STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and its affiliated LOCAL 80 Involving Certain Employes of WEST ALLIS - WEST MILWAUKEE SCHOOL DISTRICT	Case 26 No. 40744 ME(u/c)-272 Decision No. 16405-C

Appearances:

Podell, Ugent and Cross, S.C., Attorneys at Law, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202, by Ms. Nola J. Hitchcock Cross, appearing on behalf of the Union.

Foley and Lardner, Attorneys at Law, Suite 3800, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, by Mr. Herbert P. Wiedemann, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DISMISSING UNIT CLARIFICATION PETITION

District Council 48, AFSCME, AFL-CIO and its affiliated Local 80 having on June 14, 1988 filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of certain employes of the West Allis - West Milwaukee School District; and hearing in the matter having been conducted on August 11, 1988 at West Allis, Wisconsin before Examiner Robert McCormick, a member of the Commission's staff; and a transcript of the proceedings having been received on August 29, 1988; and the parties having filed briefs by October 3, 1988; the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. That District Council 48, AFSCME, AFL-CIO and its affiliated Local 80, hereinafter referred to as the Union, is a labor organization, and has its offices at 3427 West Saint Paul Avenue, Milwaukee, Wisconsin 53208.

2. That West Allis - West Milwaukee School District, hereinafter referred to as the District, is a municipal employer, and has its offices at 9333 West Lincoln Avenue, West Allis, Wisconsin 53227.

3. That at all times material to this proceeding, the Union has been the certified 1/ exclusive bargaining representative of certain employes of the District, including:

> all regular full-time employes in the Recreation Department, excluding Recreation Supervisor, Recreation Programmer, Records Clerk and all supervisors, managerial employes, professional employes and part-time and seasonal employes.

1/ The Commission certified the Union as the collective bargaining representative in November, 1986 (Dec. No. 16405-B). The parties agreed to the unit description at hearing on May 12, 1986.

4. That in the petition filed in this matter the Union requested that the Commission clarify the above-described bargaining unit by including in it all full-time positions presently excluded except for the Department Director; that at the hearing the Union amended its petition to indicate that the positions sought to be included were entitled Summer Recreation Department Supervisor; and that the District maintains that the Summer Recreation Department Supervisors are properly excluded from the unit as supervisory employes within the meaning of the Municipal Employment Relations Act and in addition are properly excluded because the positions are not regular full-time and were in existence when the parties stipulated to the scope of the existing unit.

5. That the recreation department provides leisure services such as athletic activities to the residents of the District; that the unit described above includes ten recreational instructors and three support employes, and excludes between 150 and 300 other employes such as referees and officials who work on either a part-time or seasonal basis; that the recreational instructors implement and supervise a year-round recreation program of athletics, arts and crafts, social activities and fine arts for students and adults; that the instructors work at the district's school's playgrounds and field houses; that instructors report to the Recreation Supervisor and Recreation Programmer, who in turn report to the Recreation Director; that in recent years, 1986-88, four employes have performed as Summer Recreation Department Supervisors; that Gary Polczynski, who is Recreation Supervisor for the entire year, assumes the added duties of Summer Recreation Department Supervisor for ten weeks during the summer and is paid a sum of $400 in addition to his regular rate of pay and benefits; that Geri Franz 2/ who is a Recreation Programmer for the entire year, assumes the added duties of Summer Recreation Department Supervisor for ten weeks during the summer and is paid a sum of $400 in addition to her regular rate of pay and benefits; that Mark Klobukowski is a Recreation Instructor except for ten weeks in the summer when he occupies the position of Summer Recreation Department Supervisor; that Klobukowski is paid his regular pay rate and benefits plus a lump sum of $400; that Kurt Wachholz is a certified teacher in the District during the school year and occupies the Summer Recreation Department Supervisor position for ten weeks during the summer and is paid $8.00 per hour for such work; that classifications of Recreation Supervisor and Recreation Programmer are specifically excluded from the bargaining unit stipulated to by the parties; and that the position of Summer Recreation Department Supervisor is a seasonal position which was in existence at the time the Union and the District agreed to the scope of the unit prior to the 1986 Commission election.

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

CONCLUSION OF LAW

That the express and specific exclusion of seasonal employes and of the positions of Recreation Supervisor and Recreation Programmer from the bargaining unit agreed upon between the Union and District and set forth in Finding of Fact 3 above, precludes the Union from obtaining, over the District's objection, representation rights as regards the Summer Recreation Department Supervisor positions by means of a unit clarification proceeding.

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

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2/ In 1988 Franz was on maternity leave and her position was filled by Dawn Matuszk, a Recreation Instructor.

ORDER 3/

That the unit clarification petition is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
S. H. Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner

3/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the

(Footnote 3/ is continued on page 4.)

(Footnote 3/ continued from page 3.)

county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER DISMISSING UNIT CLARIFICATION PETITION

In the amended petition, the Union seeks to include as similar employes to those already represented the Summer Recreation Department Supervisor positions, arguing that they share a community of interest with Recreation Instructors and do similar work. The District contends that these are supervisory employes within the statute's meaning, and that in addition this position is excluded by the terms of the parties' agreement on the scope of the bargaining unit prior to the 1986 election. Because we agree with the District on the latter contention, we do not find it necessary to determine whether or not these employes are statutory supervisors. Most of the essential facts are stated in the Findings and need not be repeated here.

THE PARTIES' POSITIONS:

The Union contends that the positions are not supervisory, a contention we do not address for reasons already noted. With respect to the 1986 status of these positions, the Union argues that the voting eligibility list and pre-hearing list of employes filed by the District did not identify them, and that the position did not in fact then exist. Consistent with this position, the Union contends that there was no "meeting of the minds" or even discussion of this position's exclusion. The Union argues also that this position involves similar work to the Recreational Instructors', and that excluding it could result in an employe who opted to earn the extra Summer Supervisor lump sum payment being without contractual benefits or protection during that period.

The District contends that the positions are supervisory, but in addition that the record shows they existed in 1986 and were impliedly excluded from the unit as seasonal. The District argues that the unit is limited expressly and by agreement to "regular, full-time employees", that the Summer Supervisors are not "regular"; and that the Union is trying to expand the unit to include certain previously excluded part-time and seasonal jobs. The District contends that the voting eligibility list which did not include these positions was an item agreed upon by the Union, and that there is no evidence that the District concealed the Summer Supervisor positions from the Union.

DISCUSSION:

Initially, we note that the positions of Recreation Supervisor and Recreation Programmer are explicitly excluded from the unit and that two of the positions in dispute have historically been held as "add on" employment by the incumbents in these two excluded positions. Given these explicit exclusions, two Summer Recreation Department Supervisor positions continue to be appropriately excluded from the unit in question on that basis alone.

Furthermore, as established by the uncontradicted testimony of the Director of Recreational Services, the Supervisor positions have existed for at least ten years and the record generally establishes that the positions have always been seasonal, not "regular full-time". Thus, when the parties agreed upon the scope of the "regular full-time" unit in 1986, and excluded seasonal positions, by necessary implication the positions at issue were excluded.

In Milwaukee Board of School Directors, Dec. No. 13134-A (WERC, 1/76) we held that where the parties had voluntarily agreed upon the scope of an appropriate unit which excluded certain existing positions, a party to that agreement cannot successfully seek to include said positions through a unit clarification proceeding absent a material change in circumstances. We therein commented:

> ". . . the Commission notes that the parties voluntarily agreed in a prior Commission case that employes who worked more than 26 weeks a year and for more than 10 hours a week were eligible to vote, while employes who did not meet that criteria were excluded from voting. Based upon that stipulation, to which the Board agreed, the Commission

thereafter conducted a representation election among the approximately 78 employes who met the foregoing criteria. The then approximately 1800 employes who did not meet that criteria were ineligible to vote, pursuant to the stipulation of the parties. The Commission subsequently certified the results of the election which showed that a majority of eligible employes had selected Council 48 to represent them for collective bargaining purposes.

In such circumstances, where the parties have voluntarily agreed to the present composition of the unit, and where that agreement was not repugnant to the policies of the Municipal Employment Relations Act, and where Council 48 then knew that the presently petitioned-for employes would be excluded from that unit, and in the absence of any intervening events which materially affect the status of those employes, the Commission finds that it would be inappropriate to negate the prior agreement of the parties by accreting the petitioned-for employes to the established bargaining unit. Accordingly, the Commission holds that they cannot now be placed within the voluntarily agreed to collective bargaining unit."

Applying Milwaukee to this case, it is clear that the positions in question should continue to be excluded. The classification plainly falls within the general exclusion of seasonal positions and is thus at least implicitly excluded from the agreed-upon collective bargaining unit. No change in the circumstances or functions of the position has been demonstrated which would change the fundamental basis for the parties' agreement to exclude that position. The existing unit is not repugnant to MERA. Given the foregoing, we must reject the Union's effort to seek inclusion of these positions and have dismissed the petition.

Dated at Madison, Wisconsin this 12th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner