

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MADISON TEACHERS
INCORPORATED

Involving Certain Employes of

MADISON METROPOLITAN
SCHOOL DISTRICT

Case 1
No. 36749 ME-82
Decision No. 6746-E

Appearances:

Kelly, Haus & Katz, Attorneys at Law, Lake Terrace, 121 East Wilson Street, Madison, Wisconsin 53703-3422, by Mr. Robert C. Kelly, appearing on behalf of Madison Teachers Incorporated.

Ms. Susan Wiesner-Hawley, Attorney at Law, Labor Contract Manager, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703, appearing on behalf of Madison Metropolitan School District.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER CLARIFYING BARGAINING UNIT

Madison Teachers Incorporated having filed a petition on March 21, 1986, requesting the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit described in Finding of Fact 3 by including the positions of Evaluation Coordinator and Ropes Consultant; and a hearing having been held on June 3, 1986, in Madison, Wisconsin, before Examiner James W. Engmann, a member of the Commission's staff; and a transcript having been prepared and forwarded to the parties on June 27, 1986; and the parties having filed initial briefs which were exchanged on August 18, 1986; and the parties having waived the filing of reply briefs; and the Commission having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Madison Metropolitan School District (District) is a municipal employer and has its offices at 545 West Dayton Street, Madison, Wisconsin 53703.

2. That Madison Teachers Incorporated (MTI) is a labor organization representing municipal employes for purposes of collective bargaining, and that it has its offices at 821 Williamson Street, Madison, Wisconsin 53703.

3. That in Dec. No. 6746 (WERC, 6/64), MTI was certified as the exclusive representative of the collective bargaining unit described as follows:

All regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District including psychologists, psychometrists, social workers, school nurses, attendants and visitation workers, work experience coordinator, remedial reading teachers, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, Title I coordinator, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding interns and all other employees, principals, supervisors and administrators.

4. That MTI filed a Petition to Clarify Bargaining Unit of Municipal Employees with the Wisconsin Employment Relations Commission on March 21, 1986, wherein it sought to include the positions of Evaluation Coordinator and Ropes

Consultant in the bargaining unit described above, and that the District disputes that the two positions should be included in the bargaining unit on the basis that the Evaluation Coordinator is a managerial employee and the Ropes Consultant is an independent contractor.

5. That on February 14, 1984, the District advertised a vacancy in the position of Evaluation Coordinator; that the description for the position was stated as follows:

POSITION DESCRIPTION

The Evaluation Coordinator will assume primary responsibility for designing and implementing a process to evaluate the district's desegregation/integration plan. Major components within the evaluation plan will include data related to ongoing student performance, parent/student perceptions, and school organization and climate.

The Evaluation Coordinator will utilize evaluation data for program modifications and future planning in developing a comprehensive district information processing system.

Specifically, these functions may include but not be limited to the following:

1. Provide leadership in developing the evaluation of the integration plan.
2. Ensure that all purposes of the integration plan have measurable criteria.
3. Develop uniform data collection procedures.
4. Assist in identifying assessment instruments, surveys and inventories.
5. Develop timelines for formative and summative assessments.
6. Provide timely information to the District Administrators for the integration plan.
7. Provide necessary data and facilitate the work of the citizen monitoring committee of the integration plan.
8. Coordinate evaluation of integration plan with the district's ongoing program evaluation and achievement testing.
9. Develop consistent formats for reporting data.
10. Utilize computer programming for efficient storage and retrieval of data.
11. Assist principals and staffs in collecting and interpreting data at the local school.
12. Assist local school staffs and teams in utilizing data for any necessary program modifications.

and that the specifications for the position were stated as follow:

POSITION SPECIFICATIONS

Required:

1. Master's degree within one of the following: Program Evaluation within Curriculum and Instruction, Educational Psychology, Educational Administration, Sociology or Psychology.

2. Minimum of two-three years of experience in program evaluation.
3. Possess or be eligible for a Wisconsin School District license.

Desired:

1. Doctorate degree in Program Evaluation within Curriculum and Instruction, Educational Psychology, Educational Administration, Sociology or Psychology.
2. Demonstrated leadership in conducting evaluation of desegregation/integration plans.
3. Demonstrated ability to plan for, develop, implement and evaluate instructional programs.
4. Demonstrated ability to coordinate human resources.
5. Demonstrated ability to produce/evaluate technical reports.

6. That Jennifer McCreadie was hired for the position of Evaluation Coordinator and began her duties on or about May 1, 1984; that McCreadie reports to Lee Gruenwald, Director of Integrated Student Services, who reports to Gerry Patterson, Assistant Superintendent for Instruction; that her starting salary was \$33,000; that her current salary is \$36,000; that her salary is determined by the District Administrator's salary schedule; that her position has several purposes; that one purpose is documenting the District's compliance with the agreement it has with the U.S. Office for Civil Rights; that another purpose is to inform the administration and staff of ways to develop and improve integration and other related areas; and that another purpose is to inform the public on what is happening with the integration plan.

7. That McCreadie's first major task was to evaluate the Action Plan designed to implement the Integration Plan and further define the specific objectives, criteria of evidence of compliance, arrangement of responsibilities, and timelines for implementation and evaluation of the plan; that she determined what would be evaluated and how it would be evaluated and reported, including the methodology and instrumentation; that she authored the Interpretation Plan Progress Report which was submitted to the U.S. Office for Civil Rights; that part of this report consists of the Integration Action Plan Revision with Evaluation Component for 1984/85; that for this revision McCreadie revised the purposes of the Integration Action Plan and further developed the objectives and expectations; that she was responsible for developing the evaluation component which include determining the evidence to show compliance, the person responsible for providing the evidence and the time by which the reporting of the evidence was to take place; and that once the evaluation component was completed, the objectives of the plan were implemented.

8. That the District Integration Transition Team is the management group for the six schools involved in the Integration Plan; that McCreadie is a member of this team which is composed of the Instructional Services Division Directors, the principals of the six schools involved in the Integration Plan, two teachers who are Instructional Support Coordinators between the two schools in each pair, and the Assistant Superintendent who chairs the team; that this team decides how to implement the Integration Plan and its evaluation; that McCreadie makes recommendations to this team on how to implement the Plan; that she also meets with other District Administrators and specialists to work on the Plan; that the decisions she makes regarding the evaluation process of the Plan impact on the work and duties of other staff members, including those in the bargaining unit herein involved; that the Integration Plan calls for special achievement testing; that she determines the grade levels to be tested and the frequency of testing; that the principals carry out this testing through the staff members in the school; that McCreadie determined that the evaluation process would include surveys of the staff; that she determined the content and frequency of the surveys which staff members were required to complete; that from the information she gathered, McCreadie made recommendations to the Transition Team and principals on such topics as bus supervision, building maintenance, condition of playground equipment, recognition of teaching staff for excellence and the difficulty of

addressing the diverse needs of students; and that her recommendations were considered and in many cases implemented.

9. That McCreadie authored the First Interim Report of the Integration Plan Evaluation dated September 25, 1985; that this Report contains all the instruments that were used in evaluating the District's program during the first year of the Integration Plan Evaluation; that she authored the Second Interim Report dated March 1986 which continued the evaluation set up in the First Interim Report; and that both of these reports were submitted to the U.S. Office for Civil Rights, as well as to the Board of Education, the Integration Monitoring Committee and other administrative and school groups in the District and community.

10. That McCreadie is a member of the Integrated Student Services Department Cabinet; that, in addition to McCreadie, the Director and eight Coordinators make up the cabinet, all of whom are administrators; that as a member of the cabinet she is involved in discussions about policy, programs, staffing, allocations and other decisions made by the cabinet; that McCreadie is co-chair of the Research and Evaluation Team composed of various coordinators and psychologists; that this team plans and recommends research and evaluation in the District; that this team was involved in evaluating the full day kindergarten program; that she made instructionally related recommendations to the Board of Education which, if adopted, would impact on bargaining unit teachers in that the kindergarten program would expand far beyond the four schools which currently have it; and that administrative staff members periodically request that she survey such topics as how a specific instruction program is working or what the climate in a school is like.

11. That McCreadie prepares the budget for Research and Evaluation; that this budget includes \$8000 for travel, materials, technology, computer hardware and software, equipment consultants, limited term employees and service contracts; that she prepares this budget based on what was budgeted the previous year and her anticipated needs in the coming year; that she gives her budget to the Director; and that he authorizes allocations outside of this budget.

12. That McCreadie participates in the formulation, determination and implementation of management policy to a significant degree; and that she does not have authority to effectively commit the employer's resources.

13. That the Ropes course was developed about five years ago; that it was developed cooperatively between the Juvenile Court, the Police Department and the District; that since the District was involved in the development of the course, it does not pay a fee to use the course; that other school districts and organizations use the course; that the fees they pay go into a fund to replace ropes and other equipment; and that the land on which the ropes course is located is not owned by the District.

14. That the Ropes course is based on the concept of Outreach Bound; that there are a variety of ropes and ladders in the trees; that the purpose of the course is for its participants to develop trust and problem solving and communication skills; that middle school emotionally disturbed children are the students from the District that use the course; that students can only work on the course when a certified ropes instructor is available; that the people who built the course have certified three people to handle the Ropes course; that Tom Solyst is one of the three certified instructors; and that he does the Ropes course for students from McFarland Schools, Marshall Schools, Lutheran Social Services, Outreach and Fresh Start in addition to the Madison Schools.

15. That Tom Solyst does not have a college degree nor is he certified in any manner by the Department of Public Instruction; that Dee Tull is the District's Program Coordinator for learning disabled and emotionally disturbed children; that Tull met with Solyst to contract for his services; that Solyst proposed a fee of \$100 a day; that Tull agreed to this proposal; that this is the fee paid to a number of consultants contracted by the District; that Solyst receives no fringe benefits; that Tull and Solyst drew up a tentative schedule that came to 70 days between October 15, 1985 and June 30, 1986; that although the contract calls for 70 days, he is paid for the number of days he works; that he determines the number of days he will work; that this is influenced by his availability and the availability of the Ropes course; that the course is only open during fall and spring and is scheduled heavily because many groups use it; that Solyst must submit a voucher indicating the number of days he has worked in order to be paid; and that he is paid with federal flow-through money.

16. That Solyst drafted a job description prior to entering into an agreement with Tull; that the job description is as follows:

1. To work with the three SCC middle school ED programs coordinating/consulting for the Stress Challenge Program which will consist of:
 - a. Development and implementation of field/community experiences for students in the SCC ED programs that are coordinated with classroom curriculum.
 - b. Consulting with the teachers about classroom activities for stress challenge.
 - c. Assisting classes at Ropes Course, Caves and other such activities.
2. Assist other middle school ED teachers and Laurie Frank with the ED students Stress Challenge Program at the Ropes Course and Caves.
3. Consult with Laurie Frank to organize and implement staff development regarding stress challenge for all staff on the Curriculum and Program Evaluation Committee.
4. Work with staff on strategies to get parents, siblings, non ED peers to build, enhance and/or reinforce positive self esteem of the ED student.
5. Work with Program Coordinator to evaluate the effect of stress challenge and identify strategies for generalizing the positive peer culture to regular education and high school as the ED students are transitioned to those environments.

that he is not supervised by anyone in the District; that he meets with Tull monthly to discuss how the students are doing; that he is involved with five teachers in three different schools; that Tull does not determine what kind of work Solyst is to do nor how well he is doing; that Tull does review whether the Ropes program is going according to the contract between Solyst and the District; that Solyst meets with the Curriculum and Evaluation Committee monthly to inform the members of the Ropes course; that this committee is composed of all middle school principals and teachers of the emotionally disturbed, and others, including regular education teachers, some social workers and psychologists, a nurse and a counselor; that during the 1985-86 school year approximately 30% of Solyst's time was spent on the Ropes course; that some of his time is spent in the school buildings and in the surrounding community; and that because this was the first year of the program, more of his time was spent in preparing the students for the Ropes course.

17. That Solyst determines which students will participate in the Ropes course; that he makes this determination based upon observations of the students in the classroom and on field community experience in which he takes some children into the community for an urban experience to get an idea of how the children handle being out of the classroom and how much self control they have; that teachers of students with special educational needs also take students into the community for urban experiences; that Solyst also makes this determination by doing some warm-up and trust building activities with the students and teachers in the classroom; that he met with the Sherman School class at least ten times in order to get to know the students; that for the classroom experiences Solyst contacts the teachers and together they determine when he is to be in the classroom; that no administrator tells Solyst when he is to go to the school buildings; that although a teacher may suggest a time, Solyst has veto power over when he goes to a class; and that it is a mutual decision between Solyst and the teacher as to when he comes to a class.

18. That Laurie Frank is a teacher of the emotionally disturbed; that the District funded her to become trained in the classroom position of stress challenge, an aspect of which is the Ropes course; that the classroom aspect takes the warm-up and trust building activities and develops them into classroom projects so the student understands how stress challenge relates through the entire curriculum; that Frank works with the other teachers of emotionally disturbed students to teach them how to do classroom stress challenge projects; that Frank is not certified to do the Ropes course; that Solyst is not certified to the classroom projects; and that Frank and Solyst meet weekly on school premises to determine how they can augment each other's training.

19. That Solyst determines what days the District will be permitted to use the Ropes course; that this decision is influenced by the availability of the course and his own availability; that he meets with the teachers to determine which schools will go on which days; that although they can suggest days to Solyst, teachers cannot unilaterally determine a day they will go to the Ropes course; that Solyst determines which students will go to the course, how long they stay and if they are sent back to school because of behavior problems; that it takes a minimum of 10 hours for a student to go through the course; that this is done in two to four days; that at the course Solyst demonstrates how the equipment has to be used; that he spots the students to make sure no one is injured; that he encourages the students to try things; that he teaches students to talk to and encourage their peers to try things; that the classroom teachers accompany the students when they are with Solyst on field trips or at the Ropes course; that the District provides transportation for the students to the Ropes course; that when the students are on a field experience or at the Ropes course, they are covered by the District field trip liability insurance; and that the District does not maintain any liability insurance on the Ropes course generally.

20. That Solyst does teach in the sense of developing problem solving and trust building communication skills; that the program has more of a treatment value than an educational value because these students are not able to do verbal theory with a psychologist but need active, interactive kinds of gross motor movement activities; that his role in organizing and implementing staff development has been limited to organizing one speaker who cancelled at the last minute; that he attempted three times to schedule an inservice in which the entire curriculum committee would go to the Ropes course, all of which were cancelled for one reason or another; and that he determined that the District was not ready to get parents, siblings and non-emotionally disturbed peers involved in building, enhancing and reinforcing self-esteem.

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

CONCLUSIONS OF LAW

1. That the occupant of the position of Evaluation Coordinator is a managerial employee and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and accordingly is appropriately excluded from the collective bargaining unit described in Finding of Fact 3 above.

2. That the occupant of the position of Rope Consultant is an independent contractor and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and accordingly is appropriately excluded from the collective bargaining unit described in Finding of Fact 3 above.

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

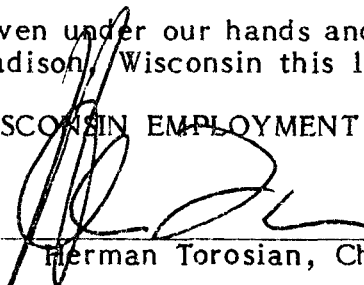
ORDER CLARIFYING BARGAINING UNIT 1/

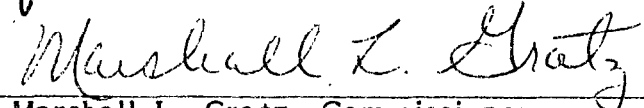
That the positions of Evaluation Coordinator and Ropes Consultant shall continue to be excluded from the collective bargaining unit described in Finding of Fact 3 above.


Given under our hands and seal at the City of
Madison, Wisconsin this 16th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

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- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner

(Footnote 1 continued on Page 8)

(Footnote 1 continued)

resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

INTRODUCTION

MTI filed a petition on March 21, 1986, requesting the Commission to clarify an existing collective bargaining unit described in Finding of Fact 3 above by including the positions of Evaluation Coordinator and Ropes Consultant. The District opposes such inclusion, alleging that the Evaluation Coordinator is a managerial employee and that the Ropes Consultant is an independent contractor.

POSITIONS OF THE PARTIES

Evaluation Coordinator

MTI asserts that the occupant of this position is an employee of the District who works with teachers in a non-supervisory non-management capacity in support of the educational process and, hence, should be included in the existing bargaining unit. More specifically, MTI argues that the Evaluation Coordinator does not participate, significantly at least, in the formulation, determination or implementation of management policy, nor does she possess effective authority to commit the employer's resources.

The District asserts that the occupant of this position participates in the formulation, determination and implementation of management policy and, therefore, should be excluded from the collective bargaining unit as a managerial employee. More specifically, the District argues that as author of the Revised Integration Action Plan, the Evaluation Coordinator participated in the formulation and determination of District policy, and that as a member of the District Transition Team for Integration, she participated in the implementation and evaluation of District policy decisions.

Ropes Coordinator

MTI argues that the occupant of this position has a strong community of interest with those District employees who make up the bargaining unit in that he works with teachers and students in support of the education process and, hence, he should be included in that unit. The MTI also argues that the Ropes Consultant is not an independent contractor but an employee of the District in that the District has the absolute power to control when, where and how he accomplishes his work.

The District asserts that the occupant of this position is an independent contractor and, therefore, should not be included in the bargaining unit. More specifically, the District argues that the Ropes Consultant sets his own schedule, including the number of days and which days he will work up to a maximum, that the District exercises no control over where he performs his job functions, that the Ropes Consultant exercises substantial control over the manner in which he performs his job functions and that he is paid in a different manner than other employees.

DISCUSSION

Evaluation Coordinator

In determining whether an individual is a managerial employee, the Commission has consistently considered the following: whether the employee participates in the formulation, determination and implementation of management policy or has the effective authority to commit the employer's resources. 2/ For a position to be

2/ Madison Metropolitan School District, Dec. Nos. 20836-A and 21200 (WERC, 11/83); City of Rice Lake, Dec. No. 20791 (WERC, 6/83).

managerial, the employee must participate in a significant manner in management policy, or must have authority to establish an original budget or to allocate funds for differing purposes from such a budget, provided such authority is not merely ministerial. 3/

The record clearly shows that the Evaluation Coordinator, Jennifer McCreadie, is integrally involved in various aspects of management policy. This is especially true in the area of the District's desegregation/integration plan in which she has participated in a significant manner in the formulation, determination and implementation of District policy.

Since being hired McCreadie has been a member of the District's Integration Transition Team. This is the management group that decides how to implement the Integration Plan. McCreadie is integrally involved in formulating and determining objectives, expectations and the evaluation of the Integration Plan, and she was directly responsible for implementing the evaluation of the District's compliance with the Integration Plan.

Specifically, her first major task was to take the original Action Plan designed to implement the Integration Plan and refine it by formulating specific objectives, expectations and timelines. She also developed the evaluation component, including the methodology and instrumentation which the District used in reporting its compliance with the Integration Plan. Based upon this work, she authored the Integration Plan Progress Report which was submitted by the District to the U.S. Office for Civil Rights in June, 1985. Since then she has authored the Integration Plan Evaluation: First Section Report, dated September, 1985, and the Second Interim Report, dated March, 1986, both of which were submitted by the District to the U.S. Office for Civil Rights.

She is also a member of the Integrated Student Services Department Cabinet, the management team that determines policy, programs, staffing and allocations for special education, talented and gifted education, achievement testing, Title I and health services. Her position on the District Integration Transition Team and the Integrated Student Services Department Cabinet involve her significantly in the formulation, determination and implementation of management policy. While it does not appear from the record that she possesses effective authority to commit the District's resources, we believe that her significant participation in management policy makes her a managerial employee and not a municipal employee and that, therefore, she should be excluded from the collective bargaining unit described in Finding of Fact 3 above.

Ropes Consultant

When a question has arisen as to whether an individual is an employee or an independent contractor, the Commission has applied the "right to control" test. 4/ This test provides that where the employer for whom the services are performed retains the right to control the manner and means by which the result is accomplished, the relationship is one of employment. 5/ Where the employer retains control only as to the result, the relationship is that of independent contractor. 6/ The determination of the relationship depends on the particular facts of each case and all the incidents of the relationship must be weighed and assessed, and no one fact is dispositive. 7/

3/ Juneau County, Dec. No. 18728-A (WERC, 1/86); Nicolet College and Technical Institute, Dec. No. 23366 (WERC, 3/86).

4/ School District of Bruce, Dec. No. 20035-A (Crowley, 2/83); Northern Pines United Services Center, Dec. No. 17590 (WERC, 2/80).

5/ School District of Bruce, Dec. No. 20035-A (Crowley, 2/83).

6/ Ibid

7/ Ibid

The District relies on Northern Pines Unified Services Center, Dec. No. 17590 (WERC, 2/80). In that case the municipal employer contracted with an individual to provide on-call counseling service from 5:00 p.m. to 8:00 p.m. one week each month. In determining that the counselor was an independent contractor, the Commission used the following criteria:

1. He was paid in a different manner than other employees.
2. He received no fringe benefits from the employer.
3. Within the period of time that he was responsible for, he made his own decisions regarding the actual hours he would have contact with a client.
4. He did his work at home, over the telephone and at the clinic.
5. He did not report on a regular basis to the employer.
6. He did not attend staff meetings.
7. He was not evaluated nor supervised on a regular basis by the employer.

According to the District, the position of Ropes Consultant is comparable to the counselor in Northern Pines. In many ways this is correct. Solyst is compensated in a different manner from other bargaining unit members. In order to be paid he submits an invoice showing the number of days he has worked. He may submit these invoices any time during the year up to four times a year. He is paid \$100 per day, and he does not receive any of the fringe benefits received by other members of the bargaining unit.

In addition, Solyst generally sets his own work schedule. After reviewing his own availability and the availability of the Ropes course, he schedules Madison Schools and calls the teachers involved to advise them what dates have been set aside for Madison. While he does confer with the teachers involved to determine which classes will go which days, it is he and not the teachers nor the District that determines when the students will go to the Ropes course. While teachers have much more say as to days he can come into the classroom, neither the teachers nor the District have the right to require him to be present on any specific day. He retains the right to say if he will work on any specific day. While he contracted to work 70 days, this is the maximum number of days he would work, and his own unavailability, the unavailability of the Ropes course or the weather, could reduce his work below 70 days.

Also, the District does not control where he performs his work. He does not have an office in the School District and performs much of his business at the Ropes course and out of his home. While he meets with the Program Coordinator on a monthly basis to discuss the Ropes course, she does not evaluate or supervise him nor does anyone else in the District.

On the other hand, MTI relies on School District of Bruce, Dec. No. 20035-A (Crowley, 2/83). In that case the municipal employer contracted with an employee to perform the employer's photocopying at a straight dollar per hour amount. Examiner Crowley described the characteristics of an independent contractor as follows:

. . . there is usually an engagement in a venture involving a financial investment and an assumption of the risks involved in the undertaking; that profit and loss are dependent on the efficiency and ability of the independent contractor; that pay for services or goods is based on the result rather than solely on the time to reach the result; and that the independent contractor exercises independent judgment and initiative in determining when, where, and how to accomplish the job. 8/

8/ Ibid

In finding that the photocopier was a municipal employee and not an independent contractor, Examiner Crowley found that the District furnished all the equipment and supplies for copying, thus not requiring a financial investment on his part; that the job was performed in the District's offices during regular school hours; that the number of hours worked were determined by the deadlines established for copies.

According to MTI, the position of Ropes Consultant is not an independent contractor under the criteria set forth in Bruce. In many ways, this is correct. Solyst does not have a direct financial investment in the Ropes course nor does he directly assume the risks involved in operating the Ropes course. Neither his nor the Ropes course profit or loss are directly dependent on his efficiency and ability. In addition his pay up to a maximum level is based on an approximation of the time to reach the result.

But the emphasis on profit-loss statements that apply to the private enterprise of photocopying and printing at issue in the Bruce case do not apply here. The Ropes course is not a business out to make a profit. It is a nonprofit operation which charges fees only to cover the costs of upkeep and maintenance of the course.

While Solyst does not have a financial investment in the Ropes course, he does have an investment in his business as a Ropes Consultant in that he has invested the time and energy to become one of three certified ropes instructors. While he has not assumed the risk involved in creating the ropes course, he does assume the risk of selling himself as a Ropes Consultant to schools and other groups. Further, his income (profit) is dependent on his efficiency and ability to provide the services of a Rope Consultant, and his pay is not based solely on the time needed to reach a result but on reaching the result in the time restrictions negotiated with his customers.

And contrary to the decision in Bruce, the District here does not furnish all the equipment and supplies, the main thrust of the job is not performed on the District's property and the number of hours worked are not determined by deadlines imposed by the District but in decisions made by Solyst.

MTI also asserts that the independent judgment exercised by the Ropes Consultant is most similar to that exercised by the teachers in the bargaining unit. Again, this is generally true. The work done by Solyst is predominately intellectual and varied in character. He exercises discretion and judgment. His work is of such a character that the result accomplished cannot be standardized in relation to a specific period of time. Because of this, MTI asserts that Solyst is not an independent contractor. Its rational is that because teachers have all these traits and they are not independent contractors, neither is Solyst. These traits do not determine whether a person is an independent contractor but whether the person is a professional. Professionals certainly can be independent contractors, as the Commission found the counselor in Northern Pines.

Finally, MTI argues that Solyst is engaged part-time in working with teachers and/or students in a nonsupervisory capacity in support of the educational process. As such, the labor organization asserts that the District has the absolute right to determine when, where and how Solyst accomplishes his job.

Solyst does spend time in the classroom, watching the children to determine if they are ready to undergo the Ropes course and building trust in the students by doing warm-up activities with the students. Solyst also spends time observing the children in field/community experiences. At all times the teacher is present. All this is prelude, however, to where his real job begins, working with the students on the Ropes course.

The Ropes course is not owned by the District. Because it provided some staff support when the course was being developed, the District may use the course free of charge. Other organizations which use the course pay a fee to replace worn out ropes and ladders. But the District cannot use the course without a Ropes Instructor. Solyst is one of three persons certified as a Ropes Instructor. He holds himself out to the public as a Ropes Consultant. As such, he has negotiated contracts with the Marshall and McFarland School District's Lutheran Social Services and the Outreach and Fresh Start Programs to perform Ropes consulting services.

When he enters into a contract with a school or other organization, he offers two things: his training as a ropes instructor and access to the ropes course. Thus he is able to get an organization time on the ropes course (for which they may have to pay a fee) and he is able to instruct those involved on the proper use of the course. Because he is contracted with other organizations and because the course is used by still other organizations, the District does not have absolute control over when, where and how Solyst does his job. While his job is done during the school day, what school days it is done is determined by Solyst (taking into consideration the availability of the Ropes course). What is done at the Ropes Course is also within his control. Thus we believe he exercises independent judgment and initiative in determining when, where, and how to accomplish the job, consistent with the criteria of an independent contractor.

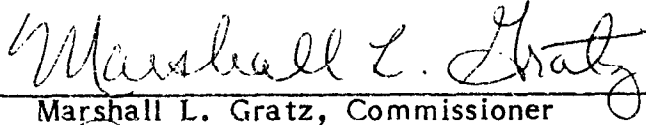
While his time in the classroom and his lack of direct financial investment are more consistent with the characteristics of a municipal employe, we believe that the method of payment consistent with how other consultants are paid, his determination of how his time is spent, the lack of supervision and the exercise of discretion in determining when and where to accomplish the job makes him an independent contractor.

Dated at Madison, Wisconsin this 16th day of December, 1986.

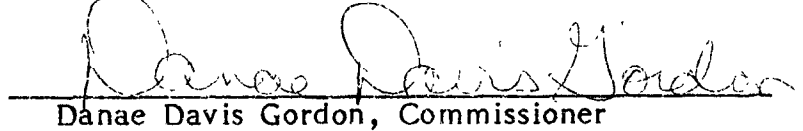
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Herman Torosian, Chairman



Marshall L. Gratz, Commissioner



Danae Davis Gordon, Commissioner