

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

NORTHEAST WISCONSIN TECHNICAL  
COLLEGE FACULTY ASSOCIATION

Involving Certain Employes of

NORTHEAST WISCONSIN TECHNICAL  
COLLEGE

Case 8

No. 50813 ME-703

Decision No. 11602-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, and Ms. Mary E. Pitassi, Associate Counsel,  
Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003,  
Madison, Wisconsin 53708-8003, and Mr. Dennis Muehl, UniServ Director,  
Bayland Teachers United, 1136 North Military Avenue, Green Bay, Wisconsin  
54303, for the Petitioner.

Godfrey & Kahn, by Mr. Robert W. Burns, 333 Main Street, Suite 600, P.O. Box 13067,  
Green Bay, Wisconsin 54307-3067, for the College.

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

On March 31, 1994, the Northeast Wisconsin Technical College Faculty Association filed a petition requesting that the Wisconsin Employment Relations Commission clarify an Association bargaining unit at the Northeast Wisconsin Technical College by directing the inclusion of the positions of Student Health Nurse and AODA Facilitator. On June 20, 1994, the College filed a unit clarification petition seeking the exclusion from the unit of twelve positions in the Center for Business and Industry, and the Minority Affairs Advisor. Hearings in the matter were held in Green Bay, Wisconsin, on December 6, 1994 and January 30, 1995, before Commission Examiner Stuart Levitan with stenographic transcripts being made available to the parties on December 16, 1994 and February 21, 1995, respectively. At the hearing of January 30, 1995, the parties placed on the record their agreement to hold in abeyance consideration of all positions other than that of the Student Health Nurse. The parties filed written briefs by April 24, 1995 and reply briefs by May 8, 1995.

No. 11602-A

On June 7, 1995, Examiner Levitan notified the parties that pursuant to Sec. 227.45(2), Stats., he desired to avail himself of certain agency records and documents from a prior case involving the parties, and that any party wishing to rebut or offer countervailing evidence could file a motion to reopen the hearing on or before June 28, 1995. Neither party filing such a motion by the stated June 28 deadline for such action, the Examiner closed the record on that date.

The Commission, now being fully advised in the premises, hereby issues the following

### FINDINGS OF FACT

1. Northeast Wisconsin Technical College Faculty Association, herein the Association, is a labor organization with offices at 1136 North Military Avenue, Green Bay, Wisconsin.
2. Northeast Wisconsin Technical College, herein the College, is a municipal employer with offices at 2740 West Mason Street, Green Bay, Wisconsin.
3. In Decision No. 11602 (WERC, 2/73), the Commission directed the election which led to the ultimate certification of the Association as the collective bargaining representative of the unit described in the Direction as:

all certified personnel teaching at least 50% of a full teaching schedule at Northeast Wisconsin Technical Institute including classroom teachers, librarians, guidance counselors and other special teachers, but excluding teaching personnel teaching less than 50% of the full teaching schedule, coordinator directors, supervisors, clerical and custodial employees;

The Association and the College agreed to the foregoing unit description but disagreed as to the inclusion or exclusion of several employees in the unit, including the Library Technician. The Commission concluded that the Library Technician was not included in the unit because, contrary to the bargaining unit description, the incumbent was not certified and the job did not require certification.

The parties' 1992-1994 collective bargaining agreement describes the bargaining unit as:

all certified personnel teaching at least 50% of a full teaching schedule at Northeast Wisconsin Technical College, including classroom teachers, librarians, guidance counselors, and other special teachers, but excluding teaching personnel teaching less than 50% of the full teaching schedule, coordinator directors, supervisors, clerical and custodial employees.

4. In February, 1983, the Association asked the College to include the position of

"School Nurse" in the bargaining unit and the College refused.

5. In August, 1984, the parties submitted to the Commission the following stipulation:

STIPULATION FOR ELECTION

It is stipulated between the Wisconsin Education Association Council (Union) and the Northeast Wisconsin Technical Institute (Employer) that a union representation election shall be conducted to determine whether certain professional employes of the Northeast Wisconsin Technical Institute shall be represented by the Union for the purposes of bargaining wages, hours and conditions of employment.

1. Those professional employes who are eligible to vote are listed on Exhibit "A".
2. The voting shall be conducted by secret ballot.
3. The election shall be conducted as soon after September 3, 1984, as possible.
4. The employes shall be given the following choices in the balloting procedure:
  - A. All eligible employes shall vote on whether they wish to be represented by the union or not.
  - B. At the same time, all eligible employes shall vote (and submit the votes in sealed envelopes) on whether, should the union prevail in the vote, those employes would become members of the Technical Support unit or members of a new unit of professionals entitled Professional Administrative Personnel.
5. By this Stipulation the undersigned parties jointly request the Wisconsin Employment Relations Commission to conduct an election pursuant to the details outlined above and in accordance with Commission rules and regulations.

NORTHEAST WISCONSIN TECHNICAL  
INSTITUTE

WISCONSIN EDUCATION  
ASSOCIATION COUNCIL

By Dennis W. Rader /s/  
Dennis W. Rader  
MULCAHY & WHERRY, S.C.  
Legal Counsel

By Stephen Pieroni /s/  
Stephen Pieroni  
Legal Counsel

Date: 8/9/84

Date: 8/23/84

Exhibit "A" listed 13 position/incumbents, and did not include the Student Health Nurse or any other health care provider.

6. On October 1, 1984, the Commission issued a Direction of Election as follows:

DIRECTED

That elections by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Directive in the following voting group for the following stated purposes:

All regular full-time and regular part-time para-professional and non-teaching professional administrative employees employed by Northeast Wisconsin Technical Institute working 18 3/4 hours or more per week, but excluding all confidential, supervisory and managerial personnel, and all other employees, who were employed on October 1, 1984, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining (1) whether the required number of such employees desire to be represented for the purposes of collective bargaining by a labor organization affiliated with the Wisconsin Education Association Council; and (2) should the required number of such employees vote in favor of representation, whether said employees desire to be included in the existing Technical Support unit, which unit is described as all regular full-time and regular part-time para-professional and non-teaching

professional administrative employees employed by Northeast Wisconsin Technical Institute working more than 18 3/4 hours per week, but excluding all confidential, supervisory and managerial personnel and all other employees, or to become members of a new unit of professional employees entitled Professional Administrative Personnel, which unit is described as all regular full-time and regular part-time professional administrative employees employed by Northeast Wisconsin Technical Institute working more than 18 3/4 hours per week, excluding confidential, supervisory, managerial personnel and all other employees.

7. On December 5, 1984, the Commission issued a Certification of Results of Elections, which certified that a majority of eligible employees who voted selected representation by a labor organization affiliated with the Wisconsin Education Association Council, rather than for no representation, and further that a majority of eligible employees voting did so for the new unit entitled Professional Administrative Personnel, rather than for inclusion into the Technical Support Unit.

8. In late 1985 and early 1986, questions arose as to the continued representation of the Professional Administrative Personnel unit, leading to a petition for election being filed with the Commission. On March 24, 1986, the parties reached an agreement as follows:

SETTLEMENT AGREEMENT REGARDING DECERTIFICATION PETITION FILED ON  
BEHALF OF CERTAIN EMPLOYEES OF THE NORTHEAST WISCONSIN TECHNICAL  
INSTITUTE PROFESSIONAL ADMINISTRATIVE PERSONNEL UNIT  
Case 55 No. 36046 ME-2530

1. The Northeast Wisconsin Technical Institute, the Professional Administrative Personnel-NWTI (WEAC) and Mr. Stan Lardinois, on behalf of the petitioning employees, agree that the employees who occupy the positions listed below will have the option of remaining unrepresented or becoming members of the Council of Auxiliary Personnel (CAP) bargaining unit at NWTI:

ADULT CONTINUING EDUCATION AIDE

PAYROLL AIDE

BOOKSTORE TECHNICIAN

MARKETING INFORMATION ASSISTANT

WRITER/SCHOOL COMMUNITY RELATIONS  
ASSISTANT

LIBRARY TECHNICIAN

STUDENT ACTIVITIES AIDE

FINANCIAL ASSISTANCE AIDE

STUDENT PLACEMENT AIDE

PROJECT ACCOUNTANT

OPERATIONS ACCOUNTANT

APPLICATIONS PROGRAMMER

SYSTEMS ANALYST/PROGRAMMER

2. The parties agree that those employees who occupy positions which become unrepresented will receive the same salary and fringe benefit increases as received by similar non-represented positions.
3. The Professional Administrative Personnel unit shall become defunct as a result of this agreement.
4. The petition for decertification of the Wisconsin Education Association Council as exclusive bargaining representative of employees within the Professional Administrative Personnel unit is hereby withdrawn.

...

VOLUNTARY RECOGNITION AGREEMENT FOR THE INCLUSION OF CERTAIN  
POSITIONS IN THE TECHNICAL SUPPORT BARGAINING UNIT AT THE  
NORTHEAST WISCONSIN TECHNICAL INSTITUTE

1. The Northeast Wisconsin Technical Institute and the Council of Auxiliary Personnel bargaining unit hereby agree that the positions indicated below shall be included in the Council of Auxiliary Personnel (CAP) bargaining unit:

Student Placement Aide

Student Activities Aide

Financial Assistance Aide

(3 positions)

(The parties will fill in the titles of the positions to be included in the bargaining unit.)

2. The employees included in the Council of Auxiliary Personnel (CAP) bargaining unit by virtue of this voluntary recognition agreement will receive the same salary and fringe benefits increases received by the members of the unit.

9. The position of Student Health Nurse was in existence as of August, 1984, but was not addressed in any way either in the Stipulation for Election or the decertification agreement.

10. In 1988, the Association asked the College to agree to the inclusion of the Student Health Nurse in the unit and the College refused.

11. In July, 1991 the Association and the College commenced a consensus bargaining process pursuant to training and facilitation provided by the Commission. The Association prepared a comprehensive compilation of issues, starting with a category identified as "Issues related to bargaining unit definitions." The first item in that category, "bargaining unit clarification," listed the Student Health Nurse as one of six positions/classifications requiring attention. During several consensus bargaining sessions, the parties failed to reach consensus on the bargaining unit status of the Student Health Nurse. The parties did not enter into any agreement specifying the consequences of a failure to reach consensus on this issue.

12. In 1993, the College placed the position of Minority Affairs Advisor in the bargaining unit. The position is not certified by the Wisconsin Board of Vocational, Technical and Adult Education and the position incumbent does not teach. In response to the Association's petition for unit clarification, the College filed its own petition seeking exclusion of this position, among others.

13. Since January, 1987, the College's Student Health Nurse has been Aimee De Baker.



She has the following conditions of employment:

WAGES, HOURS AND WORKING CONDITIONS - UNCLASSIFIED POSITIONS:  
STUDENT HEALTH NURSE; AODA SPECIALIST

Information provided is based on full-time employment. Various standard prorations are utilized for less than full-time positions.

A. Benefits

1. Health Benefits - Employees will be eligible for membership in the district's health insurance program on either the single or family plan as appropriate. The district will pay 95% of the applicable premium amount of coverage as selected by the employee.
2. Dental Benefits - Employees will be eligible for membership in the district's dental insurance program on either the single or family plan as appropriate. The district will pay 95% of the applicable premium amount of coverage as selected by the employee.
3. Disability Insurance - The employee will be covered by disability insurance as generally provided by the district in an amount equal to 90% of their regular salary amount beginning the first of the month following employment. This coverage will be at no cost to the employee.
4. Life Insurance - Comparable to that provided to Faculty staff (50,000 as of 6/91).
5. Other standard insurance coverage provided all employees by the district (i.e. Workmen's Compensation) will be equally available.

B. Retirement

By Statute, employees within this classification must belong to the Wisconsin Retirement System. The district will pay the mandator employer's share of retirement participation. In addition, the district will pay the employee's portion of this

retirement plan to a maximum of 6.1% of the employee's regular earnings. The employee shall pay their own retirement portion of any earnings beyond regular salary. Employees must work in each of five years to become vested.

C. Leaves

1. Sick Leave - Employees shall receive one sick day per month which may be accumulated to a maximum unused sick bank of 60 days. Sick leave to be available with pay for absences necessitated by incapacitating personal illness or injury or emergency dental care. Sick leave may also be available in the event of serious illness or death in the immediate family (mother, father, sister, brother, husband, wife, child, mother-in-law, father-in-law, sister-in-law, brother-in-law or other permanent member of the household). Said leave not to be applied where the individual's presence is required simply to maintain the operation of the home, provide transportation or act as a caretaker. Sick leave with pay also to be available for funerals of other than the immediate family to a maximum of two days per year.
2. Child Rearing Leave - Employees with one or more year's service with the district may, upon request, be granted unpaid child rearing leave not to exceed 6 months.
3. Long Term Disability - Employees on long term disability benefits through the district program shall maintain their status as permanent employees for a period of one year and shall have rights to return to their former or a comparable position. Beyond one year, the employee may request a long term leave of absence. Said request would be forwarded to the district board for final action. Such action is discretionary with the board.
4. Jury Duty Leave - Where an employee is required to serve on a jury, said employee shall continue to

receive full salary during the period of such service subject to the deduction of any compensation received for such service or the prompt remittance of the compensation paid them for such service.

5. Leaves of Absence Without Pay - Short term leaves of absence without pay of up to one week may be granted under extenuating circumstances by the Personnel Office. Leaves of absence without pay of up to two months may be granted by the District Director upon written request, said request to specifically indicate and document the necessity or rationale.
6. Emergency Leave - In situations of urgency and necessity or for purposes of conducting necessary business which is impossible or impractical to conduct after assigned hours or during off days, an employee may request paid emergency leave. Said leave will be granted at the discretion of the Director or his/her designee and shall be limited to 3 days per year. Requests must be made prior to the event if possible or immediately after when prior knowledge of the need did not exist. Of these days, two such leave days may be granted with pay per year without restriction. The latter are non-cumulative.

D. Holidays

The following standard holidays will be provided with pay:

Those standard holidays falling within the academic year (Labor Day, Thanksgiving, the day after Thanksgiving, Christmas, New Year's Day, two additional days during the week of Christmas and New Year's, Good Friday and Memorial Day).

E. Employee Files

A copy of the employee's personnel file will be maintained in the district office. Employees shall have the opportunity to review their file upon written request. The employee shall

have the right to attach explanations and comments to non commendatory material within 30 days after it has been included in the employee's file and when the employee was formally noticed of its inclusion or at any time if the employee was not noticed of its inclusion in the personnel file.

F. Evaluation

An annual formal evaluation will be administered by the employee's supervisor normally during the anniversary month. Salary evaluation and review will take place annually, normally on or about the beginning of the fiscal year.

G. Grievances

A formal grievance procedure is available to unclassified staff. A copy of this grievance procedure may be obtained from personnel.

H. Hours of Employment/Work Schedule and Vacation

Employment to be for 186 days (37.5 hours per week) of campus obligation. There is no vacation associated with this position.

I. Professional Development

Under existing district policy, unclassified personnel may request reimbursement for professional development course work. Requests must be made through the immediate supervisor prior to the activity and are subject to approval and the availability of funds.

Expense Reimbursement

Employees will be reimbursed for employment related expenses in accordance with existing policies.

J. Compensation/Probationary Period

Compensation for the position shall be determined by specific board action. This position serves at the discretionary (sic) of the Board.

K. Position Classification

A classification system has been established for Unclassified Staff. Classifications requests and revision requests should coincide with the anniversary date and shall be processed through the established system. Pay adjustments, if any, shall be retroactive to the employee's anniversary.

J. Reasonable Accommodations

The District will make reasonable accommodations to enable qualified applicants to perform the essential functions of the position for which they are applying. Please advise the Personnel Department of any accommodations that may be necessary to perform the job.

Other benefits or employment which are provided district-wide shall be available to unclassified staff.

The foregoing is for information and illustrative purposes. It should not be viewed as creating a contract between the employee and the college. All wages, hours, and conditions of employment are subject to board review and changes, additions, deletions, and adjustments are to be expected.

A collective bargaining agreement covering the school years 1992-1994 for personnel included in the bargaining unit described in Finding of Fact 3 provided health and dental insurance for the full contract year, under which the College paid the total single premium for a single plan, and that amount plus 95% of the added premium for a family plan; an employer contribution of 6.2% of the employee's portion of the retirement plan; an offer to retirees of remaining under the College's health and welfare insurance for three years, as allowed by the carrier, at the retirees' expense; disability and life insurance coverage similar to that provided the subject position; sick leave availability for other than immediate family members and emergency leave of a maximum of two half-days per year; a calendar of 170 student contact days and 10 non-contact days, and the execution of individual contracts, pursuant to the terms of the collective bargaining agreement between the employe and the College.

14. The qualifications for the position of Student Health Nurse include "Professional

Nursing Preparation and current registration (RN)". Baker holds B.S. and B.S.N. degrees from the University of Wisconsin-Green Bay, and, at the time of hearing, was anticipating a December, 1994 graduation with an M.S.N. degree. For the 1993-94 school year, a general overview of her new and continuing activities was as follows:

#### Section I

##### NEW ACTIVITIES AND PROGRAMS DEVELOPED FOR 1993-94

1. Developed Bloodborne Pathogen Exposure Control Plan in compliance with OSHA Standard 29CFR1910.1030 for students and staff.
2. Developed class presentation on health issues, i.e., Carpal Tunnel Syndrome, Anorexia Nervosa/Bulemia, and Nutrition.

##### **CONTINUING ACTIVITIES**

1. Plan and coordinate Health Week.
2. Assisted in developing and coordinating Multi Culture Week and display.
3. Coordinate on-campus Red Cross Bloodmobile twice this year.
4. Maintain current and informative pamphlet and poster displays on the campus.
5. Review all clinical affiliation forms for health occupation applicants.
6. Health consultant to the English as a Second Language Committee.
7. Maintain supplies and inventories of 56 First Aid Stations on campus.
8. Arrange Adult Immunization Clinic with the Green Bay Health Department to provide free immunizations to students and staff.

9. Updated clinical affiliation forms and policy for Health Occupation students.
10. Developed and coordinate medical records of Health Occupation students for Clinical Affiliations.
11. Contracted with State Health Department for Student Health Services to give immunizations: Measles, Mumps, Rubella and Tetanus, free to students and staff.
12. Flu Vaccination Program for staff and students.
13. Developed health information displays in liaison with different community groups i.e., October - Breast Cancer Awareness Month, November - Diabetes Awareness Month, February - Heart Disease Awareness Month, April - Cancer Awareness Month.
14. Vision and hearing screening of students upon request and referral.
15. Coordinate Quit Smoking Program for staff and students.
16. Immunization program of Hepatitis B for Health Occupation students and staff.
17. Active member on the Safety Committee, Employee Assistance Program, Insurance Benefit Committee, the Affirmative Action Committee and Villa Hope Campus Ministry.
18. Provide consultation services to Instructional staff in the development of curriculum materials related to Health.
19. Update Administrative policy and procedures for Student Health Service with Medical Advisor.
20. Select student health insurance program.
21. Contact students with health needs identified by Emergency/Illness card.

22. Provide first aid emergency care to students and staff with proper referral.
23. Provide temporary palliative care for students and staff with proper referral.
24. Taught Hepatitis B information to Respiratory Care Practitioner students; First Aid to Linemen, Graphics students; Women's Health Issues to JTPA and Project ReEntry participants; Bloodborne Pathogens/Universal Precautions to Police Science students; Colds, Flu and Cold Weather Safety to ESL classes; Anorexia/Bulemia, Nutrition Class to AODA class.
25. Health consultation for students and staff.
26. Coordinate the Giving Tree for 29 families or 95 children in conjunction with the Villa Hope Campus Ministry.
27. Coordinate Plight of Romania collection of toys for orphanage in Romania in conjunction with Villa Hope Campus Ministry.

To the extent the Student Health Nurse provides health services to employees represented by the Association, she may be asked by the College to provide data and opinions which the College would consider when formulating its bargaining position over health insurance issues.

15. The occupant of the position of Student Health Nurse does not have sufficient access to, or involvement in, confidential matters relating to labor relations so as to render the incumbent a confidential employe.

16. The occupant of the position of Student Health Nurse works in support of the educational program of the College.

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

#### CONCLUSIONS OF LAW

1. The following collective bargaining unit is appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats:



all certified personnel teaching at least 50% of a full teaching schedule at Northeast Wisconsin Technical College including classroom teachers, librarians, guidance counselors, other special teachers and other related professional personnel who are employed in a professional capacity to work with students and teachers but excluding teaching personnel teaching less than 50% of the full teaching schedule, coordinator directors, supervisors, clerical and custodial employees.

2. The occupant of the position of Student Health Nurse is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats. and, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

3. The occupant of the position of Student Health Nurse is a professional employee within the meaning of Sec. 111.70(1)(l), Stats.

4. The occupant of the position of Student Health Nurse shares a sufficient community of interest with the occupants of the other positions in the bargaining unit described in Finding of Fact 3, to be included therein.

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

ORDER 1/

1. The existing description of the bargaining unit represented by the Northeast Wisconsin Technical College Faculty Association is amended to read as follows:

all certified personnel teaching at least 50% of a full teaching schedule at Northeast Wisconsin Technical College including classroom teachers, librarians, guidance counselors, other special teachers and other related professional personnel who are employed in a professional capacity to work with students and teachers but excluding teaching personnel teaching less than 50% of the full teaching schedule, coordinator directors, supervisors, clerical and custodial employees.

2. The position of Student Health Nurse is hereby included in the bargaining unit described in Conclusion of Law 1.

Given under our hands and seal at the City of Madison, Wisconsin,

this 6th day of November, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/  
Herman Torosian, Commissioner

James R. Meier /s/  
James R. Meier, Commissioner

(Footnote 1/ appears on the next page.)

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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 the next page.)

(Footnote 1/ continues from the previous page.)

(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.

NORTHEAST WISCONSIN TECHNICAL COLLEGE

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

POSITIONS OF THE PARTIES

The Association's Initial Brief

As the subject position was not in existence when the Commission certified this bargaining unit in 1967, and the Commission has the statutory authority to amend the certified unit description in order to include new positions appropriate for inclusion, the Commission should exercise its authority to amend the current unit description to include "other related professional personnel who are employed in a professional capacity to work with students and teachers," and include the subject position within the faculty bargaining unit.

The record fully supports a finding that the Student Health Nurse is a professional position with community of interest with other faculty members in the carrying out of the College's educational mission. The incumbent's testimony, job description and qualifications overwhelmingly support the position's inclusion in the existing bargaining unit.

The Association has neither agreed to exclude the subject position nor waived its right to seek inclusion of a unit clarification petition. Because the subject position did not exist at the time of initial certification, and because the Association has not entered into any agreement to exclude it, there is no bar to Commission consideration of the instant petition. The College's assertion that, by raising and then dropping the issue of inclusion the Association had implicitly agreed to its exclusion is not supported by the factual record; a ruling supporting the College's theory would be a significant and radical departure from case law and would constitute unsound public policy. It makes no difference whether negotiations involved or consensus bargaining models; parties remain free to raise and drop issues, and, in the absence of a specific agreement, the Commission will not infer an agreement to include or exclude a position. A Commission ruling in this case would discourage parties from making voluntary efforts to resolve questions of unit definition, a result contrary to the underlying policy of MERA.

Further, it is inappropriate for the employer to seek to create a new bargaining unit through this unit clarification proceeding, especially given the error of the employer's assertion that the subject position was once a member of a former bargaining unit. The parties agreed that the sole issue was the question of inclusion of the Student Health Nurse in the faculty bargaining unit; it is inappropriate for the employer to seek the creation of a separate unit. Further, as the Association was never a party to any proceedings involving the defunct unit of professional administrative personnel, and as the subject position was never represented by such unit, any argument that the Association waived a claim of representation is without merit.

For the above reasons, the Commission should amend the description of the bargaining unit and include the Student Health Nurse in the bargaining unit.

### The College's Initial Brief

The Student Health Nurse does not belong in the teachers' unit pursuant to the clear language of the contract, for which the recognition clause defines the bargaining unit as consisting of certified personnel teaching at least half a full teaching load. As the Student Health Nurse is not VTAE-certified, and does not teach, the position does not meet this definition. Nor is the position a librarian, guidance counselor or other special teacher, as referenced in the recognition clause.

Further, inclusion of the Student Health Nurse position into the teachers' unit would not be appropriate under relevant Commission case law, especially as regards bargaining history, undue fragmentation and community of interest.

The bargaining history reveals that the subject position was formerly included in a unit other than the teachers' and, when that unit dissolved, that the parties did not agree that the position should join any other unit, meaning the subject position was voluntarily excluded from the teachers' unit at that time. The Commission has held that it will not accrete positions to an existing unit where the parties have previously specifically excluded such positions from said unit, as is here the case.

The bargaining history also shows the parties' use of consensus bargaining, which the Commission has actively and publicly promoted. Because the subject position was not in the teachers' unit prior to the consensus bargaining, and was a topic of discussion at consensus bargaining, the absence of consensus on the issue necessitates a result that there be no change to the status of the position. The parties having voluntarily proceeded under a consensus model, the parties should be estopped from now utilizing a formalistic Commission process to secure a result inconsistent with the result on the same issue arrived at in the consensus process. In the interest of the integrity of the consensus bargaining process promoted by the Commission, the Commission should adopt a rule which estops a party from petitioning for inclusion or exclusion of positions in a bargaining unit where unit definition was the subject of consensus bargaining.

Regarding undue fragmentation, denial of accretion of the subject position would merely lead the Student Health Nurse position away from an inappropriate unit and toward a more appropriate one. The subject position is entitled to representation; an appropriate unit would consist of non-teaching professional positions, such as accountants, data processing professionals, and so on. Because this new unit would consist of many positions, not just one, the risk of undue fragmentation does not exist.

The "community of interest" factor also resolves in the employer's favor, in that the Student

Health Nurse does not share with the other unit personnel the status of being a certified teacher, nor the workload of teaching at least half a full schedule. These are collectively bargained, historic contractual requirements; lacking them, the position lacks community of interest. Further, it may only be a matter of time before the Act 16 definition of "school district professional employe" is applied to VTAE districts; the Commission should not take any action which could exacerbate potential unit definition questions in that eventuality. It may well come to pass that a unit at NWTC consisting of VTAE-certified teachers and a non-certified nurse would no longer be statutorily appropriate; for the Commission to include the Student Health Nurse in the teachers' unit at this point could result in the necessity of taking opposite action in the very near future. Given that there is somewhere else for the nurse to go -- to a new and appropriate unit -- it is more consistent with the trend of the law to continue exclusion of the Student Health Nurse from the teachers' unit.

Further, the Student Health Nurse should be excluded on the grounds that the position is confidential. As part of the process of administering its self-funded health insurance program, NWTC must gather information relating to the nurse's provision of non-emergency medical services to NWTC staff. This information can be of value to NWTC management and also to the unions in the collective bargaining process with respect to issues of health insurance; if the position were in the unit and asked by management to provide certain information to NWTC that could result in a change to the faculty unit's benefits, either substantively or in terms of cost, the Student Health Nurse would be faced with a conflict of interest. This scenario is certainly not impossible, give that the Student Health Nurse also provides services to faculty.

While the record supports denial of the accretion on traditional unit clarification analysis, denial is also justified on a rule of estoppel which should apply so that parties who address unit definition in the consensus bargaining process live by the results for a reasonable period of time. The Commission should reject as fundamentally unfair and inconsistent the Association's attempt to unilaterally pursue issues it had previously agreed to discard as part of the interwoven consideration which is integral to consensus bargaining.

#### The Association's Reply Brief

Given that the instant unit explicitly includes professionals other than teachers, the employer's characterization of the unit as the "teachers' unit" is self-serving and inaccurate.

It is further incorrect for the employer to state that the subject position was once part of the defunct bargaining unit of paraprofessionals and administrative personnel. Since no evidence supports the claim that this position was ever part of any unit, the issue of undue fragmentation is very relevant. Contrary to the employer's claim, the Commission should not require the parties to create a new unit when the inclusion of this position would be much more appropriate.

Also contrary to the employer's contention, the record does support a finding that the Student Health Nurse does share a community of interest with the existing faculty bargaining unit,

as established by various Commission precedents which the employer has failed to address.

The record does not support the exclusion of the position as confidential. Possessing incomplete information about faculty health matters, the linchpin of the employer's speculative scenario, does not constitute having access to, or knowledge of, or participation in confidential matters relating to labor relations.

Neither the language of the recognition clause nor Commission precedence support the employer's contention that the certification order itself excludes the position. The recognition clause specifically includes "other special teachers," such as librarians and guidance counselors; like them, the Student Health Nurse is a non-classroom professional who shares in the school's educational mission, and thus, has a community of interest with the teachers. Thus, even the language defining the scope of the bargaining unit supports the inclusion of the Student Health Nurse in the bargaining unit.

The employer also errs in asserting that VTAE certification is necessary for membership in the unit; the phrase "certified personnel" could just as conceivably refer to employees possessing whatever certification they need to practice their respective professions. This interpretation is especially plausible in a unit like this, where occupants of many diverse positions require distinct professional credentials. As a fully licensed professional nurse, the position incumbent is one of the certified personnel who should be accreted to the unit.

Accordingly, the Commission should amend the description of the faculty bargaining unit to include the Student Health Nurse.

### The College's Reply Brief

Because the cases it cites are distinguishable on their facts, the Association errs in claiming Commission case law supports its call for an amendment to the unit description. The subject position here is primarily a first aid functionary rather than an integrated aspect of the overall educational process; further, VTAE certification is required for unit status. These two conditions clearly distinguish the current case from those on which the Association mistakenly relies.

Further, the Association confuses the issues of "voluntary exclusion" and "consensus bargaining." This position was once included in the Professional Administrative Personnel unit, then voluntarily excluded from the teachers' unit when the administrative unit disbanded. The attachment to the Association's brief which purported to address this issue was not part of the record and should be stricken. Anyway, it is clear from a reading of the recognition clause of that attachment that the student nurse position would more appropriately fit the paraprofessional unit rather than the faculty, even if it was not in the former at the outset.

The consensus bargaining argument holds that the Association should be estopped from



pursuing a result inconsistent with the constructive agreement -- attained because the parties never reached a consensus on changing the representation status for the position, thus reverting to the default setting of no change -- that the position remain excluded from the teachers' unit. The parties agreed to a process, which NWTC relied on; in the context of that process the student nurse position was left out of the unit. Rather than stifling discussion, as the Association erroneously claims, the WERC has an opportunity to uphold the integrity of the process to which the parties agreed. Under the agreed-upon ground rules for consensus bargaining, if the Association believes that the Student Health Nurse should be included in the teachers' unit, its proper recourse is to continue bargaining over the issue, not to ignore, and thereby render meaningless, the entire consensus process.

Finally, contrary to the Association's meritless argument, NWTC is not seeking the creation of another bargaining unit. Rather, NWTC, recognizing that the Student Health Nurse is suitable for representation by some unit, but not by the teachers' unit, has merely identified a potential new unit in which the position could properly belong, and has stated that the College would not oppose certification of that unit. Further, since the petition is limited to whether the subject position should be included in the teachers' unit as currently defined, it is rather disingenuous for the Association to argue that the unit should be amended to include the position while at the same time arguing that NWTC cannot advocate the creation of another, more appropriate unit.

Accordingly, pursuant to the clear language of the contract, status as a confidential employee, and the issues of bargaining history, undue fragmentation and community of interest, the Association's petition should be denied.

## DISCUSSION

Since 1983, the Association has unsuccessfully sought the College's agreement to include the disputed Nurse position in the Association's bargaining unit. Given these unsuccessful attempts, the Association now seeks inclusion through this unit clarification petition.

Acknowledging that the existing contractual description of the unit would exclude the Student Health Nurse (whose position is not certified by the State VTAE system), the Association seeks an amendment in the unit description to include "other related professional personnel who are employed in a professional capacity to work with students and teachers".

The College argues we should not amend the existing unit description to include the Student Health Nurse because: (1) the position previously was voluntarily excluded from the Association's unit; (2) the Association failed to acquire inclusion through the consensus bargaining process; and (3) the position does not share a sufficient community of interest with the existing unit to be appropriately included.

The College's first argument rests on a factual contention that the Student Health Nurse was

included in a "Professional Administrative" unit in the mid-1980's, and then became unrepresented by agreement of the Association and the College when the unit was subsequently decertified. However, as reflected in Findings of Fact 5-8, the documentary evidence does not support the College's contention. Of greatest importance in this regard is the absence of the Student Health Nurse from the list of eligible voters/positions which accompanied the 1984 Stipulation for Election. Thus, on balance, we are persuaded that there is not enough support in the record for the College's contention regarding a specific exclusion agreement to be found as a fact. Thus, even assuming arguendo that such a fact would provide a persuasive basis for us to reject the Association's request, we must reject this College argument.

The College also argues that because the parties voluntarily limited the unit to "certified" employes, they therefore agreed that any position which is not "certified" should be excluded. However, the record reveals that the College voluntarily included a non-certified Minority Affairs Advisor position several years ago. Thus, it is apparent that the parties have not used the "certified" status of a position as an absolute litmus test for inclusion. Therefore, we reject this argument as well.

The College's second argument asserts that where a party to consensus bargaining seeks, but does not acquire inclusion of a position through that process, said party should thereafter be estopped from seeking inclusion of the position through the unit clarification process. It is apparent that the College feels very strongly that the Association's conduct is contrary to the "spirit" of the consensus bargaining process engaged in by the parties. However, in our review of the "letter" of the parties' consensus bargaining process, we find nothing that supports the College's position. The parties' "ground rules" do not provide that if no consensus is reached, the issue cannot thereafter be pursued through other means. Indeed, these "ground rules" indicate that the parties were to develop additional ground rules to cover "aspects of the process" such as "what happens if consensus is not reached". No additional ground rules are in our record. Given the absence of specific written evidence that the "letter" of the parties' consensus process precludes the Association's pursuit of this petition, we reject the College's argument.

Lastly, the College contends that inclusion is inappropriate because the Student Health Nurse does not share a sufficient community of interest with positions in the existing unit.

When exercising our statutory discretion to determine whether a proposed bargaining unit is appropriate, we have consistently considered the following factors:

1. Whether the employes in the unit sought share a "community of interest" distinct from that of other employes.
2. The duties and the skills of the employes in the unit sought as compared with the duties and skills of other employes.

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 units.
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. This definitional duality is of long-standing, and has received the approval of the Wisconsin Supreme Court. 2/

The fragmentation criterion reflects our statutory obligation to "avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal workforce." 3/ The bargaining history criterion involves an analysis of the way in which the workforce has bargained with the employer or, if the employees have been unrepresented, an analysis of the development and operation of the employe/employer relationship. 4/ Although listed as a separate component, under some circumstances, analysis of bargaining history can provide helpful insights as to how the parties, themselves, have viewed the positions in question in the past from the standpoint of both similar interests and shared purpose. Based upon long-standing Commission

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2/ Arrowhead United Teachers v. WERC, 116 Wis.2d 580, 592 (1984):

. . .when reviewing the Commission's decisions, it appears that the concept (community of interest) involves similar interests among employees who also participate in a shared purpose through their employment. (Emphasis supplied.)

3/ Section 111.70(4)(d)2.a., Stats.

4/ Marinette School District, Dec. No. 27000 (WERC, 9/91).

precedent, we believe it is well understood by the parties that within the unique factual context of each case, not all criteria deserve the same weight 5/ and thus a single criterion or a combination of criteria listed above may be determinative. 6/

For K-12 public school districts, we have historically concluded that the factors of anti-fragmentation and community of interest both warrant the inclusion in one unit of all professional employes of a district who work in the support of the educational program (whether or not they are certified by the Department of Public Instruction). Thus, for instance, in School District of Maple, Dec. No. 17463 (WERC, 11/79), we stated the following as to the inclusion of a school nurse in a unit of "certified teaching personnel":

In Joint City School District No. 1, City of Superior (13238-A) 6/76, the Commission established the following policy with regard to the appropriateness of combining the several disciplines and professions, including a School Nurse, who work in support of the educational mission of a K through 12 school district:

...

In the past the Commission has included in a unit consisting of primarily classroom teachers those who do not engage in classroom teaching but who possess teaching certifications, evidencing a background in education and who work with students or teachers in a non-supervisory capacity in support or [sic] the educational program.

...

In order to carry out the principle of anti-fragmentation we have herein determined that all occupants of professional positions in a K through 12 school setting, who work with students and teachers, whether certified or not certified, by the Department

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5/ 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).

6/ 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).

of Public Instruction shall, absent special circumstances, be included in a unit consisting primarily of teachers.

...

The School Nurse functions in support of the educational program in the District. In that regard, she shares a community of interest with teachers. The position was not in existence at the time the teacher unit was established. Therefore, the Commission has included the School Nurse in the teacher unit.

There was no logical reason for us to follow a different path in the VTAE system than we did for K-12 districts. Thus, in Milwaukee Board of Vocational, Technical and Adult Education District No. 9, Dec. No. 8736-B (WERC, 6/79), we cited our K-12 public schools line of cases and rejected the employer claim that the school nurse and the clinical psychologist lacked sufficient community of interest with teaching professionals to be included in the same unit. Again, in Wisconsin Indianhead VTAE District, Dec. No. 11380-B (WERC, 6/87), we included the "Student Health Nurse" in a unit of teachers, student counselors, librarians and Career Education Evaluators.

The College acknowledges the existence of the foregoing precedent, but contends that in this specific instance, the factors of bargaining history, fragmentation and community of interest should produce a continued exclusion of the Student Health Nurse and rejection of the proposed amendment/expansion of the unit description.

As to bargaining history, the College relies on evidence of consensus bargaining <sup>7/</sup> and its assertion the Student Health Nurse was previously included in another unit and then voluntarily excluded from the instant unit. As previously discussed, we do not find the record supports the College's factual contentions as to prior unit inclusion. Thus, we do not find bargaining history to be supportive of the College's position herein.

Turning to fragmentation, the College argues that there could in the future be another more appropriate professional unit for the Student Health Nurse. Initially, we would note that the issue before us is whether the expanded unit sought by the Association is an appropriate unit, not necessarily the most appropriate unit. More importantly, the College's position posits the existence of two professional units instead of our historical preference (based in part on fragmentation

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7/ As discussed earlier, the "bargaining history factor" focuses on prior unit inclusion or the development of the unrepresented employe/employer relationship. The College's consensus bargaining argument (which we have in any event, previously rejected) does not relate to "bargaining history factor" as that term is used in analyzing the propriety of a unit.

concerns) for one unit including all professionals. For that reason, we find the College's fragmentation position unpersuasive.

Lastly, the College seeks to distinguish this case from our historical view that all VTAE professionals working in support of the educational program have a substantial community of interest.

The College first argues that Indianhead did not involve a VTAE unit in which certification, or a lack thereof, was a critical component in the unit definition. To the extent that the College is again arguing that the parties have voluntarily excluded all non-certified personnel, this argument is irrelevant to community of interest considerations and, in any event, one we have already rejected earlier herein. To the extent the College is arguing that the absence of VTAE certification deprives the Student Health Nurse position of a significant community of interest with other professionals who are certified, we affirm our long-standing view that the presence or absence of certification is not significant when measured against the community of interest inherent in professionals working in support of the educational mission.

The College then attempts to distinguish Maple, arguing the fragmentation concerns present in that case are not present here. 8/ As previously discussed, we see the fragmentation issue differently than the College and as being a factor supportive of inclusion of the Student Health Nurse. Thus, we reject this College argument as well.

Given the foregoing, we are persuaded that considerations of fragmentation and community of interest warrant the expansion of the unit sought by the Association and the resultant inclusion of the Student Health Nurse unless, as argued by the College, the position is confidential.

It is well-settled that, for an employe to be held confidential, such employe must have access to, knowledge of, or participation in confidential matters relating to labor relations. For information to be confidential, it must: (a) deal with the employer's strategy or position in collective

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8/ The College also notes that Maple allows for "special circumstances" in which it may be appropriate to exclude non-teaching professionals from a teacher unit. The College argues the parties' experience in consensus bargaining and the agreement to exclude the Student Health Nurse qualify as "special circumstances". We have earlier rejected these College arguments, and we do not find them persuasive in this context either.

bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. 9/

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9/ Dane County, Dec. No. 22796-C (WERC, 9/88).

While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employe from a bargaining unit, 10/ we have also sought to protect an employer's right to conduct its labor relations through employes whose interests are aligned with those of management. 11/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employe may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, 12/ and, similarly, where a management employe has significant labor relations responsibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employe without undue disruption of the employer's organization. 13/

Health care professionals obviously deal with intensely personal information, especially in a closed community such as a school setting. But personal information is not confidential information for labor relations purposes. Further, while the generic information that the Student Health Nurse possesses on health care utilization by unit members may be useful in collective bargaining, awareness of the raw data itself is not an indicia of confidential status. Contrary to the College's view, it is not unreasonable and does not create an untenable conflict of interest to expect that the Student Health Nurse will provide honest and complete answers to valid questions, regardless of her representational status, and regardless of any bargaining implications of her response. Thus, we do not find the College's arguments to be a persuasive basis upon which to find the position confidential.

Given all of the foregoing, we have ordered the position's inclusion in the unit and the necessary amendment to the unit description.

Dated at Madison, Wisconsin this 6th day of November, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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10/ Boulder Junction Joint School District, Dec. No. 24982 (WERC, 11/87).

11/ CESA Agency No. 9, Dec. No. 23863-A (WERC, 12/86).

12/ Town of Grand Chute, Dec. No. 22934 (WERC, 9/85).

13/ Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88).



Herman Torosian /s/

Herman Torosian, Commissioner

James R. Meier /s/

James R. Meier, Commissioner