

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
LAKELAND EDUCATION ASSOCIATION, WEAC	:	
COUNCIL 26	:	Case II
	:	No. 23712 ME-1599
Involving Certain Employees of	:	Decision No. 17129
	:	
WALWORTH COUNTY HANDICAPPED CHILDREN'S	:	
EDUCATION BOARD	:	
	:	

Appearances:

Mr. David Nance, Attorney at Law, appearing on behalf of the Association.
Mr. Roger E. Walsh, Attorney at Law, appearing on behalf of the Municipal Employer.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

Lakeland Education Association, WEAC Council 26, having on November 3, 1978, filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission clarify a voluntarily recognized collective bargaining unit consisting of certain employees of Walworth County Handicapped Children's Education Board; and a hearing having been held at Elkhorn, Wisconsin on December 20, 1978 before Timothy E. Hawks, a member of the Commission's staff; and the parties having filed briefs and reply briefs by February 9, 1979; and the Commission, having considered the evidence and arguments of the parties, issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Lakeland Education Association, WEAC Council 26, hereinafter referred to as the Association, is a labor organization with its offices at Southern Lakes United Educators, 202 East Chestnut Street, Burlington, Wisconsin 53105.
2. That the Walworth County Handicapped Children's Education Board, hereinafter referred to as the Board, has its offices at Lakeland School of Walworth County, Box 88, Elkhorn, Wisconsin 53121.
3. That at least since August, 1975 the Board has voluntarily recognized the Association as the exclusive collective bargaining representative of certain of its employees in a bargaining unit consisting of:

All certified teaching personnel, including classroom teachers, librarians, special teachers, and teachers on leave, excluding administrators, work experience counselor, education programmer, nurse, social worker and psychologist.
4. That in its petition initiating the instant proceeding, the Association requested the Wisconsin Employment Relations Commission to clarify the existing collective bargaining unit to include individuals in the employ of the Board occupying the positions of work experience counsellor, education programmer, social worker and psychologist, program supervisor, occupational therapist, and physical therapist; and that, however, during the course of the hearing herein, the Association modified its position and now seeks to include only the physical therapist in said unit.

5. That no physical therapist was employed by the Board in August, 1975 at the time the Board voluntarily recognized the Association as the exclusive collective bargaining representative of the employees in the unit described above, which at the time of the hearing herein, had a compliment of 59 employes.

6. That the individuals occupying the professional positions of work experience counsellor, education programmer, social worker and psychologist, physical therapist, and nurse, work with students and teachers in an educational setting; that the education programmer evaluates teachers; and that the Board does not presently employ an occupational therapist.

7. That the Board opposes the accretion of the physical therapist to the existing unit without the occupant thereof having the opportunity to vote on such accretion; and that the Board further contends that all otherwise eligible profesisonal employes, presently not included in the recognized unit, including the physical therapist, should be given the opportunity to determine for themselves whether they desire to accrete to the existing unit, or whether they desire to establish themselves as a separate unit provided the Association files a petition requesting an election among said professional employes.

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

CONCLUSION OF LAW

That the accretion of only the position of physical therapist to the voluntarily recognized existing collective bargaining unit would not effectuate the "anti-fragmentation" policy expressed in Sec. 111.70 (4)(d)2.a of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the petition filed herein be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of July, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

Positions of the Parties

The Association asserts that the employe occupying the position of physical therapist can properly be accreted to the existing voluntarily recognized collective bargaining unit, contending that the physical therapist shares a community of interest with the employes in said unit.

The Board, on the other hand, argues that the Commission should decline consideration of the instant case. According to the Board, an election among employes in the overall unit, or among those residual professionals is appropriate where, as here, there exists a situation:

- a) Where a position sought to be included in a unit is neither specifically included or excluded, and;
- b) Where such position cannot be construed to be impliedly contained within the description of included positions, and;
- c) Where such position should be includable in the unit consisting primarily of teachers only as a "related" professional, i.e., one who works with students and teachers whether certified or not certified, by the Department of Public Instruction.

In the alternative, the Board argues that, should the Commission determine this matter without conducting an election, the physical therapist does not share a community of interest with those employes currently within the voluntarily recognized unit.

Discussion

The unit of employes currently represented by the Association is not certified pursuant to the representation election procedures administered by this Commission. Instead, the Board and Association agreed in Article II of the 1975-1978 collective bargaining agreement that the Association would represent those employes included in the unit described above. After the contract was executed, the Employer added the position of physical therapist to the education staff. The Association and Board could not agree as to whether the new position should be added to the unit.

The facts dispositive of the issue are succinctly set forth in the Findings of Fact.

We have held, and often repeated, that where there exists a voluntarily recognized unit and where certain classifications of employes have been excluded from the unit, and a party involved in a recognition agreement opposes a proposed expansion, the Commission will not expand said unit without an election in the unit deemed appropriate. 1/ Subsequent to the above holding, we have broadened its sweep to bar non-concensual determination of bargaining unit issues where the parties have implicitly excluded certain positions. 2/ Moreover, the Commission will defer a

1/ City of Cudahy (12997) 9/74; Amery Joint School District No. 5 (15793-A, 15794-A) 4/78; Cumberland Community Schools Joint District No. 2 (15214) 1/77.

2/ Mt. Horeb Joint School District No. 6 (14694) 6/76.

grievance arbitration of a dispute regarding the interpretation of a contractual recognition clause. 3/ In City of Rice Lake (Fire Department) (16413) 6/78, we noted that the policy advanced by Cudahy flows in part from the presumption of a majority of support among the employes encompassed within the voluntarily recognized unit. Subsequent efforts to include those once voluntarily excluded may place in question the continuing majority support for the collective representative, thus dictating an election. 4/

But here, unlike the factual situation in Cudahy and its progeny, a position was created after the granting of voluntary recognition. In Tomahawk the Commission stated:

The Commission is mandated by Section 111.70(4)(b)(2)a of the Municipal Employment Relations Act to avoid fragmentation of municipal bargaining units. In furtherance of the statutory policy, the Commission has held that professionals, whether certified or not by the Department of Public Instruction, who work primarily with students and teachers in support of the educational program shall be included in a bargaining unit consisting primarily of teachers absent special circumstances. 5/

The position of the Employer herein is different than the position of the employer in Tomahawk. In the latter case the bargaining representative sought to accrete the new position of school psychologist to a voluntarily recognized unit consisting of "all certified teaching personnel including classroom teachers, special teachers, guidance counsellors, librarians, part-time teachers, and teaching principals who teach more than 50% of their time, but excluding administrators, elementary coordinator, principals teaching less than 50% of their time, nurses, clerical and substitute teachers and maintenacne personnel." The employer in that proceeding opposed such accretion only on the claim that the school psychologist was a supervisory and confidential employe, and further that said psychologist lacked a community of interest with employes in the unit. That employer did not contend that other professionals working with teachers and students were in issue. In the instant matter the Board raises such an issue.

To accrete the psysical therapist to the existing unit would permit the Association to enlarge the voluntarily recognized unit in a piecemeal fashion without providing the employes involved with an opportunity to participate in the designation of their bargaining representative. Further, the physical therapist has no greater community of interest with the employes in the unit than the occupant thereof has with the professional employes not in the unit.

We are therefore dismissing the petition filed herein.

Dated at Madison, Wisconsin this 12th day of July, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Gary L. Lovell
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