

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
PHILLIPS EDUCATION	:	
ASSOCIATION	:	Case 24
	:	No. 34167 ME-2406
Involving Certain Employees of	:	Decision No. 22905
	:	
SCHOOL DISTRICT OF PHILLIPS	:	
	:	
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Appearances:
Mr. Gene Degner, Executive Director, WEAC UniServ Council 18, 25 East Rives Street, Rhinelander, Wisconsin 54501, appearing on behalf of the Petitioning Association.
Mr. Richard Weghorn, District Administrator, Phillips School District, Phillips, Wisconsin 54555, appearing on behalf of the District.

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

Phillips Education Association having filed a petition on November 27, 1984, requesting the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit to include the allegedly newly-created position of school psychologist in a voluntarily recognized unit consisting of "all certified, contracted full-time and part-time teachers, including guidance counselors and librarians", but excluding "administrators, principals whose assignment is over fifty percent (50%) administrative, substitutes and intern teachers and all other employees of the School District of Phillips not mentioned above"; and the hearing in the matter having been conducted on January 11, 1985, in Phillips, Wisconsin, before Examiner David E. Shaw, a member of the Commission's staff; and a stenographic transcript having been prepared and forwarded to the parties on January 23, 1985; and the parties having filed briefs in the matter, the last of which was received on February 14, 1985; and the Commission having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That the School District of Phillips, herein referred to as the District, is a municipal employer which operates a school system and has its offices located in Phillips, Wisconsin.
2. That the Phillips Education Association, herein referred to as the Association, is a labor organization representing municipal employes for the purposes of collective bargaining and is affiliated with WEAC UniServ Council 18, which has its offices at 25 East Rives Street, Rhinelander, Wisconsin.
3. That the Association is the voluntarily recognized representative of the collective bargaining unit which is described in Article I of the parties' Master Contract for 1983-1984 and 1984-1985 as follows:

The Board recognizes the Association as the exclusive negotiating body for all certified, contracted full-time and part-time teachers in the bargaining unit including guidance

counselors and librarians, and no individual teacher shall negotiate terms of his teaching contract independent of the Association. However, this shall not prevent the Board from employing teachers for extended duty beyond the actual teaching contract and shall not prevent the Board from including language in the individual contracts for replacement teachers, for regular teachers temporarily unable to teach, providing that the employment is for a limited time only.

The Association is not the negotiating body for administrators, principals whose assignment is over 50% administrative, substitutes and intern teachers, and all other employees of the School District of Phillips not mentioned above.

Unless otherwise indicated, employees in this unit will be hereinafter referred to as "teachers".

that said contract was entered into between the parties on September 21, 1983; that at the time of the voluntary recognition and at the time the parties entered this contract, the position of school psychologist was not in existence; that from August 1974 through July 1984 the District contracted with CESA to provide such service; and that the District first hired its own school psychologist in May 1984 to begin employment in August 1984.

4. That the Association filed a Petition to Clarify Bargaining Unit of Municipal Employees with the Wisconsin Employment Relations Commission on November 27, 1984, wherein it requested the inclusion of the position of school psychologist in a collective bargaining unit; and that the District opposed said inclusion on the basis that the recognition clause excludes said position and that said position is supervisory and managerial.

5. That Kathy Haugan is licensed by the Department of Public Instruction as a school psychologist; that she was hired as a school psychologist by the School District of Phillips in May 1984; that the contract she entered into with the School District of Phillips referred to her position as an administrative one; that the contract calls for her to be paid \$19,000 for a ten month period, which is some \$1810.00 higher than the annual salary a teacher with comparable experience and educational credit would receive; that such differential is attributable to Haugan's specialized skills as a professional psychologist rather than due to any supervisory responsibilities she may have; that Haugan receives the same fringe benefits as teachers; that she reports to and is supervised by both John Boyd, Special Education Director, and Richard Weghorn, District Administrator with some input from the School Principals; and that she began her duties as a school psychologist in August 1984.

6. That the job description for Haugan's position reads in part as follows:

The goal of the school psychological services is to provide a program of services geared to assisting in the educational process of the children who are enrolled in the district. The school psychologist is to act under the direction of the Superintendent of Schools and the Director of Special Education and will be considered part of the district administrative team for all EEN and regular education programs in areas of psychological testing, staff development and supervision, and resource development. The school psychologist is to provide diagnostic assessment; carry on psychological consultation; intervention; research; assist in program planning for those pupils experiencing educational problems including pupils with exceptional educational needs who require special education services, as well as those without exceptional educational needs who can be serviced through alternative measures within regular educational programs or through parent/pupil consultation or the use of community resources.

that Haugan calls meetings for teachers regarding the special education needs of their students; that she consults with teachers regarding classroom management

techniques and modifications teachers need to make to meet particular students' special education needs; that she meets with teachers to discuss upcoming cases, to conduct inservice training and to designate what test should be done in particular cases; that Haugan does not direct and assign teachers in their classroom work load; that she does supervise aspects of the special education program; that she does not supervise or evaluate teachers as employees; that although she was present during the interviews of some aides, she has not hired, promoted, transferred, disciplined or discharged any employee nor does she have authority to effectively recommend such action.

7. That Haugan has scheduled teachers and guidance counselors for Multidisciplinary Team (M-Team) and Individual Education Programs (IEP) meetings; that she attempts to schedule said meetings during the teacher's preparation period as well as when it is convenient for the parents involved; that on occasion the principal has been required to hire a substitute to fill-in for the teacher attending said meeting; that Haugan, as well as the special education teachers, has a budget for materials and supplies; that she has no input into the budget and she does not know if she will have input into future budgets; and that Haugan does not have authority to allocate funds for purposes outside the original budget.

8. That Haugan is the District's representative at IEP conferences; that if she could not attend, she would arrange for a school principal to attend; that she has attended all IEP conferences; that she has attended meetings of the administrative counsel and the School Board; that she has had no input in the School Board meetings other than summarizing her program goals at one meeting; and that she operates under guidelines established by the Department of Public Instruction and other governmental agencies.

9. That Haugan does not exercise supervisory responsibilities in sufficient combination and degree so as to make her a supervisory employee; and that she does not participate in the formulation, determination or implementation of the District's policy in a significant manner nor does she have authority to commit the District's resources to significant degree so as to make her a managerial employee; and that the duties of the school psychologist are more akin and comparable to those of the counselors and special education teachers who are part of the bargaining unit than they are to administrators and principals.

CONCLUSIONS OF LAW

1. That Kathy Haugan occupying the position of school psychologist is neither a supervisory nor a managerial employee and, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. That the recognition clause of the collective bargaining agreement entered into on September 21, 1983 does not foreclose the Association from seeking a unit clarification order including that position in the instant bargaining unit and does not warrant exclusion of that position from the instant unit because:

a. the Recognition Clause does not specifically exclude the position of "school psychologist" from the unit;

b. neither the express inclusion of "teachers, including guidance counselors and librarians" nor the general exclusion of "all other employees of the School District of Phillips not mentioned above" has the effect of excluding from the unit a position which did not exist at the time of the agreement to that general exclusion, and the school psychologist position was first created as a position within the direct employ of the District only after September 21, 1983; and

c. the general exclusion of "administrators" does not apply to the school psychologist position in light of the nature of the duties and responsibilities of that position and the statutory policy of avoiding undue fragmentation of bargaining units.

Based on the above Findings of Fact and Conclusions of Law, the Commission issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

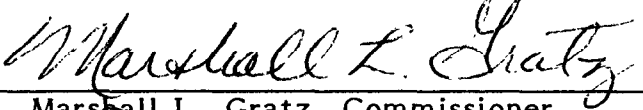
That the position of school psychologist shall be included in the collective bargaining unit described above.

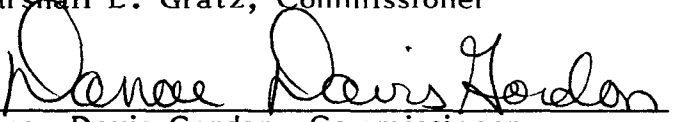
Given under our hands and seal at the City of
Madison, Wisconsin this 18th day of September,
1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

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- 1/ 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 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.

PHILLIPS SCHOOL DISTRICT

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

The Association has been voluntarily recognized by the District as the exclusive collective bargaining representative of "all certified, contracted full-time and part-time teachers, including guidance counselors and librarians", but excluding "administrators, principals whose assignment is over fifty percent (50%) administrative, substitutes and intern teachers, and all other employees of the School District of Phillips not mentioned above." At the time of said voluntary recognition and at the time the parties entered into the 1983-85 contract, the position of school psychologist did not exist in the direct employ of the District; instead, from August 1974 through July 1984 the District contracted with CESA to provide the school psychological services. In May 1984, the District hired a school psychologist to begin work in August 1984. On November 27, 1984, the Association filed a Petition to Clarify Bargaining Unit of Municipal Employees seeking to include the position of school psychologist in a collective bargaining unit.

POSITIONS OF THE PARTIES

The Association argues that since the position of school psychologist was created after the present collective bargaining agreement, including the recognition clause, was negotiated, it is appropriate to consider inclusion of the position in the collective bargaining unit in a unit clarification proceeding. As to the appropriateness of including the position in the unit, the Association argues that the school psychologist is not a managerial employee in that she makes few if any policymaking decisions, and she does not work with the budget or allocate resources. In addition, the Association argues that she is not a supervisor because she does not have authority to hire, discharge or evaluate employees. Instead, the Association argues that the school psychologist is a professional specialist within the District whose work is primarily with students, teachers and parents in the areas of psychological testing and evaluation, and coordinating M-teams and IEP's. Therefore, she shares a community of interest with teaching professionals, since she works with students and teachers in furtherance of the total educational program, and she should be included in a collective bargaining unit of teachers, consistent with the statutory policy of avoiding fragmentation of units.

The District argues that the explicit wording of the recognition clause of the Master Contract must be relied upon as the determining factor; that the clause recognizes the Association as the exclusive bargaining agent for teachers, guidance counselors and librarians; that the clause excludes from the bargaining unit all other employees of the District; that because the school psychologist is neither a teacher, guidance counselor nor librarian, she is among the "other employees of the School District of Phillips not mentioned above" in that listing and hence her position has been expressly excluded from the unit by agreement of the parties; that therefore whether the position shares a community of interest with teachers is irrelevant since the contract excludes her from the unit; and that to construe the recognition clause so as to include this position would negate the purpose and content of the recognition clause itself.

The District further argues that the job description and the employment contract denote the position of school psychologist to be an administrative position; that the school psychologist is paid approximately \$1,810 more than a teacher with the same degree, years of experience and length of contract; that the school psychologist attends monthly administrative staff meetings and sets up her own work schedule; that the District has employed a school psychologist since August 1974 through CESA who has never been a member of the bargaining unit; that excluding the school psychologist from the bargaining unit is a continuation of a past practice of over ten years; that the school psychologist will be preparing a budget for psychological services; that she has committed District funds by arranging transportation for some students and by calling meetings which required the hiring of substitute teachers; that the school psychologist serves as the administrative representative at special education conferences; and that the Department of Public Instruction lists the position of school psychologist as

District staff, a category which does not include teachers. Finally, the District argues that no greater fragmentation would occur if it is determined that the school psychologist is an administrator in that the District already has three distinct groups: teachers who are members of the Union, teachers who are not Association members, and the nine administrator/supervisors already excluded from the unit.

DISCUSSION

The District's contention that the school psychologist position should be excluded from the unit as an administrator/supervisor appears to us to present both questions of statutory exclusion as a managerial employee or supervisor and of contractually agreed-upon exclusion. We will discuss each of these arguments separately.

1. Managerial Employee

In determining whether an individual is a managerial employee, the Commission has held that the individual must participate in the formulation, determination and implementation of management policy in a significant way or the individual must have effective authority to commit the employer's resources. 2/ The power to commit the employer's resources involves the authority to establish an original budget or to allocate funds for different program purposes from such an original budget, although this power must not be ministerial, such as the authority to spend money for a certain specified purpose. 3/

The District argues that Haugan is a managerial employee in that she attends and is on the agenda of all monthly administrative staff meetings and that she has attended meetings of the Board of Education. The record shows that her participation has been minimal. Her only input at Board meetings was a summary of her program goals. By way of example of her input at administrative staff meetings she cited an instance in which she offered a comment concerning a rope jumping contest. We conclude that she is not involved in a significant way in management policy.

The District also argues that Haugan has the power to commit the District's resources. In its brief the District argues that the school psychologist will be preparing a budget for psychological services; however the record shows that the school psychologist had no input into any budget and no belief she would do so in the future. The District also argues that the school psychologist has committed the District's funds and resources by arranging for transportation of students and purchasing a piece of equipment; however, her arranging for transportation of students appears ministerial in nature, and the record suggests that it was the District Administrator who authorized the purchase of the equipment. Finally, the District argues that the school psychologist has committed resources by scheduling meetings during the school day for which the principals were obligated to hire substitutes during the time of the meeting to replace the teacher participants. This function appears to be one wherein she follows general policies set by others. In any event, it amounts at most to de minimus authority to allocate funds of the District.

Since Haugan does not participate in the formulation, determination and implementation of management policy in a significant way and since she does not have the effective authority to commit the District's resources in a significant way, we find that Haugan is not a managerial employee.

2. Supervisory Status

The Commission deems supervisory those positions which possess the following indicia in sufficient combination and degree:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;

2/ Madison Metropolitan School District, Dec. No. 20836-A, 21200 (WERC, 11/83).

3/ Ondossagon School District, Dec. No. 20022 (WERC, 10/82).

2. The authority to direct and assign the work force;
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employees;
5. Whether the supervisor is supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. 4/

Neither party asserts that Haugan has the authority to effectively recommend the hiring or firing of employees. The District asserts that as head of the M-teams and IEP meetings, Haugan directs and assigns the workforce. The record shows, however, that Haugan functions as a fellow professional in a meeting of professionals, and while she functions as a chairperson and coordinator in those meetings, she does not assign or oversee the work of the teachers and other professionals involved. The supervision she is involved in is that of an activity, such as the M-team and IEP meetings, and not the supervision of employees, all of whom are supervised by the building principals. Haugan's role therein is not sufficient to render her a supervisor.

3. Recognition Clause

The District argues that the Commission should deny the Union's request for inclusion of the School Psychologist in the instant unit because the unit was created by voluntary recognition and because the recognition clause: expressly includes only teachers, guidance counselors and librarians; expressly excludes all other District personnel; and specifically excludes administrators.

The Commission has held in many instances that a unit clarification proceeding is not an appropriate means of expanding a voluntarily recognized bargaining unit 5/; however, where, as here, the position at issue was not in existence at the time of the voluntary recognition agreement and the position is not specifically excluded by the language of the agreement, the unit clarification procedure is an available means of seeking inclusion of the position. 6/

As noted in Conclusion of Law 2, we are satisfied both that the instant circumstances are not such as to foreclose use of the unit clarification proceeding to seek inclusion of the school psychologist position at issue and that the parties' collective bargaining agreement including its recognition clause does not require or warrant exclusion of that position from the instant unit.

We note at the outset that the recognition clause does not specifically exclude the position of "school psychologist" from the unit. Furthermore, we are satisfied that the school psychologist position at issue was first created as a position within the direct employ of the District only after September 21, 1983,

4/ Wausaukee School District, Dec. No. 15620-A (WERC, 6/83), Madison Metropolitan School District, Dec. No. 20836-A, 21200 (WERC, 11/83).

5/ City of Cudahy, Dec. No. 12997 (WERC, 9/74); City of Cudahy (Fire Department), Dec. No. 18502 (WERC, 3/81).

6/ E.g., Tomahawk Unified School District No. 1, Dec. No. 12483-B (WERC, 8/77). It is also available in cases where intervening events have occurred which materially affect the status of the employees involved. See, City of Cudahy cases, supra, Note 5.

and that the previous provision of school psychologist services was pursuant to a contract for services basis between the District and its CESA District. Because the individuals provided by CESA pursuant to that contract for services arrangement were not under a direct contract of employment with the District, there is no merit to the District's contention that a school psychologist position has historically and intentionally been excluded from the bargaining unit. Rather, the parties would not have had occasion to address a position of school psychologist when they entered their most recent collective bargaining agreement since the position was created within the District's employ only after that most recent agreement was entered into on September 21, 1983.

Also, because the position did not exist when they entered into their agreement, neither the express references to "guidance counselors and librarians" as included in the unit, nor the general exclusion of "all other employees of the School District", nor the specific exclusion of administrators alone or together, warrants the conclusion that the parties intended an otherwise non-supervisory and non-managerial professional school psychologist to be excluded from the unit where the duties of the position, as here, are primarily working with students and teachers in support of the educational program.

Indeed, in Tomahawk Schools, 7/ the Commission granted a unit clarification order including a newly created school psychologist position in a professional teacher unit which expressly excluded "administrators". The rationale set forth in that case expressly provides that fragmentation of non-supervisory, non-managerial professionals working primarily with students and teachers in support of the educational program is to be avoided absent special circumstances not present in that case.

The same outcome (inclusion of the school psychologist in the teacher unit) appears appropriate herein. Although the District has identified the school psychologist position as "administrative" or an "administrator" in several respects, we have looked behind the employer's job titles and job descriptions to determine the status of the position by consideration of the actual duties and responsibilities involved. 8/ Having done so herein, we find that the position in question is a professional one working primarily with students and teachers in support of the educational process. Moreover, contrary to the District's contention, we are satisfied that there are no special circumstances in this case that would warrant exclusion of the non-managerial, non-supervisory school psychologist position from the instant unit of professionals working primarily with students and teachers in support of the educational process. We note in that regard that, unlike the school psychologist, each of the other eight administrator/supervisors, with whom the District would have us group the school psychologist, is either a supervisor or otherwise outside the statutory definition of municipal employee. Those positions consist of the Superintendent of Schools, the principal of each of the District's four schools, the director of transportation, the director of buildings and grounds, and the business manager. 9/ While the school psychologist's attendance at meetings of that group (i.e., a group otherwise limited to supervisors and managerial personnel) lends some support to the contention that her position should be excluded from the unit, we have nonetheless concluded, for all of the foregoing reasons, that Haugan's is not a position that warrants exclusion as a supervisor or on any other grounds.

7/ Supra, Note 6. In that case, the Commission 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 of primarily of teachers, absent special circumstances not present herein. To the same effect, see, Joint City School District No. 1, City of Superior, Dec. No. 13238-A (WERC, 6/76).

8/ See, e.g., Village of Shorewood, Dec. No. 13675 (WERC, 5/75).

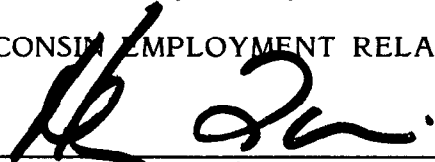
9/ Exhibits 14, 15, 16 and Tr. 29-30. This group does not include the director of special education because the function is performed by an individual contracted for through CESA who works on a part-time basis and whose office is located outside the District in Hayward. Tr. 29-30.

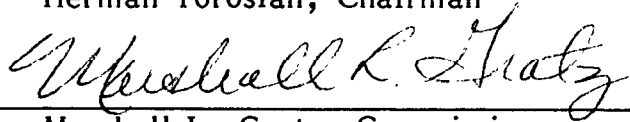
For the foregoing reasons, then, we have ordered the school psychologist position included in the existing professional teacher bargaining unit noted above. Our order does not, however, determine what the terms and conditions of employment are to be for that newly included position. Rather, that is a matter for the parties to resolve through collective bargaining.


Dated at Madison, Wisconsin this 18th day of September, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner