STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of SHAWANO COUNTY (MAPLE LANE HEALTH CARE CENTER) Involving Certain Employes of SHAWANO COUNTY (MAPLE LANE HEALTH CARE CENTER)	:	Case 52 No. 34149 ME-2401 Decision No. 22382

Appearances: 1/

Mulcahy & Wherry, S.C., Attorneys at Law, 408 Third Street, P. O. Box 1004, Wausau, Wisconsin, 54401-1004, by Mr. Ronald J. Rutlin, appearing on behalf of the County.

Cullen, Weston & Pines, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin, 53703, by Ms. Cheryl Rosen Weston, appearing on behalf of 1199W/United Professionals for Quality Health Care.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

Shawano County (Maple Lane Health Care Facility), hereinafter referred to as the County, having filed, on November 15, 1984, a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify a certified bargaining unit represented by AFSCME, Council 40 (described as all employes of the Employer employed in the Maple Lane Health Care Center except the Administrator, Assistant Administrator, Nurses, Clerical employes, Psychiatrist, Dentist and Building Maintenance Engineer) by including in said unit a separate certified unit represented by 1199W/United Professionals for Quality Health Care (consisting of all regular full-time and regular part-time technical employes employed by the Maple Lane Health Care Facility); and 1199W/United Professionals for Quality Health Care, hereinafter referred to as United Professionals, having filed, on December 17, 1984, a Motion to Dismiss the Petition for Unit Clarification on the grounds that the petition does not allege proper grounds for unit clarification and that the County is estopped from filing said petition; and the Commission (through staff member Carol L. Rubin) having established a briefing schedule for arguments in support of and opposition to the Motion to Dismiss, and having informed the County, United Professionals and AFSCME, Council 40 of its intent to take administrative notice of Commission records regarding the existing bargaining units of County employes; and the County and United Professionals having timely filed written arguments with regard to the Motion to Dismiss; and the Commission having reviewed said arguments and taken notice of Commission records regarding the County's existing bargaining units, and having concluded that the County's Petition for Unit Clarification should be dismissed, the Commission makes the following Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. That Maple Lane Health Care Facility is a nursing home care facility owned and operated by Shawano County, which handles chronically and mentally ill and developmentally disabled persons and drug and alcoholic commitments; that the facility has approximately eighty-two (82) employes; that approximately sixty (60) of those employes are in the following bargaining unit represented by Maple Lane Health Care Center Employees Local 2643 affiliated with and referred to herein as AFSCME, Council 40: all employes except the Administrator, Assistant Administrator, Nurse or Nurses, Clerical employes, Psychiatrist, Dentist and Building Maintenance Engineer.

1/ AFSCME, Council 40, was also provided notice and an opportunity to submit arguments in this matter, but it did not do so.

2. That on July 7, 1983, United Professionals filed a petition for an election among employes within the following proposed unit: all regular full-time and regular part-time professional and technical employes employed by the Employer at the Maple Lane Health Care Facility, excluding guards, supervisors and all other employes.

3. That hearing on the matter, which was transcribed, was conducted on August 19, 1983; that at said hearing the County and United Professionals stipulated that four (4) specified positions were supervisory and/or managerial; that the remaining positions in dispute were eight (8) Licensed Practical Nurses (LPN), two (2) Registered Nurses (RN), and the combined position of Volunteer Coordinator, Work Therapy Director and Assistant Activity Director; that the County contended that the last position was a managerial position, and that all ten (10) nurses occupied the position of Charge Nurse and were supervisors; that at no point in the proceeding did the County contest the appropriateness of the unit requested by United Professionals.

4. That on January 9, 1984, the Commission issued its Findings of Fact, Conclusion of Law and Direction of Election 2/ in which it concluded that the combined position described in Finding of Fact 3 was a managerial position but that none of the occupants of the position of Charge Nurse were supervisory employes; that the Commission further directed an election in two (2) voting groups, Voting Group Number 1 consisting of LPN's, who are not considered professional employes, and Voting Group Number 2, consisting of Registered Nurses, who are considered to be professional employes, in order to allow the professional employes to decide if they wished to be combined in a unit with non-professional employes should each group elect to be represented by United Professionals.

5. That on February 9, 1984, an election was held among the employes in question; that on February 27, 1984, the Commission issued its Certification of Results of Election which showed that the professional employes (i.e., the two (2) Registered Nurses) voted against inclusion in the larger unit and voted for no representation, while the non-professionals (i.e., eight (8) Licensed Practical Nurses) voted to be represented by United Professionals; that therefore United Professionals was certified as the exclusive bargaining representative of a bargaining unit described as all regular full-time and regular part-time technical employes employed by the Maple Lane Health Care Facility, excluding guards, supervisors, professional employes, and all other employes.

6. That United Professionals and the County commenced negotiations for their first collective bargaining agreement; and that, to date, no agreement has been reached.

7. That on November 15, 1984, the County filed the instant petition for unit clarification by which it sought to unconditionally include all Licensed Practical Nurses currently represented by United Professionals (described on the petition as all regular full-time and regular part-time technical employes employed by Maple Lane Health Care Facility) in the bargaining unit currently represented by AFSCME, Council 40, described on the petition as "all employees of the Employer employed in the Maple Lane Health Care Center except the Administrator, Assistant Administator, nurses, clerical employees, psychiatrist, dentist, building maintenance engineer"; that the recognition clause of every contract between AFSCME, Council 40 and the Health Center from 1967 to the present has contained an exclusion for nurse or nurses; but that nursing assistants are included in said AFSCME unit and are not included in the bargaining unit currently represented by United Professionals.

8. That on December 17, 1984, United Professionals filed a Motion to Dismiss the Unit Clarification petition on the grounds that the petition does not allege proper grounds for Unit Clarification, in that the issue of fragmentation was not raised in earlier election proceedings and that the positions in question are neither new nor had they been overlooked, or, in the alternative, that the petition should be dismissed on the basis of estoppel.

2/ Decision No. 20996-A (WERC, 1/84).

CONCLUSIONS OF LAW

1. That the anti-fragmentation ground upon which the County bases the instant petition amounts only to a claim that a combined unit would be more appropriate than the unit for which United Professionals was certified on February 27, 1984; and that a post-certification petition for unit clarification is not a proper or available means of obtaining Commission adjudication of that claim.

2. That, under Sec. 111.70(4)(d), Stats., a petition for unit clarification is not a proper or available means by which to seek a merger of two existing bargaining units.

ORDER GRANTING MOTION TO DISMISS 3/

That the Motion filed by United Professionals that the petition in this matter be dismissed is hereby granted, and the Petition for Unit Clarification filed by the County in the above matter shall be, and hereby is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

3/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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 (Footnote 3 Continued on Page Four)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

The background facts and basic positions of the parties are as stated in the Findings of Fact. All parties have had the opportunity to submit written arguments in support of and in opposition to the motion to dismiss.

All parties were also notified of the Commission's intent to take administrative notice of its records regarding the existing bargaining units of County employes. No objections to such notice were filed with the Commission.

The County acknowledges in its written argument that at the hearing noted in Finding of Fact 3,

> . . . the appropriateness of the bargaining unit represented by the Union was not challenged previously by the Employer. Therefore, for all practical purposes it was stipulated to.

However, the County now argues that a separate bargaining unit of only seven (7) employes 4/ is repugnant to the statutory "anti-fragmentation" policy. It contends that the Commission has consistently held that neither an existing collective bargaining agreement nor an associated question of time limits bar a unit clarification petition. The County further acknowledges that the basis for its attempt herein to accrete the seven (7) Licensed Practical Nurses into the

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3/ (Continued)
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. 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. 227.20 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.

4/ While the Findings of Fact in Decision No. 20996-A stated there were eight (8) LPN's employed at the facility, the County's written arguments refer to seven.

larger unit represented by AFSCME is the County's inability to successfully negotiate with the new bargaining unit many of the same contractual provisions contained in the AFSCME contract. The County contends that a hearing on the petition is essential to allow the County to show why the existing unit contravenes and is repugnant to MERA.

We agree with United Professionals that, in the instant circumstances, the County's petition for unit clarification is not an appropriate means for achieving the ends sought by the County herein.

The issue of unit appropriateness is properly one for determination in a representation election proceeding such as was conducted in advance of the vote leading to the certification of United Professionals as representative herein. Once an appropriate unit is established, it may be that a clarification proceeding is needed from time to time if positions are eliminated or new positions are created or there are other material changes in circumstances. In those cases, additions to or deletions from the established unit--with or without need of amendment of the unit description and with or without need of a self-determination vote--are made not on the basis that the existing unit is inappropriate, but rather on the basis that the positions in question belong in or out of the existing unit.

The Commission does not consider the unit clarification procedure a proper means of securing a combination of two existing bargaining units into one combined unit. This is especially so where, as here, the two units are currently represented by different labor organizations. The County has cited no previous Commission case in which a unit clarification petition to such end was entertained or granted. 5/

The unit clarification process is not an available means of attacking the appropriateness of a collective bargaining unit except where there is a claim that an existing unit is unlawful, that is, contrary to an unequivocal statutory requirement.

The County's contentions do not amount to a claim that the unit is in conflict with an unequivocal requirement of the statute, as would be the case, for example, if a claim were made that a certified unit included professional employes with non-professionals without the vote of a majority of the professionals in favor of such inclusion required by Sec. 111.70(4)(d)2.a., Stats. Although the County's anti-fragmentation argument is phrased in terms of the unit's alleged repugnance to the statute, that argument amounts only to a claim that the combined unit would be more appropriate than the unit for which the United Professionals is now certified to represent. While the above-noted requirement for a self-determination vote among professionals constitutes an unequivocal statutory requirement before a combined professional-nonprofessional unit can be certified, the anti-fragmentation provision of the statute is a less absolute, general statement of unit determination policy 6/ which the Commission has, with judicial

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5/ All of the cases cited by the County for the proposition that the Commission has consistently held that neither an existing collective bargaining agreement nor associated questions of time limits bar a unit clarification petition (City of Wauwatosa, Dec. No. 11633 (WERC, 2/73); Menomonie Jt. School District No. 1, Dec. No. 13128-A (WERC, 3/78); and Milwaukee County, Dec. No. 14786-B (WERC, 7/76)), involved petitions in which the eligibility of certain positions was at issue. Here the County is not challenging the statutory eligibility of any particular position but is seeking to accrete the entire unit to a different existing certified unit.

6/ Section 111.70(4)(d)2.a., Stats, states in pertinent part,

> The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. . . . The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes unless a majority of the professional employes vote for inclusion in the unit. . . .

approval historically included as one of several factors considered in resolving appropriate unit disputes. 7/

It should therefore be clear, not only from the nature of the representation election process itself, but also from Commission case law, that the unit clarification process is not an available means of attacking the appropriateness of an existing collective bargaining unit on anti-fragmentation, community of interest, or any other grounds short of a direct conflict of the unit composition with a specific requirement of MERA.

The representation election proceeding that led up to the certification of United Professionals as representative of the unit in question provided the County with an opportunity to make anti-fragmentation, community of interest, or other relevant arguments regarding the appropriateness of the instant unit of the sort that it now seeks to advance in the instant unit clarification proceeding. Were the Commission to now entertain such a contention, unit clarification proceedings would significantly undercut certification election processing and the stability of labor-management relationships.

For the foregoing reasons we have dismissed the County's petition for unit clarification filed herein.

Dated at Madison, Wisconsin this 25th day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

7/ In resolving disputes concerning appropriate units, the Commission has consistently applied the following criteria,

1. Whether the employes in the unit sought share a "community of interest" distinct from that of other employes.

2. The duties and skills of employes in the unit sought as compared with the duties and skills of other employes.

3. The similarity of wages, hours, and working conditions of employes in the unit sought as compared to wages, hours, and working conditions of other employes.

4. Whether the employes in the unit sought have separate or common supervision with all other employes.

5. Whether the employes in the unit sought have a common work place with the employes in said desired unit or whether they share a work place with other employes.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history.

E.g., Arrowhead School District, Dec. No. 17213-B (WERC, 6/80) aff'd sub. nom, Arrowhead United Teachers v. WERC, 116 Wis. 2d 580, (1984); City of Madison (Water Utility), Dec. No. 19584 (WERC, 5/82); and Green County (Department of Human Services), Dec. No. 21453 (WERC, 2/84).