

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUKESHA TRAINING CENTER, INC.

Decision No. 14502

Mr. Gary A. Marsack, appearing on behalf of the Employer.

NOW, THEREFORE, it is

No. 14502

managerial employees, confidential employees, guards, supervisors and all other employees, who were employed on April 5, 1976, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining (1) whether a majority of such employees eligible desire to constitute themselves a separate collective bargaining unit; and (2) whether a majority of such employees voting desire to be represented by District Council 40, AFSCME, AFL-CIO, for the purposes of collective bargaining with the above named Employer on questions of wages, hours and conditions of employment.

Given under our hands and seal at the
City of Madison, Wisconsin this 5th
day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING DIRECTION OF ELECTIONS

BACKGROUND:

Waukesha Training Center, Inc., hereinafter the Employer or Center, is a charitable organization devoted to the training and rehabilitation of physically and mentally handicapped persons. Seventy-five to ninety percent of the physically and mentally handicapped individuals served by the Employer are referred to the Center through the State Division of Vocational Rehabilitation. Other individuals may either "walk-in" or be referred by a charitable organization or state agency. A staff of approximately 25 provides assessment, training, counseling and supervision of the clients in order to provide employment for an rehabilitation of the handicapped. The mission of the Center is to sufficiently rehabilitate handicapped individuals so that they are able to assume regular employment in the community. The Employer is a federal and state certified sheltered workshop; a non-profit, tax exempt corporation. Financial support is derived from various governmental agencies and local charities including the State Division of Vocational Rehabilitation, the State Division of Mental Health, the United Community Services, and private corporations, foundations and service organizations. In addition, revenue is obtained by the production and distribution of certain proprietary items and subcontract work performed by the handicapped for various area industries. The production of goods is, however, incidental to the primary task of rehabilitation.

The Employer's facility consists of a machine shop, shipping and receiving department, woodshop, general shop, print shop, work activities area and administrative offices. Between 70 to 80 percent of the facility's floor space is devoted to production. There are three major areas of organizational activity, namely work activities/personal adjustment, rehabilitation services and production. An organizational chart of the Center is attached hereto as "Appendix A".

An informational pamphlet describes the Center's services as follows:

"The Center's 25 member staff works with the handicapped in a variety of ways - - through work training, vocational training counseling, educational programs, various kinds of specialized programming and therapy.

The first step for newcomers is initial counseling and a 15 day evaluation so the Center can learn more about their skill levels and basic abilities. From there, a blend of therapy programs is developed and tailored to the individual.

Center services include:

*Personel adjustment help - - Designed for severely retarded clients, age 16 or older. Programs orient and help prepare the person for workshop placement, stressing areas such as communication and socialization, practical skills, hygiene and basic knowledge skills.

*Education - - Courses in reading and math, remedial education classes, personal hygiene and special education classes.

*Counseling - - On an individual, group, parental or family basis - - plus followup counseling with those who have left the center and are in outside employment. Work counseling sessions

are a vital tool in helping clients develop the proper work habits and personality.

*Evaluation - - A formalized testing period (10-15 days) to assess the client's work skills utilizing work samples, standardized tests and projects with the goal of providing direction for training or placement.

*Work activities - - people with severe problems work on arts and crafts projects and other learning tasks geared to hopefully bring them to the sheltered workshop level.

*Work adjustment - - This short-term program (3 to 4 months) helps develop attitudes, behavior, personal habits and relationships to the work environment. The goal for some is readiness for placement in local business and industry.

*Job placement - - The ideal is to find the right job for the right client. For some, it means fulltime employment. For others it will be part-time work, possible in conjunction [sic] with his rehabilitation program at the Center.

*Vocational Training - - These are specific training programs in which the individual is taught vocational skills in one of the following areas: offset printing, janitorial services, or woodworking. Usual length of time is 3-9 months.

*Sheltered workshop - - This is a long-term rehabilitation program in which the individual learns to function at the highest level possible within his capabilities.

In this program, individuals work on jobs which the Center has received on a subcontract basis from local business and industry. It might be assembly of small parts, or basic woodworking, or machine tool operation, or collating catalogs.

In addition to the therapeutic and rehabilitative value of actually doing a meaningful job on a specific project, each client is paid for his work based on his productivity while working on a project."

At the time of the hearing in the instant proceeding, approximately 250 handicapped persons, or clients, were served by the Center. It is anticipated that upwards of 400 clients will be provided for subsequent to the anticipated expansion of the facility. Forty-six (25%) of the clients have been with the Center for five years or more. Four individuals who started as clients are presently employed as staff members. The Center serves three broad types of clients: 1) sheltered employees 2) trainees, and 3) work activities clients.

"Sheltered employees" are considered to be long-term handicapped employees who will not sufficiently develop the capabilities to enable them to assume employment in the general community. Approximately seventy to eighty sheltered employees were served by the Employer at the time of hearing. Sheltered employees are engaged in subcontract and/or primary sales production and receive counseling. They are referred to the Center by the Division of Vocational Rehabilitation and work 35 hours per week. "Trainees" are handicapped individuals who the State Division of Vocational Rehabilitation has authorized to be trained in a particular skill that is hoped to eventually gain conventional employment for them. Accordingly, 90% of such clients' rehabilitation is funded by the Division while the remaining 10% of a given trainee's time at the Center may be spent on a revenue-generating subcontract work. Sheltered employees and, possibly, trainees may be "laid off" in the event that no subcontract

or proprietary work is available. The third category of clients consists of "work activities clients". Such individuals are considered less capable than sheltered employees and accordingly perform only overflow subcontracting work or are engaged in arts and crafts activities. Such individuals unlike those in the other two categories receive no compensation when performing the latter. The work activities clients may not be "laid off". In the event that subcontract work is not available, they must be provided with arts or crafts activity.

Clients performing subcontract or proprietary item work are compensated on hourly or piece rates according to their ability and proficiency. A time study is conducted with a non-handicapped individual performing the required task. Thereafter the particular rate is set on the basis of the amount or speed of work the handicapped worker can perform in relation to that performed by the non-handicapped worker. Work performed by clients at the Center is exempt from the minimum wage standard of the Fair Labor Standards Act. The Employer's sources of revenue include competitively obtained subcontract work, proprietary sales, and the Division of Vocational Rehabilitation contracts, which compensates the Employer for the rehabilitation of handicapped individuals in the following three areas: 1) evaluation of the clients' capabilities and potentials by the Center's staff; 2) client training in work adjustment (the development or modification of work attitudes and habits); and 3) instruction in specific skills for authorized clients identified as "trainees." Similarly the Division of Mental Hygiene provides funding at an hourly rate for services provided.

In addition to receiving sub-minimum hourly or piece rates, clients who perform subcontract or other work activities receive certain other benefits. Overtime is paid for hours worked over 40 in a week. Clients receive two rest breaks and a lunch period daily. They are granted vacation and holidays without pay. Federal and state tax, and social security are withheld from clients' paychecks; and Workmen's Compensation contributions are made by the Employer on their behalf. Staff members and clients receive substantially different fringe benefits and are covered by separate personnel policies set forth in separate employee or client handbooks. The clients punch time cards, fill out production sheets and participate in an orientation program. Clients who habitually report to work late are subject to reprimand. Approximately twelve clients have been discharged for disciplinary reasons over the previous three years and other clients have received disciplinary suspensions during the same period.

The machine shop accommodates 10 to 15 clients; the shipping and receiving department, three trainees and two or three sheltered employees; the general shop (sub-contract area), forty-five to fifty sheltered employees; the work activities area, eighty to ninety work activities clients; and the print shop, at the time of hearing, had no clients.

ISSUE:

At the onset of the hearing, District Council 40, AFSCME, AFL-CIO, hereinafter the Union or Petitioner, amended its petition to request the conduct of an election among two separate voting groups consisting of 1) all production and clerical employees, and 2) all professional employees. The parties stipulated to the appropriateness of permitting the professional employees to determine for themselves whether they desire to constitute a separate bargaining unit.

The parties stipulated specifically to the exclusion of Shop Manager, Executive Secretary, Executive Director, Assistant Director and comptroller

from the voting group consisting of all production and clerical employees. Furthermore, the parties agreed that a ballot cast in the production and clerical voting group by the Assistant Shop Manager would be subject to challenge. The parties also agreed to the exclusion of Personal Adjustment/Work Activities Coordinator and Rehabilitation Services Coordinator from the professional employee voting group, and stipulated that the ballots cast by the Contract Procurement Specialist and the Training Coordinator in said voting group would be subject to challenge.

Issues arose, however, with regard to the appropriate inclusion or exclusion of additional positions in the respective voting groups. The Employer, contrary to the Petitioner, averred that five shop foreman positions are appropriately excluded from the production and clerical voting group and that the position of Work Activities Supervisor is appropriately excluded from the professional voting group. It is the position of the Employer that the incumbents of the aforementioned positions, namely Randy Jacobson, Dick Farrow, John LeClaire, Ben Englehart, Kevin Retzen and Linda Griffin, respectively, are supervisory employees on the basis of their supervision of clients.

During the course of the hearing, the parties jointly requested the Commission to determine a threshold issue, which the parties agreed would resolve the question whether the shop foreman and Work Activities Supervisor should be included in the respective voting groups.

The parties thus requested the Commission to determine the "employee" status of clients within the meaning of the Wisconsin Employment Peace Act. The parties stipulated that in the event the Commission found that clients are employees within the meaning of the Act, hearing would be reconvened in order to afford the parties an opportunity to adduce testimony and evidence with regard to the alleged supervisory status of the disputed positions. Further, the parties agreed that, in the event the Commission found clients not to be employees within the meaning of the Act, elections could be conducted among the aforementioned voting groups which would include the positions of shop foreman and Work Activities Supervisor in the appropriate voting groups. The remaining incumbents of the positions in dispute between the parties would be permitted to vote in the elections subject to challenge, and if the resolution of such challenges were determinative of the outcome, the Commission would subsequently determine their unit eligibility. Thereupon, the hearing was adjourned and briefs of counsel were filed in consideration thereof.

POSITIONS OF THE PARTIES:

The Employer argues that the sheltered employees, trainees and work activities clients are "employees" within the meaning of Section 111.02(3) of the Wisconsin Statutes. The Wisconsin Employment Peace Act does not, the Employer avers, specifically exempt handicapped clients of a sheltered workshop from the definition of "employee". The Employer asserts that should the Commission find the individuals disputed herein not to be employees within the meaning of the Act, the effect of such determination would be contrary to the legislative intent of the statute.

The Employer contends that the relationship between the Employer and the clients is that of an employer/employee. The clients perform subcontract work and produce proprietary items and are compensated for the same at an hourly or piece rate. Clients are subject to various terms and conditions of employment ranging from work rules, overtime, and discipline to an established work week, wage reviews and rest periods.

The Employer cites Goodwill Industries of Wisconsin, Inc. (7466) 1/66, as the Commission's precedent in recognizing the "employee" status of certain handicapped clients. Further, the Employer contends that all the indicia of employee status applied in Goodwill, are present in the instant proceeding.

The Union, contrary to the Employer, argues that the "clients" are not "employees" within the meaning of the Wisconsin Employment Peace Act. The Petitioner contends that the Center serves rather than effectively employs the clients. Thereby, clients function as consumers or students rather than as employees. The clients, the Union argues, are counseled and taught skills so that they may assume employment in the mainstream of society. Accordingly, the production and sales of products is incidental to the training process. The Union asserts that the nominal payment received by the clients for their work is not sufficient to provide them employee status. Similarly, the Union contends that the fact that certain clients cannot be "laid off" and are ineligible for unemployment compensation supports a conclusion that an employee/employer relationship is not present herein.

The Union distinguishes Goodwill from the instant situation in several areas. The Union argues that Goodwill involved only one department of the Employer which contained both handicapped and non-handicapped persons; that said employer publicly advertised for workers and hired persons with no physical impairment when there were no handicapped applicants; and that said employer had a substantially larger proportion of long-term client/employees than the Center has. The Petitioner claims that whereas, the goal of Goodwill Industries of Wisconsin, Inc. has been for handicapped persons to earn, the goal of Waukesha Training Center, Inc. has been for handicapped persons to learn.

DISCUSSION.

The Employer relies upon the Commission's decision in Goodwill Industries of Wisconsin, Inc. (7466) 1/66 to support its contention that the "clients" herein constitute "employees" within the meaning of the Wisconsin Employment Peace Act. Having reviewed the record as a whole, the Commission finds several determinative distinctions between Goodwill and the instant proceeding.

In Goodwill, the Commission directed an election among "all employees employed in the transportation department . . . including truck drivers, truck helpers, fork lift drivers, warehousemen, dock workers, dispatchers and truck servicemen but excluding supervisors and all other employees." Accordingly, Goodwill established the employees of one department of the employer as an appropriate collective bargaining unit. Employees in that unit were secured through the process of newspaper employment advertisements. Some of said employees were handicapped individuals and others were not. In the instant proceeding, the vast majority of clients served by the Center are referrals from various service agencies and organizations. Clients are not recruited in the traditional context of an employer/employee relationship. All clients are physically or mentally impaired and require some level of rehabilitation and training. Furthermore, substantial funding is received by the Center as a result of state reimbursement for rehabilitation services rendered.

In administering the Wisconsin Employment Peace Act, the Commission has, in certain situations, concluded that it is not consistent with the legislative intent of the statute to embrace certain individuals in the definition of "employees" 1/ or to include certain entities as

1/ Holy Family Hospital (11535), 1/73.

"employers". 2/ In the instant matter, the fact that the Center's clients rely upon the staff not only for rehabilitation and training but also for evaluation and counseling, satisfies the Commission that the clients do not share an interest with the Center's employees in the terms and conditions of employment.

The nature of the relationship between clients and the Center is not that of a traditional employment relationship. The service which the Employer derives from the work of the clients is incidental to the service which the Employer is performing for the clients in advancing their rehabilitation. The informational pamphlet describing the Center sets forth the following emphasis:

"In addition to the therapeutic and rehabilitation value of actually doing a meaningful job on a specific project, each client is paid for his work based on his productivity while working on a project."

It is apparent that the work performed and the nominal wage received by the clients are significantly subordinate to the rehabilitation process. Thereby the subminimum wage which clients earn serves as a learning subsidy or incentive and the rules set forth in the client's handbook function as prerequisites for the receipt or continuation of training, rather than as traditionally understood conditions of employment.

For the foregoing reasons, the Commission has concluded that the "clients" herein function primarily as recipients of the training and rehabilitation service provided by the Center and its staff. It is apparent that the clients' interest is in rehabilitation rather than employment by the Center. The clients' commitment to and participation in the rehabilitation process thus removes such individuals from the purview of the statutory definition of "employee." Accordingly, the Commission is satisfied that the clients herein are not "employees" within the meaning of the Act.

The Employer is hereby directed to submit within seven (7) calendar days, a list of the names of eligible employees, according to designated voting groups, employed by the Center as of the date of this Directive.

Dated at Madison, Wisconsin this 5th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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2/ American National Red Cross (9875) 8/70.