STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL #95, AFL-CIO Involving Certain Employes of MID-STATE VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT NO. 14	Case 3 No. 20273 ME-1302 Decision No. 14526-A

Appearances:

Mr. Steven Hartmann, Business Representative, Office and Professional Employees International Union Local #95, AFL-CIO, 111 Jackson Street, Wisconsin Rapids, Wisconsin 54494, appearing on behalf of Petitioner.

Chambers, Nash, Pierce and Podvin, Attorneys at Law, by Mr. Guy-Robert Detlefsen, Jr., 170 Third Street, North, P. O. Box 997, Wisconsin Rapids, Wisconsin 54494, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND DIRECTION OF ELECTION

On May 3, 1984, the above-named Labor Organization having petitioned the Commission to issue an order clarifying an existing bargaining unit of certain of the District's clerical and library employes to include "all office clerical and library aid employees not covered by the current collective bargaining agreement"; and a hearing on the matter having been held on June 11, 1984, at Wisconsin Rapids, Wisconsin, before Sharon A. Gallagher, an Examiner on the Commission's staff; and the parties having submitted briefs and reply briefs, the last of which was received on August 22, 1984; and the Commission having considered the evidence and the arguments, and being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law, Order and Direction of Election.

FINDINGS OF FACT

1. That Office and Professional Employees International Union Local #95, AFL-CIO, herein referred to as OPEIU or the Union, is a labor organization representing municipal employes for the purpose of collective bargaining; and that OPEIU maintains an office at 111 Jackson Street, Wisconsin Rapids, Wisconsin 54494.

2. That Mid-State Vocational, Technical and Adult Education District No. 14, herein referred to as the District, is a municipal employer employing professional and non-professional employes at educational facilities in Wisconsin Rapids, Marshfield, Stevens Point and Adams-Friendship; and that the District maintains its primary offices at 500 32nd Street, North, Wisconsin Rapids, Wisconsin 54494.

3. That in May of 1976, following a representation election, OPEIU was certified as the exclusive bargaining representative for a collective bargaining unit described in the Direction of Election and Certification of Representative as follows:

> office clerical employes and library assistant employes of Mid-State Vocational, Technical and Adult Education District No. 14 at its Wisconsin Rapids, Marshfield and Stevens Point campuses, but excluding supervisors, confidential employes, managerial employes, professional employes, executives and all other employes;

that prior to said election, OPEIU and the District agreed between themselves to an eligibility list for that election which excluded those District employes otherwise included within the above unit description but who worked 16 hours per week or less; that, as a result of that agreement, the following individuals did not vote in the election: Susan Morse (then an evening library clerk working four nights per week), Sally Van Meter (then an evening clerk/receptionist), Joan Hoekstra (then an evening Clerk Typist I operating the Wisconsin Rapids facility switchboard four nights per week), and Jean Smilgis (then a project clerk working at the Marshfield campus).

4. That following OPEIU's certification as representative, the parties agreed upon contract terms including an OPEIU proposal defining the bargaining unit which excluded from the bargaining unit (and hence from Agreement coverage) certain clerical and library assistant employes of the District; that essentially the same unit definition language has been contained in each of the parties' agreements including that in effect through June 30, 1985, and thereafter until superceded by a successor agreement or terminated in writing by one of the parties; that the unit definition language in the parties' agreements (with certain additional related provisions) reads as follows:

101 -- Definition of Bargaining Unit

101.1 -- The Board hereby recognizes the Union as the exclusive bargaining representative for all office clerical employees and library clerk employees of the . . . District at its Wisconsin Rapids, Marshfield, and Stevens Point Campuses, but excluding supervisors, confidential employees, managerial employees, professional employees, executives, federal project employees and all other employees, as their representative; pursuant to the provisions of Section 111.70, Wisconsin Statutes, on questions of wages, hours, and conditions of employment.

101.2 -- The parties agree that this Agreement shall not apply to or cover casual or temporary employees (including but not limited to those employees hired under the auspices of and with the financial assistance of the Student Activity Program, the Work Study Program, Federal Projects, or any similar program); provided, however, that during the summer months said employees may work in excess of twenty (20) hours per week if under the auspices of the programs referred to above without being covered by this Agreement. The Board agrees that such temporary and/or casual employees shall not be utilized in such a manner as to displace any bargaining unit jobs.

. . .

104 -- Definition of Employee

104.1 -- Regular Full-Time: Employees in this category shall include those employees who are assigned to a position on a full-time basis, for the full calendar year.

104.2 -- Regular Part-Time: Employees in this category shall include those employees who are assigned to a position for more than 19 hours per week but less than the full schedule of hours, for the full calendar year.

104.3 -- School Year, Full-Time: Employees in this category shall include those employees who are assigned to a position on a full-time basis, for a duration that is normally limited to forty (40) weeks per academic year.

104.4 -- School Year, Part-Time: Employees in this category shall include those employees who are assigned to a position for more than 19 hours per week but less than the full schedule of hours, for a duration that is normally limited to forty (40) weeks per academic year.

104.5 -- Casual Employees: Employees in this category shall include all employees who regularly work nineteen (19) hours or less in a normal work week.

104.6 -- Temporary: A temporary employee is defined as an employee who is hired on a temporary basis for a specific period of time or for a special project, but for less than a period of ninety (90) calendar days. Temporary employees may work a part-time schedule or a full-time schedule. If the temporary employee has been hired to replace a bargaining unit member who is either on an extended sick leave or maternity leave, they may retain their status as a temporary employee until the bargaining unit member being replaced returns to work.

104.7 -- Certification of Intent: The Board shall certify the hours it intends to employ each person covered by this Agreement. The Board also agrees to reclassify persons who have hourly assignment increases. The Board may reassign hours for a period of 30 days before reclassifying employees covered by this provision.

104.08 -- Reduction in Hours: An employee shall not be permanently reduced from regular full-time status to regular part-time status school year full-time, school year part-time or casual status or reduced from regular part-time, school year full-time or school year part-time status to casual status through a reduction in hours except through the layoff procedure. However, the Board may reduce an employee's hours for a temporary period of time not to exceed ninety (90) days in which case all fringe benefits enjoyed by the employee will be continued throughout the temporary period. In the event of a permanent change in an employee's status, the employee shall receive only the fringe benefits applicable to the new status. The foregoing shall in no way affect the right of the Board to lay employees off for lack of work.

. . .

5. That the District employs several clerical or library assistant employes (listed in Finding 9, below) whose positions the parties agree are excluded from coverage by the parties' collective bargaining agreements; and that the existing agreed-upon unit consists of some 34 employes.

6. That on May 3, 1984, OPEIU filed the instant petition requesting that the Commission issue an order clarifying the bargaining unit of District employes it represents to the effect that "all office clerical and library aid employees not covered by the current collective bargaining agreement" are included in the existing collective bargaining unit; that, in support of its petition, OPEIU argues that the Commission should order the disputed positions included immediately and unconditionally or, in the alternative, should state the conditions that must be met in order for the positions to become included in the existing unit; and that OPEIU takes the further position that it will stand an election in the expanded unit if the Commission requires it to do so in order to achieve the objective it has set forth in its petition.

7. That the District opposes the OPEIU's petition and request, arguing that the Commission should dismiss the petition and declare that the parties are bound by the bargaining unit they have agreed upon or may hereafter agree upon, that the Commission should declare that the positions in question cannot, in any event, be deemed subject to inclusion in the existing unit by any means until after the expiration of the parties' existing agreement, and that the instant petition for unit clarification cannot, by its limited nature, constitute a basis for a direction of any election among any voting group for any purpose.

8. That to the extent that the parties' agreements have expressly and specifically excluded certain regular full-time or regular part-time clerical and library assistant employes of the District from the unit, the parties have excluded individuals who share a community of interest with the members of the agreed-upon bargaining unit, based upon substantial similarities of duties, education, training and skills required, work locations and supervision.

9. That, by way of example, despite their being excluded from the agreed-upon bargaining unit definition, each of the following individuals holding the following positions at or about the time of the hearing herein, had a reasonable expectation of continued employment of sufficient regularity so as to constitute a regular full-time or regular part-time clerical or library assistant position:

a. those excluded by the parties as "casual" on the basis of working 19 or less hours per week including:

(1). Evening Clerk at the Main Office on the Wisconsin Rapids Campus, working 12 hours per week (Mary Bingham)

(2). Evening Clerk at the Main Office on the Wisconsin Rapids Campus, working 12 hours per week (Frances Kopacz)

(3). Library Clerk at the Stevens Point Campus, working an average of 12.19 hours over the preceding 2 year period (Janet Cornwall)

(4). Library Clerk at the Library of the Wisconsin Rapids Campus, working 12 hours per week (Marsha Glocke's successor, Sally Raab ??)

(5). Library Clerk at the Library on the Wisconsin Rapids Campus, working an average of 11.44 hours per week over the preceding two year period (Susan Morse)

(6). Evening Library Clerk at the Marshfield Campus, working an average of 12.24 hours per week over the preceding two year period (Lucinda Klein)

(7). A/F Center Clerk at the Adams-Friendship Campus, working 19 hours per week (Lisa Gulrud ??)

(8). Evening Library Clerk at the Library of the Wisconsin Rapids Campus, working an average of 8.29 hours per week over the preceding two years (Phyllis Allen); and

b. those excluded by the parties as "temporary" employes on the basis of being hired under auspices of federally-funded project or similar program including:

(1). Project Clerk at the Women's Career Planning Center working 38.75 hours per week (JoAnn Allison)

(2). Project Clerk, working 26.75 hours per week for the "GOAL" project and 12 hours per week for the Home Economics Department (Joan Jinsky)

(3). Project Clerk, working 38.75 hours (Mildred Martin)

(4). JPTA Clerk, working 38.75 hours per week with funding from the "Joint Partnership Training Act" (Pat Gotz).

10. That by agreeing to the contract language noted in Finding 4, above, the parties have expressly and specifically agreed to exclude various municipal employes from the bargaining unit described in the May 1976 Certification of Representative; that none of those exclusions was originally based upon statutory grounds; that the resultant agreed-upon unit, while narrower than other units which would be more consistent with anti-fragmentation policy, is nonetheless not repugnant to MERA; that there has been no showing of a change in circumstances which would warrant unconditional expansion of the unit to include the positions expressly and specifically excluded by agreement of the parties; and that, as noted, the District opposes the proposed expansion.

CONCLUSIONS OF LAW

1. That the employes listed in Finding of Fact 9, above, and any other non-supervisory, non-confidential and non-professional regular full-time and regular part-time clerical or library assistant employes of the District whose positions are currently excluded from the parties' contractually agreed-upon unit description:

a. are municipal employes within the meaning of Sec. 111.70(1)(i), Stats.;

b. share a community of interest with the members of the existing agreed-upon bargaining unit described in Finding of Fact 4, above, and

c. would not constitute an appropriate separate unit onto themselves in the instant circumstances.

2. That the express and specific exclusions of various categories of municipal employes from the bargaining unit agreed upon between OPEIU and the District (noted in Finding of Fact 4, above) preclude OPEIU, over District objection:

a. from insisting, in bargaining, upon unconditional District recognition as representative of the broader unit described in the May 1976 Certification of Representative, during the term of any agreement containing those exclusions and after expiration of the latest of the parties' collective bargaining agreements containing same;

b. from obtaining representation rights as regards any or all of the positions so excluded by means of an unconditional Commission order clarifying bargaining unit during the term of any agreement containing those exclusions or after expiration of the latest of the parties' collective bargaining agreements containing same; and

c. from obtaining through a certification election the right to bargain about such employes' wages, hours and conditions of employment to take effect at any time prior to the expiration of the latest of the parties' collective bargaining agreements containing said exclusions.

3. That absent an agreement of the parties on some other procedure, the only available means for OPEIU to expand the existing agreed-upon bargaining unit to include the employes referred to in Conclusion of Law 1, above, would be by means of a timely-filed petition for a representation election in the following unit:

All regular full-time and regular part-time clerical and library assistant employes of the District, excluding supervisors, confidential employes and managerial employes.

4. That, the unit described in Conclusion of Law 3, above, is appropriate unit within the meaning of Sec. 111.70(4)(d), Stats.

5. That in the context of the development of the instant proceeding, and notwithstanding the District's objections, the instant petition constitutes a timely-filed petition for a representation election in the unit set forth in Conclusion of Law 3, above.

6. That a question of representation presently exists concerning the representation of the employes in the bargaining unit set forth in Conclusion of Law 3, above, as regards collective bargaining with the District concerning wages, hours and conditions of employment to be in effect after termination of the parties' latest collective bargaining agreement containing the above-noted exclusions.

Upon the basis of the foregoing, the Commission also makes and issues the following

ORDER

OPEIU's request for a unit clarification order unconditionally including the positions referred to in Conclusion of Law 1 in the existing bargaining unit described in Finding of Fact 4, shall be, and hereby is, denied.

Upon the basis of the foregoing, the Commission also makes and issues the following

DIRECTION OF ELECTION

That an election 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 collective bargaining unit consisting of all regular full-time and regular part-time clerical and library assistant employes of the District, excluding supervisors, confidential employes and managerial employes, who were employed by the District on May 10, 1985, except such employes as may

prior to the election quit their employment or be discharged for cause, for the purpose of determining whether such employes desire to be represented by Office and Professional Employees International Union Local #95, AFL-CIO for the purposes of collective bargaining with Mid-State Vocational, Technical and Adult Education District No. 14 concerning wages, hours and conditions of employment to be in effect after the termination date of the latest collective bargaining agreement currently in effect between said Labor Organization and the District.

And that, in order to facilitate the election, the District shall, within twenty (20) days of this Directive, develop and submit to the Commission an updated eligibility list consistent with this decision.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MID-STATE VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT NO. 14, 3, Decision No. 14526-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND DIRECTION OF ELECTION

FACTUAL AND PROCEDURAL BACKGROUND

The basic facts are as set forth in the Findings, above. Reduced to its essence, this case involves an effort by OPEIU to obtain--by immediate and unconditional order clarifying unit, if possible, or by overall unit vote if necessary--inclusion of certain clerical and library assistant positions currently excluded from the existing non-professional clerical and library assistant unit described in the parties' collective bargaining agreements. 1/ While the Union's May 1976 Certification of Representative describes the bargaining unit in terms broad enough to include all of the disputed positions, it appears that the parties agreed in the 1976 election proceeding on an eligibility list that excluded a portion of those otherwise eligible, and they have expressly and specifically excluded various categories of clerical and library assistant personnel in the unit described in each of their collective bargaining agreements since 1976.

POSITIONS OF THE PARTIES 2/

The Union requests that the Commission issue an order establishing that it has the right to bargain in a unit expanded to the full contours of the unit described in the Certification, or that the Commission specify what conditions--including, if necessary, an overall unit vote--the Union must meet to achieve that end.

The District opposes the Union's request, asserting that the agreement precludes the Union from expanding the unit beyond that agreed upon by the parties, that the Union cannot or should not be permitted to secure its objective by means of a unit clarification order, and that, for various reasons, the expanded unit would not be appropriate.

At the hearing and in its initial brief the District took the following positions concerning the instant case:

> a. a unit clarification petition is not appropriate to determine the MERA rights of the disputed employes, but rather, where, as here, the parties have voluntarily excluded the dispute (allegedly casual and temporary) positions from the unit, the Commission may not disturb the voluntarily agreed-upon unit unless that unit is repugnant to MERA (citing, Waukesha County, Dec. No. 14830 (WERC, 8/76));
>
> b. since there is no evidence of intervening changes in the unit or non-unit positions (with the exception that more employes are not employed in both types of positions than in 1976), since the positions existed at the time of their contractual exclusion, since the District opposes accretion, and since the "unit" is not repugnant to MERA, the District asserts accretion is inappropriate (citing, Manitowoc County (Sheriff's Dept.), Dec. Nos. 19451-A and 19452-A (WERC, 12/82));

1/ We have referred in the Findings to the latest of the parties' agreements as one in effect through at least June 30, 1985. In that regard we have taken official notice of the Consent Award in the parties' mediation-arbitration dispute in Case 29, issued on February 6, 1985.

2/ While all of the parties' arguments made at hearing and in written arguments have been considered, we have attempted to summarize herein those most heavily relied upon by the parties.

c. the District has offered to bargain with OPEIU over the inclusion/exclusion of the disputed positions and the Commission should defer to such an offer to bargain;

d. the proposed unit is inappropriate because the duties, skills, supervision, work stations, wages, hours and working conditions of employes in the disputed positions are different from those of unit employes; and

e. "the bargaining history has determined the appropriate unit and it should not be disturbed." (District's Brief at 11)

OPEIU contended at the hearing and in its initial brief that federal project employes and employes working 19 hours or less per week should be declared to be included in the existing collective bargaining unit since:

a. they are municipal employes under Section 111.70 and therefore have a right to collective bargaining;

b. those working 19 or less hours per week are regularly scheduled part-time employes, not casual employes;

c. the disputed employes share a community of interest with unit employes since their duties are similar to those of unit employes;

d. these "residual" employes would not constitute a viable separate appropriate unit, and to find them to be such would violate the statutory prohibition against fragmentation of bargaining units; and

e. the District's project employes are municipal employes who have been and continue to be regularly employed, despite the fact that federal funds (which provide a part of project employe wages) must be applied for yearly and are granted for a one year period only.

On the basis of the above, the OPEIU asserts that the approximately 12 disputed positions should be included in the existing unit (consisting of approximately 34 employes) unconditionally (i.e., without need of an election), or, if that outcome is found inappropriate, the Commission should specify the conditions upon which OPEIU can obtain inclusion of the disputed employes in the existing unit. OPEIU further states that it is willing to stand for an election, if necessary, in the broader unit it seeks to represent.

In its reply brief, the District contended:

a. the parties have defined the unit through bargaining and that their contractual definition of "casual and temporary" employes should control here;

b. in any event, the Commission should defer this controversy to the parties for resolution through collective bargaining, whether or not the contours of the bargaining unit is a non-mandatory subject of bargaining;

c. the 11 employes defined as casual and temporary employes in the contract, constitute a separate appropriate bargaining unit; and

d. assuming the Commission accretes the disputed employes into the collective bargaining unit, such accretion should only take effect at the time of renewal of the existing contract so that accreted employes are not automatically covered by the current collective bargaining agreement.

In its reply brief, the OPEIU detailed what it asserted were factual and legal inaccuracies in the District's initial brief. In addition, OPEIU contended:

a. there "have been changes in the nature of the disputed positions" since the certification because there has been a 120% increase in non-bargaining unit positions while bargaining unit positions have only increased by 53%;

b. contrary to the District's assertions, there is a community of interest between unit employes and the incumbents of the disputed positions; and

c. the Commission has clearly held in Milwaukee Board of School Directors (substitute teachers), Dec. No. 20399-A (WERC, 9/83) that a certified representative has the right to insist on being recognized as regards the unit as described in the Certification of Representative. Proposed deviations from the certified unit description constitute a permissive subject of bargaining that can be enforced only during the term of the agreement containing them. As with other permissive subjects, deviations from the certified unit description should be deemed to evaporate upon expiration of the agreement containing them, and the union is again entitled to recognition in the certified unit upon request.

DISCUSSION

We agree with the District that in view of the parties' history of express and specific agreements narrowing the agreed-upon bargaining unit relative to the unit described in the Certification of Representative, the Union is no longer entitled to insist on being recognized as exclusive representative of the broader unit, even upon expiration of the latest agreement containing the agreed-upon exclusions.

While the Union correctly asserts that our decision in Milwaukee Board of School Directors (substitute teachers), Dec. No. 20399-A (WERC, 9/83) states that proposed deviations from the certified unit are a permissive subject of bargaining, that case does not mandate the further proposition that agreements concerning the contours of the unit are subject to evaporation in the same manner as other permissive subjects. Just as an employer would ordinarily not be permitted to revert to the certified unit after having agreed to recognize a union in a unit containing employe groups in addition to those included in the certified unit, so a union ought not, as here, be permitted to revert to the certified unit after having agreed to limit the scope of the unit covered by its agreement by express and specific agreed-upon exclusions of various groups of municipal employes otherwise within the unit described in the Certification of Representative. We recognize that this results in treating deviations from the certified unit differently than other permissive subjects of bargaining, which may be evaporated upon expiration of the agreement containing them. See, e.g., City of Rice Lake, Dec. No. 16413 (WERC, 6/78) at 5.

Thus, while our Milwaukee Schools decision, above, guarantees the Union the right to insist upon recognition as representative in the certified unit initially, it does not continue that guarantee in the face of specific and express voluntary agreements to exclude employe groups. Continuation of a right to insist upon the certified unit after the termination of an agreement narrowing the unit voluntarily would empower the majority representative to agree not to bargain on behalf of segments of the certified unit while at the same time precluding those employes from obtaining representation from another organization by reason of the breadth of the unit described in the Certification.

The better approach, in our view, is to entitle the majority representative in a case such as this to insist only upon recognition in the agreed-upon unit where, as here, that unit expressly and specifically excludes groups of municipal employes encompassed by the unit described in the Certification. As we commented in Milwaukee Schools, supra, the majority representative is entitled to written recognition upon request in the unit as to which it has previously been extended voluntary recognition.

We also find it appropriate to apply herein the standards developed in City of Cudahy, Dec. Nos. 19451-A and 19452-A (WERC, 12/82) as regards the circumstances in which the Commission will or will not expand an agreed-upon unit by an unconditional order clarifying bargaining unit over the objections of one of the parties to that agreement.

In Cudahy, supra, and subsequent cases, the Commission has stated that it will not grant an unconditional unit clarification order expanding a voluntarily agreed-upon unit in the following circumstances:

1. The positions at issue were in existence at the time of the voluntary recognition.

2. The description of the voluntarily recognized unit implicitly or explicitly excludes the positions at issue.

3. Either the Employer or the Union opposes the proposed expansion.

4. The original exclusion was not based upon statutory grounds.

5. The unit is not repugnant to the provisions of the Municipal Employment Relations Act.

6. There has not been any intervening event which would materially affect the status of the affected employes.

In the instant case, the positions at issue were in existence at the time of the parties' most recent agreement to the narrower agreed-upon unit description. The parties' agreement contains exclusions from the bargaining unit description that are express and specifically applicable to the employe groups the Union is now seeking to include in the unit. In other words, this is not a case in which some or all of the disputed positions have been newly created or were overlooked by the parties when they entered into their most recent agreement containing the exclusions relied upon by the District. Clearly, the District opposes the expansion of the agreed-upon unit proposed by the Union. While the exclusions render the unit narrower than that most desirable for anti-fragmentation purposes, it does not create a unit that is repugnant to MERA (as would be the case, for example, if the agreed-upon unit combined professionals and non-professionals without the requisite vote among the professionals approving a combined unit). And finally, there is no showing that circumstances have materially changed as regards the status of the positions in question. For example, the nature of the job duties of the positions involved have not changed so as to make some of those excluded positions at issue more similar to those within the unit. The change in circumstances relied upon by the Union is in the degree of utilization of project and/or part-time personnel, not in the nature of the work performed by unit or non-unit employes.

Accordingly, we have concluded that it would be inappropriate to grant the Union's request for expansion of the unit by an unconditional order clarifying bargaining unit--either before or after termination of the parties' latest agreement containing the narrowed agreed-upon unit. Instead, we have declared that in the instant case OPEIU is precluded from any non-consensual expansion of the unit during the term of the agreed-upon exclusions, and is required to timely petition for an election in the overall clerical/library assistant unit to achieve the expansion of that unit requested in its petition herein.

Contrary to the District's contentions, however, we conclude, for reasons stated below, that the representation election alternative outlined above is procedurally available to the Union without the filing of a separate election petition in this matter, and that the expanded bargaining unit referred to above is an appropriate unit.

Sufficiency of the Instant Petition as Basis for Direction of Election

The District asserts that the Commission cannot issue a Direction of Election in this proceeding and that, instead, the Union must file a separate petition requesting such Commission action. In the circumstances of this case, we reject that District position as overly technical and potentially prejudicial. While the document the Union filed was the Commission's Petition for Clarification of Bargaining Unit form, both the correspondence attached to the petition and the Union's position as stated from early on in this matter make it clear that the Union's objective is to obtain the right to represent the disputed positions in

the same unit with the members of the existing (agreed-upon) unit. The Union also made it clear that, if necessary, the Union was ready to stand for an overall unit vote to achieve that objective. While the District has maintained from the outset of the hearing in this matter that it does not consider the petition sufficient to support a Direction of Election, the District cannot be said to be surprised that we would consider treating the instant petition as a petition for election in the overall clerical/library assistant unit.

To require the filing of a separate petition would arguably present the Union with contract bar and other timeliness of filing obstacles which could not be equitably applied given the lengthy pendency of the instant petition. To avoid that inequitable outcome, we have fashioned our Order to indicate that we are treating the instant petition as a timely filed 3/ request (in the alternative) for an election in the broader unit sought by the Union.

Appropriateness of Overall Clerical/Library Assistant Unit

In determining the appropriate unit, the Commission has consistently applied the following criteria:

1. Whether the employes in the unit sought share a "community of interest" distinct from that of other employes (based on the following considerations).

2. The duties and skills of 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 employes in the unit sought as compared to wages, hours and working conditions of other employes.

4. Whether the employes in the unit sought have separate or common supervision with other employes.

5. Whether the employes in the unit sought have a common workplace with the employes in said desired unit or whether they share a workplace with other employes.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history. 4/

As noted above, we have before us a petition which is properly deemed to constitute a request for an election in an expanded unit, and the District has disputed the appropriateness of that unit. In such circumstances, the dispute concerning the appropriateness of the expanded bargaining unit proposed by the Union is one that the Commission must address rather than deferring to the parties' future bargaining for a resolution of that question. While the history of the bargaining relationship is a factor to be considered, it is only one of the several noted above and is not, alone, controlling.

The District argues that the clerical and library assistant employes currently excluded from the agreed-upon unit should not under any circumstances be included in the same unit with the clerical and library assistant employes currently included in the existing unit due to a lack of community of interest. The District asserts, instead, that the disputed positions belong in a separate unit based on the temporary or casual nature of their employment, the history of the parties' bargaining, and various differences between the two groups.

3/ It is clear from the record that there were various times during the pendency of the instant petition at which a petition for election in the broader unit would have been timely fileable.

4/ E.g., Boyceville Community School District, Dec. No. 20598 (WERC, 4/83); Arrowhead Schools, Dec. No. 17213-B (WERC, 6/80), aff'd __ Wis.2d __ (Wis. Sup. Ct. Dec. No. 81-1600, 1/31/84).

We find the District's contentions in these regards unpersuasive. We conclude, instead, that the employes at issue have a reasonable expectation of continued employment of sufficient regularity to constitute regular full-time and regular part-time clerical and library/assistant employes of the District, and that they share a community of interest with the clerical and library assistant employes in the existing agreed-upon unit. We further conclude that a separate unit consisting of the currently unrepresented clerical and library assistant employes would result in undue fragmentation and be inappropriate.

The disputed employes have duties and skills similar to those of unit employes. The evidence shows that both unit and non-unit office clerks and project clerks perform clerical duties--typing, answering the telephone, filing (if needed) and acting as receptionists where appropriate. Both unit and the disputed employes' skills are clerical in nature. Work not completed by daytime unit employes is frequently completed by nighttime non-unit office clerks and library clerks. In addition, both unit and non-unit library clerks shelve books and answer information questions. While only unit clerks catalog, inventory and order library materials and only non-unit library clerks are responsible for closing the library and for library security during night hours, we do not find any of these differences nearly significant enough to require a finding that unit and non-unit employes' duties are so dissimilar as to justify separate bargaining units.

The record also establishes that the disputed employes have levels of education and training similar to those of the employes in the existing unit. In that regard, for example, the evidence indicates that the District prefers to hire high school graduates for both unit positions and the non-unit disputed positions.

The record also indicates that, with the exception of federal project employes, the disputed employes are supervised by individuals who regularly supervise unit employes. The District's assertion that the supervision of unit employes is more intensive than that of the disputed positions does not represent a weighty difference between the two groups for community of interest analysis purposes, especially when compared with the substantial similarities between the duties performed by the two groups of employes.

In addition, the disputed employes occupy the same work locations and in some instances (i.e. evening office clerks) share desks with unit employes. The fact that evening library clerks sit at the front desk while daytime library clerks do not is not a particularly significant difference in work location.

It is true that the existing unit employes do not work evening hours, that they generally work more hours than the disputed employes, and that unit employes receive fringe benefits and are paid higher wages while employes in the disputed positions are paid lower wages and receive no fringe benefits. Those differences from unit employes must be balanced against the various similarities noted above.

The District also asserts, in essence, that the disputed employes lack a reasonable expectation of continued employment of sufficient regularity to share community of interest with regular full-time or regular part-time employes. In this regard, the District asserts that the parties' contractual definitions of "temporary" and "casual" should control but that under either the parties' or the Commission's definitions of those terms, the disputed positions are casual and/or temporary, rather than regular full-time or regular part-time employes with a reasonable expectation of continued employment. We disagree with the District in all of those respects.

In determining appropriate unit questions for representation elections, it is the Commission's rather than the parties' decisional criteria that are controlling where the appropriateness of the unit claimed appropriate is disputed. It is neither necessary nor proper to leave a dispute as to the contours of the unit to the parties where a question of representation is raised by a petition.

The Commission has held that casual employes lack a community of interest with regular full-time and regular part-time employes, defining casual in terms of the employes' lack of regularity of employment, rather than in terms of any particular minimum number of hours of work per week or month. See, e.g., Richland County (Senior Citizens Home and Farm), Dec. No. 11484 (WERC, 12/72). The Commission has also held that temporary employes lack a community of interest with regular full-time and regular part-time employes, defining temporary

in terms of a lack of a reasonable expectation of continued employment. See, e.g., Manitowoc County, Dec. No. 15250-B (WERC, 9/77). The District has relied in part on Kenosha Schools, Dec. No. 14908 (WERC, 9/76) (establishing a unit of substitute teachers) and City of Appleton Parking and Transit Commission, Dec. No. 16090-A (WERC, 9/78) (in dictum, Commission recognizes possibility that a unit of non-regular employes could be appropriate in certain circumstances). While those cases support the notion that a separate unit of non-regular personnel could be appropriate in some circumstances, they do not support the District's contentions that the disputed positions herein are non-regular in nature or that inclusion of those positions in the same unit with the members of the existing unit herein would not be proper.

In the instant record there is substantial uncontradicted evidence that the disputed employes are not on-call employes but are regularly scheduled to work and that they have regularly worked more than eight hours per week for the past two years. The fact that their regularly scheduled hours may vary from employe to employe and from time to time, that some of them work during evening hours, and that unit employes' hours appear to be greater in number, less varied and generally in the daytime, does not detract from the proven regularity of employment of the disputed employes. Therefore, we conclude that the less than full-time positions in dispute are regular part-time employes rather than casuals. cf. Village of Monticello, Dec. No. 18463-A (WERC, 5/81).

We are also persuaded that the project employes are not temporary employes. The project employes perform clerical duties and possess clerical skills. The evidence warrants a reasonable expectation on their part of continued employment with the District. For, while the duration of the project funding involved is technically one year, project employment has been such that the District's employes performing work funded by federal project monies have been continuously employed year to year. Layoffs have only occurred at the supervisory level. In the circumstances, then, the disputed federal project employes are not temporary employes. See, e.g., School District of Solon Springs, Dec. No. 18200 (WERC, 10/80); Richland County, supra.

The District also asserted that the federal project employes' work is more complex because certain federal grant forms which they type are more complex than forms typed by unit employes. Even if that were so, that is not a difference of weighty significance since, in general, the federal project employes possess similar skills and perform similar types of duties as unit employes.

Also in regard to federal project employes, the District has argued that because it generally receives up to one-half of the monies necessary to pay federal project employes' wages from the federal government, these employes are not properly includable in any appropriate unit. However, precedent is clear that the source of funding is not sufficient cause to exclude otherwise eligible government project employes from a proposed unit. See, e.g., Madison VTAE District, Dec. No. 8382-A (WERC, 1/80); Kenosha VTAE District, Dec. No. 14381 (WERC, 3/76); City of Beloit, Dec. No. 15112 (WERC, 12/76).

On balance, then, and in consideration of all of the foregoing, we have concluded that the disputed positions referred to in Conclusion of Law 1 constitute regular full-time and regular part-time clerical and library assistant positions within the District. Given the similarities in duties, skills, supervision, education and work location we find that the employes in the disputed positions share a sufficient community of interest with unit employes to be included in the same bargaining unit and that the differences between said groups of employes are insufficient to overcome the statutory mandate against fragmentation of bargaining units.

CONCLUSION

For the foregoing reasons, we have denied the Union's request for an unconditional order including the disputed positions in the existing agreed-upon unit. However, we have declared that the instant petition suffices as a timely request for an election in the broader unit; but that any certification issued pursuant to said election shall not entitle the OPEIU to bargain about wages, hours and conditions of employment of the previously excluded positions as regards any period of time prior to the termination date of the latest of the parties' agreements containing the narrower agreed-upon unit.

In view of the passage of time since the hearing was conducted in this matter, we have also directed the District to develop and submit to the Commission, within 20 days of the date of this decision, an updated eligibility list consistent with this decision.

Dated at Madison, Wisconsin this 10th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner