STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	
EDGERTON SCHOOL DISTRICT	Case 18 No. 42763 ME-357
Involving Certain Employes of	Decision No. 18856-A
EDGERTON EDUCATION SUPPORT STAFF	

Appearances:

Ms. Mallory Keener, Executive Director, Capital Area UniServ-South, 4800 Ivywood Trail, McFarland, Wisconsin 53558, with Mr. Bruce Meredith on the brief, on behalf of the Association.

Mr. James Ruhly, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53701-1664, on behalf of the District.

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

On August 17, 1989, the School District of Edgerton, hereafter the District, filed with the Wisconsin Employment Relations Commission a petition to clarify a bargaining unit represented by the Edgerton Education Support Staff, hereafter the Association. By its petition, the District seeks the exclusion from the bargaining unit of a position identified as Secretary to the Exceptional Educational Needs Director. Hearing on this matter was held in Edgerton, Wisconsin, on October 5, 1989, before Examiner Stuart Levitan, a member of the Commission's staff. A stenographic transcript was prepared by October 31, 1989. Briefs were received by December 18, 1989; reply briefs were received by January 9, 1990. Thereafter, the parties requested that the matter be held in abeyance while they sought a voluntary settlement. By letter received February 7, 1990, the District notified the Commission that such settlement efforts had failed and that the matter was ripe for decision. The Commission, having considered the record, hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The School District of Edgerton, hereafter the District, is a municipal employer with its principal offices at 200 Elm High Drive, Edgerton, Wisconsin.

2. The Edgerton Education Support Staff, hereafter the Association, is a labor organization with its principal offices at 4800 Ivywood Trail, McFarland, Wisconsin.

3. On or about June 16, 1981, the Association petitioned the Wisconsin Employment Relations Commission to conduct a representation election in the following claimed appropriate bargaining unit:

> All clerical - instructional aides (including noon hour supervisors) employed by the Edgerton Community Schools, excluding supervisory, managerial and confidential employees.

4. On July 15, 1981, during the pendency of the petition for election cited in Finding of Fact 3, the parties executed a stipulation which provided, inter alia, for voluntary recognition of the Association, and a bargaining unit described as:

> All full-time and regular part-time clerical and instructional aides including noon hour supervisors employed by The Edgerton Community Schools, excluding secretaries, supervisors, confidential employees, managerial employees, executive employees, and all other employees who were employed on July 15, 1981.

The group of secretarial positions then employed by the District but excluded from the bargaining unit consisted of the secretaries to the superintendent (1.5 full-time equivalency); three secretaries in the business office; two secretaries to the elementary school principal, and one secretary each for the principals of the high school and middle school.

5. On August 4, 1981, the Wisconsin Employment Relations Commission, having been advised in writing by the parties on July 23, 1981 that there had been voluntary recognition of the bargaining unit described in Finding of Fact 4, dismissed the petition for election.

6. While since 1981, the duties, responsibilities and skills of "secretaries" and of "clerical and instructional aides" have become increasingly similar, there remains a basic functional distinction between the two groups of employes which reflects the primary focus of the "clerical and instructional aides" toward classroom related duties and responsibilities and of "secretaries" toward assisting administrative personnel in the performance of their duties. As a result of this functional distinction, the secretaries' work schedule generally parallels that of the administrative person to whom they are assigned while the work schedule for the clerical and instructional aides generally reflects their classroom oriented responsibilities.

7. As of July 15, 1981, the District had, pursuant to Sec. 66.30, Stats., an intergovernmental agreement with the School District of Milton for the provision of special education services to both districts. Under this arrangement, the E.E.N. Director was an employe of the Milton School District, with half his salary being reimbursed to Milton by the Edgerton District. The Director's secretary was an employe of, and located at, the Milton School District; at Edgerton, the Director had available a clerical aide.

8. During the period 1985-1988, the Edgerton employe who served as the E.E.N. Director's clerical aide was Nancy Dickinson, whose time was divided between clerical aide duties and duties as a classroom aide in special education. As clerical aide, Dickinson received, dated, recorded and routed materials for student files; sent information to parents as required by the evaluation process; had regular contact with the E.E.N. Director, E.E.N. and regular staff, and parents; monitored student files to ensure timely completion; and performed other routine office procedures. She did not prepare federal or state reports, generally did not type reports and had only a small role in assisting in the preparation of the budget. She neither typed evaluations nor disciplinary reports on District employes. From the start of the school year until approximately the Spring (Easter) break, Dickinson's regular schedule had her devoting two hours per day to clerical aide duties and five hours per day to classroom aide duties; after the Spring (Easter) break, this ratio was reversed. Dickinson's work-year was 181 seven hour days.

9. Norman J. Fjelstad became Superintendent of the District on July 1, 1988. Upon assuming office, he learned of certain problems in the special education program, including formal complaints filed by affected parents with the U.S. Office of Civil Rights and the Wisconsin Department of Public Instruction. Internal and independent reviews of the program established serious deficiencies in the District's record-keeping, information distribution and deadline compliance. In large part, it was felt that these deficiencies were directly related to the time-and-work-sharing arrangement with Milton, under which the Director and his one full-time secretary were both based in, and apparently focused on, Milton. To address this situation, Fjelstad renegotiated with the Milton superintendent the particulars of the Director's contract, so that henceforth he keep Edgerton office hours fifty percent of the time. Fjelstad also directed the E.E.N. Director to draft a proposal for the creation of a new full-time secretarial position for his office.

10. In or around the first week of August, 1988, E.E.N. Director Sam Zummo prepared a position description entitled Confidential Secretary to the E.E.N. Director. After review and modification by Fjelstad and with the informal approval of the Board of Education, the position was posted and advertised. The position description and job announcement, respectively, were as follows:

PLEASE POST PLEASE POST

E D G E R T O N C O M M U N I T Y S C H O O L S

Edgerton, Wisconsin 53534

JOB OPENING: Confidential Secretary

to the EEN Director

QUALIFICATIONS:
(1) High school graduate
(2) Ability to work with special education students, parents, teachers
(3) Typing skills and knowledge of general office machines
(4) Ability to maintain necessary records and complete all necessary state and federal reports
(5) Able to retain confidences
(6) Personable and neat in appearance
(7) Other such qualifications as determined by the Board of Education

HOURS: 52-weeks per year, 7:30 a.m. - 4:00 p.m.

APPLY TO: Sam Zummo, EEN Director, no later than August 16, 1988

SZ/da
8/9/88

E D G E R T O N C O M M U N I T Y S C H O O L S

Edgerton, Wisconsin 53534

TITLE: Confidential Secretary to the EEN Director

QUALIFICATIONS:
(1) High school graduate
(2) Typing skills
(3) Clerical skills
(4) Knowledge of operation of general office machines
(5) Able to retain confidences
(6) Personable and neat in appearance

REPORTS TO: Director of Special Education

JOB GOAL: To assist the Director of Special Education by maintaining the orderly operation of the office.

SUPERVISES: Active EEN files of students in the process of evaluation.

PERFORMANCE RESPONSIBILITIES:

1. Complexity of tasks:
(a) Receive and date materials for student files
(b) Route student file material to appropriate person
(c) Record student file information in log
(d) Send information to parents as required for the evaluation process
(e) Type memos or other correspondence as required by the Director
(f) Copy materials as necessary
(g) Maintain files of students in the evaluation process
(h) Prepare all state and federal reports as required
(i) Assists in preparation of budget
(j) Types psych reports

2. Confidentiality of tasks:
(a) Maintain confidentiality for files

3. Degree of accuracy of tasks:(a) Maintain accurate records for files
(b) Give correct information to staff
(c) Type accurately

4. Human relations involved in tasks:(a) Contact with Director
(b) Contact with EEN and regular education staff
(c) Contact with parents by telephone and written communication

5. Responsibility for work of others:
(a) Monitor student files to insure that they are completed and completed in a timely manner

6. Mental and/or physical work requirements:
(a) Ability to attend to details required for completing and maintaining student files
(b) Ability to organize routine office tasks to insure orderly operation
(c) Ability to assist Director and staff with records required for EEN program

Adopted by the Board of Education: _____

SZ/da
8/88

11. On August 19, 1988, Vicki Pope began her duties as the new Secretary to the E.E.N. Director. Pope had recently left the District's employment as Secretary to the Elementary School Principal, a non-unit position. During the application and interview process, neither she nor any District administrator raised the issue of whether this new position was within or outside the bargaining unit. In setting the applicable pay range, Fjelstad assumed the position would be within the unit, and, in discussions with the District Director of Business Affairs, determined the appropriate salary step pursuant to the Association contract. The parties' collective bargaining agreement, effective July 1, 1986 through June 30, 1988, which agreement had not at the time of hearing been superseded by a subsequent agreement, described the parties' bargaining unit as follows:

1.00 RECOGNITION

The School District of Edgerton recognizes Edgerton Education Support Staff as the exclusive bargaining representative for all full-time and regular part-time clerical and instructional aides including noon hour supervisors employed by the Edgerton Community Schools, excluding secretaries, supervisors, confidential employees, managerial employees, executive employees and all other employees who were employed on July 15, 1981.

Pope accepted the position on the terms offered her by Fjelstad. Upon the hiring of Pope, Dickinson ceased performing any E.E.N. duties and assumed her classroom aide duties on a full-time basis.

12. In or around March, 1989, during preparations for contract negotiations with the Association, Fjelstad reviewed the existing contract language and, after discussions with the Board President, concluded that he had erred in placing the new position within the bargaining unit. He thereupon wrote Association President Janet Biessman as follows:

June 20, 1989

Mrs. Janet Biessman
President, EESS
302 Water Street

Cambridge, WI 53523

Dear Janet:

In August last year, the Edgerton Community Schools posted for a new position, a confidential secretary to the EEN director. For convenience, I enclose a copy of the posting. Vicki Pope began in the position on August 19, 1988.

At that time, the Edgerton school district recognized the Edgerton Education Support Staff (EESS) as the exclusive bargaining representative for clerical and instructional aides, excluding the District's secretaries and confidential employees, among others. That recognition continues, as you know.

Erroneously, however, Ms. Pope's position was handled during the past school year as though it was part of the unit represented by EESS. The District intends to correct the situation. Our current intention is that, as of July 1, 1989, the error be corrected. This means the EEN secretary will no longer be handled or treated as past of the EESS-represented unit.

If the EESS desires to discuss this matter with us, please notify me immediately. If we do not hear from you, we will assume the EESS has no objection to implementation of the proposed corrective action as of July 1, 1989.

Sincerely,

Norman Fjelstad /s/

Norman L. Fjelstad
District Administrator

NF/d

Enclosure: 1

13. The Association did not agree with the District's position and expressed objection to the District's proposed action. Thereafter, the District on August 17, 1989 filed with the Commission a petition to clarify the existing bargaining unit, in which the District sought the exclusion therefrom of the Secretary to the E.E.N. Director, on the stated grounds that "(t)his position is not within the recognized unit. Secretaries have been excluded from this unit since the unit was first recognized".

CONCLUSIONS OF LAW

1. By their conduct as set forth in Findings of Fact 11-13, the parties did not agree to exclude the Secretary to the E.E.N. Director from the bargaining unit.

2. The position of Secretary to the E.E.N. Director is a "secretary" within the meaning of the parties' existing agreement regarding the scope of their bargaining unit.

ORDER 1/

The position of Secretary to the E.E.N. Director shall be, and hereby is, excluded from the collective bargaining unit represented by the Edgerton Education Support Staff.

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

William K. Strycker, Commissioner

1/ 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.

(Footnote 1/ continued on page 7)

1/ continued

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 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, CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

POSITIONS OF THE PARTIES

In support of its petition, the District asserts and avers as follows:

The parties have a long-standing intent, reflected in the recognition clause, to exclude secretaries from this unit. The recognition clause was agreed to by the parties and was the basis for the district's voluntary recognition of the unit. The E.E.N. secretary, with duties and responsibilities which are clearly secretarial and not clerical, was placed in the unit due to the Superintendent's mistake. Such error should not be perpetuated, and the unit should be clarified to exclude the E.E.N. secretary therefrom. 2/

The duties, responsibilities and conditions of employment of the E.E.N. secretary are clearly distinct from those of clerical employes and are clearly akin to those of non-unit secretarial positions, particularly as apply to the work-day and work-year aspects. Further, the job duties of the newly-created E.E.N. secretary, while they may include minor miscellaneous duties of the former clerical aide who served the E.E.N. Director, also reflect a significant expansion, so that the position is now no longer clerical, but is instead significantly comparable to other non-unit secretarial positions serving other members of the district's administrative team. In particular, the clerical aide spent only about two hours daily in this area and served essentially as a conduit for relaying information to the E.E.N. Director's full-time secretary based in Milton; now, the secretarial position is a full-time, self-sufficient, stand-alone position.

The parties' historic agreement excluding secretarial positions from the unit is also important and compels correction of the District's place-ment error. Such history shows the District gave voluntary recognition to the Union only after the Union agreed to exclude secretaries from the unit.

It is settled that, where the parties have agreed to exclude certain positions, the Commission will not disturb the agreement through a unit clarification proceeding, absent the presence of one of four conditions (that the disputed position did not exist at the time of the agreement; that the exclusion was based on a statutory condition; that the disputed position has been materially affected by changed circumstances; or that the existing unit is repugnant to MERA). Here, none of those conditions are present.

The unit clarification procedure should be available, however, so that either party to a voluntarily recognized unit can rescind expansion resulting from a mistaken placement. Such use of this process, by enabling both parties to insist on the integrity of the recognition agreement, encourages voluntary agreements and is consistent with the Commission's established policy of honoring agreements unless they frustrate the policies of MERA.

As the recognized unit here is not repugnant to MERA, the Commission should utilize its unit clarification authority to permit correction of the District's inadvertent mistake. The District, which has invoked a peaceful statutory proceeding to correct its error, should not be disad-vantaged for so doing, nor should the Union be rewarded in its efforts to exploit the District's error. Such results would be contrary to labor peace.

In summary, it is the District which seeks to preserve the status quo and to honor the parties' voluntary agreements. Based on the duties and responsibilities of the newly-created secretarial position, and to preserve the integrity of the agreement which premised the initial voluntary recognition, the Commission should order clarification of the

2/ At hearing, the District also raised the issue of whether the position was confidential, which assertion the Association opposed. In its written argument, the District dropped its claim to confidential status for this position.

unit by excluding therefrom the secretary to the E.E.N. director.

In opposition to the petition, the Association asserts and avers as follows:

> The issue before the Commission is whether the placement of the position of Secretary to the Special Education Director into the clerical and instructional aide unit is repugnant to MERA because (a) the position has insufficient community of interest with the rest of the unit, or (b) the incumbent therein is a confidential employe. Because the answer to these questions is in the negative and because the Employer has brought this proceeding in the wrong forum, the petition for clarification should be denied.
>
> Because the current recognition clause is the result of a voluntarily recognized unit, neither party has the right to compel Commission clarification of the unit; such Commission action is generally only undertaken when a position included in the unit violates MERA.
>
> The Employer seeks to use Commission procedures to extract from the unit an employe which it placed therein, claiming its initial inclusion was by mistake. The Employer now contends that (a) secretarial positions such as that occupied by the incumbent at issue have traditionally been excluded from the unit and, thus, so should the subject position and that (b) the subject incumbent is a confidential employe.
>
> However, the question is not whether the disputed position should be excluded from the unit under principles to be gleaned from the voluntarily-agreed upon recognition clause; rather, the question is whether exclusion of this position is mandated under MERA as defined by Commission precedent. That is, rather than serving essentially as an arbitrator to determine the parties' original intent in adopting the recognition clause, the Commission's very narrow role is to determine whether continued inclusion of the disputed position would produce a unit which would be repugnant to MERA or whether a particular employe is within the statutory exclusions. Thus, the Employer's primary claim cannot be litigated in the posture currently framed by the Employer.
>
> The Employer's case, which focused on whether the subject position has a community of interest with other clerical positions, essentially involves a determination as to whether the parties' bilateral agreement shows an intent to exclude "secretarial" positions from the unit. However, since the Commission generally does not find it appropriate to pursue a unit clarification proceeding to preempt the field regarding the interpretation of a contract granting voluntary recognition, absent the presentation of statutory issues, the Employer's position must be rejected. See, Milwaukee Board of School Directors, Dec. No. 25413 (WERC, 2/88).
>
> The recognition clause at issue was an idiosyncratic one devised by the parties for their particular need, with no support in Commission precedent. Would it had the power, the Association would seek its own unit clarification, to recapture those clerical positions which were excluded by stipulation. But Commission precedent prevents such action, just as it prevents the Employer from increasing the number of incorrectly excluded clerical positions through this proceeding. Here, the Employer's only arguments are that (a) the exclusion of the subject position is mandated by MERA, or (b) that the position fits one of the statutory exclusions. Both of these arguments are without merit.
>
> The disputed secretarial position has a sufficient community of interest with other clerical employes so that exclusion is neither mandated nor appropriate. In attempting to distinguish between certain clerical and secretarial position working in close proximity, the District runs counter to all Commission precedent which uniformly holds to the contrary. Not only is the unit proposed by the Employer not appropriate, but the inclusion of the disputed position would not be inappropriate under Commission precedent.
>
> The record evidence establishes that there are no substantial differences in the qualifications, duties or working conditions between the disputed position and the other members of the clerical-aide instructional unit. The correctness of the inclusion of this position within the clerical unit was implicitly acknowledged by Superintendent Fjelstad, who testified that he just assumed the position was a bargaining unit post. Indeed, by focusing on the status and importance of the position viz a viz the members of the management team, Fjelstad's argument for exclusion is more appropriate for a psychoanalyst than a

labor practitioner.

The District's arguments that the administrative team needs non-unit secretaries is a rather elitist concept, having more to do with the status of the E.E.N. Director than the working conditions of Ms. Pope. There is simply no principled basis to treat Ms. Pope as having interests so unique from other clerical employes that a separate unit is required, especially given the statutory mandate to avoid fragmentation.

Finally, as understood in the labor relations context and applied by the Commission, Ms. Pope is not a confidential employe.

In sum, the Employer cannot transform a unit clarification procedure into a contractual dispute resolution procedure. Thus, regardless of whether the incumbent's position may be deemed secretarial under the parties' past practice, the District's evidence as to an alleged lack of a community of interest between this position and other unit positions is largely irrelevant in this forum. Thus, under established Commission precedent, the incumbent must be placed in the bargaining unit.

In its reply brief, the District posits further as follows:

The Union errs in asserting that there was a "stipulated election" at the time of the unit creation in 1981. Rather, the parties agreement to exclude secretaries resulted in voluntary recognition without any election then or since. Further, Union speculation as to the reason for such exclusion is without any evidence in the record.

The Union also errs in its statement of the issue. The issue is not, as the Union asserts, whether the placement of the disputed position into the clerical and instructional aide unit is repugnant to MERA; rather, the issue is whether to correct the District's erroneous placement of the secretary into a unit which expressly excludes secretaries. That is, should the clear, undisputed bargaining history and voluntary recog-nition agreements be disregarded due to an error by a new district administrator?

Moreover, the Union's argument against Commission involvement, not broached at all until the Union's brief, is yet another attempt to avert attention from its expansive reach.

The Union further clouds the issue by asserting that the employe was within the unit for almost a year without the issue of unit status being raised. In fact, the record establishes that the mistake was discovered in the spring of 1989, at which time the District attempted to remedy the situation. It was only Union stonewalling which dragged this controversy out this long.

While no apparent Commission precedent is totally on point with the circumstances here, no known precedent poses any significant hurdle to Commission jurisdiction and resolution. Commission case law shows that the Commission does not discourage utilization of unit clarification proceedings to resolve similar disputes. See, Milwaukee Board of School Directors, Dec. No. 25143 (WERC, 2/88); City of Green Bay, Dec. No. 12682 (WERC, 5/74).

The Commission has also shown an aversion of negating the scope of voluntary recognition agreements. See, District Council 48, AFSCME, AFL-CIO, Dec. No. 13134-A (WERC, 1/76).

Rather than seeking alteration of the unit, the District seeks Commission assistance in preserving the integrity of a long-standing recognition agreement. That the agreement could presumably be enforced through arbitration should not negate concern for the integrity of the initial 1981 stipulation.

While this controversy is not essentially a contractual problem, arbitration may indeed be available. However, the Union neither explains how arbitration is a better course than WERC resolution, nor explains why the Commission should encourage the District to create a contractual dispute through a unilateral action (correcting the mistaken placement of the secretarial position within the unit) adverse to the Union.

The Union raises further false issues as well. Community of interest between secretaries and unit clericals is irrelevant, in that the District has not argued that secretaries could not be part of the unit, only that they are not. Also irrelevant, at least unless and until a separate secretarial unit is sought, is the statutory anti-fragmentation mandate.

Finally, the District reaffirms that the exclusion of the subject position is premised on duties and responsibilities, not on status. It is nonsense for the Union to argue that the real issue is the status of the E.E.N. Director. Rather, the record establishes that the E.E.N. Director is an administrator; that district administrators have responsibilities different from those of teachers and counselors; that administrators have legitimate expectations for their secretaries, which positions have existed at least since 1981; and that the disputed position is indeed secretarial, but erroneously placed in a unit which excludes secretaries.

The Union brief has been an attempt to divert attention from the Union's true agenda, namely to seize upon the District's mistake, abrogate its prior agreement and thereby accomplish a unit expansion. As Commission case law does not sanction that agenda, and to preserve labor peace and the integrity of voluntary agreements, the Commission should grant the unit clarification as sought by the District.

In its reply brief, the Association further posits as follows:

The District fails to acknowledge that the record demonstrates a virtual similarity in job function between Ms. Pope and Union President Janet Biessman, in addition to the significant similarity in functions between Ms. Pope's post and that Ms. Dickinson. Clearly, certain bargaining unit employes who were hired as clericals have assumed higher level clerical skills which cannot be differentiated from those utilized by Ms. Pope or other purported secretaries. Given the tremendous changes in the technology which such personnel use, it is highly likely that any legal distinction reached in July, 1981 between secretarial and clerical skills is as outmoded as the technology used by so-called secretaries at that time.

The only true difference here is the highly artificial distinction between clericals who work for bargaining unit employes and clericals who work for management. Certainly, under the existing structure, the subject position would be placed outside the bargaining unit. An issue in this case, therefore, is whether this highly esoteric distinction is sufficient for the Commission to remove the subject position from the bargaining unit and make her a non-bargaining employe.

The Employer would have this be viewed as an instance of the Union attempting to regain a secretarial position from a voluntarily-recognized unit which excludes secretaries. The Commission, however, should consider this an instance of the Employer improperly attempting to use a unit clarification proceeding to reclaim a position placed in the unit due to a voluntary, thoughtful decision by the District. The District's belated contention that such placement was in error can not alter the basic fact that the Employer is attempting to remove a position currently within the unit.

Certainly, had the situation been reversed and a unit position been wrongfully kept outside the unit -- with the full knowledge and assent of the Union for almost an entire school year -- the Commission would probably reject any Union attempt to recoup the position through a unit clarification proceeding based solely on the scope and intent of the voluntary recognition clause. All the Union asks is for Employers seeking unit clarifications to be treated the same as Unions.

On policy grounds, it is preferable to litigate representational issues through unit clarification proceedings rather than arbitrations. The Union does not oppose Commission jurisdiction here, if such jurisdiction is based on Commission plans to clarify its precedents and expand the scope of unit clarification procedures. However, the union does object to any Commission action which empowers the Employer to use unit clarifications both as a sword to rectify its own mistakes as well as a shield to prevent Unions from doing the same.

If the Commission accepts jurisdiction, the position should remain in the bargaining unit. Bargaining history, standing alone, is insufficient grounds to justify exclusion. There is simply no Commission precedent to justify the exclusion of one member of a small group of non-confidential secretaries from a modestly-sized overall clerical unit.

DISCUSSION

As both parties have correctly argued at differing points in this proceeding, nothing in the Municipal Employment Relations Act prevents parties from voluntarily defining the scope of a bargaining unit and thereby agreeing to the inclusion and exclusion of certain positions. Here, the parties entered into such an agreement in 1981 when they voluntarily defined their bargaining unit in pertinent part as:

> All full-time and regular part-time clerical and instructional aides including noon hour supervisors employed by the Edgerton Community Schools, excluding secretaries . . .

In this unit clarification proceeding the District is not seeking to alter the 1981 unit agreement which the parties' have thereafter renewed in their bargaining agreements. 3/ Instead, the District asks that we apply the 1981 agreement to the position in dispute. If we were to do so, we would be interpreting the parties contractual agreement in the context of the factual record, essentially the function which a grievance arbitration could fulfill. The Association questions whether it is appropriate for us to perform this function in the context of a unit clarification proceeding and cites a portion of our decision in Milwaukee Schools wherein we stated:

3/ The Commission has held that where the parties have agreed to include or exclude certain positions from a collective bargaining unit, it will honor that agreement and will not allow a party to the agreement to pursue alteration of the bargaining unit's scope through a unit clarification petition unless:

1. The position(s) in dispute did not exist at the time of the agreement; or

2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, managerial or executive (the so-called "statutory exemptions"); or

3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; or

4. The existing unit is repugnant to the Act.

City of Sheboygan, Dec. No. 7378-A (WERC, 5/89); See generally City of Cudahy, Dec. No. 12997 (WERC, 9/74); Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76); West Allis - West Milwaukee Schools, Dec. No. 16405 (WERC, 1/89).

If the District were seeking to alter the 1981 agreement, it could not obtain a ruling on the merits of its request because none of the four exceptions noted above are applicable. Although the position of Secretary to the E.E.N. Director did not exist at the time the parties first agreed on the scope of their unit in 1981 and although, at the time of hearing, the parties had not yet renewed that agreement by bargaining a successor to the 1986-88 contract, exception 1 to the Sheboygan policy quoted in the text is nonetheless not applicable. Where, as here, the parties use generic terms such as "secretaries" and "clerical and instructional aides" in their unit agreement, the unit status of positions thereafter created which fall within such generic categories is determined by the parties' unit agreement and not de novo by the Commission. Such new positions are not "positions which did not exist at the time of the unit agreement" within the meaning of exception 1 of the Sheboygan policy. Put another way, we regard the term "position(s) in dispute" as synonymous with the term "classification in which the position(s) in dispute fits" for the purposes of applying the exception within which the former term appears.

None of the other three exceptions are present because: the exclusion of

> . . . the Commission does not generally find it appropriate to preempt the field regarding the interpretation of a contract, or contracts, granting voluntary recognition, unless statutory issues are presented.

As the Milwaukee Schools quote indicates, we do not "preempt the field" when disputes arise between parties as to how their unit agreement should be applied to a disputed position. Such disputes can be resolved through the grievance arbitration process and the Commission will honor the result reached unless said result contravenes the law the Commission administers. 4/ However, while we do not "preempt the field", we are an available forum for resolution of disputes as to the meaning and application of voluntary agreements regarding the scope of a bargaining unit. By making ourselves available for such dispute resolution, we advance the interests of labor peace which we are statutorily obligated to pursue and also provide the parties with a decision making body which possesses both expertise as to matters of contract interpretation and familiarity with issues of unit placement. Thus, we proceed to a consideration of the merits of dispute. 5/

While the record establishes that the distinctions between the duties and responsibilities of "clerical and instructional aides" and "secretaries" have lessened since 1981, even the Association acknowledges that the unit agreement continues to represent a binding agreement between the parties that "secretaries" (whose work schedule generally conforms to that of the administrators for whom they work) are excluded from the unit and "clerical and instructional aides" (whose work schedule generally conforms to the school day and year) are included therein. Thus, although the Association argues that the E.E.N. Secretary has a job function which is virtually the same as that of a unit employe, the Association acknowledges that application of the parties' 1981 unit agreement to the E.E.N. Secretary would produce her exclusion from the unit.

However, the Association argues that because the District initially placed the position in the unit, said placement should be honored despite the result which the 1981 agreement would otherwise produce.

The parties herein were and are free to agree upon exceptions to their general exclusion of "secretaries" from the unit. If the facts in this case were sufficient to establish such an agreement, the Association would prevail. However, the record establishes the District's placement of the Secretary to the E.E.N. Director in the unit was not the result of an agreement to that effect with the Association but rather was based upon a unilateral mistake by the District. The record further establishes that when the District discovered its mistake, it took reasonably prompt measures to advise the Association of its position and to then file the instant petition. Under such circumstances, we are satisfied that no agreement existed between the parties to make the E.E.N. Secretary an exception to the general exclusion of "secretaries" from the unit. Thus, we conclude that it is the general exclusion agreement which governs this dispute and, as noted earlier, that under said agreement, the Secretary in question is appropriately excluded from the unit.

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the "secretaries" was not based upon the absence of municipal employe status; there has been no change which could materially affect "secretaries" unit status; and their exclusion is not repugnant to the Act.

4/ Madison Metropolitan School District, Dec. No. 6746-G (WERC, 12/89); Stoughton Joint School District, Dec. No. 15995 (WERC, 12/77). For instance, the Commission noted in Stoughton that it would contravene the law to interpret an agreement in such a way as to include supervisors in the same bargaining unit as employes.

5/ We note that for grievance arbitration to have been an available forum here it appears the District would been required to remove the position from the unit and then await an Association grievance. To require such action when a unit clarification forum is available would be inconsistent with labor peace.

Dated at Madison, Wisconsin this 25th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner