STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. JOINT SCHOOL DISTRICT NO. 5, CITY OF CHETEK, ET AL., Respondent.	Case III No. 18106 MP-380 Decision No. 12864-A

Appearances:

Mr. James T. Guckenberg, Executive Director, appearing on behalf of the Complainant.

Coe, Dalrymple & Heathman, S.C., Attorneys at Law, by Mr. Edward J. Coe, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators having filed a complaint with the Wisconsin Employment Relations Commission alleging that Joint School District No. 5, City of Chetek, et al., has committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed George K. Fleischli, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Barron, Wisconsin on September 5, 1974; and the Examiner having considered the evidence, arguments and briefs of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as the Complainant, is a labor organization within the meaning of Section 111.70(1)(j) of the MERA and the voluntarily recognized representative of all regular, full-time and regular, part-time certificated personnel (50 percent or more) employed by the Board of Education of Joint School District No. 5, City of Chetek, et al., as classroom teachers, for purposes of collective bargaining on questions of wages, hours and conditions of employment.

2. That Joint School District No. 5, City of Chetek, et al., hereinafter referred to as the Respondent, is a public school district organized under the laws of the State of Wisconsin and is a Municipal Employer within the meaning of Section 111.70(1)(a) of the MERA.

3. That in years prior to the 1972-1973 school year, the Complainant and its predecessor, the Chetek Education Association, had negotiated a salary schedule and certain other conditions of employment with the Respondent, but had never entered into a written collective bargaining agreement with the Respondent; that on October 11, 1972, the Complainant and Respondent entered into a written collective bargaining agreement, for the first time, at the conclusion of the negotiations for the 1972-1973 school year; that during the negotiations which preceded that agreement, the parties agreed to the following recognition clause:

"ARTICLE III, RECOGNITION

A. The Board recognizes the Association as the exclusive bargaining representatives on wages, hours, and conditions of employment for all regular full-time and regular part-time certificated personnel (50% or more) employed by the board as classroom teachers.

B. The purpose of this article is to recognize the right of the bargaining agent to represent employes in the bargaining unit in negotiations with the board as provided in Sections 111.70-111.71, Wisconsin Statutes.

C. Unless otherwise indicated, classroom teachers in the unit will be hereinafter referred to as 'teachers'."

4. That at the time the Complainant and Respondent agreed to the recognition clause in question, the parties specifically discussed the fact that the recognition clause did not include administrators, non-certificated personnel or part-time certificated personnel working less than 50 percent of the time; that the evidence is inconclusive as to whether the parties discussed the question of whether the expression "classroom teachers" excluded certificated personnel employed in supportive roles such as guidance counselor, librarian, and Audio-Visual Aids Coordinator.

5. That on or about September 17, 1972, Robert Crase, Superintendent of the Respondent's District, had a discussion with Myron Olson, a teacher holding a certification in social studies, regarding Olson's employment as an Audio-Visual Aids Coordinator for the 1972-1973 school year; that on that occasion, Olson and Crase agreed that Olson would be employed as an Audio-Visual Aids Coordinator on a part-time basis (65 percent of the time) "for one year only and not subject to renewal consideration as it is a temporary position" under a provisional certification from the Department of Public Instruction, for a salary of $5,000; that at the time of this discussion, Olson and Crase discussed a number of fringe benefits which were available to all employes of the District regardless of their inclusion in or exclusion from the bargaining unit represented by the Complainant but they did not discuss the District's practice with regard to making contributions to the State Teachers' Retirement System (STRS) on behalf of teaching personnel; that during the discussion, Crase probably consulted the salary schedule for the 1971-1972 school year for guidance as to what salary offer he should make to Olson, but that the salary agreed to was not based on the 1972-1973 salary schedule which had not yet been agreed to on that date; that, in fact, the salary agreed to by Olson was different than 65 percent of the salary figure found at the appropriate step and lane on the 1972-1973 salary schedule subsequently agreed to, if Olson's salary were governed by that salary schedule.

6. That sometime after the Complainant and Respondent reached agreement on the terms of the 1972-1973 collective bargaining agreement and salary schedule, Olson became aware that the Respondent had agreed to contribute $150 to the STRS on behalf of employes covered by that agreement; that Olson asked Crase if the Respondent would be contributing $150 to the STRS on his behalf and Crase advised him that the contribution was only being made on behalf of employes covered by the collective bargaining agreement and that he was not covered by that agreement; that, thereafter, Olson had no further discussions with Crase or any other agent of the Respondent on the subject of contributions to STRS until the fall of 1973.

7. That on or about March 8, 1973, Olson had a discussion with Crase with regard to his employment as an Audio-Visual Aids Coordinator for the Respondent District during the 1973-1974 school year; that on that occasion, Olson and Crase agreed that Olson would be re-employed as an Audio-Visual Aids Coordinator on a part-time basis (65 percent of the time) "on a one year basis only" for a salary of $5,500; that subsequently, in the fall of 1973, the Complainant and Respondent reached agreement on the terms of a collective bargaining agreement covering the 1973-1974 school year; that the salary increase agreed to by Olson and Crase ($500) was substantially more than 65 percent of the salary increase that Olson would have received under the salary schedule contained in said agreement, and somewhat more than such increase even if the increase in the Respondent's contribution to the STRS were taken into account.

8. That shortly after Olson learned that the 1973-1974 collective bargaining agreement provided for a substantial increase in the Respondent's contribution to the STRS on behalf of the employes covered by its terms, Olson had a discussion with Steve Liker, an officer of the Complainant organization and a member of its bargaining team during the negotiations for the 1972-1973 and 1973-1974 collective bargaining agreements, with regard to his eligibility for the benefits established by those agreements; that Liker advised Olson that, in Liker's opinion, Olson was included within the recognition clause set out above which was identical in both agreements and was, therefore, entitled to receive the benefits established therein; that after Liker explained the procedure for filing a grievance to Olson, Olson filed a grievance on October 3, 1973, alleging inter alia that he had been improperly denied a retirement contribution on his behalf in the amount of $150 during the 1972-1973 school year and that he was being improperly denied a 4.5 percent retirement contribution on his behalf during the 1973-1974 school year; that the grievance procedure which was then applicable read in relevant part as follows:

"ARTICLE XVIII, GRIEVANCE PROCEDURE

A. The purpose of this procedure is to provide an orderly method for resolving grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure. Meetings or discussions involving grievances or these procedures shall not interfere with teaching duties or classroom instruction.

B. Definition - For the purpose of this Agreement, a grievance is defined as a difference of opinion regarding the interpretation or application of wages, hours, and conditions of employment only as specified by this Agreement.

C. Grievances shall be processed in accordance with the following procedure:

Step I

1. An aggrieved teacher shall promptly attempt to resolve the grievance informally between the teacher and his or her principal. The aggrieved teacher at his or her own option may be accompanied by one other member of the WUE when presenting the grievance.

2. If the grievance is not resolved informally, it shall be reduced to writing by the grievant who shall submit it to the principal. If a teacher does not submit his grievance to the principal in writing in accordance with Step I within fifteen school days after the facts upon which the grievance is based first occur or first become known to the teacher, the grievance will be deemed waived.

   The principal will reply in writing to the aggrieved teacher within five school days after receipt of the written grievance.

Step II

1. If the grievance is not settled in Step I and the teacher wishes to appeal the grievance to Step II, the teacher may file the grievance in writing to the superintendent of schools within five (5) school days after receipt of the principal's answer. The superintendent shall thoroughly review the grievance, arrange for necessary discussions, and give a written answer no later than five (5) school days after receipt of the written grievance.

Step III

1. If the grievance is not resolved in Step II, the grievant may file the grievance in writing to the Clerk of the Board within ten (10) school days after receipt of the answer from the superintendent. A grievance not timely filed with the Clerk of the Board shall be deemed finally resolved.

   The Board of Education shall consider the grievance at its next regular meeting or at any special meeting called for the purpose in the interim. The Board will issue its answer in writing within ten (10) days following the meeting.

Step IV

1. If the grievant is not satisfied with the action taken by the Board, he or she may appeal the grievance to arbitration provided:

   a. Written notice of a request for such arbitration is filed with the Clerk of the Board within ten school days of receipt of the Board's answer in Step III. If the request is not timely filed with the Clerk of the Board, the grievance shall be deemed finally resolved.

   b. The issue must involve the interpretation or application of wages, hours, and conditions of employment only as specified in this Agreement.

2. When a request has been made for arbitration, a three-member panel shall be established in the following manner: The Board, or its representative, and the employe representative shall each appoint a member of the arbitration panel and shall notify the other in writing of the name of its appointee to the panel within five school

days of the written appeal. The two panel members shall attempt to select an impartial third party to act as chairman of the arbitration panel. Failing to do so, they shall, within ten (10) school days of the appeal, jointly request the Wisconsin Employment Relations Commission to submit a list of five arbitrators. As soon as the list has been received the two panelists shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as chairman of the arbitration panel.

3. The arbitration panel shall schedule a hearing on the grievance as soon as possible and after hearing and considering such evidence as the parties desire to present, shall render a written decision as soon as practicable. The arbitration panel shall have no power to advise on salary adjustments except as to the improper application thereof, nor to add to, subtract from, modify or amend any terms of this Agreement. The arbitration panel shall have no power to substitute its discretion for that of the Board in any manner not specifically contracted away by the Board. A decision of the arbitration panel within the scope of its authority shall be final and binding upon the parties.

4. The Board and the NUE will share equally any joint costs of the arbitration procedure, such as the fee and expenses of the arbitrator and the cost of the hearing room. If either party desires a transcript of testimony to be prepared for the arbitrator, such will be an expense which shall be shared."

9. That the grievance was processed through the various steps of the grievance procedure and ultimately denied by the Respondent's School Board for reasons which were set out in a letter from the School Board dated November 9, 1973, which read in relevant part as follows:

"The Chetek School Board reviewed your grievance under Step 3 as provided in the Master Contract. The grievance as presented at the regular school board meeting, November 8, was officially denied by the school board.

Denial of the 1972-73 request for payment of retirement of $150 was due but not limited to the following:

A) The master agreement does not apply to you as you are not classified as being employed as a 'classroom teacher.'

B) Contract was issued as an individually negotiated contract and it specifically states completion of provision of the contract as signed by you fulfills the obligations for both you and the school district.

C) All grievances associated with the 1972-73 master agreement must be deemed as waived if not filed in writing with me within 15 days upon which facts on which the grievance is based occurred. No written grievance was filed within this time frame.

Retirement for the 1973-74 school year was denied due but not limited to the following:

A) The master agreement does not apply to you as you are not classified as being employed as a 'classroom teacher.'

B) Your individual contract specifically spells out that it is between you as a 'coordinator' and the school district.

C) It further specifically states completion of provisions of contract fulfills the obligation for both the coordinator and school district and does not specify that said contract is subject to any revisions that might be agreed upon due to subsequent negotiations as was the case with contracts issued to classroom teachers.

D) The work sheet used and issued to you specifically states 'negotiated contract.'

E) No grievance was filed relative to the contract at the time it was issued and subsequently signed by you. Contract reflected a change in remuneration you had indicated would be fair to you."

10. That after denying said grievance, the Respondent at first indicated willingness to comply with the Complainant's request that it proceed to arbitration by designating its arbitrator but later refused to proceed to arbitration by a letter from its Labor Negotiator to the Complainant dated December 13, 1973, which read in relevant part as follows:

"The Chetek School Board has considered the request for binding arbitration on the grievance of Myron Olson. Myron Olson is an audio visual coordinator hired on a less-than-full-time basis, and is so designated in his contract with the School District. As such, he is not a classroom teacher and therefore is not within the group of employees represented by Northwest United Educators as bargaining representative. Neither is he one of those employees covered by the Master Contract between the Chetek School Board and the Northwest United Educators.

Since Myron Olson is not a part of the bargaining unit represented by Northwest United Educators and since he is not subject to the provisions of the master Agreement between the Board and Northwest United Educators, the request for binding arbitration is hereby denied.

I believe that an indication was previously made that Edward J. Coe of Rice Lake would act as the Board's arbitrator in the matter, however, no official notification was directed to him of that appointment and in view of this letter, no appointment of an arbitrator will be made by the Board."

11. That in its complaint, the Complainant asks that the Commission assert its jurisdiction to decide the merits of the grievance notwithstanding the existence of the final and binding arbitration provision contained in Article XVIII of the collective bargaining agreement; that at the hearing the Respondent, by its counsel, indicated its willingness to waive the arbitration provision of the agreement since a determination in this proceeding as to the merits of its timeliness argument and its contention that Olson is excluded from coverage under the terms of

the collective bargaining agreement would be tantamount to a resolution of the merits of the grievance.

12. That Olson was not employed as a classroom teacher during the two years in question.

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

CONCLUSIONS OF LAW

1. That Myron Olson's claim that the Respondent has violated the 1972-1973 and 1973-1974 collective bargaining agreements by refusing to contribute any amount of money on his behalf to the STRS during the term of those agreements, was not waived under paragraph two of Step I of the grievance procedure set out above by Olson's failure to file a grievance until October 3, 1973.

2. That during the 1972-1973 and 1973-1974 school years, Myron Olson was not included in the voluntarily recognized collective bargaining unit consisting of all regular full-time and regular part-time certificated personnel (50 percent or more) employed by the Respondent's Board as classroom teachers, and therefore, was not covered by the provisions of the 1972-1973 and 1973-1974 collective bargaining agreements; that therefore, the Respondent did not violate the 1972-1973 or 1973-1974 collective bargaining agreements by refusing to contribute any amount of money on Olson's behalf to the STRS during the term of those agreements and has not committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the MERA.

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

ORDER

IT IS ORDERED that the complaint in the above-entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 18th day of March, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

JOINT SCHOOL DISTRICT NO. 5, CITY OF CHETEK, ET. AL., III, Decision No. 12864-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The question raised in this case is not whether teaching personnel, who work alongside classroom teachers in supportive roles such as guidance counselors, librarians or Audio-Visual Aids Coordinators, should be included or excluded from a bargaining unit of professional employes engaged in the teaching profession. The Commission has long held that it is appropriate to include such personnel in a bargaining unit of teaching personnel. 1/

The question presented herein is whether the parties have agreed that such personnel, or more specifically, the Audio-Visual Aids Coordinator, is included or excluded from the voluntarily recognized bargaining unit set out in the collective bargaining agreement. In other words, the question is one of contract interpretation and not one involving a Commission determination as to the appropriate dimensions of a bargaining unit of teaching personnel.

Because the question presented is one involving the proper interpretation of the recognition clause of the collective bargaining agreement, it is evident that the Respondent was wrong in its contention that it was not bound to arbitrate the question. Olson's grievance presents a claim which, on its face, is governed by the terms of the agreement, and is therefore arbitrable. 2/ Likewise, the Respondent's contention that the grievance was untimely raises a question of procedural arbitrability which is one properly reserved for the arbitrator. 3/

Ordinarily, where a collective bargaining agreement provides for final and binding arbitration, the Commission will not exercise its jurisdiction under Section 111.70(3)(a)5 or Section 111.70(3)(b)4 to enforce the terms of the collective bargaining agreement and will defer to arbitration. 4/ However, in this case, both parties have indicated their willingness to waive the arbitration provision in the agreement and allow the Commission to rule on the merits of the Respondent's timeliness argument and its contention that Olson is not covered by the terms of the collective bargaining agreement. Under these circumstances, it is appropriate for the Commission to assert its jurisdiction. 5/

1/ Janesville Board of Education (6678) 3/64. In Menomonie Joint School District No. 1 (12241-A) 12/73, the Commission specifically included an Audio-Visual Aids Director in a bargaining unit of teaching personnel.

2/ Oostburg Joint School District No. 14 (11196-A and 11196-B) 11/72, 12/72, affirmed Sheboygan County Circuit Court 6/74.

3/ Id. See also Seaman-Andwall Corp. (5910) 1/62.

4/ River Falls Coop. Creamery (2311) 1/50; Oostburg Joint School District No. 1, supra, note 2.

5/ Cf. Arthur Lorentzen d/b/a/ Lorentzen Tile Company (9630) 5/70.

Timeliness

Although it is evident that Olson was aware, as early as the fall of 1972, that he was being deprived of a fringe benefit which was being provided to employes covered by the collective bargaining agreement, the Complainant argues that he did not become aware that he had a claim under the collective bargaining agreement until his conversation with Liker in October of 1973. In other words, it is the Complainant's contention that Olson accepted Crase's representation that the collective bargaining agreement did not apply to him.

Because of the content of his conversations with Crase and the provisions of the salary worksheets and contracts provided to him, Olson's claim that he did not know that he might have a grievance until October of 1973 has considerable merit. Crase had given Olson every reason to believe that his employment situation was not covered by the collective bargaining agreement and Olson apparently accepted that advice. As indicated below, a simple reading of the collective bargaining agreement would lead to the same conclusion. Also, his salary was individually negotiated and the salary worksheet he was given clearly indicated that fact as well as the fact that his position was considered "temporary". Although he was given an individual contract on the same form as other teachers, his contract was altered to reflect the fact that it was a "one-year contract". Unlike the contracts given to other teachers, Olson's contract contained no statement pursuant to Section 111.70(3)4 that its terms were subject to amendment to conform to the terms of the collective bargaining agreement subsequently reached and he was specifically told that his contract was not subject to such amendment by Crase in the fall of 1972 when Crase advised him that he was not entitled to receive the $150 contribution to STRS.

The Employer argues in effect, that Olson became aware of the "facts upon which the grievance is based" when he was told that he was not entitled to receive the $150 contribution to the STRS. If this was a case involving an employe who believed that he was in the bargaining unit and was told that he was not, it would be appropriate to apply the waiver language but not necessarily in the manner urged by the Respondent. However, in view of the fact that Olson believed, with good reason, that he was not covered by the terms of the collective bargaining agreement until Liker told Olson that Liker thought that the intent of the parties during collective bargaining was to include Olson, it cannot be said that Olson was aware of the "facts upon which the grievance is based" until the fall of 1973. In addition, it should be noted that even if there was a waiver the violation was one of a continuing nature which ought not be treated as waived for all time. To apply the waiver clause to a continuing violation of this type would be to cause the grievant to forfeit any claim to STRS contributions in the future even if it is found that he was in the collective bargaining unit.

Exclusion from the Bargaining Unit

The Respondent's argument that Olson is not covered by the collective bargaining agreement requires an interpretation of Article III. Although some evidence was introduced by the Complainant with regard to the bargaining history of Article III, that evidence is of little help in interpreting Article III. It is clear that the parties discussed the fact that the recognition clause, which was proposed by the Respondent, excluded administrators, non-certificated personnel, and personnel working less than 50 percent of the time. It is not clear whether they actually discussed the question of whether the clause was intended to exclude certificated personnel working in

supportive roles rather than as classroom teachers. In cross-examination, one of the Complainant's witnesses testified as follows:

"Q I believe you testified that you don't recall what specific employes or job titles the Board wished excluded from the bargaining unit, is that correct?

A Yes.

Q And so there may have been a discussion of excluding the Audio-Visual Coordinator, the Librarian, and some others?

A That's possible.

Q You don't recall?

A Not specifically." 6/

Based on a simple reading of the language employed, it is clear that the recognition clause does not include certificated personnel who work in supportive roles rather than as classroom teachers. Contrary to the Complainant's argument, the statement found in paragraph C to the effect that "classroom teachers" will be referred to as "teachers" in the agreement suggests that the use of the more specific expression "classroom teachers" rather than the general expression "teachers" in paragraph A was intentional. The apparent purpose for using such a specific reference was to make it clear that paragraph A excluded certificated "teachers" who were not 'classroom teachers".

Although the Complainant attempted to show that the actual duties performed by Olson during the two years in question involved considerable contact with students as well as other teachers, the evidence simply does not support the conclusion that he was employed as a classroom teacher. Olson's duties were primarily related to providing audio-visual aids for classroom teachers and students at the various schools in the District. The fact that he worked with students in the process of providing those aids and through the Audio-Visual Club, and volunteered to teach a class on Aerospace during the second semester, does not change the nature of his primary employment to that of a classroom teacher. For the above and foregoing reasons, the undersigned concludes that although the grievance was not waived by Olson's failure to file the grievance until October 3, 1973, it is without merit inasmuch as Olson was not covered by the terms of the collective bargaining agreement in question. 7/

Dated at Madison, Wisconsin this 18th day of March, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

6/ Transcript at page 43. Another of the Complainant's witnesses testified that he "did not recall" any such discussion. Transcript at page 38.

7/ It should be observed that if Olson were covered by the collective bargaining agreements and entitled to the STRS contribution, it would be appropriate to set off the amount of salary he received over and above that which he was entitled to receive under the agreements and make other adjustments to conform his wages, hours and working conditions to those provided for in the two agreements.