

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

- - - - -
In the Matter of the Petition of :

MILWAUKEE TEACHERS EDUCATION ASSOCIATION: :

For Clarification of a Bargaining Unit :
Involving Certain Employees of :

MILWAUKEE BOARD OF SCHOOL DIRECTORS :
- - - - -

Case LX
No. 18480 ME-1124
Decision No. 13787-G

In the Matter of the Petition of :

PSYCHOLOGISTS ASSOCIATION OF MILWAUKEE :
PUBLIC SCHOOLS :

For an Election Involving Certain :
Employees of :

MILWAUKEE BOARD OF SCHOOL DIRECTORS :
- - - - -

Case XCIV
No. 22343 ME-1496
Decision No. 16009-D

Appearances:

Mr. James C. Brennan, City Attorney, City of Milwaukee, by Mr. Nicholas M. Sigal, Principal Assistant City Attorney, for the Milwaukee Board of School Directors.
Perry & First, Attorneys at Law, by Mr. Richard Perry, for Milwaukee Teachers Education Association.
Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, and Rausch, Hamell, Ehrle & Strum, S.C., by Mr. Raymond J. Rausch, for Administrators & Supervisors Council.
Shneidman & Myers, Attorneys at Law, by Mr. Daniel L. Shneidman, for Psychologists Association of Milwaukee Public Schools.

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

Milwaukee Teachers Education Association having filed a petition with the Wisconsin Employment Relations Commission wherein it requested the Commission to clarify an existing collective bargaining unit presently represented by it, which unit consists of teaching personnel in the employ of the Milwaukee Board of School Directors, by accreting psychologists to said existing unit; and Psychologists Association of Milwaukee Public Schools having filed a petition wherein it requested the Commission to conduct an election in an alleged appropriate bargaining unit consisting of said psychologists; and hearing in the matter having been held at Milwaukee, Wisconsin, on February 22, 23, 24, 27, 1978, and on June 7, 8, 9, and 12, 1978, during the course of which the Administrators Supervisors Council having been permitted to intervene by Examiner Sherwood Malamud; and briefs having been filed by November 24, 1978; and the Commission, having considered the evidence and arguments of Counsel, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Milwaukee Board of School Directors, hereinafter referred to as the Board, operates a school system in the City of Milwaukee and

No. 13787-G
No. 16009-D

maintains its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin.

2. That Milwaukee Teachers Education Association, hereinafter referred to as MTEA, is a labor organization, maintaining its offices at 5130 West Vliet Street, Milwaukee, Wisconsin; and that MTEA is the certified exclusive collective bargaining representative of certain employees of the Board employed in the following appropriate collective bargaining unit:

All regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent of a full teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialist, activity specialists, music teachers 550N) who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, and diagnostic teachers, excluding substitute par [sic] diem teachers, office and clerical employees, and other employees, supervisors, and executives. 1/

3. That Psychologists Association of the Milwaukee Public Schools, hereinafter referred to as PAMPS, is an organization, maintaining its offices at 818 North 63rd Street, Milwaukee, Wisconsin; that PAMPS was organized by psychologists in the employ of the Board in 1965; and that the current constitution of PAMPS prohibits administrators and supervisors from becoming members of said organization.

4. That Administrators and Supervisors Council, hereinafter referred to as ASC, maintains its offices at 5710 West Vliet Street, Milwaukee, Wisconsin; that ASC primarily represents, for the purposes of collective bargaining, supervisory and managerial personnel in the employ of the Board; and that ASC is structured in the form of a federation, comprised of the following member associations:

Milwaukee High School Principals' Association
Milwaukee Junior High School Principals' Association
Milwaukee Elementary School Principals' Association
Milwaukee Senior High School Assistant Principals' Association
Milwaukee Elementary School Assistant Principals' Association
Central Office Professional Association
Psychologists Association of the Milwaukee Public Schools (PAMPS)

5. That in October, 1963, during the course of a hearing in an election proceeding involving certified teachers in the employ of the Board, which proceeding was initiated by a petition for an election filed by the Milwaukee Teachers Union, Local 252, affiliated with the American Federation of Teachers, hereinafter referred to as Local 252,

1/ Said unit is hereinafter referred to as the teacher bargaining unit.

an issue arose as to whether the positions of Psychological Counselors (Teacher Basis), 2/ the predecessor classification of the Psychologists positions involved in the instant proceeding, were supervisory in nature; that during said proceeding Local 252, the MTEA, who had intervened in the matter, as well as the Board agreed that said positions were supervisors within the meaning of that term as defined in the Municipal Employment Relations Act, hereinafter referred to as MERA; that effective January 1, 1964 said positions were placed, in the Board's organizational structure, on the Superintendent's staff, and under the Administrator's pay schedule; that in February, 1964, following an election conducted by the Commission, the MTEA was certified as the exclusive collective bargaining representative of the employees in the teacher bargaining unit; that again in 1967 the Commission conducted a second election among employees in the teacher unit, in which MTEA was certified as the exclusive collective bargaining representative of said employees; and that since October, 1963, and continuing to the date on which MTEA filed its petition in the instant matter, MTEA, ASC, PAMPS, and the Board have continually considered the occupants of the psychologist positions to be supervisors within the meaning of MERA.

6. That in 1971 the membership of PAMPS, by a two-thirds margin, voted to affiliate with ASC, for the purpose of representing psychologists as supervisory employees in voluntary collective bargaining with the Board; that agreements with respect to wages, hours and conditions of employment of supervisory and managerial personnel in the employ of the Board are ratified by ASC under an arrangement whereby each member association approves an agreement, and thereafter the membership of each of said associations vote to approve or reject the agreement; and that since 1971 ASC has negotiated four collective bargaining agreements with the Board, the last one of which became effective from July 1, 1977, and by its terms said agreement continues through June 30, 1980, and said agreement presently covers the wages, hours and working conditions of the psychologists involved herein.

7. That the psychologists involved herein are administratively placed in the Department of Psychological Services, which department is included in the Division of Exceptional Education and Supportive Services; that the Department of Psychological Services consists of 102.5 positions of School Psychologists and Associate School Psychologists, two Trainee Psychologists positions, four to ten Psychometric Assistants, and thirty-two para-professional aides; that the Department of Psychological Services is headed by a Director, with a Coordinator being second in command; the various psychologist positions are assigned to four zones throughout the geographical area of the school system and also work on special programs and services, which are primarily federally funded; and that five Psychology Supervisors primarily supervise the psychologist positions.

8. That School Psychologists are required to have a doctoral degree, one year paid experience, and a level II certification from the Department of Public Instruction; that the Associate School Psychologists are required to possess a masters degree, plus forty-two credits and a level I certification from the Department of Public Instruction; that the Psychologist Trainee fills such position for a period of one year, and such training serves as an experience practicum for the institution of higher learning from which such trainee expects to receive a doctorate degree; that in the past many Psychologist Trainees, subsequent to the completion of their training program, have been permanently employed by the Board; that Psychometric Assistants are part-time positions and require training beyond a bachelor's degree in clinical or school psychology and participation in a practicum in psychodiagnosis and report writing; and that during the course of the hearing herein, MTEA, PAMPS, ASC and

2/ At the time, 20 in number.

the Board agreed that the positions of School Psychologist, Associate School Psychologist, and Psychologist Trainee were professional positions.

9. That the basic duties of the School Psychologists and the Associate School Psychologists, and in which they spend the vast majority of their time, is to

conduct diagnostic evaluation of children with learning difficulties or behavioral problems . . . treat, by utilizing psycho-educational therapy, in individual and group sessions, children who present symptoms of underlying learning and personality difficulties; . . . consult on and design treatment programs appropriate to the educational setting;

that in the performance of such duties the individuals occupying such positions guide the work of the Psychometric Assistants, interpret, in M-team staffings, and where appropriate to the child, parents, teachers and other professionals, the individual diagnostic evaluation with respect to learning difficulties and behavioral problems and recommendations for placing students in special programs; and that they counsel teachers, staff personnel and parents, and conduct inservice courses and workshops to acquaint teachers and other personnel with psychological principles, in order for such individuals to recognize such problems in children.

10. That the Psychological Trainees, under the direction of School Psychologists or Associate School Psychologists, evaluate the mental ability, personality, and educational functioning of children with learning and behavior problems; and that the Psychometric Assistants, pursuant to the direction of the School Psychologists and Associate School Psychologists, administer tests of personality and perpetual motor development, which are reported to the psychologists.

11. That the School Psychologists and Associate School Psychologists spend no more than ten percent of their time in directing the work of the Psychometric Assistants and para-professional aides; that said psychologists prepare departmental evaluation forms with respect to the performances of said employes (however the departmental Director or Coordinator completes such evaluations), and are also responsible for the assignments of such personnel to the psychologists, who have no authority to effectively recommend the hire or termination of any aide or assistant.

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

CONCLUSIONS OF LAW

1. That the positions of School Psychologist, Associate School Psychologist, Psychologist Trainee, and Psychometric Assistant in the employ of the Milwaukee Board of School Directors are municipal employes within the meaning of Sec. 111.70(1)(a) of the Municipal Employment Relations Act, and further said positions are occupied by professional employes within the meaning of Sec. 111.70(1)(1) of the Municipal Employment Relations Act.

2. That the Milwaukee Teachers Education Association, as well as the Psychologists Association of the Milwaukee Public Schools, are labor organizations within the meaning of Sec. 111.70(1)(j) of the Municipal Employment Relations Act.

3. That inasmuch as the membership of the Administrators and Supervisors Council is primarily composed of administrators and super-

visors in the employ of the Milwaukee Board of School Directors, a municipal employer within the meaning of Sec. 111.70(1)(a) of the Municipal Employment Relations Act, said organization is not a labor organization within the meaning of Sec. 111.70(1)(j) of the Municipal Employment Relations Act, and therefore the collective bargaining agreement negotiated by Administrators and Supervisors Council, on behalf of Psychologists Association of the Milwaukee Public Schools, does not constitute a bar as to a present determination of bargaining representative, within the meaning of Sec. 111.70(4)(d) of the Municipal Employment Relations Act, of the psychologists in the employ of the Milwaukee Board of School Directors.

4. That all regular full-time and regular part-time School Psychologists, Associate School Psychologists, Psychologist Trainees and Psychometric Assistants, in the employ of the Milwaukee Board of School Directors, excluding all other employees, administrators, supervisors, and confidential employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 111.70(1)(e) of the Municipal Employment Relations Act, and that a question of representation, within the meaning of Sec. 111.70(4)(d) of the Municipal Employment Relations Act, has arisen among said employees in said appropriate collective bargaining unit.

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

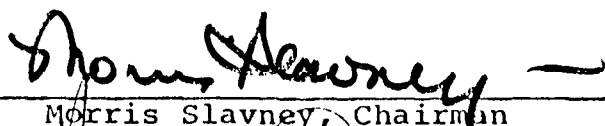
DIRECTION OF ELECTION


IT IS HEREBY DIRECTED that an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within sixty (60) days of the date of this directive in the collective bargaining unit consisting of all regular full-time and regular part-time employees of the Milwaukee Board of School Directors, who are employed in the positions of School Psychologist, Associate School Psychologist, Psychologist Trainee, and Psychometric Assistant, but excluding all other employees, administrators, supervisors, and confidential employees, who were employed by the Milwaukee Board of School Directors as of the date of this directive, except those employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees casting valid ballots desire to be represented by the Psychologists Association of the Milwaukee Public Schools (PAMPS), or by the Milwaukee Teachers Education Association (MTEA), or by no labor organization, for the purposes of collective bargaining on wages, hours and working conditions, with the Milwaukee Board of School Directors.

Given under our hands and seal at the
City of Madison, Wisconsin this 16th
day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

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

MTEA presently is the certified collective bargaining representative of "teachers" in the employ of the Board. In both elections, resulting in certifications reflecting MTEA as such representative, MTEA, as well as the Board, had agreed that professional employees occupying psychologist positions were supervisors within the meaning of the Municipal Employment Relations Act, (MERA), resulting in the exclusion of said positions from the "teacher" bargaining unit represented by MTEA. As a result of being so excluded the occupants of said positions formed PAMPS, which in recent years sought the assistance of representatives of ASC in their collective bargaining as "supervisors," and collective bargaining agreements covering their wages, hours and working conditions have been entered into with the Board. MTEA now seeks to accrete all professional psychologists to its "teacher" unit, while PAMPS, ASC and the Board opposes such accretion. During the course of the hearing issues arose as to whether the occupants of said positions are "employees" or "supervisors" within the meaning of MERA, whether Psychometric Assistants are "professional" employees within the meaning of MERA, whether the professional psychologist positions may constitute a separate appropriate bargaining unit, and whether ASC and PAMPS qualify as "labor organizations" within the meaning of MERA.

Position of MTEA

MTEA would have the Commission accrete the professional psychologist positions to the "teacher" bargaining unit represented by it. It contends that in the elections resulting in its certification it stipulated to the exclusion of such positions from said unit on the claim of the Board that the occupants thereof performed supervisory duties. However it now contends that said occupants are not "supervisors." MTEA also argues that both ASC and PAMPS are employer-dominated, and thus should not be permitted to represent "employees" for the purposes of collective bargaining. In the latter regard MTEA also claims that the existing agreement between the Board and ASC, PAMPS should not bar the Commission from accreting the psychologists to the "teacher" unit. MTEA contends that the psychologists share a community of interest with other professionals in the "teacher" unit, which includes teachers, social workers, counselors and other professionals, who come in daily contact with psychologists in support of the education program of the Board. The MTEA opposes the establishment of a separate unit of psychologists, contending that such a result would be contrary to the anti-fragmentation policy set forth in Sec. 111.70 (4)(d)2.a. of MERA.

Position of PAMPS

PAMPS presents several arguments in the alternative. It first contends that the psychologists are "supervisors," and that the relationship between it, ASC and the Board is a stable one which has existed in the face of MTEA indifference of fourteen years. Should the Commission determine that the psychologists are "employees," PAMPS argues that the existing collective bargaining agreement prevents any accretion of such positions to the "teacher" bargaining unit. Further, it contends that the psychologists do not share a community of interest with those in the "teacher" bargaining unit, since said psychologists are required to have more extensive training and qualifications, they are subject to a rigorous code of ethics, and that the information received from their "clients" enjoy a privilege from communication under Wis. Stats. PAMPS also argues that should it be determined that the psychologists should accrete to

the "teacher" bargaining unit, such accretion should occur only after the conduct of an election among said incumbents to determine whether they desire to so accrete. Finally, PAMPS contends that the "teacher" unit contains a non-professional position, namely the Recreation Specialist IV, and, therefore, pursuant to Sec. 111.70(4)(d)2.a. of MERA, the psychologists cannot be accreted to a unit which contains non-professional positions without an election.

Position of ASC

The ASC argues that the psychologists are "supervisors," inasmuch as they may take disciplinary action against aides, and that they also assign the day-to-day work of such aides. However, if the Commission should find their status to be "employees," ASC further contends that the psychologists should not be accreted to the "teacher" unit. It argues that the MTEA petition has been untimely filed, since the collective bargaining agreement covering the psychologists will not expire until June 30, 1980. ASC also is opposed to accretion on the claim that such an action will submerge the rights of the psychologists, who do not share a community of interest with instructional personnel. Finally should the Commission direct a representation election, ASC desires to be placed on the ballot.

The Position of the Board

The Board also contends that the psychologists are supervisors, and that the present relationship between the Board, PAMPS and ASC should not be disturbed.

The "Employee" Status of Psychologists

The contention that School Psychologists and Associate School Psychologists are "supervisors" within the meaning of Sec. 111.70(1)(o) of MERA must fall. While their participation in the evaluation of the Psychometric Assistants and the para-professional aides, as well as their activity in the assignments to the latter group of positions is indicative of some of the criteria required to be considered in making such a determination, the performance of such duties are minimal in nature and effect. The incumbents of the positions of School Psychologist and Associate School Psychologist spend the vast majority of their time in the performance of their professional duties in support of the educational program. It is clear from the record that the focus of supervisory authority lies with the Psychologist Supervisors, the Coordinator, and the Director of the Department of Psychological Services. Furthermore there are approximately 102 alleged "supervisory" positions, while there are only 32 aides and at most 10 Psychometric Assistants alleged to be supervised. If we were to find said positions to be "supervisors," there would exist a ratio in excess of 2 supervisors for every 1 employee supervised. We, therefore conclude that the School Psychologists and the Associate School Psychologists are "employees" within the meaning of Sec. 111.70(1)(b) of MERA.

The "Professional" Status

It is conceded that School Psychologists, Associate School Psychologists, and Psychologist Trainees are "professional" employees within the meaning of Sec. 111.70(1)(l) of MERA. A review of the qualifications and duties of the Psychometric Assistants convinces the Commission that the incumbents of the latter positions are also "professional" employees within the meaning of MERA.

The Status of ASC and PAMPS as "Labor Organizations"

Sec. 111.70(1)(j) of MERA defines the term "labor organization" as "any employee organization in which employees participate and which

exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employees . . ." Sec. 111.70(1)(b) of MERA excludes "supervisor" from the definition of the term "employee." Since it is clear that the membership of ASC overwhelmingly consists of administrators and supervisors, it cannot qualify as a labor organization for the purposes of representing employees in collective bargaining. PAMPS, at least, as of now, does not admit to membership administrative or supervisory personnel. It claims to represent the employees occupying the positions in issue herein. It, without ASC, now qualifies as a labor organization, even though its contention that said employees are supervisors is in direct contrast to the provisions in its present constitution.

The Contract Bar Issue

Since ASC played a prominent role in the negotiations leading to the collective bargaining agreement covering the psychologists, and since ASC is an organization consisting of administrators and supervisors in the employ of the Board, the Commission concludes that said agreement does not constitute a bar to a present determination of bargaining representatives of said employees. Significantly MTEA played a part in the existing representation since it did not contest the Board's position in the earlier "teacher" elections, to the effect that psychologists were supervisors.

The Appropriate Bargaining Unit

The remaining and underlying issue involving both the MTEA and the PAMPS petitions involves a determination as to the appropriate collective bargaining unit in which the positions in issue herein shall be placed. MTEA asserts that since said employees perform duties supportive of the educational function and mission of the Board, they should be accreted to the "teacher" unit. On the other hand, PAMPS would have the Commission establish a separate unit of psychologists. In Joint City School District No. 1, City of Superior (13238-A) 6/76, in its consideration of the accretion of a School Psychologist to a "teacher" bargaining unit, the Commission established its policy with regard to the application of both the community of interest and anti-fragmentation factors to accretion questions involving professional employees in a K through twelve school district. With regard to the community of interest factor, the Commission stated that:

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

With regard to the legislative anti-fragmentation policy, the Commission stated that:

In order to carry out the principle of anti-fragmentation we have herein determined that all occupants of professional positions in a K through 12 setting, who work with students and teachers, whether certified or not certified, by the Department of Public Instruction shall, absent special circumstances, be included in a unit consisting primarily of teachers. (emphasis added)

The very reason it is inappropriate to accrete the psychologists to the MTEA "teacher" unit, are the special circumstances present here

which justify the establishment of a separate bargaining unit of psychologists. While it is true that psychologists share a community of interest with teachers and other personnel who are supportive of the educational function, such as guidance counselors and school social workers, the accretion of the psychologists is inappropriate here. The history of bargaining since 1971, together with the existence of a separate psychologist organization, PAMPS, during the past 14 years, are the special circumstances which justify the establishment of a separate bargaining unit of psychologists. There are approximately 108 incumbents of the positions of School Psychologist, Associate School Psychologist, Psychologist Trainee and Psychometric Assistant. There are a sufficient number of psychologists in the employ of the Board to assure that a separate unit of psychologists will be able to engage in meaningful collective bargaining. The Board has not objected to the establishment of a separate psychologist unit on the grounds that it will be burdensome or hinder collective bargaining with other of its employees. The parties have assured the Commission that there are no other groups of professional employees of the Board who are not already in a collective bargaining unit, and hence, there is no danger of the fragmentation or the proliferation of units as a result of this decision. For the reasons stated above, the Commission has directed an election in a separate unit of psychologists.

The Pending Prohibited Practice Case

Although prior to the close of the hearing herein, the MTEA filed a complaint with the Commission wherein it alleged that the Board, as well as ASC and PAMPS, committed prohibited acts in interference, as well as domination, as a result of the representation of ASC of the psychologists for the purpose of collective bargaining, at the request of the parties we have determined the issues herein and have issued the instant direction.

Dated at Madison, Wisconsin this 16th day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
Gary L. Covelli, Commissioner