STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of

WISCONSIN EDUCATION ASSOCIATION COUNCIL

Involving Certain Employes of

OCONTO SCHOOL DISTRICT

Case 22
No. 55575
ME-3628

Decision No. 29295

Case 23
No. 55576
ME-3629

Decision No. 29296

Appearances:

Mr. Charles S. Garnier, WEAC Field Representative, Wisconsin Education Association Council, 550 East Shady Lane, Neenah, Wisconsin 54956, for the Association.

Godfrey & Kahn, S.C., Attorneys at Law, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, by **Mr. John A. Haase,** for the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF ELECTIONS

On September 18, 1997, the Wisconsin Education Association Council filed two petitions with the Wisconsin Employment Relations Commission seeking elections in two bargaining units of employes of the Oconto School District. The District opposed the petitions, arguing the only appropriate bargaining unit is a wall-to-wall unit. The parties submitted factual stipulations and written argument, the last of which was received December 17, 1997.

Having considered the matter and being fully apprised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1.Wisconsin Education Association Council, hereinafter the Association, is a labor organization with offices located at 550 East Shady Lane, Neenah, Wisconsin, 54956.

2.The Oconto School District, hereinafter the District, is a municipal employer which operates a school district serving primary and secondary students. The District has its principal offices at 1717 Superior Avenue, Oconto, Wisconsin, 54153-2099.

3.On June 19, 1997, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusion of Law and Order in Dec. No. 29119 wherein the Commission majority (Chair Meier and Commissioner Hahn) concluded that a bargaining unit consisting of "all regular full-time and part-time Aides of the Oconto School District" was not an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats. In that decision, the Commission further held that:

> 12/ Balancing all of the appropriate factors, either a wall-to-wall or a white collar only unit (Aides and Secretaries) would be appropriate units within which Aides could seek representation.

The Commission decision was based upon evidence presented at a September 25, 1996 hearing.

1.On September 18, 1997, the Association filed two petitions with the Commission seeking elections in a blue collar and a white collar bargaining unit of District employes. All non-professional "municipal employes" of the District would be in one or the other of these units (24 employes in the white collar unit and 18 employes in the blue collar unit).

2.The record created at the September 25, 1996 hearing, as supplemented by the parties' stipulation of facts herein, warrants a determination that a white collar bargaining unit is an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

3.The record created at the September 25, 1996 hearing, as supplemented by the parties' stipulation of facts herein, warrants a determination that a blue collar bargaining unit is an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

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

CONCLUSIONS OF LAW

1.A bargaining unit consisting of all regular full-time and regular part-time aides, secretaries and clerical employes of the Oconto School District, excluding supervisory, managerial, confidential, professional and all other employes is an appropriate collective bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

2.A bargaining unit consisting of all regular full-time and regular part-time custodial, maintenance and food service employes of the Oconto School District, excluding supervisory, managerial, confidential, professional and all other employes is an appropriate collective bargaining

unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

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

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Direction in the collective bargaining units consisting of:

> all regular full-time and regular part-time aides, secretaries and clerical employes of the Oconto School District, excluding supervisory, managerial, confidential, professional and all other employes, who were employed on January 28, 1998, except such employes as may prior to the election quit their employ or be discharged for cause; and
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> all regular full-time and regular part-time custodial, maintenance and food service employes of the Oconto School District, excluding supervisory, managerial, confidential, professional and all other employes, who were employed on January 28, 1998, except such employes as may prior to the election quit their employ or be discharged for cause

for the purpose of determining whether the required number of employes desire to be represented by the Wisconsin Education Association Council for the purposes of collective bargaining with the Oconto School District, or whether such employes desire not to be so represented by said labor organization.

Dated at the City of Madison, Wisconsin this 28th day of January, 1998

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul A. Hahn, Commissioner Paul A. Hahn /s/

I concur.

A.Henry Hempe, Commissioner A. Henry Hempe /s/

I dissent.

James R. Meier, Chairperson James R. Meier /s/

Oconto School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF ELECTIONS

The parties supplemented the record created at the September 25, 1996 hearing for the purposes of Dec. No. 29199 with the following:

1. A list of current support staff employes, their position and work location.

2. Current job descriptions.

3. Current job evaluation forms.

4.The names of employes excluded from any unit as confidential or supervisory employes.

5.On May 19, 1997, the Board of Education of the Oconto Unified School District met and dealt with all non-professional employes uniformly in establishing wages, hours and conditions of employment. At such meeting, the school board passed an across the board wage increase of $.27 per employe. Likewise, at such meeting, the Board of Education of the Oconto Unified School District dealt with all non-professional employes uniformly by approving in a single act all job descriptions for all support staff positions at the Oconto Unified School District. On October 16, 1997, the Board of Education again dealt with all support staff uniformly by approving the job evaluations for all support staff employes.

6.An affidavit reflecting that in the District's athletic conference, three school districts (including Oconto) have unorganized support staff, five districts have organized support staff in wall-to-wall units, and one district has organized support staff with a unit of bus drivers and another unit consisting of all other support staff.

We have considered the parties' stipulation when reaching our decision.

POSITIONS OF THE PARTIES

The Association

The Association asserts the Commission has already ruled that a white collar unit would be an appropriate unit within which the Association could seek to represent employes of the District. The Association contends that the additional evidence submitted by the parties does nothing to alter the accuracy of the Commission's prior holding in this regard. The Association further argues that to the extent the Commission has already held a white collar unit to be appropriate, it follows that a blue collar unit of the remaining non-professional District employes is also an appropriate bargaining unit.

The Association asserts that blue collar and white collar units do not run afoul of the anti-fragmentation statute. The Association further contends that when the six other analytical factors consistently used by the Commission are applied to a blue collar/white collar unit structure, such units are clearly appropriate. The Association particularly notes the differing duties performed by Aides and Secretaries as compared to Custodians and Food Service Workers.

Given the foregoing, the Association asks that the Commission direct an election in the blue collar and white collar units.

The District

The District urges the Commission to conclude that the blue collar/white collar units are not appropriate because they would result in undue fragmentation contrary to Sec. 111.70(4)(d)2.a., Stats. The District further contends that the proposed bargaining units are not appropriate because all non-professional employes of the District share a unique and distinctive community of interest.

The District contends that existing WERC precedent indicates a strong preference for a wall-to-wall unit given the size of the support staff at issue herein. The District further asserts that the Commission has not already ruled on the propriety of the blue collar/white collar units inasmuch as the Commission was not directly presented with that issue in its June, 1997 decision and thus only provided the parties with potential guidance in a decision footnote. The District argues that considering the additional evidence presented since the last hearing, it is now clearer than ever that the only appropriate bargaining unit for support staff employes is a wall-to-wall unit. The District asserts that anything less than a wall-to-wall unit violates the statutory anti-fragmentation policy. The District therefore requests that the petitions for election be dismissed.

DISCUSSION

Our role in disputes such as this is to determine whether the units sought are appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats. which provides:

> 1.a. The commission shall determine the appropriate collective bargaining unit for the purpose of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining 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 municipal employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit.

When making that determination, we consider the facts presented by the parties as measured against the statutory language of Sec. 111.70(4)(d)2.a., Stats. and the following factors:

1.Whether the employes in the unit sought share a "community of interest" distinct from that of other employes.

2.The duties and skills of employes in the unit sought as compared with the duties and skills of other employes.

3.The similarity of wages, hours and working conditions of employes in the unit sought as compared to wages, hours and working conditions of other employes.

4.Whether the employes in the unit sought have separate or common supervision with other employes.

5.Whether the employes in the unit sought have a common workplace with the employes in said desired unit or whether they share a workplace with other employes.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history. 1/

We have used the phrase "community of interest" as it appears in Factor 1 as a means of assessing whether the employes participate in a shared purpose through their employment. We have also used the phrase "community of interest" as a means of determining whether employes share similar interests, usually – though not necessarily – limited to those interests reflected in Factors 2-5. This definitional duality is of long-standing, and has received the approval of the Wisconsin Supreme Court. 2/

The fragmentation criterion reflects our statutory obligation to "avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal workforce." 3/ The bargaining history criterion involves an analysis of the way in which the workforce has bargained with the employer or, if the employes have been unrepresented, an analysis of the development and operation of the employe/employer relationship. 4/

Based upon long-standing Commission precedent, it is well established that within the unique factual context of each case, not all criteria deserve the same weight 5/ and thus a single criterion or a combination of criteria listed above may be determinative. 6/ Consequently, the Commission gives effect to the aforesaid statutory provision by employing a case-by-case analysis 7/ "to avoid the creation of more bargaining units than is necessary to properly reflect the employe's community of interest." 8/

In June, 1997, after an analysis of the facts, the statute and the seven factors noted above, a Commission majority determined that a unit consisting only of Aides was not appropriate. However, the Commission majority further stated that "either a wall-to-wall or a white collar only unit (Aides and Secretaries) would be appropriate units within which Aides could seek representation." Among other matters, this Commission statement reflects that there can be more than one appropriate unit and thus that our role is not to determine whether the unit sought is the most appropriate unit but rather whether it is an appropriate unit. 9/

In September, 1997, the Association filed election petitions in a white collar unit (Aides and Secretaries) and in a blue collar unit (Custodial, Maintenance and Food Service). The District contends the only appropriate unit for non-professional District employes is a wall-to-wall unit. I disagree. While a wall-to-wall unit would be an appropriate unit, the white collar and blue collar units are also appropriate under Sec. 111.70(4)(d)2.a., Stats.

The cases cited by the District 10/ in support of a wall-to-wall unit are consistent with our holding herein. In MILTON, MAPLE, COLUMBUS and WISCONSIN HEIGHTS, the union sought a wall-to-wall unit which the Commission found to be an appropriate unit. Blue collar/white collar units may also have been appropriate units in those cases but an election was not being sought in said units. Where such units have been sought among school district non-professional employes, the Commission has found blue collar/white collar units to be appropriate. 11/

Based on our consideration of the record created by the parties herein, the applicable statutory language, and the seven factors noted above, the blue collar/white collar units sought by the Association are appropriate.

As reflected in our June, 1997 decision, considerations of fragmentation, community of interest and bargaining history led us to conclude an "Aides only" unit was not appropriate. As to fragmentation, the blue collar/white collar units substantially lessened the impact of this

factor because now there is the potential for only two support staff units instead of four. As to community of interest, the distinct duties and skills of the blue collar/white collar occupational groupings are better and more appropriately reflected in blue collar/white collar units than was true in an "Aides only" unit or would be true in a wall-to-wall unit. 12/ The evidence of bargaining history submitted by the parties in their supplemental stipulation continues (in the view of the June, 1997 Commission majority) to reflect a wall-to-wall unit personnel relationship. However, in my view, the fragmentation and community of interest factors are sufficient to carry the day as to the appropriateness of these blue collar/white collar units.

Dated at the City of Madison, Wisconsin this 28th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul A. Hahn, Commissioner Paul A. Hahn /s/

ENDNOTES

8.ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS.2D 580 (1984); BENTON SCHOOL DISTRICT, DEC. NO. 24147 (WERC, 12/86); BOYCEVILLE COMMUNITY SCHOOL DISTRICT, DEC. NO. 20598 (WERC, 4/83).

9. ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS.2D 580, 592 (1984):

> . . . when reviewing the Commission's decisions, it appears that the concept (community of interest) involves similar interests among employes who also participate in a shared purpose through their employment. (Emphasis supplied).

1. Section 111.70(4)(d)2.a., Stats.

1. MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

2.SHAWANO-GRESHAM SCHOOL DISTRICT, DEC. NO. 21265 (WERC, 12/83); GREEN COUNTY, DEC. NO. 21453 (WERC, 2/84); MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90).

3.Common purpose MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 20836-A and 21200 (WERC, 11/83); similar interests, MARINETTE SCHOOL DISTRICT, SUPRA; fragmentation, COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79); bargaining history, LODI JOINT SCHOOL DISTRICT, DEC. NO. 16667 (WERC, 11/78).

4. APPLETON AREA SCHOOL DISTRICT, DEC. NO. 18203 (WERC, 11/80).

5.AREA BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT NO. 1, DEC. NO. 11901 (WERC, 5/73).

6. MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

10. --
■.MELROSE-MINDORO SCHOOL DISTRICT, DEC. NO. 27162 (WERC, 2/92) - unit of bus drivers and mechanic sought and found inappropriate but blue collar unit is appropriate.
■.SCHOOL DISTRICT OF MILTON, DEC. NO. 19039 (WERC, 10/81) - wall-to-wall unit sought and found appropriate.
■.SCHOOL DISTRICT OF MAPLE, DEC. NO. 18469 (WERC, 2/81) - wall-to-wall unit sought and found appropriate.
■.RANDALL CONSOLIDATED SCHOOL DISTRICT, DEC. NO. 18291 (WERC, 12/80) - custodial only unit sought and found inappropriate.
■.COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79) - wall-to-wall unit sought and found appropriate.
■.WISCONSIN HEIGHTS SCHOOL DISTRICT, DEC. NO. 17182 (WERC, 8/79) - wall-to-wall unit sought and found appropriate.

1.See for example SHAWANO-GRESHAM SCHOOL DISTRICT, DEC. NO. 21265 (WERC, 12/83) and the cases cited in footnote 4 therein.

1.In SHAWANO-GRESHAM, SUPRA, we made the following analysis of the blue collar/white collar distinction in duties and skills for school district support staff:

> While the record establishes that in many respects there is a similarity among all support classifications in terms of wages, benefits and conditions of employment, as well as common ultimate supervision and worksites, the Commission has determined that differences between the job functions in the resultant unit and the custodian and food service employe groups are sufficient to warrant establishing a "white collar" unit. For, unlike the clerical functions that characterize a significant portion of the work of the employes in the "white collar" unit, the duties of custodial employes consist generally of the cleaning and maintaining of physical structures and grounds, and the duties of food service employes consist of preparing and serving foods. Furthermore, there is little, if any, job integration between the white collar and the other support employes. While there are some differences between the teacher aides and secretaries/clericals in educational background and student contact time, they do share common clerical job duties such as typing, filing and record keeping. The fact that the District has treated their non-professional employes uniformly with regard to their working conditions in the past while they were unrepresented does not outweigh the distinctions in job functions between the white collar and blue collar groups.

This analysis is generally applicable to this case as well.

CONCURRING OPINION OF COMMISSIONER A. HENRY HEMPE

Six months ago, a majority of this Commission declined to approve a bargaining unit in the Oconto School District consisting of only teachers aides. I dissented from that holding. Consistent with this Commission's holding in an earlier case, 1/ I found the teacher aides to have a community of interests quite distinct from other nonprofessionals employed by the district. In addition, a separate bargaining history also emerged, all of which led me to conclude that in this case a separate unit for the aides would be appropriate.

But this was not intended to suggest that a bargaining unit configuration among the nonprofessionals that established a separate unit of teacher aides is the *only* one which meets the standards we use for measurement. Sec. 111.70(4)(d)2.a., Stats., does not require us to determine whether the unit sought is the *most* appropriate bargaining unit. "Our role is to determine whether the unit sought is an appropriate unit, not whether the unit sought is the most appropriate unit." 2/

Under the standards we have traditionally employed, I believe the new proposal we consider today also passes muster. Whether or not that proposal is the alternative we *prefer* is immaterial.

The proposal before us today would establish two bargaining units for the school district's nonprofessional staff. One unit would consist of both teacher aides and secretaries and clerical support staff. The other unit would consist of custodial, maintenance, and food service workers.

In effect, one unit consists of white collar workers: the other, blue collar employes. Each has a separate and distinct community of interests: 3/ 1) the duties and skills of the employes in one unit are significantly different from the duties and skills of those in the other; 2) a majority of members of one group have different work schedules than a majority of members of the other group; 3) the employes of one group have separate supervision from those of the other; 4) the employes of one group do not share a common work-site with the employes of the other (although, for that matter, employes within the same group do not necessarily share the same work-site with each other); and 4) each group has differing wages and benefits. It further appears that a portion of one group (teacher aides) have a separate (albeit recent) bargaining history from the employes of the other.

Under these circumstances, it seems clear enough that at least five of our seven standards have been substantially met, and a sixth standard (separate bargaining history) met at least partially.

Our seventh standard inquires "whether the unit sought will result in undue fragmentation." That standard reflects a legislative directive that the Commission ". . .avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force." Sec. 111.70(4)(d)2.a., Stats.

It is on this basis that our dissenting colleague disagrees with the majority's determination in this matter. He claims to find no rational basis ". . . for the majority's departure from its prior practice of ordering wall-to-wall units for a municipal work force of such a small size."

I find no consistent "prior practice" of the Commission as to the ordering of wall-to-wall units even "for a municipal work force of such a small size." What is consistent is the Commission's long-time recognition of its obligation to strike a balance between the need to avoid fragmentation and the unique interests and aspirations of a given group of employes. 4/ In carrying out this policy, based on our assessment of factors relating to "community of interests," we have, for instance, even ordered the accretion of five professional engineers to a five-person inspector unit instead of creating a "wall-to-wall" unit of professionals. 5/

Size is, perhaps, in the mind of the beholder, and opinions can and will differ. In the instant matter, the white collar unit will represent twenty-four employes; the blue collar unit, eighteen. The majority sees no evidence that either unit is so minuscule or ". . . fragmentized as to be inadequate for viable collective bargaining". 6/ Nor is any cited by our dissenting colleague. Under this circumstance, the majority's application of the 7-Factor Test seems both fitting and rational.

For nowhere in the statute is avoiding fragmentation stated as an absolute or depicted as a rigid objective. Nowhere is a means of avoiding fragmentation expressed as a specific, quantifiable number. Nowhere is the Commission told to avoid fragmentation at all costs - or, for that matter, that 42 (or 32 or 52) employes are too insignificant a number to divide into two bargaining units.

Instead, the Commission is pointed in a general policy direction and invested with statutory discretion to implement it. The Commission is advised to avoid fragmentation where "*practicable*." The same statute further empowers the Commission to determine, on a case-by-case basis, whether the municipal employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit. It is left to the Commission to supply and implement a rational, reasonable, and balanced interpretation of this directive, and reasonable and balanced definitions of its terms.

Over the years, the 7-Factor test has continued to be the Commission's response. As noted by our dissenting colleague, its "community of interest" factors have been explicitly approved by the Wisconsin Supreme Court as constituting " . . a rational basis for the interpretation of sec. 111.70(4)(d)2.a. . . ."7/

Our carefully balanced approach further appears to have met with legislative approval. Had it not, it is fair to assume that the Legislature would have redrawn its directives. It has not chosen to do so.

Thus, the majority seeks to make no change in our interpretation of the legislative policy directive contained in sec. 111.70(4)(d)2.a., Stats. We are satisfied our approach is consistent with our well-established policy that has been endorsed by both the Wisconsin Supreme Court and subsequent legislative inaction. To change that approach in this case seems as unwarranted as it could be legally perilous.

Dated at Madison, Wisconsin this 28th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A.Henry Hempe, Commissioner A. Henry Hempe /s/

ENDNOTES

1/ MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

2/ MARINETTE SCHOOL DISTRICT, SUPRA, NOTE 1.

3/ As reflected in Factors 2 - 5, inclusive, found in the Commission's 7-Factor Test. Factor 1, of course, simply recites "Community of interest" which we have used as both a reflection of Factors 2 - 5 and a means of assessing whether the employes participate in a shared purpose. Participation in a "shared purpose" can virtually always be stated broadly enough as to have become a given for employes of the same employing entity.

4/ JUNEAU COUNTY, DEC. NO. 27877 (WERC, 11/93); also see CITY OF MADISON, DEC. NO. 14463 (WERC,7/76).

5/ CITY OF KENOSHA, DEC. NO. 26988 (WERC, 8/98).

6/ MARINETTE SCHOOL DISTRICT, SUPRA, NOTE 1.

7/ ARROWHEAD UNITED TEACHERS V. ERC, 116 WIS.2D 580, 595, 342 N.W.2D 709 (1984).

DISSENTING OPINION OF CHAIRPERSON JAMES R. MEIER

I dissent.

In ARROWHEAD UNITED TEACHERS V. ERC (116 WIS.2D 580) the Wisconsin Supreme Court held that the Commission's use of the concept of community of interest constitutes a rational basis for the interpretation of Sec. 111.70(4)(d)2.a., Stats. ARROWHEAD leaves open for case-by-case analysis whether departure from prior practice has a rational basis.

The question here is whether the majority's departure from its prior practice of ordering wall-to-wall units for a municipal work force of such a small size has a rational basis. I can't find a rational basis. Here, the majority is creating two units where the petitioner is requesting to represent all the employes that could and should be in a wall-to-wall unit.

The only fact that distinguishes this case from the wall-to-wall units certified in the other districts in the conference is that here, the petitions requested two units. The majority might argue that in those other districts it might have similarly ordered multiple units if the petitions requested multiple units. If that's the case, the body of Commission law on this subject stands for the proposition that the Commission gives effect to the anti-fragmentation mandate in cases with these circumstances only where that is the desire of the petitioning party.

The majority's failure to deny the petitions, thereby requiring Petitioner to seek a wall-to-wall unit, is, in my opinion, inconsistent with its prior practice and is not sustained by a rational basis.

Dated at Madison, Wisconsin this 28th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier, Chairperson　　James R. Meier /s/