

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of	:	Case VI
NORTHWEST UNITED EDUCATORS	:	No. 21794 ME-1452
	:	Decision No. 15793-A
Involving Certain Employees of	:	Case VII
AMERY JOINT SCHOOL DISTRICT NO. 5	:	No. 22002 ME-1469
	:	Decision No. 15794-A

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Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, appearing on behalf of the Petitioner.  
Cwayna, Novitzke, Byrnes, Gust and Williams, Attorneys at Law, by Mr. Don Paul Novitzke, appearing on behalf of the Municipal Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
DISMISSING PETITION FOR UNIT CLARIFICATION,  
AND DIRECTING AN ELECTION

Northwest United Educators having filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify a voluntarily recognized bargaining unit consisting of classroom teachers in the employ of Amery Joint School District No. 5; and hearing in the matter having been scheduled for September 16, 1977; and prior thereto, and on August 30, 1977, Northwest United Educators having filed a petition requesting the Commission to conduct an election pursuant to Section 111.70(4)(d) of the Municipal Employment Relations Act, among a unit consisting of all professional employees in the employ of said School District; and hearing on said petitions having been held on September 16, 1977, at Amery, Wisconsin, before Examiner Duane McCrary; and the Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, hereby issues the following Findings of Fact, Conclusions of Law and Order Dismissing Petition for Unit Clarification, and Directing an Election.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as NUE, is a labor organization representing employees for the purposes of collective bargaining and has its offices at 16 West John Street, Rice Lake, Wisconsin.
2. That Amery Joint School District No. 5, hereinafter referred to as the District, is a School District employing professional and non-professional employees in the operation of a public school system.
3. That the NUE and the District were parties to a collective bargaining agreement effective July 1, 1973 to June 30, 1974, as well as an agreement from July 1, 1975 to June 30, 1977, covering wages, hours and conditions of employment for certain professional employees, reflected in said agreement as follows: 1/

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1/ The composition of said unit was voluntarily agreed upon by the parties.

## "ARTICLE I

### RECOGNITION

A. The Board recognizes the Association as the exclusive bargaining representative on wages, hours, and conditions of employment for all employees classified as classroom teachers but with the following personnel excluded:

1. Administrators.
2. Principals, Supervisors, coordinators or supervisors of instructional programs, and those department heads having evaluative responsibility over staff members.
3. Non-instructional personnel such as nurses, guidance counselors and social workers.
4. Office, clerical, maintenance and operating employees."

4. That on June 22, 1977 NUE filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify the unit set forth above so as to include the positions of Guidance Counselor, Social Worker, Coordinator, and Nurse in said unit; that prior to the scheduled hearing on said petition, NUE filed a second petition with the Commission, wherein it requested the Commission to conduct an election among all professional employees in the employ of the District, including not only certified teachers but the positions of Guidance Counselor, Psychologist, Social Worker, Nurse, and Speech Therapist, to determine what, if any, representation said employees desired for the purpose of collective bargaining; that hearing on both petitions was conducted at Amery, Wisconsin, on September 16, 1977, during the course of which issues arose as to the supervisory and/or managerial status of the positions of Director of Special Services, Nurse, Social Worker, Guidance Counselor, and School Psychologist, and Learning Disabilities Coordinator, and that the inclusion or exclusion of such positions in the unit was an issue in bargaining between the parties, as it had been in previous years.

5. That the position of Director of Special Services (Pupil Services) presently occupied by Wayne Hanson, (1) is generally responsible for the administration of all programs relating to student activities, and in that regard Hanson directs the activities of the Guidance Counselors and evaluates them once a year; (2) Hanson has participated in conferences relative to the hiring of teachers and has evaluated teachers with whom he has contact, which, in turn, are referred to the Superintendent; (3) Hanson spends approximately 25% of his time directing the activities of the special services group, i.e., nursing services, social work, special education instructors, speech correction, school psychologists, as well as setting up the District's program in guidance and counseling which, among other things, dictates the extent to which Guidance Counselors will be involved with individualized counseling, testing, referrals and multi-disciplinary team involvement; (4) he assists the high school principal in setting up the schedule for a given year and the assignment of teachers to that particular schedule; (5) Hanson assumes the duties of the high school principal in the latter's absence and Hanson's level of pay is commensurate with principals in the district; and (6) Hanson also observes the School Psychologists, School Counselor, Intern Counselor, Nurse and the High School Special Education Instructor and files a report concerning those observations with the Superintendent.

6. That Florian Heiser is employed as a Social Worker, and also serves as Director of the Multi-disciplinary Team, which is a team of employees mandated by Chapter 115 of the Wisconsin Statutes to meet the needs of those students identified as having exceptional educational needs; that the Multi-disciplinary Team (M-team) is composed of the Social Worker, the Psychologist, Nurse, Speech Therapist, and the Learning Disabilities Coordinator, and after identifying the student with exceptional educational needs, the M-team prescribes a learning program for that student; that after the program is prescribed, Heiser confers with the teacher who will implement the program for and with the particular student usually as part of the teacher's normal duties in the mainstream classroom; that Heiser (1) spends 97-100% of his time directing the M-team activities, (2) observes individual performance and evaluates that performance, which evaluation is given to the Superintendent. He evaluates the classroom teacher who has been given the responsibility of implementing a learning program for a student with exceptional educational needs, which evaluation is placed in the teacher's personnel file, and (3) prepares an annual report and may report on an as needed basis to the Board concerning M-team activities as well as his activities as Social Worker which is tied in with his role as Director of the M-team; that Heiser is on a twelve-month contract, is "on call" during the evenings and on weekends, and is not compensated for working overtime; and that Heiser has participated in discussions concerning teacher discipline and teacher contract renewal, as well as having some input concerning the Psychologist's schedule and in "assignments" to them.

7. That Thora Fransted, the Nurse, is a Registered Nurse and is also certified as a Public Nurse, is generally responsible for the administration of the District's health program, which involves setting up visual and auditory examinations, inoculations and other health services, provides emergency medical service to students, records all accidents on school property, plans and supervises health screening programs, provides health counseling and ensures that the District meets all statutory requirements concerning communicable diseases; and that Fransted is responsible for all District medical records and must verify all medical insurance claims.

8. That Katherine Kuhlman and David Meyers are utilized as Psychologists on a part-time basis, and are compensated under a package plan through the Cooperative Education Service Agency (CESA) #4, whereby the school districts utilizing the Psychologists' services jointly prepare a budget in consultation with the CESA Coordinator, however the Psychologists are then paid through CESA; that both Psychologists report to and receive their assignments, which may be individual or group in nature, from Heiser; and that they negotiate their own salaries.

9. That the District utilizes 2.5 Guidance Counselors -- Wayne Hanson, Winfred Johnson, and Alan Stoddard (50%); that Stoddard also functions as Middle School Principal; that a Guidance Counselor predominantly counsels students in their personal, education or occupational problems, and does not direct the activities of any employees; that Johnson is in charge of the Title IV program for the District, a federal program by which a school district may obtain various teaching materials, which includes audio-visual equipment; that after surveying the needs of the teachers, Johnson will outline the proposal to the Board of Education for its approval and then it is sent to the Department of Public Instruction, and instruct teachers in the use of audio-visual equipment; that as Director of Career Education, Johnson surveys the District's needs in the area of career education and works with teachers to integrate career occupational information into the curriculum; that Johnson is responsible to Hanson, Director of Special Services, in the performance of his duties as Guidance Counselor, which he is involved in from 60-65%

of his time; that Johnson teaches two classes and is on a nine-month contract and has the responsibility of the publication of the yearbook, as well as the development of the school calendar.

10. That the Learning Disabilities Coordinator, Susan Ghoca, is a member of the M-team who prescribes a program to correct the learning disability of a student who may have been referred to the M-team by a parent, classroom teacher, principal or by the Learning Disabilities Coordinator; that as the program is carried out by the classroom teacher as part of their normal duties in the mainstream classroom, the Learning Disabilities Coordinator will visit classrooms to observe both teacher and student, and after classroom observation, the Learning Disabilities Coordinator will discuss progress with the teacher, and teacher and student progress will be discussed with the school Principal. 2/

11. That the duties and responsibilities of Wayne Hanson, Director of Special Services, Florian Heiser, Social Worker and Director of the Multi-disciplinary Team, and Alan Stoddard, Middle School Principal and Guidance Counselor, perform supervisory functions; that neither the positions occupied by Winfred Johnson, Guidance Counselor, Thora Fransted, Nurse, nor Susan Ghoca, the Learning Disabilities Coordinator, perform either managerial or supervisory functions; and that Katherine Kuhlman and David Meyers are not employees of the District.

On the basis of the above and foregoing Findings of Fact, the Commission makes the following

#### CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission, in order to carry out the policies of the Municipal Employment Relations Act, especially those provisions of MERA relating to the determination of appropriate bargaining units, will not, in a unit clarification proceeding accrete positions to an existing unit, where the parties involved previously specifically excluded such positions from said unit.

2. That since Wayne Hanson, as the Director of Special Services, Florian Heiser, as a Social Worker, and Alan Stoddard, as the Middle School Principal and Guidance Counselor, perform supervisory duties, said individuals cannot be considered municipal employees within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act, and therefore said employees are excluded from any collective bargaining unit consisting of any employees of Amery Joint School District No. 5.

3. That Winfred Johnson, Guidance Counselor, Thora Fransted, Nurse, and Susan Ghoca, Learning Disabilities Coordinator, perform insufficient managerial and supervisory duties, they are deemed to be employees within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

4. That since the Psychologists are not employees of the District they cannot be included in any collective bargaining unit consisting of employees of the District within the meaning of Section 111.70(1)(e) of the Municipal Employment Relations Act.

5. That, since all professional employees in the employ of a school district who work with students and teachers in an educational setting, whether certified or not, may constitute an appropriate bargaining unit within the meaning of Section 111.70(4)(d)2.a. of MERA,

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2/ The Commission took notice of Amery Joint School District No. 5 (14802-A) 6/77 for the purpose of ascertaining the duties and responsibilities of the Learning Disabilities Coordinator.

and therefore all certified teaching personnel in the employ of the District, as well as the positions of Guidance Counselor, Nurse, Learning Disabilities Coordinator, and non-supervisory Social Workers, constitute an appropriate bargaining unit.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

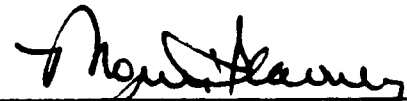
1. That the petition for unit clarification be, and the same hereby is, dismissed.

2. That an election by secret ballot be conducted under the Direction of the Wisconsin Employment Relations Commission within thirty (30) days from the date of this Directive in the collective bargaining unit consisting of all classroom teachers, Guidance Counselor, Nurse, Learning Disabilities Coordinator, and non-supervisory Social Workers in the employ of Amery Joint School District No. 5, but excluding managerial, supervisory and confidential employees, 3/ and all other employees, who were employed on April 10, 1978, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether the required number of such employees desire to be represented by Northwest United Educators for the purposes of collective bargaining with Amery Joint School District No. 5 on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

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3/ The Director of Special Services and the Middle School Principal-Guidance Counselor are excluded from the unit.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER DISMISSING PETITION FOR UNIT  
CLARIFICATION AND DIRECTING AN ELECTION

The NUE filed a petition with the Commission for unit clarification on June 22, 1977, requesting that the Commission determine whether certain professional positions, which were not occupied by certified teachers, should be included in the existing previously voluntarily recognized unit consisting of classroom teachers presently represented by the NUE. Hearing was set on said petition, but prior to the conduct thereof, and on August 30, 1977, NUE filed a petition with the Commission requesting the Commission to conduct an election in a unit which included not only classroom teachers, but also the professional positions occupied by other than certified teachers. Hearing on both petitions was conducted on September 16, 1977. At the outset of the hearing the District moved to dismiss the petitions, alleging, inter alia, that the filing of said petitions, while the parties were attempting to bargain with respect to the inclusion or exclusion of the positions in issue, constituted a constructive refusal to bargain in violation of Sec. 111.70(3)(b)3 of the Municipal Employment Relations Act.

The Commission will not, in either a unit clarification or election proceeding adjudicate any prohibited practice allegation. 4/ Sec. 111.70(4)(d) of MERA imposes a duty upon the Commission to determine appropriate units. However, MERA does not preclude parties from voluntarily establishing a unit as long as the composition thereof is not repugnant to the Act. 5/ The existing voluntarily recognized unit is not repugnant to the Act. However, such fact, nor the fact that the parties were attempting to reach an agreement on the positions involved, does not preclude the NUE from the filing of its petition herein. Nevertheless the petition for unit clarification is deemed inappropriate, since the Commission will neither accrete employees to a unit where they were previously specifically excluded therefrom, 6/ nor will it clarify the unit to include such employees under the same circumstances. Where there exists a voluntarily recognized unit and where certain classifications have been excluded from the unit, and a party involved in the recognition agreement opposes the proposed expansion, the Commission will not expand said unit without an election in the unit deemed appropriate. 7/ Therefore we have dismissed the petition requesting a unit clarification, and are directing an election in the unit deemed appropriate by the Commission.

Section 111.70(1)(o)1 of MERA defines the term "supervisory" as follows: "As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment."

The Commission, in order to determine whether the statutory criteria are present in sufficient combination and degree to warrant the conclusion that the individuals in question are supervisors, considers the following factors:

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- 4/ City of Milwaukee (6960) 12/64
  - 5/ Village of East Troy (10913) 4/72
  - 6/ The positions involved herein were previously specifically excluded by the parties from the previously existing unit.
  - 7/ Fox Valley Tech. Institute (13204) 9/74

1. The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees;

2. The authority to direct and assign the work force;

3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;

4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees;

5. Whether the supervisor is primarily supervising an activity or primarily supervising employees;

6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees;

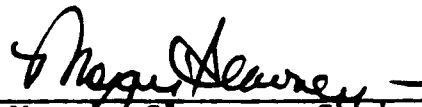
7. The amount of independent judgment and discretion exercised in the supervision of employees. 8/

It is apparent that the duties and responsibilities of the positions of the Director of Special Services (Hanson), of the Director of the Multi-disciplinary Team (occupied by Social Worker Heiser), and of the Middle School Principal-Guidance Counselor (Stoddard) are sufficient in combination and degree to warrant the exclusion of such positions from the unit. On the other hand the statutory criteria utilized in determining "supervisory status" is insufficient in combination and degree with respect to the duties performed by the Nurse, the Guidance Counselors, 9/ and the Learning Disabilities Coordinator, and therefore such positions are included in the unit. Further, since the Psychologists are employees of CESA #4, and not of the District, they cannot be included in any bargaining unit of employees of the instant District.

Dated at Madison, Wisconsin, this 10th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

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8/ Fond du Lac County (10579-A) 1/72

9/ With the exception of Stoddard.