

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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.

Having considered the matter and being fully advised in the premises, 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 and the collective bargaining

representative of certain employes of the District in a collective bargaining unit which includes both employes who hold a license issued by the state superintendent of public instruction under Sec. 115.28(7), Stats. and whose employment requires that license and employes who do not hold and whose employment does not require that they hold such a license. The Association has its principal offices at 550 East Shady Lane, Neenah, Wisconsin 54956.

3. The District and Association are bargaining an initial collective bargaining agreement covering the employes of the District represented by the Association. Prior to the District having filed any petition with the Wisconsin Employment Relations Commission raising a question as to the Association's continuing majority status as the collective bargaining representative, the Association had filed a petition for interest arbitration with the Commission pursuant to Sec. 111.70(4)(cm)6, Stats.

4. 1993 Wisconsin Act 16 amended the definition of a "collective bargaining unit" contained in Sec. 111.70(1)(b), Stats. and created a definition of a "school district professional employe" in Sec. 111.70(1)(ne), Stats.

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 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.

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

DECLARATORY RULING

1. The Association continues to be the collective bargaining represent-ative 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.

Given under our hands and seal at the City of
Madison, Wisconsin this 23rd day of June, 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

GRAFTON SCHOOL DISTRICT

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

BACKGROUND

The petition seeks a declaratory ruling as to the following questions:

. . .

1. In light of the fact that Act 16 changed the definition of "collective bargaining unit" pursuant to Sec. 111.70(1)(b), (defining such unit as including either professional employees or non-professional employees), and because Act 16 further created a definition of professional employee in Sec. 111.70(1)(ne) as those individuals for whom the Department of Public Instruction requires certification, does the previously recognized mixed unit of professional and non-professional employees retain bargaining unit status and the right to negotiate pursuant to Sec. 111.70 Wis. Stats.?

2. Assuming a combined unit of professional and non professional (sic) employees is appropriate under the changes to Sec. 111.70, Wis. Stats. which are mandated by Act 16, have the stipulated changes in the makeup of this unit between the time of recognition and the present time destroyed any presumption of majority status which might otherwise exist?

3. Assuming the School District has a continuing duty to bargain with a combined unit of professional and non-professional employees under the facts of the case, what impasse procedure applies to that combined unit, the procedure applicable to professional units or non-professional units pursuant to Act 16? Specifically, will the submission of a qualified economic offer by the School District exempt the parties from the obligation to pursue interest arbitration of economic issues? Furthermore, may the School District arbitrate a duration clause providing for an ending date on the Collective Bargaining Agreement of anything other than June 30, 1995?

4. Assuming the WERC is obligated to create two separate units of professional and non-professional employees pursuant to Act 16, does the School District

have an automatic duty to bargain with the two separate units, or must an election or voluntary recognition first occur in these two new bargaining units under the unique facts in this case?

. . .

By letter dated March 11, 1994, the parties were directed to file written argument as to the timeliness of the District's challenge to the Association's continuing majority status and as to the impact of Act 16 and "the fate of Assembly Bill 929" on the issues raised in the petition. Both parties filed argument in response to this directive.

POSITIONS OF THE PARTIES

The District

When assessing the timeliness of the District's challenge to the Association's continuing majority status as the collective bargaining representative for certain District employes, the District urges the Commission to apply existing precedent in a manner which allows the employes to exercise their free choice to determine the Association's current status. The District acknowledges that a balance must be struck between free choice and stability in collective bargaining relationships. Here, because this is a new voluntarily recognized unit in which the employes have never had the opportunity to vote, the District contends a narrow exception to the existing interest arbitration bar rule is appropriate.

Turning to the question of whether the existing unit remains appropriate under the Municipal Employment Relations Act, the District asserts Act 16 mandates dissolution of the existing unit. It argues the amended definition of "collective bargaining unit" in Sec. 111.70(1)(b), Stats. clearly and specifically requires that collective bargaining units consist only of "school district professional employes" or of "municipal employes who are not school district professional employes." Thus, the District argues the existing unit is clearly "repugnant" to the Municipal Employment Relations Act and must be clarified to create a lawful unit. However the Commission accomplishes this clarification, the District contends that the clarification removes any otherwise operative presumption of continuing majority status and requires the conduct of an election.

The Association

Citing existing Commission precedent, the Association urges the Commission to conclude that the pendency of the Association's interest arbitration petition renders untimely the District's challenge to the Association's continuing majority status.

As to the continuing viability of the existing unit following the passage of Act 16, the Association argues the amendments to the Municipal Employment Relations Act do not compel splitting the existing appropriate unit. The Association contends Act 16 was intended to restrict access to interest arbitration over economic issue but not to fragment existing units. The Association asserts there is no clear prohibition in the Municipal Employment Relations Act against units of professionals and non-professionals and argues the Commission should not infer such a prohibition from the amended language of Sec. 111.70(1)(b), Stats.

To the extent the Commission concludes the splitting of units is appropriate, the Association contends an employer should not be allowed to split an existing unit during the pendency of an interest arbitration petition. The Association argues such employer conduct is inconsistent with the duty to bar-gain in good faith.

DISCUSSION

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.

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:

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 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/

. . . .

2/ Durand Unified Schools, Dec. No. 13552, (WERC,

4/75).

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

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

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 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 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.

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).

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/

Appropriate Unit

The Association raises a threshold question of whether the District's challenge to the appropriateness of the existing unit should be dismissed as being inconsistent with the District's duty to bargain in good faith. As fully reflected in the Racine Schools decision also issued today, 2/ we conclude the statutory amendment to Sec. 111.70(1)(b), Stats. and new Sec. 111.70(1)(ne), Stats. provide a legitimate basis for a school district to raise the question of whether an existing unit of school district professional employees and non-professional employees continues to be appropriate. Thus, we reject the Association's position as to this threshold question and proceed to the merits of the issue.

Prior to 1993 Wisconsin Act 16, Sec. 111.70(1)(b), Stats. provided:

(b) "Collective bargaining unit" means the unit determined by the commission to be appropriate for the purpose of collective bargaining.

When determining whether a bargaining unit was appropriate, Sec. 111.70(4)(d)2.a., Stats. directed the Commission as follows:

2. a. The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employees concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit.

1/ Like certified units, voluntarily recognized units enjoy a presumption of majority status. Milwaukee Board of School Directors, Dec. No. 25143 (WERC, 2/88).

2/ Racine Unified School District, Dec. No. 27982-B (WERC, 6/94).

The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes, unless a majority of the professional employes vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the unit. Any vote taken under this subsection shall be by secret ballot.

The determination of whether the employe of any municipal employer was a "professional employe" was based on the following definition contained in Sec. 111.70(1)(L), Stats.:

(L) "Professional employe" means:

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.

Given the foregoing statutory provisions, prior to Act 16, the only substantive requirement created by Sec. 111.70(1)(b), Stats. regarding the composition of a bargaining unit was that the unit be "appropriate." Section 111.70(4)(d)2.a., Stats. provided the Commission with direction as to what it should consider when deciding whether a unit was "appropriate" and further provided that a unit consisting of professional and non-professional employes could be "appropriate" if the required vote occurred.

1993 Wisconsin Act 16 amended Sec. 111.70(1)(b), Stats., left Secs. 111.70(1)(L) and 111.70(4)(d)2.a., Stats. intact, and created a definition of a "school district professional employee." Section 111.70(1)(b), Stats. now provides:

(b) "Collective bargaining unit" means a unit consisting of municipal employes who are school district professional employes or of municipal employes who are not school district professional employes that is determined by the commission to be appropriate for the purpose of collective bargaining.

Newly created Sec. 111.70(1)(ne), Stats. provides:

(ne) "School district professional employee" means a municipal employe who is employed by a school district who holds a license issued by the state superintendent of public instruction under s. 115.28(7), and whose employment requires that license.

Although 1993 Wisconsin Act 16 became law August 12, 1993, Section 9320 of Act 16 specifies that amended Sec. 111.70(1)(b), Stats. and new Sec. 111.70(1)(ne), Stats. first take effect:

. . . with respect to collective bargaining agreements entered into on the effective date of this subsection, . . .

Having considered the new statutory language defining a "collective bargaining unit" and a "professional school district employe," we are satisfied that with respect to collective bargaining agreements entered into on or after August 12, 1993, a collective bargaining unit cannot include both "professional school district employes" and employes who are not "professional school district employes." In our view, the clear meaning of the phrase "consisting of" in Sec. 111.70(1)(b), Stats. compels this result.

The phrase "consisting of" does not have a statutorily established definition. Black's Law Dictionary, Revised Fourth Edition (1968), defines "consisting" as:

Being composed or made up of. This word is not synonymous with "including;" for the latter, when used in conjunction with a number of specified objects, always implies that there may be others which are not mentioned.

"Consist" is defined in a similar manner. 3/

3/ American Heritage Dictionary, Second College Edition, 1985, defines

From the definition of the phrase "consisting of," we conclude that Sec. 111.70(1)(b), Stats. clearly provides that "school district professional employes" cannot appropriately be included in same bargaining unit as "employes who are not school district professional employes . . ."

Our interpretation does not render meaningless any other relevant statutory provisions. All the provisions of Sec. 111.70(4)(d)2.a., Stats. remain operative when we are determining the appropriate unit of "employes who are not school district professional employes . . ." including the ability of "professional employes" as defined in Sec. 111.70(1)(L), Stats., to elect to be included in a unit with non-professional employes. The directive to "avoid fragmentation" remains operative even for "school district professional employes."

Applying our interpretation of the amended statutes to the instant proceeding, the parties here agree that the existing unit represented by the Association includes both "school district professional employes" and non-professional employes of the District. As the parties do not presently have a contract, the previously quoted language from Section 9320 of Act 16 makes our interpretation immediately applicable to the parties. 4/ Thus, we conclude the existing unit is no longer "appropriate for the purpose of collective bargaining."

Our holding creates the potential need for a determination as to unit(s) in which it is now appropriate for the Association to continue to represent the employes in question. Given the absence of factual record we cannot make a definitive ruling on this issue at this time. Absent agreement by the parties as to a resolution of this issue which they find acceptable, we will convene hearing within 30 days of the date of this decision to create the factual

"consist" as "To be made up or composed:".

4/ In our view, Section 9320 generally provides that where there is an existing bargaining agreement entered into prior to August 12, 1993, covering a "mixed" unit of professional and non-professional school district employes, the unit continues to be "appropriate" until the agreement expires. Prior to reaching a new agreement, the parties need to have agreed on how to conform their "mixed" unit to Sec. 111.70(1)(b), Stats. or to have brought that issue to us for resolution.

record necessary for us to make the "appropriate" unit determination.

Dated at Madison, Wisconsin this 23rd day of June, 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