STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE BOARD OF SCHOOL DIRECTORS Involving Certain Employes of MILWAUKEE PUBLIC SCHOOLS	Case 181 No. 36769 ME-85 Decision No. 25143

Appearances:

Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Board of School Directors.

Mr. Richard Perry, Perry, First, Lerner, Quindel & Kuhn, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, appearing on behalf of the Milwaukee Teachers' Education Association.

Ms. Nola J. Hitchcock Cross, Podell, Ugent & Cross, S.C., Attorneys at Law, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202-4905, appearing on behalf of District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local #1616.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION TO CLARIFY BARGAINING UNIT

The Milwaukee Board of School Directors (MBSD) having, on January 23, 1986, filed a petition for declaratory ruling with the Wisconsin Employment Relations Commission (Commission), in which the MBSD requested the Commission to issue a declaratory ruling pursuant to Secs. 111.70(4)(b) and 227.41, Stats., determining whether individuals who are employed as members of the staff of the recreational programs of the Division of Municipal Recreation and Community Education of the Milwaukee Public Schools and who are also (in connection with their regular employment) employed by the MBSD as certificated teachers are members of the bargaining unit represented by District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local #1616 (AFSCME), or members of the bargaining unit represented by the Milwaukee Teachers' Education Association (MTEA) during the period of time and for the hours within which they are employed as members of the staff of the recreation programs of that Division, and further determining which collective bargaining agreement applies to such individuals during the period of time within which they are employed in such capacity; and the MTEA having, on February 6, 1986, filed a motion to dismiss the petition for declaratory ruling, contending that said petition presented matter which was more appropriately the subject of a unit clarification proceeding and was in fact the subject of a prohibited practice complaint filed by the MTEA with the Commission on February 3, 1986, and contending in the alternative that if the declaratory ruling petition was not dismissed, said petition should be consolidated with the complaint of prohibited practice; and AFSCME having, on February 7, 1986, filed a motion for extension of time to file a response to the petition for declaratory ruling; and the Commission having, on February 7, 1986, granted said motion; and AFSCME having, on February 18, 1986, filed a response to the petition for declaratory ruling in which AFSCME contended that it was the exclusive collective bargaining representative for the positions at issue, that an existing contract between AFSCME and the MBSD barred the petition for declaratory ruling, that AFSCME was not a party to the prohibited practice complaint which accordingly should not be consolidated with the declaratory ruling petition and that said petition, if addressed, could be appropriately addressed only under Sec. 227.41, Stats.; and AFSCME also having, on February 18, 1986, filed a motion to dismiss the petition for declaratory ruling; and the MBSD having, on February 21, 1986, responded to the various motions made by the MTEA and AFSCME by asserting, among other things, that the matter could be properly addressed either as a request for unit clarification or for a declaratory ruling, that the prohibited practice complaint

should be separately heard after the declaratory ruling matter, and that the MBSD may not have any objection to AFSCME's contention that the declaratory ruling was barred by contract; and the Commission having, by letter dated March 24, 1986, informed the parties that it would appear that the dispute could be more clearly resolved if the MBSD were to withdraw its declaratory ruling and file a unit clarification petition; and the MBSD having, on April 3, 1986, filed the document previously filed as a petition for declaratory ruling as a petition for unit clarification; and the MBSD and the MTEA having, in letters filed with the Commission between April 4 and April 17, 1986, disputed whether the unit clarification or prohibited practice should be heard first; and the Commission having, on April 14, 1986, determined not to consolidate the petition for unit clarification and the complaint of prohibited practice; and AFSCME having, on April 14, 1986, filed with the Commission a motion to dismiss the unit clarification petition together with a supporting affidavit, in which AFSCME asserted that said petition was barred by contract, raised no genuine question concerning representation, and would be rendered moot by the pending complaint of prohibited practice; and hearing on the unit clarification petition having been conducted on July 15, July 16, September 29, and October 28 of 1986, in Milwaukee, Wisconsin before Richard B. McLaughlin, an Examiner on the Commission's staff; and a transcript of each day of hearing having been prepared; and the parties having submitted various documents into the evidentiary record by March 17, 1987; and the parties having submitted briefs in the matter by July 20, 1987; and the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of School Directors, hereinafter referred to as the MBSD, is a municipal employer which has its offices located at 5225 West Vliet Street, Milwaukee, Wisconsin 53201.

2. That the Milwaukee Teachers' Education Association, hereinafter referred to as the MTEA, is a labor organization which has its offices located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. That District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local #1616, hereinafter referred to as AFSCME, is a labor organization which has its offices located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

4. That the present matter concerns a petition for unit clarification filed by the MBSD with the Commission on April 3, 1986, the allegations of which were originally filed by the MBSD with the Commission on January 23, 1986, as a petition for declaratory ruling; that said petition for unit clarification requests the Commission to determine the following questions:

> Are individuals who are employed as members of the staff of the recreational programs of the Division of Municipal Recreation and Community Education of the Milwaukee Public Schools and who are also (in connection with their regular employment) employed by the Milwaukee Public Schools as certificated teachers members of Local 1616 District Council 48 American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO or members of the Milwaukee Teachers' Education Association during the period of time and for the hours within which they are employed as members of the staff of the recreation programs of that Division? Furthermore, which collective bargaining agreement applies to such individuals during the period of time within which they are employed in such capacity?

and that, if these questions are reached by the Commission, the MBSD and AFSCME contend that such employes fall within a bargaining unit represented by AFSCME, while the MTEA contends that the duties performed by certain of such employes constitute academic instruction which must be considered bargaining unit work of employes represented by the MTEA.

5. That the MBSD, among its functions, operates a public school district known as the Milwaukee Public Schools, and conducts, through the various schools in that system, a course of instruction which is subject to the regulation and

oversight of the State of Wisconsin's Department of Public Instruction, hereinafter referred to as the DPI; and that, among its functions, the MBSD operates the Division of Municipal Recreation and Community Education, hereinafter referred to as the Recreation Division.

6. That the MTEA was first certified by the Commission as the exclusive collective bargaining representative of certain employes of the MBSD in Commission Case V, No. 9399, ME-124, Decision No. 6595, which was issued by the Commission on February 19, 1964; that the bargaining unit then certified has been subject to a number of proceedings regarding the amendment or clarification of the bargaining unit description; that the most recent clarification of said bargaining unit description occurred in Commission Case 101, No. 24218, ME-1639, Decision No. 17009-D, which was issued by the Commission on July 22, 1986, on the basis of facts stipulated by the MBSD and the MTEA; and that the collective bargaining agreement between the MTEA and the MBSD in effect, by its terms, from July 1, 1982, to June 30, 1985, contains, at Part II, Section A, a provision entitled "RECOGNITION," which reads as follows:

> 1. The Board of School Directors (hereinafter referred to as the Board) recognizes the Milwaukee Teachers' Education Association (hereinafter referred to as the MTEA) as the duly certified exclusive collective bargaining representative for all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent (50%) of a full teaching schedule or presently on leave, as well as those teaching on a regular part-time basis less than fifty percent (50%) of a full teaching schedule, (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialists, activity specialists, music teachers 550N who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, diagnostic teachers, vocational work evaluators, community human relations coordinators, human relations curriculum developers, mobility and orientation specialists, community resource teachers, program implementors, curriculum coordinators and Montessori coordinators), excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors and executives . . .

7. That AFSCME was first certified by the Commission as the exclusive collective bargaining representative of certain employes in the Recreation Division of the MBSD in Commission Case XXXIX, No. 15779, ME-808, Decision No. 12067, which was issued by the Commission on January 21, 1974; that the Commission described the bargaining unit in said decision thus:

> . . . all employes in the employ of the Milwaukee Board of School Directors, Department No. 888J, in the classification of Per Diem Payroll (Social Center), who have been employed 26 or more weeks during the 12-month period from September 1, 1972, through August 31, 1973, and who worked 10 or more hours per week during said period, in the weeks involved they so worked . . .

that the Commission noted in said decision that the election which had preceded the certification included 78 eligible voters, 40 of whom cast ballots, 1 of which was void, 28 of which were cast for AFSCME and 11 of which were cast against AFSCME; that the Commission subsequently clarified this bargaining unit in Commission Case LIX, No. 18432, ME-1118, Decision No. 13134-A, which was issued by the Commission on January 27, 1976, and which clarified the bargaining unit description to read thus:

> All employees in the employ of the Milwaukee Board of School Directors, Department No. 888J, in the classification of Per Diem Payroll (Social Center) who are employed 26 or more weeks during a 12-month period and who work 10 or more hours per week during said period.

that in the memorandum accompanying said unit clarification, the Commission noted that: "Council 48 does not seek to represent employes who are certificated or those who perform professional duties;" 1/ that in said memorandum, the Commission also stated the following:

> In resolving this issue, the Commission notes that the parties voluntarily agreed in a prior Commission case . . . that employes who worked more than 26 weeks a year and for more than 10 hours a week were eligible to vote, while employes who did not meet that criteria were excluded from voting. Based upon that stipulation, to which the Board agreed, the Commmission thereafter conducted a representation election among the approximately 78 employes who met the foregoing criteria. The then approximately 1800 employes who did not meet that criteria were ineligible to vote, pursuant to the stipulation of the parties. The Commission subsequently certified the results of the election which showed that a majority of eligible employes had selected Council 48 to represent them for collective-bargaining purposes.
>
> In such circumstances, where the parties have voluntarily agreed to the present composition of the unit, and where that agreement was not repugnant to the policies of the Municipal Employment Relations Act, and where Council 48 then knew that the presently petitioned-for employes would be excluded from that unit, and in the absence of any intervening events which materially affect the status of those employes, the Commission finds that it would be inappropriate to negate the prior agreement of the parties by accreting the petitioned-for employes to the established bargaining unit. Accordingly, the Commission holds that they cannot now be placed within the voluntarily agreed to collective bargaining unit.
>
> The Commission has, however, clarified that unit so as to delete all references to particular months and years, as the parties at the hearing indicated that they had no objection to such a clarification. 2/

that AFSCME and the MBSD have been parties to a series of collective bargaining agreements dating from 1979 through the present and covering certain employes of the Recreation Division; that the collective bargaining agreement in effect, by its terms, from August 28, 1979, to December 31, 1980, contained, at Part II, Section A, a provision entitled "RECOGNITION," which reads as follows:

> The Board recognizes the Union as the exclusive collective bargaining agent for the appropriate certified bargaining units and as the certified representative of those employees in the same bargaining units occupying the positions and classifications as defined in the appropriate "Certifications of Representatives," promulgated by the Wisconsin Employment Relations Commission (Case LIX, No. 18432, ME 1118, Decision No. 13134-A). Entry criteria to the unit requires a minimum of twenty-six (26) weeks of work between September 1 and August 31 of a program year. A week shall be counted when an employee works ten (10) or more hours. To maintain membership in the bargaining unit, the employee must contine to work ten (10) or more hours for twenty-six (26) or more weeks within each ensuing above program year. . .

that AFSCME and the MBSD agreed, in the collective bargaining agreement in effect, by its terms, from January 1, 1981 to June 30, 1983, to amend Part II, Section A, to read as follows:

1/ Dec. No. 13134-A at 3, footnote 1/.

2/ Ibid., at 4.

> The Board recognizes the Union as the exclusive collective bargaining agent for the appropriate certified bargaining units and as the certified representative of those employes in the same bargaining units occupying the positions and classifications as defined in the appropriate "Certifications of Representatives," promulgated by the Wisconsin Employment Relations Commission (Case LIX, No. 18432, ME 1118, Decision No. 13134-A). Entry criteria to the unit requires a minimum of thirty-six (36) hours of work in a biweekly pay period. . .

that Part II, Section A, in each of the collective bargaining agreements between AFSCME and the MBSD which have succeeded the 1981-1983 agreement reads the same as that contained in the 1981-1983 agreement which is set forth above; that AFSCME and the MBSD have, since at least 1984, mutually agreed that all employes covered by the unit description in Part II, Section A, are also covered by all the provisions of the collective bargaining agreement then in force without regard to the number of hours worked, with the exception of a fair share obligation stated in the collective bargaining agreement then in force; that AFSCME and the MBSD have, since at least 1984, mutually agreed that the hours threshold stated in Part II, Section A, establishes the number of hours worked beyond which an employe becomes obligated to make a fair share payment which is then automatically deducted from that employe's paycheck; and that during a given program year the Recreation Division employs approximately 1900 employes, with approximately 150 of those employes hired to instruct summer programs, and approximately 300-400 of those employes hired to instruct programs in the balance of the year.

8. That the Recreation Division offers various recreational and instructional programs throughout the calendar year, which are not typically subject to regulation by the DPI; that the Recreation Division is an autonomous division of the MBSD's overall operation, and has been in existence since 1911; that the Recreation Division is financed in major part by a tax levy which is separate from that necessary to operate the DPI regulated course of instruction offered through the Milwaukee Public Schools; that the Recreation Division maintains its own program budget which is distinct from the budget for the MBSD's DPI regulated course of instruction; that the Recreation Division typically charges a user fee for the programs it offers; that the Recreation Division has its own administrative structure, which was headed, as of July 15, 1986, by the position of Assistant Superintendent of Schools in charge of the Division of Municipal Recreation and Community Education of the Milwaukee Public Schools; that the Recreation Division hires instructors for the instructional and recreational programs it offers; that such hiring is effected by administrative personnel within the Recreation Division; that instructors hired by the Recreation Division are limited term, part-time employes; that the Recreation Division has considered hiring, and has hired, DPI certified teachers as instructors for some of its programs; that some of these DPI certified teachers are also employed by the MBSD to teach in its DPI regulated instructional program; that the MBSD hires DPI certified teachers for its DPI regulated instructional program through its Division of Human Resources, which is administratively separate from the Recreation Division; that the Division of Human Resources hires employes to fill the positions of Community Recreation Specialist and Activity Specialist, which are the only full-time instructional positions in the Recreation Division; that the quality of performance of employes who serve as instructors in Recreation Division programs is overseen by Recreation Division personnel; that Recreation Division programs are offered to Milwaukee residents generally; that Recreation Division programs are typically created and maintained in response to community interest and are not typically integrated with course offerings of the MBSD's DPI regulated course of instruction; that the Recreation Division does not receive State of Wisconsin educational aids for its programs with the exception of a program devoted to swimming instruction; that Recreation Division programs do not have an attendance requirement, and do not typically employ any grades or exams, excepting, for example, courses in swimming or driver's education; that the Recreation Division has, since 1981, offered a program known as Foreign Language Exploration, hereinafter referred to as the FLEX program; that the Recreation Division has, since the summer of 1983, offered a program known as Computer Camps; and that the Recreation Division has considered the hire of, and has hired, DPI certified teachers, who are also employed by the MBSD as teachers in its DPI regulated instructional program, to instruct these programs.

9. That the MBSD operates a course of instruction during the summer months when its public schools are not in normal school year operation; that these summer school courses constitute a regular feature of the MBSD's DPI regulated instructional program; that summer school courses are funded in major part by State of Wisconsin educational aids; that the MBSD does not charge a fee for its summer school courses to public or non-public school students whose parents reside in the City of Milwaukee; that summer school courses are taught by DPI certified teachers and are typically taught by teachers who are employed by the MBSD to teach during its regular school year DPI regulated course of instruction; that the MBSD offers summer school courses to students from public and non-public schools in grades K through 12; that attendance is required of summer school students; that a student's performance in a summer school course may be graded depending on the particular course involved; that students in grades 9 through 12 can earn credits for meeting graduation requirements through satisfactory completion of summer school courses; that elementary and middle school students do not earn credits but can be promoted from one grade level to another through satisfactory completion of summer school courses; that the MBSD reflects the variety of student purposes by offering enrichment courses through which students functioning at or above their grade level can enhance a particular skill, and by offering promotional/make-up/strengthening courses through which students who have received failing grades can address an area of weakness, make-up for a failed course, or qualify for promotion to the next grade level; and that the MBSD has, since at least 1982, offered summer school courses in computer education and in foreign languages.

10. That the Recreation Division's FLEX and Computer Camp programs were initiated by the governing board of the MBSD, which does consider the instructional value of the programs; that the FLEX program was first offered as an after school program in the fall of 1981, and was again so offered in the spring of 1982; that the after school program met from 4:15 to 6:15 p.m. two times per week, for ten weeks; that the FLEX program was offered by the Recreation Division as a summer program in 1982, and was described in the relevant advertising circular thus: ". . . a program for children, grades K-6, to learn a foreign language and cultures. Languages to be explored are: French, German, Spanish, Chinese and Japanese . . . ;" that the FLEX program has been described in subsequent advertising circulars in substantially the same way; that the 1982 summer FLEX program met for two hours, twice per week, for five weeks; that the FLEX program has not been offered as a summer program since the summer of 1982; that in the fall of 1982, the Recreation Division offered the FLEX program as an after school program which met from 4:00 to 5:30 p.m. once or twice a week for nine weeks; that in the spring of 1983, the Recreation Division offered the FLEX program as a noon hour program; that the Recreation Division presently offers the FLEX program as a noon hour program which meets for from twenty to thirty minutes once or twice a week; that throughout its history, the FLEX program has been offered at schools within the Milwaukee Public School District; that the MBSD has hired DPI certified teachers to serve as instructors of the FLEX program, including teachers employed by the MBSD to teach in its DPI regulated instructional program; that the Recreation Division has hired instructors for the program whose qualifications turn on their fluency with the language involved; that the Recreation Division does not regard a DPI teaching certificate as a condition of hire for the FLEX program; that the MBSD offered summer school "Additional Elementary Programs" in 1985 and in 1986 entitled "English as a Second Language" and "Foreign Language" which were described in the relevant advertising circulars thus:

> English As a Second Language-Available to non-English speaking pupils from first through grade six. . .
>
> Foreign Language-This three-week . . . summer school program is designed for pupils in kindergarten through grade six who would like to have a foreign language learning experience. The program will introduce pupils to French, German, or Spanish through class activities and field experiences. . .

that the Recreation Division has offered Computer Camps as a summer program since 1983; that the relevant advertising circular described the program thus: "an experimental program to introduce computer concepts to children and youth in grades 4-9;" that the 1983 Computer Camps included beginning and intermediate sections; that the 1983 Computer Camps were divided into two separate afternoon sessions of two weeks duration, meeting two hours per day, five days per week;

that the Recreation Division employed as instructors for the 1983 Computer Camps only DPI certified teachers who also taught for the MBSD in its regular year, DPI regulated instructional program; that the MBSD offered computer education classes in its summer schools in both 1982 and 1983; that such summer school classes were taught between the hours of 8:00 a.m. to 12:00 p.m., five days per week for six weeks; that the Recreation Division has offered the Computer Camps as a summer program in 1984, 1985 and 1986; that the advertising circular for the 1984 Computer Camps contained the same program description as had the 1983 circular; that the advertising circular for the 1985 and 1986 Computer Camps described the program thus: "An introductory two-week program to acquaint students in grades 4-9 with the computer;" that the Computer Camps offered by the Recreation Division in the summers of 1984, 1985 and 1986 consisted of two separate afternoon sessions of two weeks duration, meeting for two hours per day, five days per week; that the MBSD's summer school computer education program included various courses for students in grade levels K through 12, including a course entitled Computer Day Camp which was offered to students in grades 4-8; that the summer school courses for 1984, 1985 and 1986 were taught between 8:00 a.m. and 12:00 p.m., with classes typically meeting for about two hours per session, five days per week, for six weeks; that Dennis Lypek and Charles Zinser have served as instructors in the Recreation Division's Computer Camps and in computer education courses offered through the MBSD's summer school; that both Lypek and Zinser have been employed by the MBSD as DPI certified teachers in the MBSD's DPI regulated instructional program for at least the last thirteen school years; that Lypek served as an instructor in the Recreation Division's Computer Camps program in the summers of 1983 and 1984, and served as an instructor for the MBSD's DPI regulated summer school computer education courses in 1982, 1983 and 1984; that Zinser served as an instructor in the Recreation Division's Computer Camps program in the summers of 1983, 1984, 1985 and 1986, and served as an instructor for the MBSD's DPI regulated summer school computer education courses in 1982, 1983, 1984 and 1985; that both Lypek and Zinser have taught material in the Recreation Division's Computer Camps which is similar to that taught by them in courses offered through the MBSD's DPI regulated summer school courses except for the amount of time available to teach the material; that the Recreation Division has, since the summer of 1983, employed instructors for its Computer Camps who are not certified to teach by the DPI; that the Recreation Division has not, at least since 1983, required a college degree as a condition of hire for the Computer Camps, and has hired instructors for the Computer Camps based on the familiarity of an instructor with computers; that the Recreation Division has never required a Computer Camp instructor to follow a specific or standardized curriculum; that the Recreation Division has allowed its instructors to instruct a Computer Camp however the individual instructor deems appropriate; that the content of an individual Computer Camp varies with the individual instructor; that DPI certified instructors employed by the MBSD in its summer school computer courses have had considerable impact on the MBSD's development of curricula for such courses; and that Recreation Division advertising circulars for the FLEX and Computer Camp programs do not specify the identity or qualifications of a particular instructor.

11. That AFSCME has served as the exclusive collective bargaining representative for employes occupying limited term, part-time instructional positions in the Recreation Division from at least August of 1979 until the present; that included among such employes have been employes who are also employed by the MBSD as DPI certified teachers in its DPI regulated course of instruction; that the MTEA has served as the exclusive collective bargaining representative for employes of the Recreation Division occupying the full-time positions of Community Recreation Specialist and of Activity Specialist from at least July of 1982 until the present; that collective bargaining agreements covering employes in the AFSCME bargaining unit have been in effect from August of 1979 through the present; that the MBSD has, in entering contracts with AFSCME and with the MTEA agreed to different levels of wages and different types of benefits for each bargaining unit; that, for example, the collective bargaining agreement presently in effect between AFSCME and the MBSD provides, at Part III, B, under the heading "REEMPLOYMENT," the following:

> Employes in the bargaining unit will be given preference in employment for the job classification they previously held, if their prior evaluation was satisfactory, their service is continuous and they have completed the following hours of service:

Recreation Centers	600 hours
Playgrounds (Sp., Sum., Fall)	875 hours

. . .

that said collective bargaining agreement, as well as the collective bargaining agreement mentioned in Finding of Fact 6, each contain provisions granting final and binding arbitration of issues concerning the interpretation or application of the provisions of the agreement; and that the MBSD has, since at least August of 1979, treated instructors in the Recreation Division's FLEX and Computer Camps programs as employes covered by the collective bargaining agreements between it and AFSCME.

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

CONCLUSIONS OF LAW

1. That none of the employes hired by the MBSD's Recreation Division to instruct its Computer Camp and FLEX programs constitute a "Professional employe" within the meaning of Sec. 111.70 (1) (L), Stats., during the period of time they are so employed.

2. That the Commission can not, under the provisions of Sec. 111.70(4)(d) 2. a, Stats., order the placement of employes hired by the Recreation Division to instruct its Computer Camp and FLEX programs in the bargaining unit represented by the MTEA and mentioned in Finding of Fact 6 above, because such employes are not professional employes.

3. That it is inappropriate in the instant circumstances to grant the MBSD the unit clarification order sought in its petition of April 3, 1986.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER 3/

That the petition to clarify bargaining unit of municipal employes filed by the MBSD with the Commission on April 3, 1986, be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

3/ 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 3 continued on page 9.)

(Footnote 3 continued from page 8.)

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.

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DISMISSING PETITION
TO CLARIFY BARGAINING UNIT

POSITION OF THE MBSD

The MBSD states the present matter presents only the following issue:

> Should the Commission confirm by declaratory ruling and/or unit clarification the current placement of Instructors employed by the MPS Recreation Division on a part-time, ("per diem") basis with that collective bargaining unit represented by Local 1616 District Council 48 AFSCME AFL-CIO (and more popularly denoted the "888J" unit), regardless of whether or not those individuals coincidentally happen to be employed on a separate basis by the "educational" program of MPS as certificated teachers or in other positions?

The MBSD prefaces its argument with an extensive review of the record, stressing among other points that the Recreation Division has a long history as "an autonomous division of the MBSD (which) operates independently of the MPS educational program." In addition, the MBSD notes in its review of the record, that the bargaining unit of Recreation Division employes represented by AFSCME has a significant history of its own, evincing "all the indicia of a mature, functioning collective bargaining relationship" thus constituting a "representational status quo, which has satisfactorily served the interests of all parties concerned, (and) was never questioned until the MTEA filed an unprecedented grievance . . . " The MBSD initiates its argument by asserting the present matter can not be limited, as the MTEA asserts, to instructors in the FLEX or Computer Camps programs, but must be seen to affect "the bargaining unit placement of all (emphasis from text) Recreation Division instructors." According to the MBSD, the MTEA "is attempting here to "cherry-pick" one or two or a few courses whose instructors it wishes to "raid" from the established AFSCME-represented 888J unit," and this attempt subverts the purposes of the Municipal Employment Relations Act. The MBSD also contends that all Recreation Division instructors are rightfully, and must rightfully continue to be, members of the AFSCME represented bargaining unit. This contention is well founded, according to the MBSD, in the significant differences between the MBSD academic program and the leisure programs of the Recreation Division. Specifically, the MBSD notes that Recreation Division programs are recreational, not governed by DPI, not geared toward academic advancement, and not necessarily taught by certified teachers; that Recreation Division programs are not limited to students, but are offered to all Milwaukee residents; that Recreation Division programs are not supported by State of Wisconsin educational aids; and that Recreation Division programs are not coordinated with the MBSD's academic program. Beyond this, the MBSD asserts that AFSCME has represented Recreation Division instructors for years and that there is nothing inappropriate about an individual employe being represented by two different bargaining representatives. In addition, the MBSD asserts that the MTEA's concerns that the MBSD has sought to evade contractual obligations with the MTEA are unsupported in the record and that the application of the Commission's traditional "Community of Interest" criteria warrant placing Recreation Division instructors in a bargaining unit separate from teachers. The MBSD's next major line of argument is that the MTEA's presentation was entirely irrelevant to the issues presented for determination in this matter. Characterizing the MTEA's concern with the possibility of MBSD and AFSCME collusion regarding the use of Recreation Division instructors as "patent nonsense," the MBSD asserts that had it not filed the declaratory ruling/unit clarification petition it could have been held liable to AFSCME for undermining "a recognized and long-established AFSCME collective bargaining unit." Beyond this, the MBSD asserts that the MTEA has no valid claim that any Recreation Division offering is "bargaining unit work" under the MTEA contract, and further that there can be no valid challenge to the MBSD's and AFSCME's agreed upon alteration of the 888J bargaining unit description.

POSITION OF THE MTEA

The MTEA states the issues presented by the unit clarification petition thus:

> 1. Was the unit originally certified by the Wisconsin Employment Relations Commission in Dec. No. 12067 (8/73), i.e., all nonprofessional recreation department employees who worked more than 10 hours in 26 weeks, an appropriate unit for collective bargaining?
>
> 2. In its Dec. No. 13134-A (1/76) was the Wisconsin Employment Relations Commission correct in refusing to expand the aforesaid collective bargaining unit to include all employees in the recreation division payroll irrespective of the number of hours they worked because it would expand a 150-employee unit to approximately 2,000 employees without a vote or any employee indication of support for the certified bargaining representative correct as a matter of law and public policy?
>
> 3. Where the Commission refused to accrete approximately 1,850 employees to a 150 employee bargaining unit because it would be in violation of the right of self-determination set forth in the Municipal Employee (sic) Relations Act, was it appropriate for the Employer and AFSCME to conspire to accrete the same employees to the certified bargaining unit?
>
> 4. In the present petition for unit clarification, is it appropriate for the Commission to expand a collective bargaining unit from 150 employees who had an opportunity to vote on the collective bargaining representative to include an additional approximately 1,850 employees who were not eligible to cast a vote on the question of the collective bargaining representative?
>
> 5. Did the duties of the MPS Computer Camps instructors constitute academic instruction which belong in the teacher bargaining unit . . . represented by the MTEA?
>
> 6. Did the duties of the MPS foreign language instructors constitute academic instruction which belong in the teacher bargaining unit represented by the MTEA?

The MTEA prefaces its argument with an extensive review of the record, including background on the parties and the underlying dispute which prompted the filing of the unit clarification petition, the parties' positions, as well as the history of the AFSCME bargaining unit as certified and as expanded. The MTEA initiates its argument by asserting that employes hired by the MBSD to instruct school-age students in academic subjects are performing duties within the scope of the MTEA represented unit and not within the scope of the AFSCME represented unit. Beyond this, the MTEA asserts that unlike virtually all other municipal Recreation Division programs, Computer Camps and FLEX programs were directly initiated by individual directors of the MBSD. In addition, the MTEA asserts that a review of the record demonstrates that material taught in the Recreation Division Computer Camps was essentially academic in nature. A similar review of the record establishes, according to the MTEA, that the MBSD hired instructors for the FLEX program to perform academic instruction. Responding to an MBSD argument, the MTEA urges that the fact that the MBSD did not apply for State aids for the Computer Camps or FLEX programs can not be considered determinative, "since the Employer was paying far lower wages under the AFSCME contract than it would have to under the MTEA teacher contract to perform the same duties, there was little necessity for applying for State aids for the computer camp or FLEX program courses." The MTEA's final major line of argument is that the unlawful conduct of the MBSD in determining the exclusive bargaining representative for approximately 2,000 employes had a major impact upon the statutory rights of those employes. Such action, according to the MTEA, clearly derogates rights protected under the Municipal Employment Relations Act. The MTEA concludes its argument by requesting the Commission to make the following determinations:

> . . . It is, therefore, respectfully submitted that the Commission must, as a matter of sound public policy, reject the unit clarification petition of the Employer . . . It is further respectfully submitted that the duties performed by the instructors in both the computer camps and the foreign language exploratory programs . . . constitute academic instruction belonging in the MTEA collective bargaining unit . . .

POSITION OF AFSCME

AFSCME argues that although "the testimony and argument in this case was limited solely to the classification of recreation center instructors of computer science employed through the Recreation Division, the case obviously has more far reaching implications." Characterizing the MTEA's action in the present matter as an "obvious raid," AFSCME contends that a determination of the issues in this matter turns on the Commission's traditional community of interest criteria. Applying those standards to the present facts, AFSCME asserts that instructors in the Recreation Division have "interests distinct from those in the regular MPS programs and allied with those of the other Recreation Division Instructors in the Local 1616 bargaining unit;" that the skills required of a teacher in the MBSD's DPI regulated academic program are not the skills required of a teacher in the Recreation Division's programs, which require no teaching certificate; that "the wages and benefits of the individuals filling the disputed positions are dissimilar to the MTEA-represented employees and identical to the 888J represented employees;" that the disputed positions share the same supervision as all other Recreation Division instructors; that "in some cases the workplace may be the same for employees represented in the 888J unit as in the MTEA unit;" and that bargaining history clearly establishes that the disputed positions have been treated as within the AFSCME unit. Against this background, AFSCME concludes: "While any one of the above factors may not be the deciding factor, the evidence is decidedly in support of at least five of the six long-standing criteria."

DISCUSSION

The tortuous procedural background to the present matter, as well as the parties' positions, are set forth above and will not be repeated here. The Commission requested that the MBSD submit its petition as a request for unit clarification rather than for a declaratory ruling. Parties have litigated, and the Commission has adjudicated, cases involving unit inclusion/exclusion issues as declaratory rulings. 4/ Such cases were more frequent in the past, however, and the Commission has stated a preference not to treat matters raising unit clarification type issues as declaratory rulings. 5/ The Commission has in more recent cases preferred to handle matters questioning the unit placement of particular positions or questioning the scope of a bargaining unit as unit clarification requests, reserving for the declaratory ruling forum matters questioning the duty to bargain on a particular subject. 6/

There have been a variety of motions lodged in the present matter, two of which present threshold issues to an examination of the merits. These two motions concern AFSCME's assertions that the present matter presents no genuine question concerning representation and is barred by contract. AFSCME's assertion that the

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4/ See, for example, City of Cudahy, Dec. No. 9381 (WERC, 12/69); City of Milwaukee, Dec. No. 6960-F (WERC, 1/70); Village of West Milwaukee, Dec. No. 9576 (WERC, 4/70); Whitefish Bay School District, Dec. No. 10799 (WERC, 2/72); Wausau School District, Dec. No. 10371-A (WERC, 4/72); City of Milwaukee, Dec. No. 10835-A (WERC, 12/72).

5/ City of Milwaukee, Dec. No. 10835-A (WERC, 12/72) at 4: "Although petitions for unit clarifications and amendments filed pursuant to Chapter ERB 11 of the Commission's rules are to be preferred as simpler therefore and more desirable, the Commission has in the past entertained a number of petitions for Declaratory Ruling . . . "

6/ See, for example, Greendale Board of Education, Dec. No. 12611 (WERC, 4/74); and Eau Claire County, Dec. No. 11030-A, 16354 (WERC, 5/78).

present matter does not present a question concerning representation is correct. However, the Commission has distinguished requests which seek to question the majority status of a bargaining representative through the Commission's election processes from unit clarification requests which "merely seeks to clarify an existing bargaining unit." 7/ Although the MTEA has raised questions regarding the propriety of clarifying the AFSCME unit, those questions do not serve to transform the MBSD's petition from one seeking a unit clarification to one seeking an election. It is apparent from the pleadings and from the arguments of the parties that the MBSD has been exposed to a complaint of prohibited practice from the MTEA due, at least in part, to its attempt to assert the provisions of its collective bargaining agreement with AFSCME as a defense to certain MTEA grievances. It is also apparent that if the MBSD accepts the MTEA's position in the grievances, it could expose itself to a complaint of prohibited practice from AFSCME. The underlying authority and purpose of the unit clarification process is broad enough to consider a dispute such as the present one. That authority and purpose has been stated by the Commission thus:

> Unit clarification proceedings are not specifically referred to in the Municipal Employment Relations Act, but are conducted by the Commission as an adjunct of our jurisdiction over representation disputes under Section 111.70 (4) (d), to provide an orderly impartial proceeding for the review of collective bargaining units. This is done in order to relieve labor organizations and Municipal Employers of an area of dispute. 8/

Thus, the dispute noted in the MBSD's petition is one that can be at least considered, if not resolved, through the unit clarification process.

The Commission has addressed the issue regarding the impact of an existing contract on a unit clarification petition thus:

> In unit clarification proceedings, there is no requirement that a petition be filed at any particular time and thus a collective bargaining agreement would not bar the proceeding. 9/

The policies underlying contract bar principles turn on the presence of an election request presenting a question concerning the majority status of a representative, and seek "to balance the potentially conflicting purposes of encouraging the stability of existing collective bargaining relationships and of recognizing employe freedom of choice." 10/ In the absence of such an election request, these policies are not implicated. Since a unit clarification petition does not question the majority status of a representative, contract bar is not a relevant consideration.

It is now necessary to examine the unit placement issues posed in this matter. AFSCME and the MBSD agree that those issues are posed in the MBSD's petition and that those issues should be resolved by an order declaring that the instructors in issue come within the voluntarily defined AFSCME unit, and that those instructors are covered by the provisions of the contract between AFSCME and the MBSD. The MTEA requests the Commission to reject the MBSD's petition, and to declare that the work performed by the Computer Camp and FLEX instructors properly belongs within the MTEA bargaining unit.

7/ City of Milwaukee, Dec. No. 10835-A (WERC, 12/72) at 4.

8/ City of Green Bay, Dec. No. 12682 (WERC, 5/74) at 3.

9/ Milwaukee County, Dec. No. 14786-B (WERC, 4/80) at 6. This states a proposition well established in the Commission's case law, see, for example: Menomonie Joint School District No. 1, Dec. No. 13128-A (WERC, 3/75); Walworth County, Dec. No. 11686, 9394-A (WERC, 3/73); City of Wauwautosa, Dec. No. 11633 (WERC, 2/73); City of Milwaukee, Dec. No. 10835-A (WERC, 12/72); and Wausau School District, Dec. No. 10371-A (WERC, 4/72).

10/ City of Green Bay (City Hall), Dec. No. 21210 (WERC, 11/83), at 7.

The MTEA's argument regarding the unit placement of the Computer Camp and FLEX instructors can not be accepted. The assertion that labelling the work involved as "academic instruction" serves to determine unit status must be rejected. Even assuming "academic instruction" can be meaningfully defined, the MTEA's exclusive focus on the subject matter involved is without support in the MERA or relevant case law.

Sec. 111.70(4)(d), Stats., authorizes the Commission to make determinations regarding the scope or composition of appropriate bargaining units. The Commission's determinations are bounded by various MERA provisions and by the Commission's case law. Applicable to resolution of the present matter are Sec. 111.70(1)(L), Stats., and Sec. 111.70(4)(d) 2. a, Stats. Under Sec. 111.70(4)(d) 2. a, Stats., the Commission can not without an appropriate vote place the Computer Camp or FLEX instructors within the teacher bargaining unit represented by the MTEA if the employes filling those positions are not employed by the MBSD as professional employes as defined by Sec. 111.70(1)(L), Stats. By the same token, the Commission can not without an appropriate vote place the disputed instructors in the AFSCME represented bargaining unit, which includes non-professional employes, if those instructors are professional employes. 11/

Sec. 111.70 (1) (L), Stats., defines "Professional employe" thus:

> 1. Any employe engaged in work:
> a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
> b. Involving the consistent exercise of discretion and judgment in its performance;
> c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
> d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or
> 2. Any employe who:
> a. Has completed the courses of specialized intellectual instruction and study described in subd. 1. d;
> b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

All of the criteria noted above must be present in order to find an employe to be professional. 12/ Subsection 2 of Sec. 111.70 (1) (L), Stats., is not applicable here, and thus the determination turns on subsection 1.

Even assuming that the Computer Camp and FLEX instructors meet the criteria of subsection 1, a, b and c, the only employes even arguably meeting the requirements of subsection d are those certified teachers, such as Zinser and Lypek, who are employed by the MBSD in its DPI regulated instructional program and who have taught the same material in summer school as in Recreation Division programs. FLEX instructors need no more qualification than familiarity with a foreign language and culture, and the non-certified Computer Camp instructors need only a demonstrated knack for handling a computer. While foreign languages and cultures and computer science can constitute "a field science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education," that form of computer science and foreign language study practiced by the Recreation Division's non-certified instructors can not be considered of this nature.

11/ Stoughton Joint School District No. 3, Dec. No. 15995 (WERC, 12/77).

12/ Milwaukee County, Dec. No. 14786-B, (WERC, 4/80).

The issue becomes, however, far closer when applied to employes such as Lypek and Zinser. They teach essentially the same material in summer school as in the Recreation Division, differentiated primarily by the time available to impart that material. The MBSD asserts this is a function of their background, and is a convenience for them as instructors, not a condition of hire. They, like other Recreation Division instructors, according to the MBSD, teach what they have some background in. This contention is considerable. The Recreation Division makes no apparent attempt to advertise Computer Camp sections taught by certified instructors or to require those certified teachers to instruct their DPI-regulated courses for the Recreation Division. In addition, the Recreation Division's use of certified instructors has varied widely over time. 13/ Ultimately, it appears that Zinser and Lypek could, if they so chose, totally depart from the summer school format and treat the Recreation Division Computer Camp as recreational time for themselves and their "students." Against these considerations, however, it can be noted that while there is no extensive coordination of Recreation Division and summer school programs, the Recreation Division Computer Camps were initiated by members of the governing board of the MBSD, and that board is aware of the existence and instructional significance of Recreation Division offerings on computer concepts. Thus, it is not inconceivable that the Recreation Division, in hiring DPI-certified teachers for its Computer Camps, obtains certified teachers who will function, in all practical respects, in their professional capacity. Although this is a close issue, the loosely structured and shifting nature of the Recreation Division Computer Camps, the minimal integration of those Camps with the MBSD's summer school program, and the presence of little, if any, DPI regulation of the Recreation Division offerings establishes that the work of a Recreation Division Computer Camp instructor is not professional in nature, requiring the sort of knowledge described in Sec. 111.70 (1) (L), Stats., but is rather of a type requiring only a particular knack, which Zinser and Lypek have acquired as a function of their professional background. This knack is not a necessary function of the position or of the work involved. While working for the Recreation Division, then, Computer Camp instructors, whether DPI-certified or not, are not employed as professional employes within the meaning of Sec. 111.70(1)(L), Stats.

It is now necessary to address the issues raised by the MBSD's petition. Two prefatory points must, however, be addressed. The first is to clarify what is not at issue here. The propriety of a municipal employer's voluntary recognition of a labor organization as the representative of a bargaining unit is not at issue here. 14/ Nor can the present proceeding be considered a basis to set aside or decertify the unit represented by AFSCME. There is no requirement that voluntary recognition of a bargaining unit occur only with small numbers of employes, and voluntarily recognized units enjoy a presumption of majority status. 15/ The appropriate vehicle to test the majority status of a bargaining representative is an election request, and the appropriate vehicle to challenge the conduct leading to a voluntary recognition is through a complaint of prohibited practice. The second prefatory point is that a unit clarification of a voluntarily defined bargaining unit is not a matter of right. The Commission examines the circumstances of each case to determine if and when such an order of unit clarification may issue. 16/

13/ The MTEA has asserted that this may be accounted for by its filing of a grievance regarding the instructors. This assertion is not a relevant consideration in this forum. That the Recreation Division has been content to use both certified and non-certified instructors is all that is relevant here. See, Amery Joint School District No. 5, Dec. No. 15793-A, 15794-A (WERC, 4/78).

14/ No citation of authority is necessary here. The Commission's election digests, as well as this decision, are replete with references to cases involving the voluntary recognition of a bargaining representative, as well as the voluntary definition of bargaining units.

15/ City of Rice Lake, Dec. No. 16413 (WERC, 6/78).

16/ For examples of cases developing a doctrine of the circumstances of when a Commission clarification of a voluntarily defined bargaining unit may issue, see City of Cudahy, Dec. No. 12997 (WERC, 9/74); City of Cudahy, Dec. No. 18502 (WERC, 3/81), and authority cited at footnote 2 at 6; and City of Cudahy, Dec. No. 19451-A, 19452-A (WERC, 12/82).

Thus focused, the issue for decision is whether the facts of the present matter constitute an appropriate basis to afford the MBSD the two-fold order it seeks. A review of the record establishes that this is not an appropriate case for the clarification of a voluntarily defined bargaining unit. There are fundamental difficulties with the MBSD's request. The first difficulty is that the MBSD seeks to resolve an essentially contractual problem through the Commission's statutory authority to make unit determinations. The first issue posed in the MBSD's petition requires, at a minimum, that the Commission interpret the contract and related practices which grant recognition of AFSCME. The difficulties that result are both procedural and substantive. The procedural defect is that where appropriate the Commission defers disputes regarding the interpretation of contracts granting voluntary recognition to grievance arbitration. 17/ In this case, the contract between AFSCME and the MBSD contains a provision for final and binding arbitration. The procedural difficulties are compounded here by the fact that a separate agreement between the MBSD and the MTEA may present interpretive issues. This procedural problem prefaces the substantive problem, which is that 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. 18/

The MBSD has attempted to surmount the problem posed by conflicting union claims for the same work by asserting the Commission has exclusive jurisdiction over the issues presented in its petition. The Commission described and addressed a somewhat analogous claim in Stoughton Joint School District No. 3 thus:

> The . . . District . . . filed a petition for a unit clarification. It simultaneously petitioned for a stay of grievance arbitration.
>
> On the face of the documents presented it appears that the question posed to the grievance arbitrator is the inclusion or exclusion of certain positions from the collective bargaining unit. Petitioner contends that such issue belongs within the exclusive jurisdiction of the Commission, that arbitration should be stayed and that the Commission should decide the question.
>
> Although the legislature has empowered the Commission to make unit determinations, nothing in the Municipal Employment Relations Act prevents parties from voluntarily defining the appropraite (sic) unit, with certain exceptions. For example, professionals and non-professionals cannot be co-mingled in a single unit without an appropriate vote . . . It may be that the parties have in their collective bargaining agreement agreed to include the positions which the Petitioner asks the Commission to exclude. The Commission's long-standing policy is to honor these agreements unless it is shown that such agreements frustrate the purposes and policies of the Municipal Employment Relations Act.
>
> The first question, then, is whether the parties have so agreed to include such positions. That question goes to the interpretation of the agreement, which must be left for the arbitrator.
>
> The second question is whether the inclusion of these positions in the unit frustrates some policy of the law. 19/

From this, it can be seen that the Commission's jurisdiction is exclusive only in the sense that the ultimate determination of the statutory propriety of a unit's

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17/ Stoughton Joint School District No. 3, Dec. No. 15995, (WERC, 12/77); Walworth County Handicapped Children's Education Board, Dec. No. 17129 (WERC, 7/79).

18/ Dec. No. 15995 at 2.

19/ Ibid.

scope or composition is reserved to the Commission. It does not follow from this that a Commission decision interpreting a contract voluntarily defining a bargaining unit carries greater weight than an arbitrator's, where exclusively contractual issues are presented.

In the present matter, the MBSD's difficulty is that the validity of the voluntary recognition it asserts stems from the agreement of AFSCME and the MBSD. As a function of contract, however, the MBSD could conceivably enter into overlapping or conflicting obligations with different parties. It is not inconceivable that the Recreation Division could enter into an agreement with AFSCME to pay all of its seasonal instructors a given level of pay and benefits while the "educational" division entered into an agreement with the MTEA to pay certified teachers a given pay rate whenever they instruct MBSD offered courses. This is not to say this has happened here, but to exemplify the potential "work jurisdiction" type disputes that can result from overlapping contractual obligations between different parties.

Thus, the first difficulty precluding the two-fold unit clarification order that the MBSD seeks is that the request seeks to employ the Commission's statutory unit determination authority to resolve an essentially contractual issue. The contract interpretation difficulties have been noted. It is also necessary to note that offering the MBSD the two-fold order it seeks would violate the Commission's authority to make unit determinations. In an analogous setting involving the MBSD and the MTEA, the Commission stated the following in response to an MBSD claim that a previously issued Commission unit clarification order afforded the MBSD a defense to an MTEA request for arbitration:

> Fundamentally, (the MBSDs) argument fails to appreciate that a unit clarification ruling by the commission is not an adjudication of the substantive provisions of a collective bargaining agreement. A unit clarification merely clarifies and/or determines whether certain classifications are included in the existing collective bargaining unit. The unit clarification previously issued by the commission is not determinative of whether the provisions of the collective bargaining agreement have been violated with respect to the classifications involved. 20/

In sum, the Commission finds it is inappropriate to offer the MBSD the answer to the two issues its petition poses. Those issues would require the Commission to look not only at the duties of the positions in dispute, but also at the potential contractual dilemma of which of two conflicting claims to govern the wages, hours and conditions of employment of certain employes should be honored. 21/

Dated at Madison, Wisconsin this 8th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

20/ Milwaukee Board of School Directors, Dec. No. 14614-B (WERC, 2/77) at 4.

21/ In Board of Education, Whitefish Bay Public Schools, Dec. No. 10799 (WERC, 2/72), at 4, the Commission stated the following in addressing a situation analogous to that at issue here: "The parties cannot, by stipulation, overcome the legislature's exclusive delegation to this Commission of authority to determine appropriate bargaining units while, at the same time, invoking the processes of the Commission in declaratory ruling proceedings to determine a dispute involving a portion of their bargaining unit description."