STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

NORTHERN OZAUKEE SCHOOL DISTRICT AUXILIARY ASSOCIATION

Involving Certain Employees of

NORTHERN OZAUKEE SCHOOL DISTRICT

Case 19
No. 64086
ME-1121

Decision No. 14211-C

Appearances:

Rebecca Ferber Osborn, Staff Counsel, Wisconsin Education Association Council, 13805 West Burleigh Board, Brookfield, Wisconsin 53005-3058, appearing on behalf of the Northern Ozaukee School District Auxiliary Association.

John A. Haase, Godfrey & Kahn, S.C., Attorneys at Law, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of Northern Ozaukee School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 15, 2004, the Northern Ozaukee School District Auxiliary Association (Association or Union) filed a petition for unit clarification with the Wisconsin Employment Relations Commission (Commission) seeking to include various part-time positions in a bargaining unit of non-professional employees of the Northern Ozaukee School District (District) that the Association currently represents.

On October 25, 2004 the District filed a Motion to Dismiss the petition. After a pre-hearing conference on November 11, 2004, the parties filed a Stipulation setting forth most of the facts necessary to resolve the issues raised by the District's Motion to Dismiss. A supplemental hearing was held at Brookfield, Wisconsin, on April 26, 2005, before Commission Chair Judith Neumann. The parties filed written arguments supporting their respective positions on or before May 24, 2005.

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

FINDINGS OF FACT [1]

1. The Association is a labor organization within the meaning of Wis. Stat. §111.70(1)(h).

2. The District is a municipal employer within the meaning of Wis. Stat. §111.70 (1)(i).

3. The District and Association were parties to a 2002-2005 Master Agreement between the Board of Education, Northern Ozaukee School District and the Northern Ozaukee School District Auxiliary Association. Article 1 of the Agreement, titled "Recognition," provides in relevant part:

> The Board recognizes the Auxiliary as the exclusive and sole bargaining representative for the following unit of employees whether under contract, on leave, employed by the Board:
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> All regular full time and regular part time (working nineteen (19) or more hours per week) office clerical employees, clerical teacher aides, library aides, custodians and cooks employed by the Northern Ozaukee School District in Fredonia, WI, but excluding all supervisory, professional, confidential (Superintendent's secretary and one bookkeeper) and managerial employees and seasonal and temporary employees.

4. The bargaining unit description was voluntarily agreed upon by the parties. A stipulated election was held on January 15, 1976.

5. The Unit was described in the stipulated election as:

> All regular full-time and regular part-time (working 19 or more hours per week) office clerical employees, clerical teaching aides, library aides, custodians and cooks employed by the Unified School District #1, Fredonia, Wisconsin, but excluding all supervisory, professional, confidential and managerial employees and seasonal and temporary employees who were employed by the Municipal Employer on December 12, 1975.

6. The unit was certified by the Commission on February 3, 1976.

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[1] Paragraphs 1 through 13 of the following Findings substantially incorporate the facts as set forth in the parties' Stipulation.

7. At the time the unit was recognized, the District was known as the Fredonia Unified School District No. 1. At that time, the unit consisted of 24 employees, including seven teacher aides, five secretaries, eight maintenance/custodial employees, and four cooks.

8. At present, 26 employees are included in the bargaining unit at issue, including ten teacher aides, four secretaries, six maintenance/custodial employees, and six cooks.

9. Ed Liesenberg was employed by the District as a 40 hour per week bargaining unit maintenance/custodial employee. Mr. Liesenberg retired from the District at the end of the 2003-04 school year. When Mr. Liesenberg ended his employment with the District, the District reassigned the maintenance responsibilities held by Mr. Liesenberg to bargaining unit members and hired four custodial employees each working 17.5 hours per week. Filling these positions are Tammy Thomas, Steve Schommer, Katie Krueger, and Rebecca Shroeder. The District has treated these four part-time positions as non-bargaining unit positions, because they work fewer than 19 hours per week. These positions are at issue in the Association's petition for unit clarification.

11. Jackie Plier was employed as a 35 hour per week bargaining unit library aide for the 2004-05 (sic) school year. Ms. Plier retired at the end of the 2003-04 school year. The District hired Amy Lawrence as a library aide working 16 hours per week. Later, Ms. Plier requested to return to work at the District as a part-time library aide, and she was hired to work eight hours per week. The District has treated Ms. Plier's reduced position and Ms. Lawrence's position as non-bargaining unit positions because they work fewer than 19 hours per week. The library aide position held by Ms. Plier and the position held by Ms. Lawrence are at issue in the Association's petition for unit clarification.

12. Karla Thurow was employed by the District as a bargaining unit aide/cook working 30 hours per week in the 2002-03 school year. Ms. Thurow's responsibilities as an aide involved working in the copy room, and her responsibilities as a cook involved working as a cashier in the lunchroom. At the beginning of the 2003-04 school year, the District eliminated the aide portion of Ms. Thurow's position. Ms. Thurow continued to work as a cashier for 3.75 hours per day, 18.75 hours per week during the 2003-04 school year, and the District excluded her from the bargaining unit at that time. Beginning November 24, 2003, she left the kitchen and accepted a three-hour per day position as a special education aide. Ms. Thurow ended her employment with the District at the end of the 2003-04 school year. In the 2003-04 school year, the District hired Jo Ann Arndt-Haage as a cashier in the lunchroom for 13.75 hours per week to fill the cook portion of the position formerly held by Ms. Thurow. The cook position held by Ms. Arndt-Haage is at issue in the Association's petition for unit clarification.

13. The employees that are the subject of the instant petition are the only non-professional municipal employees working fewer than 19 hours in the District, except for lunchroom supervisors, whose positions the Association is not seeking to accrete in the instant unit clarification petition.

14. The stipulated eligibility list at the time of the election in 1976 included the following numbers of employees in the following specified categories: Teacher Aide Staff/Para-Professional Staff (seven); Secretarial Staff (five); Maintenance and Custodial Staff (eight); and Cooks, Noon Servers, and Monitors (four).

15. At the time the unit was certified, the District employed two or three individuals as "Noon Servers," who worked regularly but less than 19 hours per week. The District and the Association agreed that they were neither in the bargaining unit nor eligible to vote in the election. Neither at that time nor at any time since, other than as specifically set forth in the preceding Findings of Fact, has the District employed any other non-professional employees working less than 19 hours per week.

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

CONCLUSIONS OF LAW

1. The four part-time custodial positions referred to in Finding of Fact 9, above, the four part-time library aides referred to in Finding of Fact 11, above, and the part-time cashier and part-time cook positions referred to in Finding of Fact 12, above, are regular part-time employees who have a community of interest with the non-professional bargaining unit represented by the Association.

2. The District and the Association have agreed to exclude the positions described in Conclusion of Law 1, above, from the bargaining unit represented by the Association.

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

ORDER

Employees working fewer than 19 hours per week, including the incumbents in the positions referred to in Findings of Fact 9, 11, and 12, above, shall continue to be excluded from the bargaining unit represented by the Association.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

NORTHERN OZAUKEE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant case presents, apparently for the first time, a situation in which an employer has not filled vacant fulltime bargaining unit positions, created and filled several part-time positions performing essentially the same type and amount of work previously performed by the full-time unit positions/employees, and then relied upon an agreed-upon unit exclusion of part-time employees when seeking to block a union's petition to clarify the newly-created part-time positions into the bargaining unit. As such, this case tests the equitable limits of the Commission's long-standing rule that, in unit clarification cases involving agreed-upon units, "a deal is a deal" and the Commission will not alter the agreed-upon structure if the other party objects except in limited circumstances With some considerable difficulty, and because the factual context presents a clear unit agreement [2] and an absence of bad faith, the Commission once again reaffirms that rule and its underlying policies and rejects the Union's petition.

Generally, the Commission gathers into a single bargaining unit employees who share a community of interest with each other in terms of wages, hours, and conditions of employment, attempting to avoid "fragmentation" by maintaining as few units as practicable, in accordance with the statutory directive. Sec. 111.70(4)(d)2.a., Stats. While the Commission has established, with Court approval, a set of guidelines for determining community of interest, ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS.2D 580 (1984), employees performing similar work under similar conditions are generally presumed to have a community of interest with each other such as to belong in the same unit. For this reason, and because of the anti-fragmentation mandate, the Commission generally, in a contested case, would include regular part-time employees performing similar work under similar conditions as full-time employees in the same bargaining unit with the full-time employees, regardless of the number of hours the part-time employees regularly work. [3] Each of the part-time employees at issue in the instant case works regularly performing similar work under similar conditions to that of bargaining unit members. Thus, if the Commission were determining this bargaining unit *ab initio,* there is no question that the Commission would place all of the disputed employees into the bargaining unit of non-professional employees of the District.

However, despite its commitment to the foregoing unit determination principles, and despite its clear authority to reconfigure bargaining units by means of unit clarification

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[2] If the agreement is not clear, then the Commission proceeds to resolve the merits of the petition. SAUK COUNTY, DEC. NO. 17343-C (WERC, 11/02).

[3] CITY OF BRILLION, DEC. NO. 20017 (WERC, 10/82). The number of hours worked per week without losing regular part-time status can be very low. See SCHOOL DISTRICT OF ASHLAND, DEC. NO. 18085 (WERC, 10/80) where employees working 5-10 hours per week were found to be regular part-time employees.

petitions as well as election petitions, the Commission for over thirty years has refused to change the scope of a voluntarily agreed-upon bargaining unit, even if the disputed positions otherwise clearly should be included, except under certain conditions. This so-called "deal is a deal" policy, first coined in CITY OF CUDAHY, DEC. NO. 12997 (WERC, 9/74), and further developed in CITY OF CUADHY, DEC. NOS. 19451-A AND 19452-A (WERC, 12/82), has both statutory and pragmatic roots: on the one hand, the laws the Commission administer are designed to foster voluntary dispute resolution; on the other hand, it is efficient for the Commission as well as the parties to encourage a practical give-and-take over the contours of a bargaining unit, as this historically has permitted elections to occur in perhaps 90% of the cases without the delay and expense that would be occasioned by a preliminary unit determination hearing and decision While it is ultimately the Commission's duty to foster appropriate units, and thus the scope of a bargaining unit remains a non-mandatory subject of bargaining, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20399-A (WERC, 9/83), the pragmatic policies favoring voluntary unit composition are an entrenched, well-established, and time-tested element of the Commission's regulatory procedures. With hindsight, a party's agreement on any particular inclusion or exclusion may appear unwise, but presumably the agreement reflected the pragmatic conditions prevailing at the time, including the efficiencies of a quicker election. As in this case, the Commission may strongly disapprove of the negotiated unit description or the unforeseen results of the agreement. Nonetheless, on balance, the Commission continues to find value in the "deal is a deal" policy and will apply it in the instant case.

In this case, as the District argues, the relevant portion of the parties' voluntarily-agreed upon unit description has remained unchanged since the parties stipulated to an election in that unit in December 1975: "All regular full-time and regular part-time (working 19 or more hours per week) office clerical employes, clerical teaching aides, library aides, custodians and cooks … ." On its face, this language indicates that the parties agreed to define the included regular part-time employees as those who worked 19 or more hours per week. The record further indicates that this language was chosen advisedly, as both parties wanted to exclude certain "Noon Servers" who worked fewer than 19 hours per week and were viewed as lacking a substantial community of interest with the other non-professional employees. The Union proposed the threshold of 19 hours, because the 20-hour threshold in some other units had sometimes caused employers to move "them down to 19 and fractional hours. So to avoid that, we just wrote it a little more broadly at 19." (Tr. at 8). On the other hand, at that time and for the twenty-odd years preceding the events giving rise to this case, the only employees regularly working fewer than 19 hours per week were the Noon Servers. No one in the job categories specified in the contract (i.e., office clericals, clerical aides, library aides, custodians, or cooks) worked fewer than 19 hours.

The Union contends that the apparent voluntary exclusion of employees working fewer than 19 hours per week should not preclude accreting the newly created part-time positions at issue in the instant case. Essentially, the Union argues that it did not and would not have excluded part-time employees in the job categories specified in the unit description, especially where those part-time employees are performing the work previously performed by full-time

employees in positions which were not filled once vacated. In support of its argument, the Union invokes the first and third of the following exceptions to the "deal is a deal" policy, most recently summarized by the Commission in FOND DU LAC COUNTY, DEC. NOS. 22758-B, 22811-C (WERC, 2/04):

> 1. The position(s) in dispute did not exist at the time of the agreement;
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> 2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, etc;
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> 3. The position(s) in dispute have been impacted by changed circumstances which materially effect (sic) their unit status; or
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> 4. The existing unit is repugnant to the Act.

ID. at 13-14, and cases cited therein. Exceptions (1) and (3), on which the Union relies, describe circumstances in which the Commission could not equitably conclude that the petitioning party had actually reached a deal regarding the positions in question. Exceptions (2) and (4), on the other hand, provide the Commission an opportunity to overturn what the parties may have agreed upon, where that agreement collides with the statute.

Since the Union relies upon Exceptions (1) and (3), the question is whether the Commission equitably can conclude that the Union agreed to exclude employees working fewer than 19 hours where those employees are performing work that was previously performed exclusively by bargaining unit positions and where the excluded employees are replacing eliminated bargaining unit positions. Under these facts, argues the Union, the Commission either should find that these positions did not exist at the time of the unit agreement in 1976, or the Commission should find that the attrition of full-time employees and their replacement with these part-time employees constitute materially changed circumstances that render inapplicable the 19-hour threshold.

The Union's arguments are strong and the factual situation is troubling. The Commission finds it statutorily distasteful to condone the exclusion of regular employees performing bargaining unit work – which necessarily allows the potential for two units of employees performing the same work for the same small employer. We find plausible the Union's assertion that it would not have agreed to the 19-hour structure if the employees had been arrayed as they currently are. Ultimately, however, we conclude that the bargaining unit description voluntarily chosen, when interpreted in light of Commission precedent, cannot be reconciled with the Union's arguments. Under the Commission's well-established generic approach to Exceptions (1) and (3), the positions in question did exist at the time of the election and those positions, generically conceived, have not been affected by material changes.

The Commission has explained in similar, though not identical, contexts that the question of whether a position "exists" at the time of a voluntary unit composition agreement is generic rather than literal. That is to say, the question is whether the agreed upon unit description shows that the existence of the *type* or *category* of position was contemplated by the parties as an exclusion when they reached their agreement. For example, in FOND DU LAC COUNTY, SUPRA, the agreed upon bargaining unit comprised social service workers within the county's Social Services Department. Years later, the county created a new department providing certain targeted social services and staffed that new department with several employees who had performed similar work in the Social Services Department and had been in that bargaining unit. In that case, the bargaining unit would lose a substantial amount of work and several previous bargaining unit employees if the Commission did not grant the union's petition to accrete the social workers in the new department into the existing bargaining unit, as the union sought. The Commission nonetheless rejected the union's clarification petition and concluded that,

> [A]lthough the newly created CMO positions obviously did not exist at the time the Social Services Department units were created, positions outside the Social Services Department did exist. Accordingly, where, as here, the parties have agreed to departmental units, they have necessarily also agreed that all non-department employees should be excluded. Thus exception 1 is not applicable.

DEC. NO. 22758-B, 22811-C, at 14 (citations omitted). SEE ALSO, CITY OF RICHLAND CENTER, DEC. NO. 17950-A (WERC, 2/96) at 9-10 (where an agreed-upon unit description excluded "clerical" employees, the Commission excluded a recently-created non-confidential clerical employee, stating, "that generic exclusion governs the unit status of clerical positions whenever created.") Thus, although parties cannot have agreed explicitly to exclude positions that literally did not yet exist, the Commission will infer an implicit agreement to exclude those positions if they fall outside a categorical structure on which the parties clearly have agreed.

In the instant case, the unit structure on which the parties agreed was based in part upon number of hours worked. There is no ambiguity on this point, as there were regularly scheduled part-time employees (Noon Servers) working fewer than 19 hours at the time the unit was formed. The Union attempts to distinguish FOND DU LAC COUNTY and similar cases on the asserted ground that, in this case, there were no employees working fewer than 19 hours who had a community of interest with the bargaining unit. According to the Union, the Noon Servers were excluded because they lacked a community of interest rather than because of their hours. However, this assertion seems strained and untenable to us. The parties did not explicitly exclude Noon Servers, but rather, the record suggests, chose to exclude them implicitly under the "fewer than 19 hours" rubric. Moreover, the Union's reason for concluding that the Noon Servers lacked a community of interest was a direct reflection of the number of hours they worked, e.g., insufficient hours to be eligible for various benefits. We conclude that, had the parties wished to exclude only the Noon Servers, as such, that intention would have been expressed more directly and narrowly, such as an exclusion for "Noon Servers," or for "Noon Servers working fewer than 19 hours."

Accordingly, under the Commission's standard, generic approach to the "deal is a deal" policy, the positions at issue means positions working fewer than 19 hours per week, which did exist at the time of the original unit agreement and were excluded. The inevitability of this difficult conclusion is accentuated by the fact that the Commission would have to rewrite the recognition clause in the parties' agreement, by eliminating the hours limitation, in order to accrete these employees.

For similar reasons, the Commission reaches the uncomfortable conclusion that in these circumstances even the attrition of bargaining unit employees and their replacement by employees hired to work fewer than 19 hours per week is not a "material" change in circumstances that warrants modifying the agreed-upon bargaining unit composition through a unit clarification. FOND DU LAC COUNTY provides insight on this point, as well. Just as a departmental unit structure carries the inherent potential for erosion of the bargaining unit simply by the creation of a new department and a reorganization of the work, an hours-based unit structure carries the inherent potential for erosion by shifting work from full time to part-time employees Contrary to the Union's argument, whether a material change has occurred cannot depend upon whether or not the Union actually foresaw this eventuality, if the eventuality is inherent in the language to which the Union agreed. In reaching this conclusion, we stress that, despite the Union's assertions, this record does not reflect bad faith by the District or a deliberate or abusive effort to undermine the Union.[4] The full-time employees whose positions were not filled were not laid off or terminated but rather left voluntarily prior to the creation of the part-time positions.

Lastly we address an issue raised only tangentially by the parties, i.e., whether excluding the disputed employees creates a bargaining unit that is "repugnant to the Act" within the meaning of Exception (4) to the "deal is a deal" policy as set forth above. It should be apparent from the foregoing discussion that the Commission does not condone units that are defined in terms of hours worked, not only because of the potential for proliferation of bargaining units performing similar work under similar conditions, but because of the potential to divide or disrupt the work place, as individuals working side by side performing the same work may have very different wages or benefits. Nonetheless, while the law discourages such fragmentation, the law does not forbid it and the Commission has tolerated and enforced hours-based unit descriptions for a very long time. [5] Many such units currently exist. It would be impractical in the extreme to cast doubt upon their legality at this juncture.

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[4] It is also not clear that a unit clarification petition, rather than a prohibited practice charge or perhaps a grievance arbitration, would afford the appropriate forum for litigating an employer's bad faith, anti-union motives, or withdrawal of recognition, if such were alleged in connection with the diminution of a bargaining unit.

[5] SEE, E.G., MT. HOREB JOINT SCHOOL DISTRICT, DEC. NO. 14694 (WERC, 6/76) (where the unit was described as "all full time employees ... engaged in teaching ... ," and at least one of the five part time teaching positions existed at the time the unit was agreed upon, the Commission dismissed the union's petition for clarification); MADISON VOCATIONAL, TECHNICAL, AND ADULT SCHOOL, DEC. NO. 8382-A (WERC, 1/80) (where the unit was described as "all professional teachers, teaching at least 50% of a normal teaching schedule," the Commission would accrete only those federally-funded "instructors" who worked 50% or more).

Having grappled with this situation, however, the Commission is likely to look more closely in the future at proposed unit descriptions that exclude regular part-time employees who otherwise would have a community of interest with the bargaining unit. The Commission will encourage parties negotiating a unit description to delineate their mutually agreeable exclusions as narrowly as possible so as to avoid unforeseen future consequences and disputes such as those occurring here. The Commission also notes that a unit clarification proceeding is not the only avenue available to the Union to effectuate either the part-time employees' collective bargaining rights or the Union's interests in preserving bargaining unit work. The Union is free to seek to represent the positions at issue here through an election petition either for an overall unit of all regular full-time and regular part-time non-professional employees or for a residual unit of all unrepresented regular full-time and regular part-time non-professional employees, and also free to negotiate the issues affecting its bargaining unit work.

For the foregoing reasons, the Union's petition for unit clarification is dismissed.

Dated at Madison, Wisconsin, this 14th day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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