STATE OF WISCONSIN
CIRCUIT COURT
WAUKESHA COUNTY

Waukesha County Technical
Educators Association,

Petitioner,
v.

Wisconsin Employment Relations
Commission and Waukesha County
Technical College,
Respondents.

DECISION
Case No.: 99-CV-2252
[Decision Nos. 11076-F and 29564-C]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

Petitioner, The Waukesha County Technical Educators Association, (hereinafter "WCTEA" or "the Association"), petitions this Court for review under Wis. Stats. Chapter 227 of the decisions of Respondent, the Wisconsin Employment Relations Commission, (hereinafter "WERC" or "the agency"), dated February 25, 1999, restricting approximately 115 employees from voting in an election for WCTEA representation among employees teaching evening courses at Waukesha County Technical College, (hereinafter "WCTC"). Petitioner asks this Court to reverse the WERC decision and remand the matter to the WERC for appropriate action based on the decision of this Court. Because 115 employees were inappropriately denied the right to vote in the election, this Court grants the Petitioner's request.

PROCEDURAL BACKGROUND

In 1998 the WCTEA and the Waukesha County Technical College Part-Time United Faculty filed petitions for election with the WERC to create two bargaining units: one composed of all professional employees employed less than 50%, and one composed

of all professional employees employed more than 50%. The WCTEA then amended its petition requesting that if the two proposed units were inappropriate then the WERC should conduct an accretion election among all professional employees teaching in the evening program to determine whether they desired representation for purposes of collective bargaining.

The WERC rejected the initial proposal because the two units were not appropriate for purposes of collective bargaining within the meaning of Wis. Stat. § 111.70(4)(d)2a. Instead, the WERC approved an accretion election consisting of all full and part-time unrepresented professional employees. As a result, instructors teaching in the evening program who also taught in the day program, and were represented by the WCTEA for their day program work, were not allowed to vote in the election.

The election commenced on April 21 and 22, 1999. The WERC certified the election on October 14, 1999, determining that the eligible voters did not desire the WCTEA representation. The vote failed by a margin of 159 to 104. Approximately 115 evening instructors were not eligible to vote because of their day program status.

On November 5, 1999, the WCTEA commenced this proceeding for the review of the WERC decision under Wis. Stats, Chapter 227. The WCTEA asks this Court to reverse the WERC decision and remand the matter to the WERC for appropriate action based on the decision

of this Court.

FACTUAL BACKGROUND

The WCTEA first represented full-time WCTC instructors who taught during the day in 1968. At the time, WCTC offered associate degree and vocational degree programs during the day and provided unassociated non-credit "hobby" courses at night. Evening courses were designated as those scheduled after 6:00 p.m. Full-time, certified instructors generally taught the credit classes offered during the day while part-time instructors taught the non-credit courses at night.

Counselors, full-time non-instructional staff, and part-time instructors who taught during the day petitioned for and received inclusion in the bargaining unit in 1972. In 1975, regular full-time adult basic education instructors petitioned and were included, and in 1979 part-time adult basic education instructors who taught during the day also became part of the bargaining unit.

Subsequent to the final unit clarification, WCTC's program and course offerings changed. The school's mission grew to include retraining and upgrading of skills and technical assistance to business and industry along with the original associate and vocational degree programs and adult basic education. Further, WCTC began to offer more credit programs and courses at night and more non-credit courses during the day. The

marked distinction between “day” and “night” school disappeared, as did the distinction between the types of instruction offered in the day program and in the night program.

Nevertheless, inclusion in the bargaining unit and the determination of a faculty member’s percentage of work remain limited by the time of day the faculty member teaches. Only day credit classes count toward full-time employment and the full-time employment “workload” determines the employee’s salary and benefits qualification as set forth in the collective bargaining agreement.

The collective bargaining agreement creates three classes of employees teaching in the day program. Full time employees are fully covered by the collective bargaining agreement. Part-time I employees work less than 50% of full-time and receive a bargained hourly wage based on the type of classes taught and the years of service. Part-time II employees work more than 50% of full-time and covered by most contractual provisions of the collective bargaining agreement.

Teachers in the evening program at WCTC are not covered by the collective bargaining agreement regardless of the type of instruction they provide, and their evening program work does not count toward bargaining unit status for wages or benefits. Therefore if an instructor teaches in both the day and the evening programs, the daytime work is compensated pursuant to the

collective bargaining agreement while the evening work earns compensation unilaterally established by the employer. If a daytime instructor wishes to teach classes during the evening, the instructor must separately apply for the evening courses and WCTC must hire him or her.

The WCTEA petitioned the WERC in 1998 for an election among employees teaching evening courses at WCTC for inclusion in two separate bargaining units: one for all professional employees working 50% or more, and one for all professional employees working less than 50%. The WCTEA then amended its petition to request that if the two proposed units were inappropriate then the WERC should conduct an accretion election among all professional employees teaching in the evening program to determine whether they desired representation for purposes of collective bargaining.

The WERC granted the petition on February 25, 1999 for an accretion election but excluded from voting employees who also taught during the day program and were represented by the WCTEA for their day program work. These instructors numbered approximately 115. The WERC reasoned that if "we were to allow existing bargaining unit employees to vote, we would in effect be allowing employees to vote on whether to join themselves." The WCTEA held an election on April 21 and 22, 1999. Instructors opposing WCTEA representation prevailed by a vote of 159 to 104.

ANALYSIS

I. Standard of Review

A court is not bound by an agency's conclusions of law. West Bend Educational Association v. WERC, 121 Wis.2d 1, 11 (1984). While there are circumstances when it is appropriate for a court to defer to an agency's interpretation of a statute, those circumstances require that the agency have a long continued and substantially uniform practice regarding such interpretation that has not been subject to challenge, and that the facts of the case are not facts of first impression. See Local No. 695 v. LIRC, 154 Wis.2d 75, 82-83 (1990).

There are three levels of deference afforded conclusions of law and statutory interpretation in agency decisions. "Great weight" entitles a reviewing court to defer to an agency interpretation provided it is not irrational. See, Racine Educational Association v. WERC, 214 Wis.2d 353, 356 (CT. App. 1997). This level of deference applies when the agency has "superior experience, technical competence, and specialized knowledge to aid the agency in its interpretation and application of a statute.[1]" Id. (quoting West Bend, 121 Wis.2d at 12).

The "due weight" or "great bearing" standard is applied to an agency decision if the decision is "very nearly" one of first impression. Id. at 357. A de novo standard is applied to agency

[1] This standard is generally applied in the review of an agency determination.

decisions which are clearly decisions of first impression or when the agency has no special expertise or experience. Id.

Generally, WERC ruling dealing with collective bargaining agreements are afforded great weight because the WERC has expertise in collective bargaining matters, specifically through the interpretation of WI. Stat. § 111.70[2] of the Municipal Employment Relations Act, (hereinafter "MERA"), to determine an appropriate collective bargaining unit. See Generally, County of LaCrosse v. WERC, 180 Wis.2d 100, 107 (1993).

The WERC has a long-standing practice of applying the community of interest standard to collective bargaining unit

[2] Wisconsin Statute § 111.70(4)(D)2.a. provides:
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 employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit. Before making its determination, the commission may provide an opportunity for the municipal employees concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit. The commission shall not decide, however, that any group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both municipal employees who are school district professional employees and municipal employees who are not school district professional employees. The commission shall not decide that any other group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both professional employees and nonprofessional employees, unless a majority of the professional employees vote for inclusion in the unit. The commission shall not decide that any group of municipal employees constitutes an appropriate collective bargaining unit if the group includes both craft employees and noncraft employees unless a majority of the craft employees vote for inclusion in the unit. The commission shall place the professional employees who are assigned to perform any services at a charter school as defined in s. 115.001(1) in a separate collective bargaining unit from a unit that includes any other professional employees whenever at least 30% of those professional employees request an election to be held to determine that issue and a majority of the professional employees at the charter school who cast votes in the election decide to be represented in a separate collective barraging unit. Any vote taken under this subsection shall be by secret ballot.

determinations. See, Arrowhead United Teachers v. ERC, 116 Wis.2d 580, 594 (1984). Because of the Agency's significant expertise as a result of the development and application of this standard, the Agency's interpretation of MERA is usually entitled to the "great weight" level of deference. Id. at 595. However, the facts of the case at bar are very nearly facts of first impression.

In Arrowhead, a case with congruent but not analogous facts, the court upheld the Agency's decision to prohibit one-semester intern teachers from joining the same collective bargaining unit as full time teachers. See generally, Arrowhead, 116 Wis.2d 580. The decision deviated from the agency's past practice of avoiding separate bargaining units but was appropriate. Although the intern teachers and full time teachers performed the same work their concerns were different; the interns were motivated by their academic pursuits while the full time teachers were motivated by economic benefit. Id.

In the case at bar, a distinction between motivations is not quite as easy to draw. Here, the disputed class of instructors are not one-semester interns but full-time day instructors, already members of the collective bargaining unit for purposes of their daytime work, seeking the same coverage for performing the same work during the evening. Therefore this is a case of very nearly first impression and the WERC's decision is entitled to

due weight.[3]

II. WERC Decision

When determining the proper collective bargaining unit, the WERC first examines the work employees perform and second examines the desires of individual employees. The first examination explores whether employees share a community of interests. Employees who share a community of interests generally have similar interests and participate in a common purpose through their employment. See, Arrowhead, 116 Wis.2d at 592.

The second examination concerns the motivations of the individual employees and their own desire to join the union. Here the position the employee holds takes a back seat to the individual freedom of the employee to choose representation. The WERC makes clear that whether positions share a community of interests and whether individual employees desire representation are two separate and distinct issues.

The WERC determined in its Findings of Fact and Conclusions of law dated February 25, 1999 that all professional employees of WCTC have a "shared purpose of educating students" and that the "essential duties, skills, and qualifications of all professional

[3] Regarding the level of deference afforded an agency decision, the Arrowhead Court in 1983 gave the ERC's decision great weight because the ERC had significant experience interpreting the specific statute regardless of whether the facts were of first impression. 116 Wis.2d at 594. However, in 1990 the Court in Local 695 held that the agency's decision should be afforded "due weight" or "great bearing" because the facts were very nearly of first impression. 154 Wis.2d at 83.

teachers employed by WCTC are fundamentally the same." Having found a shared community of interests the Agency then concluded that a collective bargaining unit comprised of all full-time professional employees and all part-time professional employees would be appropriate.

At this point the freedom of the individual to choose representation should have gone into action. However, the WERC prevented each individual from freely choosing whether he or she desired representation for all his or her work. The agency disallowed individuals already represented by the collective bargaining unit for their daytime work from participating in the election even though they performed the same work *unrepresented* during the evening program.

MERA provides that municipal employees shall have the right to affiliate with a labor organization "of their own choosing" and the right to be represented by a labor organization "of their own choice." See, WERC v. Evansville, 69 Wis.2d 140, 159 (1975). The WERC's position assumes that the 115 employees already represented by the Association for daytime employment would exert "improper influence" over the election. This position requires speculation regarding how many of those 115 employees had the opportunity to vote for or against the Association when it was originally proposed, and of those who did, whether they actually voted for or against the Association.

The 115 excluded employees have more than perfect information regarding the Association; they have the experience of being represented for daytime program work. It is inevitable that some of those instructors appreciate and agree with the representation while others do not. Whether they want the same representation for their evening program work is for them to decide. The 115 excluded employees should have been entitled to vote whether they wanted their wages, hours, and working conditions for the evening program negotiated by the Association.

Finally, the Agency argues that allowing the 115 disputed employees to vote in this election would be like allowing them to vote to join themselves. In fact, the 115 employees would not be voting to join themselves but voting to have their unrepresented work represented by the Association. Essentially, these individuals hold two jobs. The only fact that makes this situation perplexing is that those employees hold their two jobs with one employer. For all practical purposes they are treated by WCTC as two separate employees. Allowing them to vote for representation of their evening program work would not be giving them a "double vote." The proper analogy is still one vote for one person. Since the 115 disputed employees have two separate employment identities each employment identity has the right to vote for representation.

The Association represents the 115 disputed employees for

one job but not the other. Daytime program work was not a subject of the election so the 115 employees should not have been excluded from the election as a result of their other employment affiliation. Their evening program work is not represented; they are not union members for the purpose of their evening work and have no rights as union members for their evening program work. Therefore, they should have been allowed to vote in an election to determine whether employees who teach in the evening program wished to be represented by the Association for the purpose of negotiating over the wages, hours, and working conditions for evening program jobs.

CONCLUSION

THEREFORE, it is the order of this Court that the decision of the WERC is reversed and this matter is remanded to the WERC with instructions to proceed according to the decision of this Court.

Dated this 22 day of Jan, 2001.

Kathryn W. Foster /s/
Kathryn W. Forster,
Circuit Court Judge