STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of GRAFTON SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Sec. 227.41, Stats. Involving a Dispute Between Said Petitioner and GRAFTON PARAPROFESSIONAL AND AIDES ASSOCIATION	Case 12 No. 50515 DR(M)-537 Decision No. 28093-A

Appearances:

von Briesen & Purtell, S.C., Attorneys at Law, by Mr. James R. Korom, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, for the District.

Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On February 15, 1994, the Grafton School District filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41, Stats. as to certain questions of law arising out of the District's collective bargaining relationship with the Grafton Paraprofessional and Aides Association. The parties thereafter filed written argument as to issues raised in the petition, the last of which was received April 29, 1994.

On June 23, 1994, the Commission issued Findings of Fact, Conclusions of Law and Declaratory Ruling. In that decision the Commission concluded as follows:

CONCLUSIONS OF LAW

1. The interest arbitration petition filed by the Association presently bars the District from litigating the merits of the question of whether an election should be conducted to determine the Association's continuing status as the collective bargaining representative of District employes.

2. Given Act 16's amendment of Sec. 111.70(1)(b), Stats. and creation of Sec. 111.70(1)(ne), Stats. the District is not barred from litigating the question of whether the bargaining unit represented by the Association continues to be appropriate for the purposes of collective bargaining.

3. A collective bargaining unit that includes both municipal employes of a school district who hold and whose employment requires that they hold a license issued by the state superintendent of public instruction under Sec. 115.28(7), Stats. and municipal employes of a school district who do not hold and whose

employment does not require that they hold such a license is not an appropriate unit for the purposes of collective bargaining within the meaning of Sec. 111.70(1)(b), Stats.

. . .

DECLARATORY RULING

1. The Association continues to be the collective bargaining representative of the District employes.

2. The collective bargaining unit of District employes represented by the Association is no longer appropriate for the purposes of collective bargaining.

3. Hearing will commence within thirty (30) days of the date of this Order to determine the scope of the unit(s) in which the Association may appropriately continue to represent the District employes.

The parties were ultimately successful in their efforts to determine the scope of the bargaining units created by the June 23, 1994 decision. On August 30, 1994, the parties stipulated that the two units should be described as follows:

All regular full-time and regular part-time aides and paraprofessionals who hold, and whose employment requires that they hold, a license issued by the State Superintendent of Public Instruction, under Section 115.28(7). Stats., excluding supervisory, confidential, clerical, and managerial employes.

All regular full-time and regular part-time aides and paraprofessionals who do not hold, or whose employment does not require that they hold, a license issued by the State Superintendent of Public Instruction, under Section 115.28(7), Stats., excluding professional, supervisory, confidential, clerical, and managerial employes.

On August 30, 1994, the parties also agreed that they would submit additional issues to the Commission for potential resolution. The parties thereafter filed their respective positions as to remaining issues on or before September 30, 1994.

Having considered the matter and the positions of the parties herein, the Commission makes and issues the following

FINDINGS OF FACT

1. The Grafton School District, herein the District, is a municipal employer having its principal offices at 1900 Washington Street, Grafton, Wisconsin 53024.

2. The Grafton Paraprofessional and Aides Association, herein the Association, is a labor organization. On or about December 8, 1992, the District voluntarily recognized the Association as the collective bargaining representative of employes in a bargaining unit of:

> All full-time and regular part-time employees in the classifications of district teacher EEN aides, district paraprofessionals (LC coordinators, LC aides, kindergarten aides), and 66:30 cooperative EEN aides, excepting professional, supervisory, managerial, confidential and clerical employees.

The Association is presently the collective bargaining representative of certain employes of the District in two collective bargaining units described as follows:

> All regular full-time and regular part-time aides and paraprofessionals who hold, and whose employment requires that they hold, a license issued by the State Superintendent of Public Instruction, under Section 115.28(7). Stats., excluding supervisory, confidential, clerical, and managerial employes.
>
> All regular full-time and regular part-time aides and paraprofessionals who do not hold, or whose employment does not require that they hold, a license issued by the State Superintendent of Public Instruction, under Section 115.28(7), Stats., excluding professional, supervisory, confidential, clerical, and managerial employes.

The Association has its principal offices at 550 East Shady Lane, Neenah, Wisconsin 54956.

3. Prior to the District having filed any petition with Wisconsin Employment Relations Commission which raised a question as to the Association's continuing majority status as a collective bargaining representative of the employes now included in the two collective bargaining units set forth in Finding of Fact 2, the Association had filed a petition for interest arbitration with the Commission pursuant to Sec.111.70(4)(cm)6, Stats., covering the employes now included in the two collective bargaining units set for in Finding of Fact 2.

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

CONCLUSIONS OF LAW

1. The interest arbitration petition filed by the Association presently bars the District or any of its employes from seeking an election to determine the Association's continuing majority status as the collective bargaining representative of District employes in the two collective bargaining units set forth in Finding of Fact 2.

2. An election petition challenging the continuing majority status of the Association in either or both of the collective bargaining units which the Association presently represents may be timely filed:

> If the parties voluntarily reach agreement on the initial contract(s) or the agreement(s) is established by an interest arbitration award and if the agreement(s) contains a provision which specifies a date by which a party is to advise the other that they wish to bargain a successor agreement (herein the reopener date) and if the parties reach such an agreement or receive the award before the commencement of the sixty (60) day period prior to the reopener date, then an election petition can be timely filed during the sixty (60) day period prior to the reopener date.
>
> If the parties reach agreement on an initial contract(s) or receive an award(s) during or after the above noted sixty (60) day period, but prior to the expiration of the contract, or if the parties reach agreement on an initial contract(s) or receive an award(s) which does not contain a reopener date, then an election petition can be timely filed during the sixty (60) day period following agreement on an initial contract(s) or receipt of the award.
>
> If the contract(s) remains in the interest arbitration process but the term of the contract(s) under either party's offer has expired, then an election petition can timely be filed during the sixty (60) day period following the expiration date of the pending offers.
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> If the initial contract(s) expires and no interest arbitration petition has been filed for the successor agreement, then an election petition can timely be filed.

3. The Association has the right to bargain with the District over the wages, hours and conditions of employment of employes originally included in the collective bargaining unit represented by the Association but who have since been laid-off.

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

DECLARATORY RULING 1/

1. It is now appropriate for the parties to proceed with the collective bargaining and interest arbitration process as to the two bargaining units presently represented by the Association.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of November, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(footnote 1 begins on page 6)

1/ 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.

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.

(footnote 1 continues on page 7)
(footnote 1 continued from page 6)

(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.

GRAFTON SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECLARATORY RULING

The background of this proceeding has been recited in the introductory paragraph in this decision and will not be repeated herein. Suffice it to say that the parties found it in their mutual interest to present all remaining issues that they believed would prevent them from proceeding with the collective bargaining and interest arbitration process. We proceed to express our views on those issues.

POSITIONS OF THE PARTIES:

The District

The District asserts that there are four remaining issues which need to be resolved.

1. Is there any basis to conclude there is a majority of support for Association representation within either of the two designated bargaining units?

2. What is the appropriate window period for the filing of a decertification petition?

3. On which date were the two units in this case created?

4. Are individuals who are no longer employed by the Grafton School District, and who have no expectation of continued employment, and who have not been employed by the Grafton School District since before July 1, 1993 a part of either bargaining unit in this case?

As to the first issue, the District argues that the Commission's June 23, 1994 decision in this matter did not decide the question of whether the issue of majority status can appropriately be raised. Although it acknowledges that the Commission concluded that the interest arbitration petition filed by the Association in the old bargaining unit barred consideration of this question, the District asserts that we now have the new issue of whether there should be consideration of the majority status question in the context of the two new bargaining units. The District contends that this case squarely presents an issue of whether the Commission feels the institutional interests of the Association are more important that the rights of individual employes to express their desires concerning representation. The District asserts that there is no Commission precedent directly on point because this factual situation has never occurred prior to Act 16. Thus, the District alleges the Commission could order an election in these two units without disrupting or overturning any of its prior case law.

If the Commission concludes that the interest arbitration proceeding continues to bar issues as to the Association's continuing majority status,

then the District asks that the Commission identify when a decertification petition can be filed. The District contends that it is unclear under existing precedent when an election petition can timely be filed and that the parties and the employes would be well-served by having a clear answer to this question.

As to the third and fourth issues, the District argues that when the Association was voluntary recognized as the collective bargaining representative for the old aide bargaining unit, the District employed certain individuals who serviced an educational cooperative established pursuant to Sec.66.30, Stats. Prior to July 1, 1993, the educational cooperative was dissolved and the employes who serviced the educational cooperative were laid-off without any expectation of continued employment. The District contends that under these circumstances it does not have a continuing obligation to negotiate with the Association over the wages, hours and the conditions of employment of the laid-off individuals. When resolving this question, the District asserts that it is important for the Commission to consider the question of when the two units now present were created. Although the initial aide unit was voluntarily recognized on December 8, 1992, the District argues that the two existing units were in effect created in August, 1993 when Act 16 became law. Thus, the District asserts that only those employes who were employed on the effective date of Act 16 continue to be represented by the Association.

The Association

The Association contends that the passage of Act 16 and the subsequent agreement by the parties to split the initial unit into two has no impact on the Association's already established ability to bargain rights for those employes who were employed when it was originally recognized as the collective bargaining representative. The Association asserts that its representation rights cover all employes then employed without regard to whether they were subsequently laid-off. The Association argues that the fortuitous passage of Act 16, although it ultimately changed the composition of the unit, should not act to disenfranchise these employes of their right to representation nor the Association's right to bargain future employment rights on their behalf. Thus, the Association contends that the date of the establishment of the new units is irrelevant as to the issue of whether the Association can bargain over recall rights, etc., for those employes laid-off.

As to the question of when an election petition could timely be filed, the Association contends that the "window period" should not occur until the employment status of the laid-off employes is determined by the first collective bargaining agreement. In the alternative, the Association argues that the employes whose status is still uncertain as a result of the delayed bargain should have the right to vote in any election. In determining election bar issues, the Association contends the Commission has attempted to balance the important public policies of protecting employes' right to self-determination with the need for some stability to allow the collective bargaining process to take place. The Association argues that it would be unfair and contrary to these public policies to allow an election to occur prior to the settlement of the first contract even if the contract pending before an interest arbitrator has already expired. The Association alleges that there have been extraordinary delays in the bargaining process while the parties have litigated various issues which arose because of the passage of Act 16. Most importantly, the Association asserts that it should not have to face an election until the status of the laid-off employes is resolved. This is so in the Association's view because the right of the laid-off employes to vote

will be determined by the result of the collective bargaining process or an interest arbitration award.

Discussion

In Grafton School District, Dec. No. 28093 (WERC, 6/94), we held:

Interest Arbitration Bar

> One of the issues before us in this proceeding is whether the pendency of the Association's interest arbitration petition as to the parties' initial contract bars the District from attempting to challenge the Association's continuing majority status. We conclude the pendency of the interest arbitration petition does act as a bar.
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> In New London School District, Dec. No. 27396-B (WERC, 11/93), in the context of bargaining over an initial contract, we addressed the timeliness issue present here and concluded:
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> > Determinations as to the timeliness of election petitions seeking to change or eliminate the existing bargaining representative require that we balance competing interest and rights. 2/ On the
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> 2/Durand Unified Schools, Dec. No. 13552, (WERC, 4/75).
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> > one hand, we have the interest of encouraging stability in collective bargaining relationships which enhances the potential for labor peace. 3/ On the other hand, we have the statutory right of employes to bargain collectively through representatives of their own choosing, which right necessarily includes the right to change or eliminate a chosen representative. 4/
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> . . .
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> > Further, in September, 1993, prior to Zuehlke's petition, Wisconsin Education Association Council had filed an interest arbitration petition as to negotiations for an initial contract between WEAC and the District for the non-professional unit. When balancing the competing interests noted earlier herein, we have generally held that we will not process an election petition filed after a petition for interest

arbitration is filed. 6/ Zuehlke's petition is also untimely given the presence of the interest arbitration petition.

Although we have dismissed Zuehlke's petition, it should be clear that he is guaranteed the right to timely file an election petition after the parties have either voluntarily reached agreement on an initial contract or the terms of the initial contract are established by an

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3/Secs. 111.70(4)(c) and 111.70(1)(a), Stats.

4/Secs. 111.70(2) and 111.70(4)(d)5, Stats.

6/Mukwonago School District, Dec. No. 24600, (WERC, 6/87); Marinette County, Dec. No. 22102, (WERC, 11/84); Oconto County, Dec. No. 21847, (WERC, 7/84); Dunn County, Dec. No. 17861, (WERC, 6/80).

interest arbitrator. For instance, such a petition can be timely filed during the 60 day period prior to the date in the initial contract for reopening negotiations on a successor agreement. If the first contract is still pending before an interest arbitrator (SIC) during the 60 day period following the date the award is ultimately issued. Further, a petition can be timely filed if the contract pending before an arbitrator (under either party's offer) has already expired.

Thus, we are satisfied that Zuehlke's interests can ultimately be met by our result.

We are satisfied the balancing of interests set forth in New London is applicable here and provides the District with the enumerated future guaranteed opportunities to timely raise issues as to the Association's continuing majority status. The voluntarily recognized status of the unit is irrelevant to the question of when the District can timely challenge the majority status it voluntarily accepted in the past. 1/

1/Like certified units, voluntarily recognized units

> enjoy a presumption of majority status. Milwaukee Board of School Directors, Dec. No. 25143 (WERC, 2/88).

The District correctly perceives that our above-quoted decision does not explicitly resolve the question of whether the interest arbitration petition filed as to the original single combined aide unit bars an election in the two aide units that now exist.

Thus, we proceed to decide that issue here and conclude that the original interest arbitration petition bar present for the single combined aide unit continues to be applicable to the two aide units.

As recited in our earlier decision, the timeliness of an election petition is determined by balancing the competing statutory interests and rights of stability/labor peace against the right of employes to change or eliminate a chosen representative. As recited in our earlier decision, we have previously balanced these interests and rights by concluding that when an interest arbitration petition is filed prior to an election petition, the interest in stability/labor peace is sufficiently strong enough to warrant a delay in the opportunity for employes to decide whether they wish to continue to be represented by the Association. The fact that the single aide unit has now become two separate aide units does not have any impact on the interests and rights we balance and thus, we again conclude the interest arbitration petition presently bars the District or its employes from seeking an election.

Having reached this conclusion, we concur with the parties' view that it is appropriate to specify when a petition can timely be filed. Although the Association argues otherwise, we do not find the unique circumstances of this case warrant a departure from existing precedent. Thus, as reflected in the New London School District, Mukwonago School District, Marinette County, Oconto County and Dunn County decisions quoted or cited earlier herein, we hold that in the present circumstances, an election petition may be timely filed:

> If the parties voluntarily reach agreement on the initial contract(s) or the agreement(s) is established by an interest arbitration award and if the agreement(s) contains a provision which specifies a date by which a party is to advise the other that they wish to bargain a successor agreement (herein the reopener date) and if the parties reach such an agreement or receive the award before the commencement of the sixty (60) day period prior to the reopener date, then an election petition can be timely filed during the sixty (60) day period prior to the reopener date.
>
> If the parties reach agreement on an initial contract(s) or receive an award(s) during or after the above noted sixty (60) day period, but prior to the expiration of the contract, or if the parties reach

> agreement on an initial contract(s) or receive an award(s) which does not contain a reopener date, then an election petition can be timely filed during the sixty (60) day period following agreement on an initial contract(s) or receipt of the award.
>
> If the contract(s) remains in the interest arbitration process but the term of the contract(s) under either party's offer has expired, then an election petition can timely be filed during the sixty (60) day period following the expiration date of the pending offers.
>
> If the initial contract(s) expires and no interest arbitration petition has been filed for the successor agreement, then an election petition can timely be filed.

The remaining issues involve the status of District employes included in the original collective bargaining unit but who were laid-off prior to the enactment of 1993 Wisconsin Act 16 and the resultant creation of the two aide units.

It is beyond dispute that when the District voluntarily recognized the Association in December, 1992 as the collective bargaining representative of:

> All full-time and regular part-time employees in the classifications of district teacher EEN aides, district paraprofessionals (LC coordinators, LC aides, kindergarten aides), and 66:30 cooperative EEN aides, excepting professional, supervisory, managerial, confidential and clerical employees.

the Association acquired the opportunity to bargain a contract with a term commencing on or after December, 1992 for all employes within the confines of the above-quoted unit at the time of the voluntary recognition. In our view, it is also beyond dispute that the Association thereby acquired the opportunity to bargain a contract whose terms give employes laid-off after voluntary recognition but during the term of a proposed contract continuing status as bargaining unit members after their layoff. Thus, in Grafton School District, Dec. No. 27935 (WERC, 2/94) we concluded that an Association proposal which inter alia gave laid-off employes recall rights for two years was a mandatory subject of bargaining.

The District now in effect asks whether the passage of 1993 Wisconsin Act 16 and the subsequent split of the original aide unit into two units changes the foregoing. We conclude it does not.

The Association's status as the collective bargaining representative for employes in the unit on or after the date of voluntary recognition is unaffected by the subsequent split of the original unit. The Association simply exercises its continuing representative status in two units instead of

one.

Lastly, we have been asked to comment on the eligibility of laid-off employes to vote in any future representation election. As the question posed is one of first impression for us and as the facts existing at the time of any such petition are speculative, we conclude it is not appropriate to resolve this issue. We do note that the analysis of the National Labor Relations Board as to this issue focusses on the laid-off employe's reasonable expectancy of returning to work, Owens Illinois Glass Company, 36 LRRM 1585 (1955).

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of November, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner