STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WONEWOC-CENTER SUPPORT STAFF, Complainant,

vs.

WONEWOC-UNION CENTER SCHOOL DISTRICT, Respondent.

Case 26
No. 58164
MP-3575

Decision No. 29813-B

Appearances:

Attorney Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Wonewoc-Center Support Staff.

Hale's Legal Services, by **Attorney Linda L. Hale,** 433 Linn Street, P.O. Box 114, Baraboo, Wisconsin 53913-0114, appearing on behalf of Wonewoc-Union Center School District.

ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 10, 2000, Examiner Amedeo Greco issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats. To remedy the prohibited practices found, the Examiner ordered Respondent to cease and desist from committing such practices and to take certain affirmative action.

Respondent timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received October 18, 2000. 1/

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

1/ The Complainant argues that the District acted inappropriately by failing to file an initial brief in support of the petition for review.

The petition included a brief recitation of the legal argument on which the District relied when seeking reversal of the Examiner's decision. Consistent with our standard practice, we then established a briefing schedule that gave the parties an opportunity to file argument in support of or in opposition to the petition. The District did not file an initial brief in support of the petition for review. The Complainant then filed a response to the petition that included an assertion that the District's failure to file an initial brief indicated that the petition for review was a "sham" and put the Complainant at an inappropriate disadvantage. The District then filed a reply brief.

In our view, the District's conduct vis-à-vis the petition for review has been entirely appropriate. The opportunity to file written argument in support of a petition for review is just that -- an opportunity. The District has no obligation to file an initial brief in support of its petition and we draw no inference from its decision not to do so. Particularly where, as here, the petition itself contains legal argument, the Complainant is not placed at any disadvantage when filing a brief in opposition to the petition.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-9 are affirmed.

B. Examiner Finding of Fact 10 is modified to read as follows:

10. During the bargaining that followed, the Association proposed in March 1998 that the unit clarification petition be settled by an agreement to continue to include the Head Custodian and Head Cook in the unit but to exclude the High School Secretary as a confidential employee. The District rejected this proposal and the parties were also unable to reach an agreement on the 1997-1999 contract at that time.

In September 1998, the parties met with a Commission staff mediator in an effort to reach agreement on the 1997-1999 contract. During the mediation session, the Association advised the mediator that it would like to settle the unit clarification petition and relayed to him the settlement proposal it had previously made to the District in March 1998. During the September mediation session, the unit clarification petition was settled and on November 18, 1998, the Commission issued an Order of Dismissal which stated that the petition was being dismissed because the parties:

. . . agreed to a stipulation whereby the positions of Head Custodian and Head Cook would remain in the bargaining unit certified in Commission Decision No. 22684, and the position of Administrative Secretary/Bookkeeper would be excluded on the grounds of confidential status;

In January, 1999, the parties reached agreement on a 1997-1999 contract.

At the time of the September 1998 settlement, both the District and the Association knew that Head Custodian Gavin was considering retirement within the next year.

From the District's perspective, Gavin's retirement presented an opportunity to revise the Head Custodian's job responsibilities so as to make the position supervisory, remove it from the bargaining unit, and fill it with someone who would be more willing to function as a supervisor than the District believed Gavin had been. When it entered into the settlement agreement in September 1998, the District's attorney was present and advised the District that the agreement would not prevent the District from taking such action in the future.

From the Association's perspective, continued inclusion of his position in the unit was important because several current employees were interested in filling the position upon Gavin's retirement.

The concerns/interests/understandings of each side were not communicated directly (or indirectly through the mediator) to the other side during the September 1998 meeting when the unit clarification petition was settled.

C. Examiner Finding of Fact 11 is set aside.

D. Examiner Finding of Fact 12 is renumbered Finding 11 and is affirmed.

E. Examiner Finding of Fact 13 is renumbered Finding 12 and modified to read:

12. Upon learning of the posting, Association representative Byers contacted Administrator Manning to complain about the District's removal of the Head Custodian position from the bargaining unit.

F. Examiner Findings of Fact 14-15 are set aside and the following Finding is made:

13. The Building and Grounds Supervisor and Safety Director directs the work of three custodians. He makes specific work assignments for these employees as required, formally evaluates the custodians' work performance and plays a role in the approval of custodian leave requests. He spends the majority of his work day performing maintenance duties.

No employees have been hired since Supervisor/Director Burch took the position. The job description indicates that the Supervisor/Director "Participates in the recruiting and screening of custodial and maintenance staff applicants."

The Supervisor/Director has the independent authority to verbally reprimand an employee. As to more serious discipline, the District Administrator would perform an independent investigation of the facts surrounding any disciplinary recommendation received from the Supervisor/ Director.

The Director receives a salary of $27,000 which is approximately $2,000 more and $6,000 more than the Head Custodian and Custodian positions received on an annual hourly wage basis under the terms of the parties' 1997-1999 contract.

G. Examiner Finding of Fact 16 is set aside and the following Finding is made:

14. The District was dissatisfied with the level of computer resources it could offer to students and decided to seek additional funding to upgrade those resources. In early Spring 1998, District administrators made four informational presentations to the public seeking support for passage of an April 1998 $150,000 expenditure referendum which would allow the District to meet a variety of needs including computer improvements.

During those presentations, the administrators reviewed the various purposes for which the $150,000 would be spent. Administrator Benish's personal notes used for those presentations contain the entry "Computer Technician ½ Time 16,000-$18,000 per year" in addition to notations about the cost of a new furnace, textbooks, computers and software, internet access, water

and sewer, insurance and maintenance.

Following passage of the referendum, the District weighed its options as to how to provide computer support services and ultimately concluded that it would create the part-time position of Tech Specialist. The District filled the position with Kathy Lindsey who was also working part-time for the District as an aide in the Association bargaining unit.

The Association did not know that the Tech Specialist position had been created and filled until bargaining unit employees received a memo from the District in August 1999 indicating that Lindsey's assignment for the 1999-2000 year included "4 hour, 210 day contract as Tech Specialist at $17,000."

The District did not bargain with the Association over the Tech Specialist's wages, hours and conditions of employment.

H. Examiner's Conclusion of Law 1 is affirmed and modified as follows:

1. The District committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally establishing the Tech Specialist's wages, hours and conditions of employment.

I. Examiner Conclusion of Law 2 is set aside and the following Conclusion of Law is made:

2. The Building and Grounds Supervisor and Safety Director is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats.

J. Conclusion of Law 3 is made as follows:

3. The District committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by removing the Building and Grounds Supervisor and Safety Director from the bargaining unit and unilaterally establishing the Director's wages, hours and conditions of employment.

K. Examiner's Order is affirmed as modified below:

ORDER

Wonewoc-Union Center School District, its officers and agents, shall immediately take the following action that the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from refusing to bargain with the Wonewoc Center Support Staff and interfering with, restraining and coercing employees in the exercise of rights guaranteed by

2. Take the following affirmative action:

A. Immediately return the position of Building and Grounds Supervisor and Safety Director to the Support Staff bargaining unit.

B. Immediately bargain in good faith with the Wonewoc-Center Support Staff over the wages, hours and conditions of employment of the Tech Specialist and the Building and Grounds Supervisor and Safety Director for the period commencing when the positions were first respectively filled.

C. Notify all of its employees represented for the purposes of collective bargaining by the Wonewoc-Center Support Staff by posting copies of the Notice attached hereto as Appendix A in conspicuous places on its premises where said employees work. The Notice shall be signed by an official of the District and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

D. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

I concur in part and dissent in part.

James R. Meier /s/

James R. Meier, Chairperson

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT violate Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by unilaterally establishing the wages, hours and conditions of employment of the Tech Specialist and Building and Grounds Supervisor and Safety Director.

WE WILL bargain in good faith with the Wonewoc-Center Support Staff over the wages, hours and conditions of employment of the Tech Specialist and Building and Grounds Supervisor and Safety Director.

Dated this _____ day of _____, 2000.

WONEWOC-CENTER SCHOOL DISTRICT

_____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

Wonewoc-Union Center School District

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

The complaint, as amended, alleges that the District violated Secs. 111.70(3)(a)4 and 1, Stats., by: (1) removing the Head Custodian position from the Association's bargaining unit; and (2) failing to bargain with the Association over the wage rate for the new bargaining position of Tech Specialist.

To remedy the violations, the complaint asks that the District:

1. Cease and desist from committing such prohibited practices;

2. Restore the Head Custodian position to the bargaining unit;

3. Bargain in good faith with the Association;

4. Post appropriate notices; and

5. Pay the Association's attorneys' fees and costs.

The District filed an answer to the complaint denying that the District had committed any prohibited practices and asking that the Association be ordered to pay the District's attorney fees and costs.

The Examiner's Decision

The Examiner concluded that the District violated its duty to bargain with the Association by unilaterally establishing a wage rate for the new Tech Specialist position.

In reaching his conclusion, the Examiner rejected the District's contention that the Association waived its right to bargain over the wage issue by failing to demand bargaining over that issue. The Examiner found that although there had been some public discussion about the creation of a new position, the Association did not know the new position had been created until the new position and unilaterally determined wage rate were first posted.

To remedy this violation, the Examiner ordered the District to bargain over the Tech Specialist wage rate.

As to the Head Custodian, the Examiner concluded that the District engaged in bad faith bargaining when it agreed to continue to include the Head Custodian in the bargaining unit but then later removed the position upon the incumbent's retirement. The Examiner reasoned as follows:

> The second issue to be resolved here is whether the District engaged in bad faith bargaining when, after it expressly told the Association on September 23, 1998, that it would keep the non-supervisory Head Custodian position in the bargaining unit, it subsequently turned around and failed to do so after former Head Custodian Gavin retired.
>
> As to that, the District also misses the point in arguing that it has the right to establish supervisory positions. It, of course, has that right, which is why the Association's Reply Brief, at p. 1, acknowledges: "Obviously, it had that power." But here, that is not the point. What is in issue is the separate legal question of whether the District waived its right to create such a supervisory position after it expressly agreed to keep the Head Custodian and the Head Cook positions in the bargaining unit in exchange for the Association agreeing to place the Administrative Secretary/Bookkeeper position outside the bargaining unit.
>
> By securing the Association's agreement to place the latter position outside the bargaining unit, the District got something of value: it saved the cost of proceeding with its unit clarification petition which was then pending before the Commission and it received an iron-clad assurance that the Administrative Secretary/Bookkeeper would no longer be in the bargaining unit – a result that was not guaranteed in the unit clarification proceeding.
>
> Having obtained that important *quid*, the District now seeks to take away the important *quo* it gave to the Association when it agreed in September, 1998, that it would keep the Head Custodian position in the bargaining unit after Gavin retired.
>
> On this issue, School Board member Charles Hubele testified: "Well, it was discussed when their current one would retire, we could look at changing the new job description because it would – you have to understand that we were trying to get this contract settled. . ." I then ruled at the hearing that because of attorney-client privilege, I would not allow any questioning relating to any

conversation Attorney Organ had with the School Board members at that negotiating session. However, this privilege was earlier breached when Attorney Organ told Byers over the telephone that he had told Board members at this meeting that they could repost Gavin's job as a supervisory position after he retired. (No objection was raised by the District to this part of Byers' testimony and it therefore stands undisputed and unchallenged.) In addition, when Administrator Manning was asked on cross-examination whether "you were going to attempt to try to change it [i.e. Gavin's position] and take it out again," he replied: "That likely was in the future, yes, ma'am." He also said that he was unaware of any District representative disclosing that fact to the Association at that time. Given Organ's and Manning's admissions, I find that the District's negotiators at that time had little or no intention of keeping Gavin's non-supervisory position in the bargaining unit after he retired and that the District's contrary representation misled the Association into believing that Gavin's position would remain in the bargaining unit.

The District's actions constituted the very antithesis of good faith bargaining because the record shows that the District never intended to keep its word and that it deliberately misled the Association into believing otherwise so that it could get the Association to agree to exclude the Administrative Secretary/Bookkeeper from the bargaining unit. In doing so, the District violated one of the iron rules in collective bargaining: "When you give your word, you keep your word." Having violated that rule by not fulfilling its end of the bargain and by engaging in bad faith bargaining, the District violated Section 111.70(3)(a)4 of MERA.

That brings us to the question of remedy. There are two possible remedies to address the District's conduct.

One is to simply order the District to cease and desist from engaging in such bad faith bargaining in the future and to post a Notice to that effect. That, though, is meaningless, since such a limited remedy allows the District to reap the benefits of its unlawful conduct by keeping Gavin's prior Head Custodian position outside the bargaining unit through the simple device of renaming that position and giving it purported supervisory powers. Hence, an alternative remedy must be found if the terms of the September, 1998, agreement between the parties are to be carried out and if MERA's remedial powers are to be fully effectuated.

I conclude that the only meaningful way to rectify the District's unlawful conduct is for it to carry out the terms of that agreement. It therefore immediately must post and fill Gavin's non-supervisory Head Custodian/District Safety Director position which is set forth in Finding Of Fact 4 above and keep it in the bargaining unit, and the above Order so provides.

Given this conclusion, it is unnecessary to determine whether Burch is a supervisor under Section 111.70(1)(o)1 of MERA and whether his position should be outside the bargaining unit, as the District itself has agreed that Gavin's former non-supervisory position – which it must now fill – is to be placed in the bargaining unit.

POSITIONS OF THE PARTIES ON REVIEW

The District

As to the Tech Specialist position, the District argues the Examiner erred by rejecting the District defense that the Association knew the position was being created and failed to demand bargaining over the wage rate. The District contends that the questions of whether and how to provide computer services within the District were discussed at several public meetings leading up to a District referendum on the subject. In this context, the District alleges the Association waived its right to bargain over the wage rate.

As to the Head Custodian, the District contends the Examiner wrongly concluded that the District bargained in bad faith when settling the unit clarification case and failed to consider and follow Commission precedent expressed in RIB LAKE SCHOOLS, DEC. NO. 29625-B (WERC, 7/2000).

The District asserts that when it agreed to leave the Head Custodian position in the bargaining unit, it did not thereby agree that the position could never be changed. The District argues that upon the incumbent's retirement, it added supervisory responsibilities to the position sufficient to make the new incumbent a supervisor. Because the Building and Grounds Supervisor and Safety Director is now a supervisor, the District alleges the position cannot be included in the bargaining unit.

In support of its position, the District further notes that in RIB LAKE, the Commission concluded that parties cannot be forced to live with bargaining unit composition agreements which are contrary to law and that the law does not permit the inclusion of supervisors in bargaining units.

Given the foregoing, the District asks that the Examiner be reversed.

The Association

The Association initially argues that because the District did not file an initial brief in support of the petition for review, the Association is placed at the disadvantage of having to respond to anticipated argument. Thus, the Association asserts that the District should not be allowed to respond to the Association argument by raising new matters in reply.

As to the merits of the Examiner's decision, the Association asserts it is undisputed that the District unilaterally established the wage rate for the Tech Specialist. Contrary to the District's argument that referendum-related meetings put the Association on notice as to the new position and wage rate, the Association contends that the referendum only established the budget for obtaining services -- not the pay rate for a position.

Turning to the Head Custodian, the Association argues that the District's reliance on RIB LAKE is misplaced. The Association asserts that RIB LAKE allows parties to litigate agreements reached for the purposes of a representation election but does not allow parties to breach agreements where other concessions -- in this case settlement of the overall contract -- were also made.

The Association contends that the District remains free to create a new supervisory position. However, the settlement agreement reached by the parties and upheld by the Examiner requires that the Head Custodian position/duties existing at the time of the settlement remain in the unit.

Given the foregoing, the Association asks that the Examiner be affirmed.

DISCUSSION

We look first at the establishment of the Tech Specialist wage rate.

The Association is the collective bargaining representative for a bargaining unit described in the 1997-1999 contract as:

> . . . all regular full-time and regular part-time non-professional employees employed by the Wonewoc-Center School District, excluding professional, supervisory, confidential, managerial, and substitute employees.

The Tech Specialist is a non-professional employee of the District and thus the District generally has the obligation to bargain with the Association over the Tech Specialist's wages, hours and conditions of employment.

The District argues that the Association waived its right to bargain over the wage rate for the newly created Tech Specialist position because the Association knew the new position was being created and failed to demand bargaining in a timely manner. When arguing the Association knew about the new position, the District cites the public nature of the District's effort to persuade voters to pass a referendum that included funding for computer services and at least inferentially the public nature of District School Board action when a new position is created.

The record establishes that District administrators made four informational presentations to the public in early spring 1998 seeking support for passage of an April 1998 $150,000 expenditure referendum. During those presentations, the administrators reviewed the various purposes for which the $150,000 would be spent. Administrator Benish's personal notes used for these presentations contain the entry "Computer Technician ½ Time 16,000-$18,000 per year" in addition to notations about the cost of a new furnace, textbooks, computers and software, internet access, water and sewer, insurance and maintenance. There is no evidence in the record that bargaining unit employees or Association representatives attended any of these meetings.

Administrator Benish's testimony at hearing does not indicate whether or not there was any comment or discussion during the informational presentations regarding creation of a District employee "Computer Technician" position as opposed to contracting for the position or whether any District employee would be included in the Association bargaining unit. Benish's testimony does indicate that even after the referendum passed, the District was not sure whether anyone hired would be in the Association bargaining unit.

Association representative Byer testified that the Association did not know that a bargaining unit Tech Specialist position had been created until employees received a memo in August 1999 indicating that the assignment of a current employee for the 1999-2000 school year now included "4 hour, 210 day contract as Tech Specialist at $17,000." Byer further testified that she did not routinely attend District school board meetings or receive notices as to the matters to be discussed/acted upon at a Board meeting. No evidence was presented as to whether local Association officers do or do not attend Board meetings or receive notices/minutes of Board meetings.

Considering all of the foregoing, we conclude that the Association did not know that a bargaining unit Tech Specialist position had been created. Because the Association did not know that position had been created, its failure to demand bargaining over the position's wages, hours and conditions of employment until after the position was filled does not constitute a waiver of its right to bargain over these maters. We reach our conclusion regarding the Association's lack of knowledge because (1) the record does not support a finding that the creation of a bargaining unit position was discussed during the administrators' presentations to the public much less that any Association representative was present during any such discussion; (2) the record does not support a finding that the Association had knowledge of the School Board's action to create the new position; (3) there is no evidence that the District directly notified the Association of the position's creation; and (4) Byers' credible testimony.

Given all of the foregoing, we affirm the Examiner's conclusion that the District violated Sec. 111.70(3)(a)4, Stats., by unilaterally establishing the wage rate for the Tech Specialist. As pled in the complaint but not acted upon by the Examiner, the District's action also constituted a derivative violation of Sec. 111.70(3)(a)1, Stats.

To remedy these violations, we have ordered the District to bargain with the Association over the Tech Specialist's wages, hours, and conditions of employment.

We now turn to that portion of the petition for review that challenges the Examiner's determination that the District violated Sec. 111.70(3)(a)4, Stats., by failing to keep the Head Custodian in the bargaining unit.

The record reflects that in the Fall of 1997, the District advised Head Custodian Gavin and two other employees that although the District believed them to be supervisors, it would allow them to continue to remain in the Association bargaining unit if they wished to so remain. The Association then advised the District that: (1) it did not believe it was appropriate for the District to be contacting the employees about their unit status; and (2) the proper method for seeking the employees' removal from the unit was to get the Union's agreement or to "take legal measures to have them removed." The District then filed a unit clarification petition seeking to have the three employees/positions removed from the bargaining unit.

At the time the petition was filed, the parties were about to exchange initial proposals for 1997-1999 collective bargaining agreement. During the bargaining that followed, the Union proposed in March 1998 that the unit clarification petition be settled by an agreement to continue to include the Head Custodian and Head Cook in the unit but to exclude the High School Secretary as a confidential employee. The District rejected this proposal and the parties were also unable to reach an agreement on the 1997-1999 contract at that time.

In September 1998, the parties met with a Commission staff mediator in an effort to reach agreement on the 1997-1999 contract. During the mediation session, the Association advised the mediator that it would like to settle the unit clarification petition and relayed to him the settlement proposal it had previously made to the District in March 1998. During the September mediation session, the unit clarification petition was settled and on November 18, 1998, the Commission issued an Order of Dismissal which stated that the petition was being dismissed because the parties:

> . . . agreed to a stipulation whereby the positions of Head Custodian and Head Cook would remain in the bargaining unit certified in Commission Decision No. 22684, and the position of Administrative Secretary/Bookkeeper would be excluded on the grounds of confidential status;

In January, 1999, the parties reached agreement on a 1997-1999 contract.

At the time of the September 1998 settlement, both the District and the Association knew that Head Custodian Gavin was considering retirement within the next year.

From the District's perspective, Gavin's retirement presented an opportunity to revise the Head Custodian's job responsibilities so as to make the position supervisory, remove it from the bargaining unit, and fill it with someone who would be more willing to function as a supervisor than the District believed Gavin had been. When it entered into the settlement agreement in September 1998, the District's attorney was present and advised the District that the agreement would not prevent the District from taking such action in the future.

From the Association's perspective, continued inclusion of his position in the unit was important because several current employees were interested in filling the position upon Gavin's retirement.

The concerns/interests/understandings of each side were not communicated directly (or indirectly through the mediator) to the other side during the September 1998 meeting when the unit clarification petition was settled.

If the parties entered into a written settlement agreement during the September 1998 meeting, it is not in the record before us.

When considering all of the foregoing evidence, the Examiner concluded:

> I find the District's negotiators at that time had little or no intention of keeping Gavin's non-supervisory position in the bargaining unit after he retired and that **the District's contrary representation misled the Association into believing that Gavin's position would remain in the bargaining unit.** (emphasis added)

We begin by asserting our general agreement with the principles enunciated by Examiner Greco as to the need for each party to keep its word in its dealings and bargaining with the other. In addition to being a sound moral code, this rule represents a fundamental form of enlightened self-interest.

But we disagree with the Examiner's conclusion that the District engaged in bad faith bargaining. The Examiner determined that the District negotiated an agreement to keep the Head Custodian position in the bargaining unit *even after it became vacant*. We do not share the Examiner's opinion that the District's agreement was that broad. We share the Examiner's view that the parties reached an agreement that the Head Custodian position be placed in the bargaining unit. We find, however, no evidence of any discussion as to District obligations in the event there occurs a significant change of circumstances. We deem such a change of circumstances as necessarily including the position becoming vacant due to the retirement of the position's incumbent.

The absence of any communication between the parties as to the occurrence of this possible contingency is particularly surprising in view of the acknowledgment by an Association witness that the forthcoming retirement of Head Custodian Bo Gavin was common knowledge. But contrary to the apparent Association assumption that Gavin's retirement would change nothing in its agreement with the District, the District believed that it would be free to reshape Gavin's position into a supervisory mold when Gavin retired. Unfortunately, neither party sought to verify its view with the other. Under these circumstances, we conclude that there was no meeting of the minds between the parties as to whether the District had a continuing obligation to keep the position in the bargaining unit upon Gavin's retirement if the District wished to convert the position into a supervisory one.

We note that had the District told the Association what it had it mind (or for that matter, had the Association thought to ask) the District may well have obtained Association acceptance of its plan. For clearly the District has the right to create such supervisory positions as it may deem necessary to conduct its business in a responsible fashion, consistent with the provisions of Ch. 111.70. Had this occurred, both parties would have avoided the stress, expense and risk of a contested hearing, and each party would have understood and received exactly what it bargained for. Bargaining candor is the better practice, for it is more apt to lead to a mutual satisfaction of the parties' interests.

Given the foregoing, we conclude that the District did not bargain in bad faith when it entered into the September 1998 agreement to settle the unit clarification proceeding.

We also take this opportunity to remind the parties that under the law they are not free to negotiate a bargaining unit composition that is contrary to that permitted by statute. It is not the practice of this Commission to scrutinize closely bargaining unit compositions to which parties have agreed. However, in the event a dispute over the status of any position included in a unit composition agreement should develop, this Commission is legally obligated to determine whether the duties of the positions in issue are compatible with bargaining unit status. 2/

2/ As reflected in RIB LAKE SCHOOL DISTRICT, DEC. NO. 29625-B (WERC, 7/2000) AND MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-B (WERC, 7/2000).

We recognize this practice may lead to negotiation gamesmanship. That is unfortunate: sharp bargaining is not necessarily synonymous with enlightened bargaining, for it may lead to mutual mistrust and discord. In some cases, moreover, it may not even achieve the immediately desired objective. Absent modification of the statutes, however, we believe this is a necessary price we pay for the practice of allowing parties the opportunity of attempting to reach their own bargain on the composition of a bargaining unit.

We note the opinion of our concurring/dissenting colleague that "(i)n fact, the majority has held that it is irrelevant in unit clarification cases whether there is an agreement or whether there was bad faith in breaching the agreement." But our colleague's statement of our view is incomplete. Suffice to say that we believe that any bargaining unit composition to which the parties have reached agreement *is in jeopardy if it is a composition contrary to statute*. Good faith negotiations are not a license to parties that empowers them to amend the statutes.

Based on this view, we further believe that a municipal employer cannot be lawfully precluded in perpetuity from changing the duties of any position in a bargaining unit where, as here, there has been a significant change in circumstances. We do not believe the Legislature has given any evidence of intending to so hamstring municipal governments. As our colleague acknowledges, this has been a time-honored position of this and previous Commissions.

In this instance, we have concluded that the District was not prohibited from seeking removal of the Head Custodian position from the bargaining unit by restructuring the position into a supervisory one following Gavin's retirement. Our conclusion in this regard, however, does not resolve the "duty to bargain" allegation in the complaint. While the settlement agreement did not prohibit the District from seeking to recast the Head Custodian as a supervisor when Gavin retired, if the District was not successful, such position remains in the bargaining unit. Under that circumstance the District would have violated its duty to bargain by removing a unit position from the bargaining unit and by unilaterally establishing or altering the wages, hours and conditions of employment for what continued to be a bargaining position. On the other hand, if the District successfully created a supervisory position, then no duty to bargain violation occurred because supervisors are and statutorily must be excluded from the bargaining unit.

Thus, we turn to the question of whether the "new" Head Custodian, the Building and Grounds Supervisor and Safety Director, is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats.

Section 111.70(1)(o)1, Stats., defines a supervisor as:

> . . . an individual who has authority, in the interest of the municipal employer to hire, transfer, suspend, layoff, recall, promote, assign, reward or discipline other employes, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When evaluating claims of supervisory status under Sec. 111.70(1)(o)1, Stats., we consider the following:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;

2. The authority to direct and assign the workforce;

3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;

4. The level of pay including an evaluation of whether the supervisor is paid for his skills or for his supervision of employees;

5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;

6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees, and

7. The amount of independent judgment exercised in the supervision of employees. WATERTOWN SCHOOL DISTRICT (FOOD SERVICE), DEC. NO. 29694 (WERC, 8/99).

We have consistently held that not all of the above factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors support supervisory status in sufficient combination and degree to warrant finding an individual to be a supervisor. ONEIDA COUNTY, DEC. NO. 24844-F (WERC, 1/99).

Looking first at the Building and Grounds Supervisor and Safety Director's authority to effectively recommend hiring, no employees have been hired since this position was removed from the unit. The evidence before us is limited to the revised job description which indicates that the Director "Participates in the recruiting and screening of custodial and maintenance staff applicants." From the relatively weak language of the job description, we conclude the Director will participate in the hiring process but will not effectively recommend which applicant should be hired.

As to transfers and promotions, the Director's evaluation of a custodian's job performance could play a role in the District's decision regarding the qualifications of employees who post for a vacant position.

Regarding the Director's authority to effectively recommend discipline or discharge, the record establishes that the Director has the independent authority to verbally reprimand an employee. As to more serious discipline, District Administrator Manning testified that he would personally perform an independent investigation when presented with a discharge recommendation from the Director. From this testimony, we conclude that Manning would independently assess the need for and appropriate level of discipline. Thus, we are satisfied that the Director does not have the authority to effectively recommend serious discipline or discharge.

Turning to the authority to direct and assign the workforce, the record establishes that the Director has and exercises this authority. He makes work assignments when needed and plays a role in the approval of employee leave requests.

The Director directs the work of three custodians. The District Administrator exercises greater authority over the same employees by virtue of his role in disciplinary situations.

The Director receives a salary of $27,000 which is approximately $2,000 more and $6,000 more than the Head Custodian and Custodian positions respectively receive on an annual hourly wage basis under the terms of the parties' 1997-1999 contract. Given the difference in job duties between the custodians' (primarily cleaning) and the Director's duties (primarily maintenance), we conclude the Director's level of pay reflects both his skills and his responsibilities directing the custodians' work.

Although the Director testified that he spends the majority of his time supervising employees, we do not find this testimony credible in light of the fact that for the first 3 ½ hours of his work day, no custodians are working. Therefore, we conclude that he spends a majority of his time performing maintenance work -- not supervising the three custodians.

Because the work of the custodians follows a well established routine and because matters such as whether to grant a vacation request are largely resolved based on whether school is in session or not, the Director does not exercise a large amount of independent judgment when interacting with the custodians. On balance, we are further satisfied that the Director is primarily supervising the activity rather than employees.

Considering all of the foregoing, we conclude that the indicia of supervisor status are not present in sufficient combination and degree to make the Director a supervisor. While he directs the work of the custodial employees and evaluates their job performance, the number of employees supervised is small and he spends a majority of his time doing his own maintenance work. Most importantly, the record does not persuade us that the Director can effectively recommend the hiring or firing of employees. If the District wishes to create a supervisory position over its custodians, it must give the Director significant authority in these critical areas.

Having concluded that the Director is not a supervisor, it follows that the District violated its duty to bargain with the Association when it removed the position from the unit and unilaterally established the wages, hours and conditions of employment for the Director. As pled in the complaint but not acted upon by the Examiner, the District's conduct also constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats. To remedy this violation, we have ordered the District to place the position of Director in the bargaining unit and to bargain with the Association as to the position's wages, hours and conditions of employment, from the date the position was filled and for as long as the position remains non-supervisory.

Due to the District's mistaken belief that it had transformed a bargaining unit position into a supervisory one, the Director position was not posted, and an external candidate was selected. The District is now on notice that as presently constituted the Director position is at present a bargaining unit position. Unless the District now gives the Director significant hiring/firing authority to make him a supervisor, the District must post the position and fill it pursuant to the parties' contract or the District's status quo obligations if no contract is in effect.

The Association asked for attorneys fees and costs as part of its remedy. The Examiner did not address this request in his decision. We do so and deny the request. Other than in certain successful duty of fair representation proceedings, SEE UW-MILWAUKEE, DEC. NO. 11457-H (WERC, 5/84) fees and costs are only available where an extraordinary remedy is warranted. TREMPEALEAU COUNTY, DEC. NO. 29598-B (WERC, 1/2000). Such a remedy is not appropriate here.

Dated at Madison, Wisconsin this 7th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Wonewoc-Union Center School District

Concurring and Dissenting Opinion of Chairperson James R. Meier

I concur with the majority except as stated below.

The majority asserts their general agreement with the principle that parties should keep their word. In fact, the majority has held that it is irrelevant in unit clarification cases whether there is an agreement or whether there was bad faith in breaching the agreement. See MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-B (WERC, 7/2000) and RIB LAKE SCHOOL DISTRICT, DEC. NO. 29625-B (WERC, 7/2000).

Here the majority holds that the examiner erred in finding that the District agreed to keep the Head Custodian position in the bargaining unit even after it became vacant. I note that this Commission issued an Order of Dismissal of a unit clarification petition on November 18, 1998 because the parties agreed that the **positions** of Head Custodian and Head Cook would remain in the bargaining unit, and nothing in the record supports the proposition that the agreement evaporated upon the resignation of the incumbent. If the District only agreed that the Head Custodian position would be in the unit until vacant, that fact did not show up in the Commission's Order of Dismissal.

The fact is that the Commission majority does not require parties to honor agreements they reach regarding the makeup of a bargaining unit when the agreement is based on the asserted implication of the statutory "municipal employee" status of the employee/position. I do not agree with the majority that the statutes require the result they reach. As I indicated in RIB LAKE SCHOOLS and MANITOWOC SCHOOLS, SUPRA, parties should be required to live up to such agreements. Nevertheless, I would not require the District to keep the positions in the unit because the District's conduct has always been allowed by the Commission.

Dated at Madison, Wisconsin this 7th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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