

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of | : | |
| | : | |
| MILWAUKEE DISTRICT COUNCIL 48, | : | Case I |
| AFSCME, AFL-CIO | : | No. 8600 ME-10 |
| | : | Decision No. 7135-R |
| | : | |
| For Clarification of Existing | : | |
| Bargaining Units Involving | : | Case XLIII |
| Certain Employees of | : | No. 13734 ME-554 |
| | : | Decision No. 10272 |
| COUNTY OF MILWAUKEE | : | |
| | : | |

Appearances:

Mr. Robert G. Polasek, Assistant Corporation Counsel, appearing on behalf of the Municipal Employer.
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr. and Mr. Harold W. Schmidt, Assistant Director of Milwaukee District Council 48, AFSCME, AFL-CIO, appearing on behalf of the Union.

ORDER CLARIFYING BARGAINING UNIT

The Wisconsin Employment Relations Commission, pursuant to Section 111.70 of the Wisconsin Statutes, having heretofore certified Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO (and its appropriate locals) as the collective bargaining representative for employees of the County of Milwaukee employed in the following appropriate collective bargaining unit:

"All regular full time and regular part time employees of the County of Milwaukee, excluding fire fighting classifications, and other craft employees, registered nurses, and other professional employees, confidential employees, supervisors, department heads and exempt positions"

and Milwaukee District Council 48 having petitioned the Wisconsin Employment Relations Commission to conduct an election pursuant to Section 111.70 of the Wisconsin Statutes, among Housekeepers employed by the Department of Public Welfare of Milwaukee County; and a hearing on such petition having been conducted at Milwaukee, Wisconsin on June 18, 1970, before Allan J. Harrison, Examiner, wherein the parties agreed that the election petition should be treated as a petition for clarification of the above collective bargaining unit represented by Milwaukee District Council 48; and a further hearing in the matter having been conducted at Milwaukee, Wisconsin, on October 27, 1970, before Robert B. Moberly, Examiner; and the Commission having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and files the following


IT IS ORDERED that the classification of Housekeeper employed in the Department of Welfare, Milwaukee County, is not deemed included in the present existing collective bargaining unit, and, therefore, the description of the unit involved is amended to read as follows:

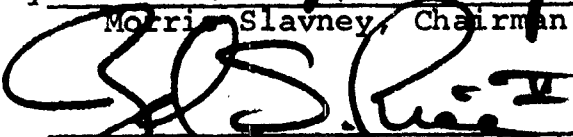
"All regular full time and regular part time employes of the County of Milwaukee, excluding housekeepers, fire fighting classifications, and other craft employes, registered nurses, and other professional employes, confidential employes, supervisors, department heads and exempt positions"

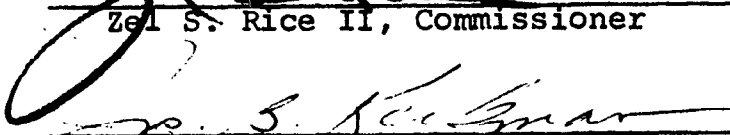
Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of April, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

STATE OF WISCONSIN

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MILWAUKEE DISTRICT COUNCIL 48, : Case I
AFSCME, AFL-CIO : No. 8600 ME-10
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Certain Employees of : Case XLIII
COUNTY OF MILWAUKEE : No. 13734 ME-554
: Decision No. 10272

MEMORANDUM ACCOMPANYING ORDER CLARIFYING BARGAINING UNIT

During the course of the hearing the parties stipulated that the issue in this case is whether Housekeepers are employees of Milwaukee County within the meaning of Section 111.70, Wisconsin Statutes. The Municipal Employer contends that they are not employees of Milwaukee County, and the Union contends that they are employees of Milwaukee County. Both parties agree that this matter should be treated as a petition for clarification of the existing overall unit represented by Milwaukee District Council 48, and that if Housekeepers are employees of Milwaukee County they should become part of the overall collective bargaining unit, set forth in the accompanying Order Clarifying Bargaining Unit, represented by Milwaukee District Council 48.

The Employer submitted a proposed Statement of Facts, and the Union agreed to the Statement of Facts with certain deletions. Both parties reserved the right to submit further evidence in addition to the proposed Statement of Facts. The Statement of Facts stipulated to, with the deletions noted, is as follows:

DATA RELATING TO HOUSEKEEPERS

ESTABLISHMENT OF LIST

The term "housekeeper" is applied to individuals who make their services available, through the agency of Milwaukee County, to welfare recipients who are temporarily ill, or otherwise incapable of caring for their children or accomplishing other fundamental domestic needs, e.g., laundry, food preparation, cleaning, shopping, etc.

. . . A simple statistical data sheet (Exh. 1) is prepared listing their name, address and telephone number and other personal information, together with a statement of their work experience and education. After this form has been filled out, they are provided with a letter advising them of the necessity for a physical examination (Exh. 2) which points out that the policy of such examinations is imposed by the Federal Government.

The form also indicates that the Federal Government requires each housekeeper to take at least ten hours of training in child care and family relationships. These courses are offered at the Milwaukee Technical College in two hour sessions for five consecutive weeks. The

cost of the physical examination, which is required annually, is \$10.00. The cost of the training program is \$4.00. Both costs are borne by the County on a pro rata funding basis which will be illustrated later.

The individuals who are to act as housekeepers are also furnished with a "General Information To Housekeepers" bulletin (Exh. 3). It indicates basically the manner in which housekeepers are paid, the way in which social security is treated, and sets out seven basic rules which in very broad language govern the conduct of the housekeepers on the job. [The Rules are as follows:

R U L E S

1. The Home Management Service Unit does not allow any housekeeper to drink on the job or to go to work in an intoxicated condition.
2. Housekeepers are not permitted to have men friends or their husband visit them while on the job.
3. Housekeepers may not use physical means to discipline children.
4. Housekeepers are expected to report to jobs on time and to put in the requested hours.
5. If you accept a job with another employer, please notify our office, (344-6400, Extension 314) so we can keep our housekeeper file accurate and up to date.
6. Housekeepers may not give medication.

* * * * *

7. Housekeepers may not transport clients in their cars.]

METHOD OF REFERRAL

In 1969, the Home Management Division had a list of 1,025 housekeepers available for service to welfare recipients. These individuals are referred to particular welfare homes in one of three ways.

(1) When it is the determination of the professional case worker assigned to the recipient that temporary housekeeper assistance is necessary for any of the reasons previously enumerated.

(2) Upon the request of a welfare recipient made directly to the Home Management Division that housekeeper's services be provided. When such request is made and the need verified, one of the housekeepers on the list is referred to perform whatever services are necessary at the welfare recipient's home.

As previously indicated, referrals to particular homes are made at the request of the client or the case worker. . . .

(3) . . .

When certification for the need of a housekeeper is made, the homemaker, who is a civil service employe, selects one of the individuals from a list supplied her to service the case. The individual is then notified in person at her home or by phone to report to the residence of a particular client to perform the housekeeping service. . . .

The housekeepers do not have civil service status of any type and may exercise their own judgment in accepting or rejecting preferred assignments.

SUPERVISION

The Home Management Division is staffed by civil service employes in various classifications, among which are ten homemakers. The function of the homemaker is to work with welfare recipients in an effort to improve their housekeeping habits and to train them in fundamental domestic chores in order to make them self-sufficient and to improve the general environment of the home. It is also a part of the duties of the homemakers to refer the housekeepers and to verify for payment purposes whether or not they are actually performing the service to which they are assigned. The homemakers spend approximately four hours per day in this type of activity following up on approximately 100 housekeepers each. Because of the ratio of homemakers to housekeepers, supervision is . . . limited, in most instances, to delivering the paycheck of the housekeeper and investigating complaints made by clients to the department about the activity of a particular housekeeper. No effort is made by the homemaker to train the housekeeper in basic domestic skills nor in the manner in which they are to be carried out. Most of the housekeepers are mature women and it is assumed that they are equipped with the basic skills required for the job.

In addition to the nine homemakers, the department has 30 positions of homemaker aides whose duty it is to assist the homemaker in checking to see that the housekeepers are in fact on the job and to serve the further purpose of filling the breach where the need for a housekeeper arises and none is immediately available for assignment. Basically, the function of the homemaker aides is to instruct recipients, not housekeepers, in domestic practices.

EARNINGS, WITHHOLDING, OASDI

At the conclusion of an assignment, the housekeeper prepares a certification of services rendered (Exh. 4) which indicates the name of the client to which the service was provided, the nature of the service and the number of days spent in the performance thereof. On the basis of this certification, the housekeepers are paid \$1.45 per hour, or \$15.00 per day, where the assignment is on a continual basis. Checks are issued by Milwaukee County.

The County does not withhold income taxes because of the position of the State of Wisconsin, Department of Health and Social Services, Bulletin FS-69-40, dated 10-2-69, (Exh. 5, p. 18, lines 9-11) that the housekeepers are employes of the recipient.

In the data supplied to the housekeepers, it is pointed out that they are under an obligation to pay their share of OASDI taxes, . . . the County deducts the housekeeper's share from the check for services

and deducts the employer's share from the welfare grant of the client. After payment has been made to the housekeepers, the total sums, including those advanced on behalf of the housekeeper for social security, are certified to the Wisconsin Department of Health and Social Services which funds the program in cooperation with the Federal Government and the County in the following ratios:

Federal Funds - 75.00 percent
 State Funds - 13.75 percent
 County Funds - 11.25 percent

To the extent that the housekeeper's share of OASDI insurance is paid out of gross earnings, only 11.25 percent of the 4.8 percent of gross wages is paid out to County Funds.

STATISTICAL DATA - EARNINGS DISPERSION
 (Source: Exh. 6, Total Housekeeper Wages for 1969)

During the year 1969, housekeeper's salaries totaled \$827,504.79, an average of \$807.32 per housekeeper. Of these 664 or 64.78 percent earned less than \$500.00, 690 or 77.07 percent earned less than \$1,000.00, 939 or 91.61 percent earned less than \$3,000.00. The lowest earnings reported by any housekeeper was \$3.90, while the highest was \$9,975.50. The following is a tabulation of the salaries earned by the ten highest paid housekeepers and the ten lowest paid:

| <u>Highest</u> | <u>Lowest*</u> |
|----------------|----------------|
| \$9,975.50 | \$3.90 |
| 9,361.30 | 4.50 |
| 6,766.40 | 4.85 |
| 6,589.50 | 5.00 |
| 5,677.50 | 5.20 |
| 5,647.50 | 6.00 (2) |
| 5,600.50 | 6.50 (2) |
| 5,596.00 | 7.75 |
| 5,580.20 | 7.95 |
| 5,568.75 | 8.03 |

* Two individuals on the list received no payment for the year 1969.

The parties also stipulated that payment for case workers who service welfare clients are paid with the same ratio of federal funds, state funds and county funds as is used in the case of Housekeepers as set forth in the stipulated Statement of Facts.

Bulletin FS-69-40 of the Wisconsin Department of Health and Social Services, Division of Family Services, entitled "AFDC Plan to be Implemented for November 1, 1969, Assistance Payments," makes the following statements emphasized by the Municipal Employer with regard to the employer-employee relationship between Milwaukee County and its Housekeepers:

2. An employer-employee relationship exists under OASDI if the person who performs the services is subject to control by the person for whom he provides services. This means control over when the work is done, where it is done, and how it is done.

When child care is performed in the recipient's home, an employer-employee relationship generally exists. When child care is performed outside of the recipient's home, an employer-employee relationship generally does not exist. In questionable cases, the county agency should contact its District Director of Internal Revenue for an official determination.

If the county agency uses vendor payments for in-home child care, the county agency shall compute the OASDI tax on wages and make the appropriate payment of the employer's and employee's share to the District Director of Internal Revenue. It should be remembered that the agency is doing this on behalf of the recipient, because the recipient is considered to be the employer. To protect itself, the county agency may wish to obtain a written request from the recipient to make the OASDI tax payments on the client's behalf. If the recipient refuses to give such written permission, it is suggested that the payment be made to the recipient.

In testimony, the Supervisor of Homemaker Services in the Department of Welfare testified that the function of her department was to provide homemaker services to welfare recipients. Civil Service personnel in the Homemaker Services Department include Homemakers, Homemaker Aides and clerical personnel. The Housekeeper is a non-Civil Service person who is employed to go into the welfare recipients' homes to perform child care, housework and other domestic work.

The list of housekeeping employees has grown from about 75 in 1965 to about 1,100 or 1,200 at the time of the hearing. Persons are placed on the housekeeping list by case work referrals, word-of-mouth, etc. The Municipal Employer also advertised for live-in Housekeepers in The Milwaukee Journal and the Milwaukee Sentinel approximately three years ago, but a majority of the Housekeepers are not live-in Housekeepers. Generally, the Homemaking Supervisor, Homemaker or Homemaker Aide interviews potential Housekeepers to determine their experience and qualifications. With respect to qualifications, the Supervisor testified that "we need a mature person who has some basic skills in running a home or knowing a little bit about cooking and cleaning and this kind of thing."

It was testified that the Homemaker directs the Housekeeper with respect to where to go, what services to perform and the duration of the job if known. The length of assignment may vary from a day to three months or more. The Housekeepers are not generally required to report to the welfare center for instructions or assignment, but might come in for case conferences with case workers, Homemakers, Homemaker Aides and Housekeepers. The Homemaker also discusses the on-the-job performance of the Housekeeper with the case worker. The work of the Housekeeper is checked by either the case worker, the Homemaker or Homemaker Aide or a combination of these individuals. In a 1970 report of a committee study on Homemaker services, sponsored by the Department of Public Welfare, it was stated that "Much time [of home-

making civil service personnel] is also spent in overseeing the work of the Housekeepers." The report also complained of an extremely high monthly expenditure for Housekeepers, primarily because homemaking duties have been delegated to the Housekeepers, while the homemaker civil service personnel have been burdened with various administrative details, such as verifying Housekeeper earnings and in delivering checks to Housekeepers and welfare clients.

The Supervisor of Homemaker Services testified that frequently the only direct contact of Housekeepers with Homemakers is regarding payroll matters, and occasional visits or telephone conversations. But she also testified that the Homemaker often instructed Housekeepers in the manner in which a particular function is to be performed, and that if necessary they provide instructional work in Housekeeping duties.

The welfare recipient may direct the Housekeeper regarding duties the recipient wants performed, and if dissatisfied with the Housekeeper's personality or performance skills may request that the Housekeeper's services be terminated. The recipient may further request that a specific Housekeeper be referred. But it is the case worker who makes the final decision as to whether or not there should be a Housekeeper to help the welfare client. The case worker, and sometimes the Homemaker, also has final authority to terminate housekeeping services or send another Housekeeper. It was further testified that if there is a difference of opinion between the welfare client and the case worker over the duties of the Housekeeper, the case worker's opinion will prevail if the differences cannot be worked out. Additionally, if the welfare client and the case worker have a difference of opinion over who should be the Housekeeper, again the case worker or sometimes the Homemaker has the authority to make the final decision if the differences cannot be reconciled. Thus it is apparent that the County through its agents retains the final authority to make decisions over whether a Housekeeper should be assigned, the duties to be performed by the Housekeeper, and which Housekeeper should be assigned to particular welfare recipients.

The issue here is whether Housekeepers are "employees" under Section 111.70, or whether, as the Employer suggests, their status is that of an independent contractor or some other status.

The Commission previously has stated:

"The test of whether a person is an employe or independent contractor is that of the 'right of control'. Essentially, a person is an employe rather than an independent contractor if the employer for whom the services are performed reserves the right to control the manner and means by which the job is accomplished." 1/

The testimony and evidence demonstrate that the Municipal Employer reserves the right to control the manner and the means by which the job of housekeeping is accomplished. The County provides a physical examination and training and instruction of Housekeepers. It sets forth rules governing their conduct on the job. It retains the power

1/ Milwaukee Board of School Directors, Dec. No. 8901, 2/69.

to select Housekeepers and to take them off its employment list, as a disciplinary measure or otherwise. A Housekeeper is subject to the supervision and direction of the case worker or Homemaker working with the welfare recipient. The Municipal Employer, primarily through case workers and Homemakers, reserves the right to determine the duties to be performed by the Housekeepers, to determine to whom the Housekeeper should be assigned, and to direct them in their manner of housekeeping. It is true that the welfare recipient also may direct the Housekeeper concerning duties to be performed and may request a particular Housekeeper, but if there is a difference of opinion, final authority rests with the Municipal Employer through its case workers and Homemakers. While this authority may not always be exercised by the case worker or Homemakers, the test is whether there exists a right of control rather than whether that right is exercised. 2/

While the Housekeeper may refuse a proffered assignment, this situation is similar to cases involving substitute teachers 3/ and driver education teachers, 4/ who also could refuse proffered teaching assignments but were nonetheless considered "employees" under the Act. In this case, as in those cases, that factor is not deemed controlling in view of the other factors present indicating an employment relationship. These indicia dictate a finding that the Housekeeper be considered an employee of the Municipal Employer, and not an independent contractor.

For the same reasons, Housekeepers cannot be considered employees of the welfare recipients as the term "employee" is normally used in labor relations. The Municipal Employer retains final authority over most aspects of the employment relationship. A major purpose of Section 111.70 is to permit employee organizations to participate with the municipal employer in decisions relating to their wages, hours and working conditions. Since it is the Municipal Employer rather than the welfare recipient which has final authority with respect to the terms and conditions of employment of Housekeepers, Housekeepers must be considered employees of the Municipal Employer rather than employees of the welfare recipient.

The fact that part of the funds for payment of Housekeepers comes from the state and federal governments does not negate their employment relationship with the municipal employees. It was stipulated that Housekeepers are paid with the same ratio of federal, state and county funds as case workers, and the Municipal Employer does not contend that case workers are not its employees. Moreover, this issue has been decided in a case involving school aides whose salaries were paid by the school board with state and federal funding. In that case, we held that a municipal employee will not be denied coverage under Section 111.70 "solely for the reason that he is paid from funds provided through programs funded by the federal or state government." 5/

2/ Ibid, and authority cited therein.

3/ Ibid.

4/ Wauwatosa Board of Vocational and Adult Education, Dec. No. 8158, 8/67. The Commission also stated that the driver education teachers were deemed to be "employees" within the meaning of Section 111.70 "regardless of the 'temporary,' 'casual,' 'seasonal,' 'occasional' or 'regularity' of their employment."

5/ Milwaukee Board of School Directors, Dec. No. 9000, 4/69. Accord, Superior Vocational School System, Dec. No. 7479, 2/66.

Nor is the fact that Housekeepers may be considered employees of the welfare recipient rather than the Municipal Employer for income tax or social security purposes controlling on the question of whether Housekeepers are employees under Section 111.70. The question under Section 111.70 is whether Housekeepers are employees for labor relations purposes, not whether they are considered employees for income tax or social security purposes. Under Section 111.70 (1)(b), a municipal employee is defined as "any employee of a municipal employer," except certain law enforcement employees. The Wisconsin Supreme Court has stated that this "broad definition" of municipal employee "certainly indicates a legislative desire to make collective bargaining units available for as many municipal employees as is consistent with sound municipal government." 6/ The conclusion reached herein is in harmony with this policy.

While we are satisfied that Housekeepers are employees within the meaning of Section 111.70, we are not satisfied that they should be included in the existing collective bargaining unit. At the time of the certification of the original election in the unit involved 7/ there were some seventy-five Housekeepers in the employ of the Municipal Employer. Neither the Petitioner herein, which organization was certified as the collective bargaining representative of the employees in the unit involved, nor the Municipal Employer, brought this fact to the attention of the Commission, and, therefore, the classification of Housekeeper, at that time or thereafter, was neither included nor excluded from the eligibles in the bargaining unit, and at the time of the hearing on the instant petition there were between 1,100 and 1,200 Housekeeper positions in the employ of the Municipal Employer. The number of eligible employees involved in the original election herein, totaled some 4,614 employees. The Commission is of the opinion that to include any substantial number of Housekeepers in the existing unit, under such circumstances, would not effectuate the policies of Section 111.70.

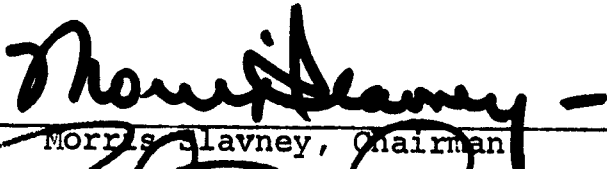
However, since the individuals occupying the position involved are employees of the County, we are of the opinion that they should be given the opportunity to bargain collectively if they so desire with their Employer. Therefore, should the Petitioner herein still desire to represent the employees occupying the position of Housekeeper, it may file a new petition requesting a unit of employees employed as Housekeepers. The unit consisting of Housekeepers will be deemed to be appropriate since it is a residual unit of an otherwise overall unit of County employees. Should the parties stipulate to such an election in such a unit and agree to the eligibility of the particular Housekeepers involved, the Commission will accept such an agreement on the eligibility to participate in the election. If the parties are unable to agree upon the eligibles, then the Commission will set hearing in the matter to determine the test to be established for the eligibles to participate in the election. The Commission will not include among the eligibles all employees employed as Housekeepers. The eligibles must work a substantial

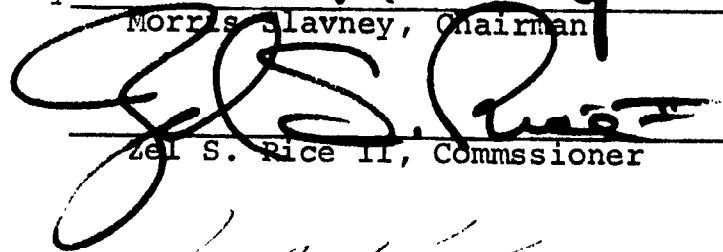
number of hours if they are to have a voice in the selection of the bargaining representative. The determination as to what constitutes a substantial interest will be made by the Commission after the consideration of the facts material to that particular issue.

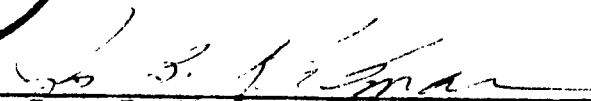
Dated at Madison, Wisconsin, this 14th day of April, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

6/ City of Milwaukee v. WERC, 43 Wis. 2d 596, 168 N.W. 2d 809
71 LRRM 3214 (1969).

7/ Decision No. 7135-F, December 10, 1965.