

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
UNITED NORTHEAST EDUCATORS
Involving an alleged Employee of
SEYMOUR COMMUNITY
SCHOOL DISTRICT

Case 2
No. 36092 ME-57
Decision No. 23844

Appearances:

- Mr. Lawrence J. Gerue, Program Director, United Northeast Educators, and Bayland Teachers United, 1540 Capitol Drive, Green Bay, Wisconsin 54303, on behalf of the UNE.
- Mr. Lyle Martens, District Administrator, 10 Circle Drive, Seymour, Wisconsin 54165, appearing on behalf of the District.
- Mulcahy & Wherry, S.C., Attorneys at Law, 414 Walnut Street, Green Bay, Wisconsin 54305, by Mr. Dennis W. Rader, appearing on behalf of CESA 7.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

United Northeast Educators (herein UNE), having on December 4, 1985, filed a petition requesting that the Wisconsin Employment Relations Commission clarify a bargaining unit consisting of full-time and part-time certified classroom teachers, librarians, guidance counselors and nurses, to determine whether a certain speech therapist position should be included in the bargaining unit; and a hearing on the matter having been conducted in Seymour, Wisconsin, on January 27, 1986, by Deborah A. Ford, a member of the Commission's staff; and Cooperative Educational Service Agency No. 7, (herein CESA 7) having entered an appearance and, without objection of any party, having been permitted to participate as a party in the instant proceeding; and a stenographic transcript of the proceeding having been received by February 4, 1986; and on February 13, 1986, UNE having filed a motion requesting that the hearing be reopened for the purpose of presenting additional testimony; and on February 17, 1986, CESA 7 having filed a post-hearing brief; and on February 20, 1986, CESA 7 having filed a written response opposing UNE's motion to reopen the hearing; and the agreed-upon time for filing briefs having expired on or about February 20, 1986, without a brief being filed by either the UNE or the District; and the Commission having considered the evidence and arguments of the parties and the UNE's motion to reopen, and being fully advised in the premises, makes and issues the following Finding of Fact, Conclusions of Law and Order.

FINDING OF FACT

1. That United Northeast Educators, hereinafter referred to as UNE, is a labor organization with principal offices at 1540 Capitol Drive, Green Bay, Wisconsin 54303.
2. That Seymour Community School District, hereinafter referred to as the District, is a municipal employer with principal offices at 10 Circle Drive, Seymour, Wisconsin 54165.
3. That Cooperative Educational Service Agency, #7, hereinafter referred to as CESA 7, is a municipal employer with offices at 301 East Mill Street, Plymouth, Wisconsin.
4. That UNE has been recognized by the District as the exclusive bargaining representative of a bargaining unit of District employes described in the most recent District-UNE collective bargaining agreement as follows:

All employes of the Board certified as classroom teachers (full-time and part-time), librarians, guidance counselors and nurses, excluding principals, assistant principals, supervisors, psychologists, social workers, administrators and substitute teachers.

5. That in its petition and at the hearing, UNE contends that the part-time speech therapist working at the District on a 60% time basis should be included in the abovenoted bargaining unit of District employes; that at the outset of the hearing, UNE, CESA 7 and the District agreed that the current occupant of that position, Renae S. Tushkowski, was an employe of CESA 7; that UNE argued at the hearing that in view of the language of the unit description in the abovenoted agreement recognition clause and in view of the fact that the District had treated full and part-time speech therapists working on its premises as members of the abovenoted bargaining unit in school years 1981-1982 through 1984-1985, the District had no right to employ a speech therapist from outside the bargaining unit in the 1985-1986 school year, such that the occupant of that position should be ordered included in the abovenoted unit by the Commission herein; and that CEAS 7 and the District contend that since Tushkowski is employed solely by CESA 7 and not by the District, there is no standing for or merit in UNE's request for inclusion of that position in the abovenoted unit of District employes.

6. That after the hearing in the instant matter was concluded, UNE requested the record be reopened for the taking of further evidence on the question of whether Tushkowski was in fact an employe of the District rather than of CESA 7, and "in particular the responsibility and usage of evaluations and evaluators and in regards to the School District's influence over Ms. Tushkowski's continued employment"; and that CESA 7 responded in writing in opposition to that motion.

7. That Tushkowski has worked as a 60% time speech therapist in the District's schools since August, 1985; that said employment is pursuant to Tushkowski's having been selected for hire by CESA 7; that Tushkowski and CESA 7 are parties to an employment contract; and that the District has a contract for services with CESA 7 for the provision of the services of a 60% speech therapist.

8. That Tushkowski is one of two speech therapists working in the District's schools in 1985-1986; that the other speech therapist position is a full-time position, the occupant of which was hired directly by the District without the involvement of CESA 7; and that the latter employe is included in the UNE bargaining unit described above; and that in Findings of Fact 4, that employe's position is not in dispute herein.

9. That at the time the District sought to fill the abovenoted full-time therapist position, it also attempted to hire a person for the part-time position but was unsuccessful; that the District subsequently contacted the offices of CESA 7 to inquire whether CESA 7 had personnel available to provide speech therapist services to the District; that in the past the District has contracted with CESA 7 for speech therapy services; and that in 1985-1986, CESA 7 was able to provide the services of Tushkowski pursuant to a contractual arrangement between it and the District.

10. That Tushkowski receives her salary from CESA 7; that Tushkowski is paid according to the normal CESA 7 formula which provides that its employes receive an average of all the salaries paid in the school district's in which they work; that because Tushkowski works solely in the District, she received the amount listed in the District's salary schedule; that Tushkowski's health and life insurance benefits are determined and provided by CESA 7; that Tushkowski's employment contract is with CESA 7 rather than with District; that CESA 7 makes retirement fund contributions on behalf of Tushkowski in accordance with a policy determined by CESA 7; but, that the District is responsible for day-to-day supervision of Tushkowski.

11. That in the past several years the District has utilized the services of speech therapists with whom it directly contracted and speech therapists provided pursuant to contracts with CESA 7 and its predecessor CESA; but that the District has not utilized CESA speech therapist personnel since the 1981-1982 school year.

12. That none of the speech therapy personnel previously provided pursuant to contracts with a CESA have been included in the bargaining unit.

CONCLUSIONS OF LAW

1. That Renae Tushkowski is an employe of CESA 7 and not an employe of the Seymour Community School District.

2. That as an employe of CESA 7 Renae Tushkowski is not eligible for inclusion in the bargaining unit referred to in Finding of Fact 4.

3. That Conclusions of Law 1 and 2, above, would not be affected by additional evidence referred to in the UNE motion to reopen hearing quoted in Finding of Fact 6, above.

4. That, in light of Conclusion of Law 3, above, there is no good cause shown, within the meaning of Commission Rule ERB 10.19, Wis. Adm. Code, for reopening the hearing in this matter as requested by UNE.

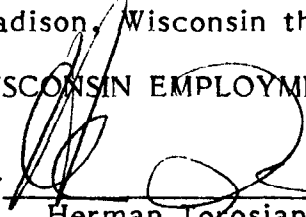
ORDER 1/

1. UNE's motion to reopen hearing shall be, and hereby is, denied.

2. UNE's petition for clarification of bargaining unit shall be and hereby is, dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 22nd day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Herman Torosian, Chairman

 _____
Marshall L. Gratz, Commissioner

 _____
Danae Davis Gordon, Commissioner

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

(Footnote 1 continued on Page 4)

(Footnote 1 continued)

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.

SEYMOUR COMMUNITY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

UNE

UNE contends the speech therapist position held by Renae Tushkowski should be included in the bargaining unit because the recognition clause covers all certified personnel employed by the District and because in the past four school years such positions have been held by personnel treated by the District as within the UNE bargaining unit. UNE argues in support of its Motion that, contrary to the parties' stipulation, the evidence presently of record and the additional evidence UNE requests reopening to adduce shows and would confirm that Tushkowski is a District employe rather than an employe fo CESA 7.

The District

The District maintains that Tushkowski is not an employe of the District but rather is an employe of CESA 7. The District argues that it has previously contracted with CESA for speech therapist personnel and has treated such personnel as outside the bargaining unit.

CESA 7

CESA 7 asserts that it is the sole employer of Tushkowski, not the District. It notes that CESA 7 hired and set the wages and benefits for the position in question and that day-to-day supervision by the District is made irrelevant by Sec. 116.045, Stats. From those facts, CESA 7 argues that it is clear that Tushkowski is not a District employe, that Tushkowski is not includable in the UNE unit of District employes, and that the additional evidence sought to be introduced could not change those basic conclusions. It further notes that the District attempted to hire directly but found no candidates and thereafter looked to CESA 7 as a source of the speech therapy services it needed.

DISCUSSION

Merit of the Petition Based on Evidence Presented at Hearing

The issue to be decided herein is not whether the District violated its agreement with UNE by contracting for speech therapy services with CESA 7 for 1985-1986, but rather whether CESA 7 or the District is the employer of Tushkowski. Clearly, if CESA 7 is the sole employer of Tushkowski, then she could not be deemed an employe of the District, and she could not be included in the UNE bargaining unit which by its terms is limited (and appropriately so) to employes of the District.

UNE's reliance on past practice is entirely unpersuasive. The record reveals that over the last eight years the District has utilized speech therapists both directly hired by the District and contracted for by the District through CESA. When hired directly by the District, such personnel have been treated as in the UNE bargaining unit, whereas when contracted for from CESA such personnel have been treated as outside the UNE bargaining unit. In 1985-1986, after unsuccessful attempts to directly hire a part-time speech therapist, the District sought and contracted for speech therapist services from CESA 7. The foregoing facts in no way support the UNE's contention that a speech therapist whose services are contracted for with CESA 7 should be included in the UNE bargaining unit of District employes.

In determining who employs Tushkowski, relevant factors include who has a formal employment contract with the employe, and who controls the hiring, firing, and setting of wages, hours and conditions of employment for the employe in

question. 2/ Supervision and control of day-to-day activities is expressly made nonrelevant by Sec. 116.045, Stats., which states regarding educational service agencies as follows:

Agency personnel. The agency is the sole employer of the personnel it employs. A recipient of personnel services is not deemed an employer because of the exercise of supervision or control over any personnel services provided.

The evidence adduced at the hearing reveals that Tushkowski was hired by CESA 7 and receives her paycheck from CESA 7. Her health and life insurance are provided by CESA 7 in accordance with benefits policies established by CESA 7, and CESA 7 makes contributions to the Wisconsin Retirement Fund on Tushkowski's behalf. Moreover, CESA 7 determined the formula by which Tushkowski's salary would be determined, although in Tushkowski's case that salary paralleled that provided by the District to employes in the UNE unit.

In light of the foregoing, it is clear that CESA 7 hired Tushkowski and has exercised and retained ultimate authority and responsibility with respect to setting her wages, hours and conditions of employment. Although the District is responsible for the day-to-day supervision of Tushkowski, by statute that fact has no bearing on whether the District or CESA 7 is her employer.

Based on the foregoing, we have concluded that CESA 7, not the District, is Tushkowski's sole employer; and that she is not, therefore, eligible for inclusion in the bargaining unit referred to in Finding of Fact 4. 3/

Request for Re-opening of Hearing

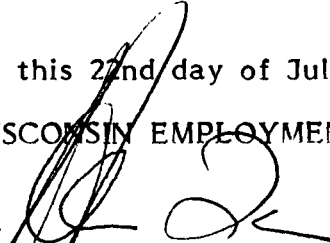
Commission Rule ERB 10.19 4/ permits reopening of a hearing at the request of a party only "on good cause shown".

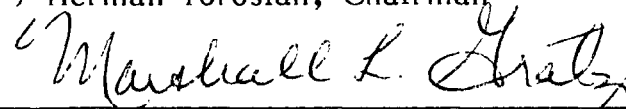
UNE based its request to reopen the record upon its view that, when taken together with the balance of the evidence of record, additional testimony concerning the role of District evaluation and evaluators and of District influence regarding Tushkowski's continued employment would warrant the conclusion that Tushkowski is an employe of the District rather than of CESA 7. We do not agree.

In our view, the evidence of record noted above, in the context of Sec. 116.045, Stats., is such that the additional evidence sought to be introduced by UNE would not affect our basic Conclusions of Law 1 and 2, herein. 5/ For that reason, UNE's request to reopen the hearing is denied and the petition has been dismissed.

Dated at Madison, Wisconsin this 22nd day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Herman Torosian, Chairman

 _____
Marshall L. Gratz, Commissioner

 _____
Danae Davis Gordon, Commissioner

2/ CESA 14, Dec. No. 17235 (WERC, 8/79) at 8, citing, CESA 4, Dec. No 9989 (WERC, 11/70) and CESA 7, Dec. No. 12175 (WERC, 9/73).

(Footnotes continued on Page 7)

(Footnotes continued)

3/ Accord, cases cited in Note 2, supra.

4/ Reads as follows:

ERB 10.19 Close of hearing. A hearing shall be deemed closed when the evidence is closed and when any period fixed for filing of briefs, presentation of oral argument, if any, or both has expired. The hearing may be re-opened on good cause shown.

5/ See, CESA 14, Dec. No. 17235, supra, (control of decisions as to whom to employ and the setting of wages, hours and conditions of employment given controlling weight against evaluation and other factors in determining whether District or CESA was the employer of certain disputed employees.)