time Rec employee position being filled by an individual who is regularly employed as a CCW in the District remains in AFSCME's Part-Time Hourly Recreational Workers bargaining unit.

Dated at Madison, Wisconsin this 25th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

