

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
SOUTH WEST TEACHERS UNITED	:	Case II
Involving Certain Employes of	:	No. 22813 ME-1527
COOPERATIVE EDUCATIONAL SERVICE	:	Decision No. 17235
AGENCY #14	:	

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Appearances:

Ms. Priscilla Ruth MacDougall, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Petitioner.  
Mr. David Nance appeared on the brief.  
Kramer, Nelson & Kussmaul, Attorneys at Law, by Mr. Nick Kramer, appearing on behalf of CESA #14. Mr. Dean R. Dietrich appeared with Mr. Kramer on the brief.

INTERIM FINDINGS OF FACT AND CONCLUSIONS OF LAW

South West Teachers United having on March 22, 1978 filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election among certain professional employes of Cooperative Educational Service Agency #14; and a hearing having been held on the matter; and three basic issues having been raised, the first one being whether CESA #14 is the employer of certain individuals, the second one being whether certain other individuals who are employes of CESA #14 are supervisory, managerial and/or confidential employes, and the third one being the description of the appropriate bargaining unit; and the record having been completed on the first issue upon receipt of briefs by April 20, 1979; and the record remaining open on the second and third issues 1/; and the Commission, having considered the evidence and arguments of the parties in regard to the first issue and being satisfied that that issue should be decided prior to completion of the entire record, makes and issues the following Interim Findings of Fact and Conclusions of Law.

INTERIM FINDINGS OF FACT

1. That South West Teachers United, hereafter Petitioner, is a labor organization with its offices at 1136 Lincoln Avenue, Fennimore, Wisconsin 53809.

2. That Cooperative Educational Service Agency #14, hereafter CESA #14, is a Municipal Employer with its offices at 1020 Lincoln Avenue, Fennimore, Wisconsin 53809 and that it is authorized by ch. 116, Stats., to, among other things, provide services and personnel pertaining to special education programs for the following 31 local school districts located in southwestern Wisconsin:

1/ The record on the second and third issues remains incomplete due to the expanding nature of the unit and Petitioner's request that the first issue be decided prior to the others.

Argyle  
Barneveld  
Belmont  
Benton  
Black Hawk  
Bloomington  
Boscobel  
Cassville  
Cuba City  
Darlington  
Dodgeville  
Fennimore  
Hazel Green  
Highland  
Iowa Grant

Ithaca  
Kickapoo  
Lancaster  
Mineral Point  
North Crawford  
Pecatonica  
Platteville  
Potosi  
Prairie du Chien  
Richland Center  
Riverdale  
Seneca  
Schullsburg  
Wauzeka  
West Grant  
Weston

3. That Petitioner contends that the appropriate bargaining unit consists of all full-time and part-time professional and/or certificated employes of CESA #14, including teachers, nurses, librarians, physical therapists, social workers, child find specialists, substitutes and aides, whether under contract, on leave or paid on an hourly class rate, but excluding supervisory, managerial and confidential employes 2/; that CESA #14 contends that the appropriate bargaining unit consists of all regular professional, certificated employes under contract to CESA #14, including psychologist, who work ten months or less a year, excluding substitutes, aides, nurses, physical therapists, occupational therapists, social workers and supervisory, managerial and confidential employes.

4. That CESA #14 contends that there are approximately 74 professional individuals who are under contract to local school districts served by CESA #14; that CESA #14 serves only as a fiscal agent, not as an employer, for those individuals; and that, therefore, these individuals are not appropriately included in the above bargaining unit; that Petitioner contends that said individuals are employes of CESA #14 and should be included in the above bargaining unit.

5. That CESA #14 admits that it employs approximately 48 employes 3/; that approximately 21 of these are professional, certificated educators, some of whom are claimed by CESA #14 to be managerial, supervisory and/or confidential employes; that disputes exist about whether the Child Find Specialist is a professional employe and certificated educator, about whether the Fiscal Manager is a certificated educator, in addition to which there is a dispute about whether the Fiscal Manager is a managerial or confidential employe; that CESA #14 admits that the teaching staff, which number approximately nine (these nine were included in the 21 professional educators mentioned above), is appropriately included in a collective bargaining unit; that the parties have stipulated that another seven of the 21 professional educators are to be excluded from the collective bargaining unit on the basis of supervisory, managerial and/or confidential status.

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2/ Title I teachers are not included in the petition.

3/ This number has increased by an unknown number since the date of the last hearing.

6. That the disputed employes mentioned in Finding of Fact 4 work as psychologists, speech clinicians, educable mentally retarded teachers, learning disabilities teachers and librarians, among others, and are connected with CESA #14 either by virtue of what CESA #14 calls "package plans" or "66.30 contracts". 4/

7. That with "package plans", CESA #14 enters into a written contract with one local school district to purchase an entire educational program involving a particular teacher and then CESA #14 enters into separate written contracts with other school districts to sell the program to these districts, who pay a prorated share of the program costs depending on the number of students they send to the programs; that "package plan" teachers typically work in one school building teaching children, most of whom are from the "host school" but some of whom are from several different local school districts within the area served by CESA #14; that CESA #14 serves as a fiscal agent vis-a-vis local school districts involved in "package plans"; that, as such, CESA #14 processes all paperwork involved in meeting state and federal requirements necessary to obtain aids and grants; that teachers hired pursuant to "package plans" are issued individual teaching contracts by the "host school"; that applicants for said positions are interviewed by local school administrators and/or other local school district employes who, on occasion, may ask CESA #14 employes to participate in the interviewing process and/or evaluate an applicant's credentials; that the decision as to who to hire is made by a local school district; that the "host school" issues the paycheck for the "package plan" employe and makes the appropriate payroll deductions, including social security; that the level of salary and fringe benefits paid to "package plan" employes and their hours and other conditions of employment are determined by the "host school"; that "package plan" employes receive life insurance through CESA #14, although the amount of premium the employe is required to pay varies according to which districts the employe is working in.

8. That "66.30" teachers work in two or more local school districts within the area served by CESA #14 and that they travel among the several school districts; that for the school years prior to the 1977-1978 school year, CESA #14 issued and signed individual teaching contracts to each "66.30" teacher; that for the 1977-1978 school years and thereafter, the local school districts utilizing the same "66.30" personnel jointly issue said contracts which are signed by all the local school district administrators utilizing that teacher; that for the 1977-1978 school year, said contracts were issued on a CESA #14 letterhead and read, in part, that "pursuant to a resolution adopted by the Board of Control of CESA No. 14, a legally created unit in the State Cooperative Educational Service Agency plan, said Board of Control hereby provides a contract on behalf of [named] school district(s), employer, party of the first part with: [named teacher], party of the second part, hereinafter call [sic] 'employee'...;" that the individual teaching contract for the 1978-1979 school year was not issued on CESA #14 letterhead and did not contain the above quoted material but instead reads, in pertinent part, that: "the undersigned school district(s) hereby offers to employ [named employe]...;" that the individual teaching contract states each district's share of the salary and fringe benefits set forth in the individual contract on the

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4/ Section 66.30, Stats., enables municipalities to contract with each other for goods or services.

basis of a percentage; that each local school district utilizing "66.30" personnel passes a resolution authorizing CESA #14 to act as fiscal agent for such personnel "and to sign and submit on behalf of the School District all state retirement fund reports, unemployment compensation reports, tax reports and other similarly required records and reports as relates to the above named shared personnel"; that no written contract or memorialization of the arrangement exists between the local school districts utilizing the same teacher; that applicants for said positions are interviewed by the local school administrators sharing the personnel and/or other local school district employes who, on occasion, may ask CESA #14 employes to participate in the interviewing process and/or evaluate an applicant's credentials; that the decision as to who to hire is made by the local school districts sharing said personnel; that although the Board of Control of CESA #14 recommends specific wage increases for "66.30" personnel, the local school districts utilizing "66.30" personnel determine the wages, hours and conditions of employment for these individuals; that CESA #14 issues the paychecks for "66.30" personnel and makes the appropriate payroll deductions, including social security, using, where applicable, the local school district's identifying number; that "66.30" personnel receive health and life insurance through CESA #14, although the amount of premium the employe is required to pay varies according to which school districts the employe is working in; that CESA #14 bills each school district for the amount of money sufficient to cover the costs of employing the particular teacher involved with that school.

Based upon the above Interim Findings of Fact, the Commission makes and issues the following

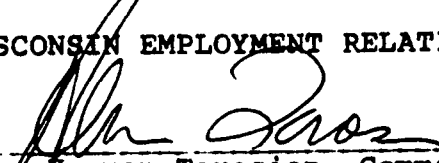
INTERIM CONCLUSIONS OF LAW

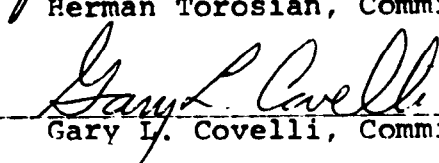
1. That the disputed personnel described in Findings of Fact 4, 6, 7 and 8 are employes of the local school district for which they perform services and thus are not employes of CESA #14.
2. That because the disputed personnel are not employes of CESA #14, they are not appropriately included in a professional unit of CESA #14 employes.

Given under our hands and seal at the  
City of Madison, Wisconsin this 24<sup>th</sup>  
day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING INTERIM  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

POSITION OF THE PETITIONER:

Petitioner contends that the disputed personnel are employes of CESA #14 and therefore should be included in the professional bargaining unit.

To determine whether individuals are employes of a specific employer, certain "indicia of control" exercised by that employer over the individuals in question are looked for. These "indicia of control" include the power to hire and fire and to set wages and working conditions. These indicia are not exclusive, however, and individuals have been deemed to be employes of a specific employer without those "indicia of control". Thus, in CESA #6 (9989) 11/70, the Commission held that CESA #6 was the employer despite the fact that the employes at issue were not supervised on a day-to-day basis by CESA #6, but by the local school districts. Similarly, in CESA #4 (13100-E) 12/77, the Examiner held that CESA #4 was the employer even though the local school district, not CESA #4, determined the employe's assignments, set the number of pupil contact days and hours and evaluated the employe's performance. Another case is NLRB v. Atkins and Co., 331 U.S. 398, 67 S.Ct. 1265, 20 LRRM 2108 (1947), which involved the question of whether plant guards who had been "militarized" by the War Department were employes of the plant they guarded. Military authorities could veto all hiring and firing decisions concerning the guards and had the power to discipline and direct the activities of the guards. Despite the absence of these indicia of control, the guards were determined to be employes of the plant. The Supreme Court held:

In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. [emphasis supplied]

Thus, it is clear that the presence or absence of any one "indicia of control" is not determinative of employer status. 5/ The real question is whether collective bargaining between a group of employes and an employer could have some effect on the relationship between the two. If it could, then that relationship is of the type that collective bargaining laws were enacted for and the relationship may be treated as one of "employment" for that purpose.

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5/ See also Civil Service Commission v. Board 73 LRRM 2822 (Mich. Ct. of Appeals, 1973); Sweet v. Labor Board 87 LRRM 2248 (Pa. S. Ct., 1974); All-Work, Inc., 193 NLRB 918, 78 LRRM 1401 (1971).

The Petitioner argues that CESA #14 exercises significant and primary control over the disputed personnel, whether "66.30" or "package plan" employes. The apparent independence of the local school districts over these employes is illusory, particularly in light of the district's need to rely on CESA #14's expertise in the special education field. CESA #14 controls the selection, supervision and compensation of CESA-connected employes in local school districts. The fact that the local school districts hold the individual employment contracts with the disputed employes does not require a determination, as indicated by Atkins, that CESA #14 is not the employer. CESA #14 exercises a degree of control of these employes sufficient to allow meaningful collective bargaining. Although CESA #14 personnel couches their input in terms of "recommendations" and "advice" to the local school districts, it is clear that this input is highly effective. A unit of CESA employes such as that requested in the instant petition could engage in collective bargaining due to CESA #14's power to "recommend" the hiring, firing and terms and conditions of employment. Moreover, the creation of the present system of employment contracts was intended by CESA #14 to obscure the actual employment relationship between CESA #14 and the employes.

The appropriateness of including the contested employes into a CESA #14 bargaining unit is clear when one considers the consequences of abandoning these employes to local bargaining units. CESA-connected personnel or part-time personnel are excluded from professional collective bargaining units by terms of collective bargaining agreements in many of the 31 school districts in CESA #14. And in those districts where CESA-connected personnel could be included in the bargaining unit bargaining will be hampered due to the control CESA #14 exercises over these employes. The Commission should not deny the contested employes an opportunity to be represented for purposes of collective bargaining. If this group, unified by their connection to the central provider of special education services, is fragmented into the 31 districts in the area, they will be foreclosed from any effective voice in matters concerning their employment.

#### POSITION OF CESA #14:

CESA #14 contends that the disputed personnel are employed by various local school districts, not by CESA #14, and therefore should not be included in a collective bargaining unit of teachers employed by CESA #14.

The Wisconsin Supreme Court has held that the primary test for the existence of an employer-employee relationship is whether the alleged employer exercises sufficient control over or maintains the right to control the actions of the alleged employee. 6/ The Supreme Court has further held that other factors may be considered such as place of work, time of employment, method of payment and right of summary discharge. 7/ Thus, to argue, as Petitioner does, that CESA

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6/ Snider v. Northern States Power Co., 81 Wis 2d 224, 260 N.W. 2d 260 (1977); Phaneuf v. Industrial Commission, 263 Wis 376, 57 N.W. 2d 406 (1953); Thurn v. LaCrosse Liquor Co., 258 Wis 448, 46 N.W. 2d 212 (1951); See also Deaton Truck Lines, Inc. 53 LRRM 1497 (1963); Albert Lee Cooperative Creamery Association, 41 LRRM 1192 (1957).

7/ Thurn, above.

#14 is the employer of the disputed personnel because CESA #14 aids local school districts in special education areas is to ignore the requirements necessary for finding an employer-employee relationship.

CESA #14 does not exercise sufficient control over or have the right to control the "66.30" or "package plan" personnel and thus is not their employer. The several local school districts, in the case of "66.30 contracts", and the host local school district, in the case of "package plans", interview, hire and supervise the disputed personnel. The districts issue individual teaching contracts to these teachers and set their salaries, fringe benefits and working conditions. CESA #14 merely performs the administrative tasks required for compliance with federal and state regulations in the area of special education, performs certain bookkeeping functions and also coordinates the efforts of local school districts in supplying special education programs.

The WERC cases 8/ which hold that CESAs are municipal employers does not support the contention that CESA #14 is the employer of the disputed personnel. Those cases did not involve the issue presently before the Commission.

Finally, CESA #14 is not a joint employer of the disputed personnel with the local school districts because the record does not support findings that CESA #14 and the local schools share common management, integration of operations or centralized control of labor relations. 9/

#### DISCUSSION:

The issue presented for this interim decision is whether CESA #14 is the municipal employer within the meaning of section 111.70(1)(a) of the Municipal Employment Relations Act (MERA) 10/ of two groups of professional, certificated personnel (called by CESA #14 "package plan" personnel and "66.30" personnel) who provide special education services to local school districts. Although the Commission has repeatedly treated cooperative education service agencies as municipal employers 11/ the precise issue involved in this case has not been ruled on by the Commission. It is important to note that CESA #14 is not claiming that it is not under any circumstances a municipal employer but only that it is not the municipal employer of certain groups of personnel. In fact, CESA #14 has admitted that it employs approximately 48 employees and has stipulated to the inclusion of some of those employees in a professional bargaining unit.

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8/ CESA #4 (13100-E, Examiner decision) 12/77; CESA #4 (14177), 12/75; CESA #4 (12304) 1/74; CESA #14 (12175) 9/73; CESA #6 (9989) 11/70.

9/ Radio and Television Broadcast Technicians Local 1264, IBEW v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 85 S.Ct. 876, 58 LRRM 2545 (1965); CESA #4 (13100-E, Examiner decision) 12/77.

10/ 111.70(1)(a) of MERA states that:

'Municipal employer' means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied.

11/ CESA #2 (15802) 9/77; CESA #6 (15594) 6/77; CESA #4 (12304) 12/73; CESA #14 (12175) 9/73; CESA #16 (10458-A) 8/71; CESA #6 (9989) 11/70.

Of the several election cases involving cooperative educational service agencies, 12/ the Commission has expressly discussed the circumstances under which such an agency is a municipal employer in CESA #4 (9989) 11/70 and CESA #14 (12175)9/73. 13/ In both cases the decisive factors in determining that each agency was a municipal employer were that the specialists were "employed under a contract with the agency" and that "the hiring, firing and establishing of wages and working conditions of said specialists falls within the authority of CESA." A related case is Walworth Elementary Joint School District No. 1 (13600) 5/75 where the pertinent issue was whether five professional personnel were employes of that local school district or of an association, formed pursuant to Section 66.30, Stats., of five elementary school districts and one union high school district. The five performed their duties for varying amounts of time for each of the six member districts. The association issued the individual employment contracts to these professional personnel who were paid according to a separate salary schedule which had been established by the association. The Commission held that the five professionals were employed by the association.

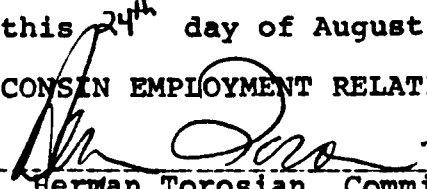
The Commission's findings of facts in regard to both "package plan" and "66.30" personnel are set forth above in paragraphs 7 and 8. Although it is true that CESA #14 and the local school districts often work closely in finding qualified special education personnel and in evaluating the success of a particular special education program, it is also and more importantly true that the local school districts make the decision as to who to employ in their special education programs, set the wages, hours and conditions of employment for these personnel and issue the individual employment contracts. On the basis of these factors, the Commission concludes that the disputed personnel are employed by the local school districts. This decision will not prevent the disputed employes from being effectively represented for collective bargaining purposes as members of local school district collective bargaining units because it is the local school districts that controls these employes' hiring, firing and settling of wages, hours and conditions of employment.

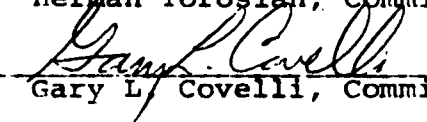
The Association argues that since some of the disputed positions are currently excluded from representation in the school districts where they are employed the Commission should include them here. Although some of the disputed employes may be currently excluded from coverage of a collective bargaining agreement in the local school district for which he/she is employed, that fact has no bearing on whether they are employed by CESA #14. Furthermore this interim decision should not be interpreted as expressing any opinion as to the appropriateness of said recognition clauses contained in any local school district collective bargaining agreements and there is nothing to preclude the Petitioner from seeking to represent said employes.

Dated at Madison, Wisconsin this 24<sup>th</sup> day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

12/ See footnote 11, above.

13/ The other cases involved stipulated elections.