

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

UNITED NURSING HOME AND HOSPITAL :  
EMPLOYEES' FEDERATION, LOCAL 222 :

For Determination of Bargaining :  
Representatives for Certain Employees of :

HOPE, INC. :  
Milwaukee, Wisconsin :

Case I  
No. 15411 E-2737  
Decision No. 11468

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Appearances:

Mr. Kenneth C. Islo, and Mr. Roger Jacobson, Business Repre-  
sentatives, appearing on behalf of the Petitioner.

Mr. Russ R. Mueller, Attorney at Law, appearing on behalf  
of the Employer.

DIRECTION OF ELECTION

United Nursing Home and Hospital Employees' Federation, Local 222, having petitioned the Wisconsin Employment Relations Commission to conduct an election pursuant to Section 111.05 of the Wisconsin Statutes, among certain employees of HOPE, Inc., Milwaukee, Wisconsin, for the purpose of determining what, if any, representation such employees desire for the purpose of collective bargaining; and hearing on such petition having been conducted at Milwaukee, Wisconsin, on March 27, 1972, before Herman Torosian, Examiner, and the Commission having considered the evidence and arguments of Counsel and being satisfied that questions have arisen concerning representation;

NOW, THEREFORE, it is

DIRECTED

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within thirty (30) days from the date of this Directive in the collective bargaining unit consisting of all full time and part time employees, but excluding the Executive Director and Registered Nurses, who were employed on December 18, 1972, except such employees who may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees desire to be represented for the purpose of collective bargaining by the above named Union.

Given under our hands and seal at the  
City of Madison, Wisconsin, this 18<sup>th</sup>  
day of December, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney  
Morris Slavney, Chairman

Del S. Rice II  
Del S. Rice II, Commissioner

Jos. B. Kerkman  
Jos. B. Kerkman, Commissioner

No. 11468

MEMORANDUM ACCOMPANYING  
DIRECTION OF ELECTION

On March 6, 1972, United Nursing Home and Hospital Employees' Federation, Local 222, hereinafter referred to as the Petitioner, filed a petition with the Commission requesting that a representation election be conducted in an alleged appropriate bargaining unit consisting of all full time and part time employees, excluding the Executive Director and Registered Nurses, employed by HOPE, Inc.

During the hearing the parties stipulated to the following appropriate collective bargaining unit should the Commission direct an election in the matter:

"All full time and part time employees employed by HOPE, Inc., but excluding the Executive Director, Registered Nurses, supervisors, confidential and managerial employees."

During the course of the hearing the Employer contended that the instant petition should be dismissed in that the Petitioner is not a statutory representative sufficient to maintain status on an election ballot; that the Commission should not assert jurisdiction over the Employer; that the unit in question is an expanding unit and therefore an election should not be conducted at this time; that of the three employees employed by HOPE, Inc., namely, Karen DeNoyer, Marta Ramirez, and Virginia Schramm, DeNoyer is a confidential employee and Ramirez and Schramm are managerial and supervisory employees and therefore there are no "employees" in the unit involved.

The Petitioner's Status as a Labor Organization

The issue of whether the Petitioner is a representative within the meaning of Section 111.02(1) and (4) and 111.05(3) of the Employment Peace Act has been previously determined by the Commission in Manitowoc County (Park Lawn Home) case. a/ In that case the Commission stated the following:

"The term labor organization, which is not defined in the Employment Peace Act, is defined in the Municipal Employment Relations Act and reads as follows:

"'Labor organization' means any employee organization in which employees participate and which exists for the purpose in whole or in part of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.' 7/

It is significant to note that the Legislature did not see fit to impose any formal requirements on a labor organization, such as a requirement that it have a constitution or by-laws, or that it admit employees to formal membership, or that it charge employees dues. The only requirement set out, other than the requirement that the organization have the appropriate intent, is that employees participate; there is no requirement that the nature of the participation be any more formal than that desired by the employees themselves.

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a/ Decision No. 10899, 3/72.

The evidence is clear that employees participate in the activities of the Petitioner, primarily through informal meetings held at the various locations in the State wherein the Petitioner seeks to become the bargaining representative of employees. The fact that the Petitioner does not see fit to characterize those employees as "members", since they do not currently pay dues, is not controlling. The proposed constitution and by-laws would confer "membership" status on employees who apply for such and those members would be required to pay dues and would be given the opportunity to ratify the constitution and by-laws and elect officers. To say that the Petitioner does not yet exist as a labor organization because it has not yet formalized its operations would impose a requirement not contemplated by the statute. 8/

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7/ 111.70(1)(j).

8/ Our concession in this regard is not meant to imply that only labor organizations can represent employees. Sec. 111.70(2) grants municipal employees the "right of self-organization", and the right "to bargain collectively through representatives of their own choosing...". Should employees designate an individual as their representative said individual would be a proper party petitioner under the Act."

Nothing was presented in the instant matter which would change the above conclusion reached by the Commission.

#### The Employer's Status

HOPE, Inc. is a Wisconsin non-stock, non-profit and non-membership corporation and is tax exempt for internal revenue purposes. Its basic purpose is to promote better health through advisory means among residents within the surrounding area in which HOPE operates. HOPE's entire revenue for operation depends solely upon money received through outside sources from governmental social action agencies.

HOPE, Inc. contends that it is not an employer within the meaning of Section 111.02(2). It is argued that logic must be stretched beyond the breaking point to construe as an employer for collective bargaining purposes one which has absolutely no control over the sources and expenditures of revenue and which is a non-stock, non-profit, non-membership and charitable corporation. It is impossible to conceive, it is contended, of the establishment and/or existence of any meaningful collective bargaining between such an employer and an appropriate representative of employees within an appropriate collective bargaining unit respecting wages, hours and conditions of employment. HOPE claims that under the circumstances the potential establishment of collective bargaining by a finding that HOPE is an employer for that legal purpose would be a futile and empty result. HOPE, as such an employer, could not possibly engage in meaningful collective bargaining, since it would have absolutely no voice as to the possibility and/or implementation of negotiated agreements. It claims that the creation and promotion

of the principal of collective bargaining under the Employment Peace Act was not intended to apply to such an operation.

Section 111.02(2) defines the term "employer" as "a person who engages the services of an employee, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact". The term does not exclude non-stock, non-profit, non-membership and charitable corporations but only excludes from such definition "the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact".

It is clear therefore that HOPE, Inc. is an "employer" within the meaning of Section 111.02(2) of the Act, if it employs employees.

Furthermore in face of Section 111.02(2) the Commission cannot as a matter of policy refuse to assert jurisdiction as argued by the Employer. In Goodwill Industries of Wisconsin, Inc. b/ wherein the same argument was presented to the Commission the Commission concluded that it was precluded from exempting an employer from the coverage of the Wisconsin Employment Peace Act because there is no statutory provision in said Act authorizing the Commission to grant exceptions to any employer except those enumerated in 111.02(2). To do so without any legislative mandate, the Commission concluded, would be administratively amending the statute.

The Commission would also add that requiring HOPE, Inc. to bargain collectively would not be a futile and empty result. While HOPE, Inc. is dependent on outside sources for its total operation, it nevertheless, as an employer, if it employs employees, has the authority to hire, fire and establish the working conditions of said employees and therefore can meaningfully bargain over same.

#### Eligible Employees

HOPE, Inc. employs four individuals: an Executive Director, a Secretary-Receptionist, a Co-ordinator, and a Planner. The Executive Director is responsible for the operation of the corporation including the authority to hire, fire and supervise the individuals occupying the three latter positions.

The Petitioner has petitioned for a unit including the remaining three positions. The job description for the Secretary-Receptionist, Karen DeNoyer, states the following responsibilities:

- "1. All typing and duplicating.
2. Answering incoming telephone calls.
3. Assist in the maintenance of Center records.
4. Maintain neatness in front of office and waiting room areas.
5. Take minutes of all meetings of the Board of Directors.
6. Maintain files of correspondence and other Center informational materials.

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b/ Decision No. 7446

7. Maintain adequate stock of disposable supplies."

The Secretary-Receptionist handles most of the Executive Director's correspondence, is responsible for most of his typing; and has in the past typed the minutes of the Board of Director's meetings. She also has attended closed executive meetings.

It is the Employer's position that based on the above duties DeNoyer is a confidential employee.

The Commission concludes that DeNoyer, being the only secretary and the one that handles most of the Executive Director's correspondence and performs most of his typing, will most likely act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. Therefore her position is excluded from the bargaining unit, and therefore, DeNoyer is not eligible to vote in the election.

As to the remaining two positions occupied by Virginia Schramm and Marta Ramirez, it is the Employer's position that said individuals are managerial and supervisory employees and therefore their positions should be excluded from the bargaining unit. Marta Ramirez, as a Co-ordinator, has the following responsibilities:

- "1. Translating information and interpreting for clients.
2. Maintaining smooth operation of various clinics and services, including scheduling, maintaining supplies, etc.
3. Keep adequate client records.
4. Making home visits to make initial evaluations and follow-ups on behalf of neighborhood residents.
5. Advocate on behalf of clients with various agencies.
6. Maintain neatness of clinical areas.
7. Assist in the development of educational programs.
8. Assist in data collection and other research-related activities."

In addition to the above the Co-ordinator is responsible for the operation of the office in the absence of the Executive Director which tasks usually amount to ten hours per week.

The Planner, Virginia Schramm, is primarily responsible for preparing funding applications for HOPE, Inc. Since HOPE, Inc. has no on-going source of funds the Planner is responsible for making proposals to support HOPE's activities in the future. The Planner is also involved in program development activity whereby possible programs are explored, possible sources, potential clientele, and possible organization structure in order to implement such programs. Also in the future the Planner may become involved in evaluative activity in regard to such programs.

It is clear to the Commission that neither the positions of Co-ordinator nor Planner are supervisory positions. Neither employee has the authority to hire, promote, transfer, discipline or discharge employees, or to effectively recommend same. While Ramirez is in charge of the office in the absence of the Executive Director, which

usually amounts to about ten hours per week, the final authority in the areas of supervision clearly remains with the Executive Director. Also while both employees may be required to exercise independent judgment in performing their duties said independent judgment and discretion is not exercised in the area of supervision of employees.

Also, the Commission cannot conclude as argued by the Employer that said positions are managerial positions.

The Employer in support of its position relies on two tests in defining a managerial employee and/or position; namely, (1) whether the employee is so closely related to, or aligned with, management so as to create a potential conflict of interest between the employer and the bargaining unit employees; and, (2) whether the position is so allied with management by way of the exercise of independent judgment in the formulation, determination and effectuation of management policies so as to create a potential conflict of interest existing and promoted among the bargaining unit employees.

In considering the duties of Ramirez and Schramm as outlined above, the Commission is not convinced that said employees are so closely related or aligned with management so as to create a potential conflict of interest or that said employees exercise the degree of independent judgment in the area of management policy so as to establish them as managerial employees.

Finally, the Employer argues that should the Commission find the Co-ordinator and Planner eligible the petition is premature since the Employer intends to hire three community health workers who will also be included in the unit. It is argued that the community health workers will comprise at least one-half of the unit and to hold an election at this time would be depriving them of their representation rights. While HOPE, Inc. has proposed certain changes in its overall operations including the hiring of community health workers, the Commission is convinced by the record that the adoption of said proposals or the funding needed for said proposal is too uncertain for the Commission to deny the instant Petitioner the right to an election at this time. In this regard it was the Executive Director's own testimony that it would be almost impossible to determine what the possibility would be of HOPE, Inc. ever reaching the level where they could employ health workers.

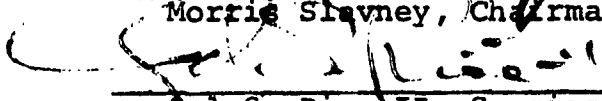
Based on the above the Commission has today directed an election to be conducted in the stipulated appropriate collective bargaining unit which at the time of the hearing consisted of the positions of Co-ordinator and Planner. c/

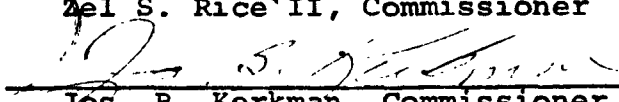
Dated at Madison, Wisconsin, this 18th day of December, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Mel S. Rice II, Commissioner

  
Jos. B. Kerkman, Commissioner

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c/ Of course should any health workers be employed as of the eligibility date they will be included in the unit and are eligible to vote.