STATE OF WISCONSIN
CIRCUIT COURT
RACINE COUNTY

RACINE EDUCATION ASSOCIATION,
Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Defendant.

Case No. 94-CV-1820
Decision No. 27982-C

NOTICE OF ENTRY OF DECISION AND ORDER

To: Anthony L. Sheehan
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PLEASE TAKE NOTICE that a decision and order affirming the decision of the Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the court on the 31st day of March, 1995, and duly entered in the Circuit Court for Racine County, Wisconsin, on the 31st day of March, 1995.

Notice of entry of this decision and order is being given pursuant to secs. 806.06(5) and 808.04(1), Stats.

Dated this 7th day of April, 1995.

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DECISION AND ORDER

This matter is before the Court on the petition of Racine Education Association ("the Association") for judicial review of a decision of the Wisconsin Employment Relations Commission ("WERC" or "the Commission") pursuant to Chapter 227 of the Wisconsin Statutes. In its decision dated June 23, 1994, the WERC affirmed the Hearing Examiner's order dismissing the Association's prohibited practice complaint against the Racine Unified School District ("the District"). The central issue is whether the District was refusing to bargain in good faith when it filed a unit clarification petition during the course of District initiated interest arbitration proceedings for purposes of clarifying the bargaining unit solely to come under the provisions of 1993 Wisconsin Act 16 that would allow the District, upon impasse, to avoid interest arbitration and implement its qualified economic offer unilaterally. An additional issue is whether the commission was bound by the decision in Madison Teachers, Inc. v. Madison Metropolitan School District, Dane County Circuit Court Case No. 93-CV-3970 (1993), ("MTI v. MMSD"), in which Judge Nichol determined in a similar fact situation that the Madison District's attempt to clarify the existing unit constituted bad faith bargaining.

FACTS

The facts in this matter are largely undisputed and will be recited in summary fashion here. While the Association contends in its brief that the Commission "neglected to address obvious factual disputes between the parties" [i.e., the timing of the District's objection to the bargaining unit's composition and the motivation for the unit clarification petition] in its decision, the record reflects that the Commission's findings resolved both of the claimed disputes in favor of the Association. See Commission Findings 6a and 6b.

The Association at all times relevant to this dispute has been the exclusive bargaining representative for employees of the District and has maintained an ongoing collective bargaining relationship with the District. The Association was certified as the exclusive bargaining representative for all regular full-time and regular part-time certified teaching personnel employed by the District, but excluding on-call substitute teachers, interns, supervisors, administrators, and directors by the Wisconsin Employment Relations Board on April 28, 1965. Over the years, the

District and Association mutually agreed to expand the previously certified unit, and a number of positions that are not "school district professional employees" as defined by Section 111.70(1)(b) have been voluntarily recognized by the parties for inclusion in the bargaining unit. That bargaining unit has been determined to be appropriate for collective bargaining purposes for approximately 20 years, and throughout that period of time, the District and Association have maintained and enforced a series of collective bargaining agreements, the most current of which expired on August 24, 1992.

The Association and the District exchanged initial offers for a successor contract for the period 1992-94 in July of 1992. They then met for bargaining on at least nine occasions. The District filed for interest arbitration pursuant to Section 111.70(4)(cm), Stats., in January 1993. The District filed a unit clarification petition with the Commission on January 14, 1994, seeking to have non "school district professional employees" separated from the existing bargaining unit and put into a separate unit. At no time prior to the January 14, 1994, filing of the unit clarification petition did the District ever raise the issue of the appropriateness of the existing bargaining unit.

On August 12, 1993, 1993 Wisconsin Act 16 became effective, substantially changing the Municipal Employment Relations Act ("MERA"). Prior to the effective date of Act 16, MERA provided for final offer interest arbitration on both economic and non-economic issues. Section 111.70(4)(cm), Stats. Section 2207ak of Act 16 created Section 111.70(4)(cm)5s, Stats., which provides that in a collective bargaining unit consisting of school district professional employees, if the municipal employer makes a "qualified economic offer" applicable to any period beginning on July 1, 1993, no economic issues are subject to interest arbitration for that period. The Commission findings supporting the dismissal of the Association's prohibited practices complaint found that the District sought to clarify the existing bargaining unit solely to come under certain provisions of Act 16 allowing the District to avoid interest arbitration if it makes a qualified economic offer and to unilaterally implement its qualified economic offer upon deadlock (Commission Finding 6b).

All parties have acknowledged the existence of a decision by the Dane County Circuit Court in Madison Teachers, Inc. v. Madison Metropolitan School District, supra. In that declaratory judgment action, the Union represented a collective bargaining unit consisting of both employees who are "school district professional employees" and employees who are not "school district professional employees." Shortly after petitioning for interest arbitration, the Madison School District petitioned the Commission for unit clarification, seeking, as in the instant case, to exclude from the existing bargaining unit those employees who are not school district professional employees. The Union commenced an action in circuit court to declare that the amended version of MERA which would allow the district to avoid interest arbitration on economic issues by submitting a qualified economic offer did not apply to the bargaining unit represented by the union because it was a unit "consisting of" not only school district professional employees but also employees who were not school district professional employees. The court granted the declaratory relief sought by the union and further ruled that the school district had committed a prohibited practice (a failure to bargain in good faith) by petitioning for unit clarification while the negotiation and interest arbitration were pending. It further enjoined the school district from proceeding with its petition for unit clarification, ruling that the existing bargaining unit was not repugnant to the amended version of the statute. The Association argues that the Dane County decision controls this case as well.

As an aside, the parties have noted that the unit clarification petition which forms the basis of the alleged prohibited practice was decided by the Commission on August 11, 1994, splitting the previously existing bargaining unit into two separate bargaining units. The Association has not petitioned for review of the Commission's decision in that matter.

DISCUSSION

This Court is asked to determine two questions of law: 1) whether the District committed a prohibited practice by filing the petition for unit clarification, and 2) whether the Commission was bound by a contrary decision of the Circuit Court for Dane County in MTI v. MMSD, supra.

In reviewing the conclusions of law made by an administrative agency, three levels of deference are applied. The "great weight" standard is given when the "agency's experience, technical competence, and specific knowledge aid the agency in its interpretation and application of the statute..." The next level of review is the "due weight" or "great bearing" standard which is given when "the agency decision is 'very nearly' one of first impression." The lowest level of deference is the de novo standard, in which "no weight" is given when the case is one of first impression and the agency has no special expertise or experience in the particular area. WSEU v. WERC, 189 Wis.2d 406, 410-11 (1994), citing Sauk County v. WERC, 165 Wis.2d 406 (1991). The Court believes that the middle burden ("due weight" or "great bearing" standard) is appropriate on the prohibited practice issue. The WERC has specialized knowledge in the interpretation and application of MERA, but the specific issue here to be decided in light of the Act 16 amendments is very nearly one of first impression. On the issue of deference to the Dane County decision, the Court believes that the de novo standard is appropriate.

The Court addresses first the issue of whether the Dane County decision in MTI v. MMSD is controlling, since an affirmative answer to that question would be dispositive of this case. Interestingly, both the District and the Commission cite an unpublished circuit court decision from Washington County for the proposition that an unpublished circuit court decision is generally not citable and is binding only upon the particular case in which it was rendered.

Section 111.07(1) of the Wisconsin Statutes provides for concurrent jurisdiction in matters concerning unfair labor practices:

> 111.07 Prevention of Unfair Labor Practices. (1) Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

Ordinarily circuit court judgments or decisions are not citable as authority. Servomation Corp. v. Dept. of Revenue, 106 Wis.2d 616, 317 N.W.2d 464 (1982). While circuit court decisions are often considered for their reasoning, as a research aid, other circuit courts are not bound by them and, indeed, it is not uncommon for two circuit courts in the same county to rule on an issue contrary to one another. This Court can find no statute or case law mandating the Commission to follow a circuit court decision, whether it be Dane or another county, in a case to which the WERC

was not a party. Therefore, while the reasoning in the Dane County case is instructive, this Court does not believe that the instant case is controlled by MTI v. MMSD.

The substantive issue raised is whether the District failed to bargain in good faith when it filed the petition for unit clarification. MERA vests the Commission with discretion to determine the appropriate bargaining unit for the purpose of collective bargaining. Section 111.70(1)(b) and 111.70(4)(d)2.a, Stats. Prior to the Act 16 amendments, Sec. 111.70(1)(b) defined "collective bargaining unit" as "the unit determined by the Commission to be appropriate for the purpose of collective bargaining." Section 2207ah of 1993 Wisconsin Act 16 amended the definition of collective bargaining unit in Sec. 111.70(1)(b) to mean "a unit consisting of municipal employees who are school district professional employees or of municipal employees who are not school district professional employees that is determined by the Commission to be appropriate for the purpose of collective bargaining." The term "school district professional employee" was separately defined to mean "a municipal employee who is employed by a school district, who holds a license issued by the state superintendent of public instruction ... and whose employment requires that license." Sec. 111.70(1)(ne), Stats., as created by Sec. 2207ai of Act 16. The significance of the new definitions is Act 16's creation of a special interest arbitration provision which excludes arbitration of economic issues where a municipal employer submits a qualified economic offer in a collective bargaining unit 'consisting of school district professional employees.' Sec. 111.70(4)(cm)5s, Stats., as created by 1993 Wisconsin Act 16, Sec. 2207ak. Thus, the makeup of the bargaining unit determines whether economic issues will be subject to binding arbitration upon impasse.

The separate issue of whether a "mixed" bargaining unit is valid under the amended Sec. 111.70(1)(b) is not before this Court, although all parties have to some extent addressed the merits of that issue. This threshold inquiry is appropriate to the extent that a plausible interpretation of amended 111.70(1)(b) is that a bargaining unit can consist of school district professional employees, municipal employees who are not school district professional employees, but not a "mixed" unit containing both (as is the case here.) A change in the law in the midst of the bargaining process will inevitably raise new questions; the inquiry here is whether those questions can appropriately be raised in the middle of ongoing contract negotiations. The Association's point is well taken that a part of the time period for which the parties were negotiating was the 1992-93 school year - a period arguably not covered by the new act. The "qualified economic offer" provisions of the new statute refer to a QEO "applicable to any period beginning on July 1, 1993." Here, the parties were retroactively negotiating a 1992-93 and 1993-94 contract when the unit clarification petition was filed in 1994. While the retroactive nature of the negotiations may procedurally muddy the waters, it is not unreasonable to allow an inquiry as to whether the existing bargaining unit continues to be appropriate.

The Association concedes that it is generally true that a unit clarification petition may be filed at any time. It cites the MTI case, however, for the proposition that in particular situations, based upon the totality of the circumstances, such a petition may constitute bad faith bargaining. In this case, the Association cites the parties' prior bargaining history and, particularly, the timing of the request for unit clarification (coming some five months after the effective date of 1993 Wisconsin Act 16). The Commission deals with this argument in its decision memorandum, reasoning that the need to seek to clarify the existing unit to gain the benefit of Act 16 only became apparent in

December 1993 when the MTI case was decided, and the District thereafter filed its petition in January 1994. [Commission decision pg. 12, footnote 5.]

The Commission crystallized its view of the issue as follows:

> "In effect, complainant asks us to conclude that a party engages in bad faith bargaining when it asks an administrative agency (the WERC) a question (through filing a unit clarification petition) which if resolved in the questioner's favor will give that party access to statutory rights which will enhance the party's bargaining position. We do not find such a scenario constitutes bad faith bargaining. As argued by respondents, engaging in activity whereby a party seeks to exercise a statutory right is not bad faith bargaining.
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> . . .
>
> The law defining "collective bargaining units" and the scope of interest arbitration rights changed while the parties ... were bargaining a contract. The change in the law raised bonafide questions as to whether the existing units continued to be appropriate and what interest arbitration procedures applied. Change in the law in the midst of a bargain is inherently disruptive. However, the disruption was caused by the legislature, not the employer. Under such circumstances, the employer can hardly be faulted for asking the agency responsible for administering the new law whether the change impacts on the parties' existing unit. [Commission decision pgs. 12-13.]

The Court agrees with the Commission's analysis and is satisfied that the Commission acted within the law when it dismissed the Association's prohibited practice complaint. The Commission has stated a rational basis for its determination that the District did not engage m bad faith bargaining when it filed its unit clarification petition.

ORDER

Now, therefore, it is ordered that the decision of the WERC dismissing the Association's prohibited practice complaint is affirmed, and this petition for judicial review is hereby dismissed.

Dated this 31st day of March, 1995.

BY THE COURT:

/s/ Emily S. Mueller
EMILY S. MUELLER
Circuit Court Judge