

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MIDWAY MANOR CORPORATION

Involving Certain Employees of

MIDWAY MANOR CORPORATION

Case I

No. 20456 E-2914 R-5827

Decision No. 14820

Appearances:

Cotton, Rose and Rose, Attorneys at Law, by Mr. Terry W. Rose,
appearing on behalf of the Petitioner.

Mr. Michael W. Corbett and Mr. Paul Whiteside, Business Representative, appearing on behalf of the Union.

DIRECTION OF ELECTION AND ORDER
DISMISSING PETITION FOR REFERENDUM

Midway Manor Corporation, hereinafter referred to as the Employer, having, on May 7, 1976, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election, pursuant to Section 111.05 of the Wisconsin Employment Peace Act, hereinafter referred to as WEPA, and a referendum, pursuant to Section 111.06 of WEPA, among certain employees of the Employer, to determine whether said employees desire to be represented by Retail Clerks Local 526, AFL-CIO, hereinafter referred to as the Union, for the purposes of collective bargaining and whether said employees favor an "All-Union Agreement" between the Employer and the Union; and a hearing on such petition having been held at Kenosha, Wisconsin on June 22, 1976, Ellen J. Henningsen, Hearing Officer, being present; and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, and being satisfied that a question has arisen concerning representation of certain employees of said Employer, and further being satisfied that the portion of the petition requesting the conduct of a referendum should be dismissed;

NOW, THEREFORE, it is

DIRECTED

That an election by secret ballot shall 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 regular full-time and regular part-time employees of Midway Manor Corporation, Kenosha, Wisconsin, excluding managerial, confidential and supervisory personnel who were employed on August 2, 1976 except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether such employees desire to be represented by Retail Clerks Local 526, AFL-CIO, for the purposes of collective bargaining with Midway Manor Corporation;

NOW, THEREFORE, it is

ORDERED

That the portion of the petition requesting the Commission to conduct a referendum among the employees involved be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this *2nd* day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION
AND ORDER DISMISSING PETITION FOR REFERENDUM

Following a request from the Union that it be recognized as the collective bargaining representative of certain employees employed by the Employer, the Employer filed a petition with the Commission, requesting that both an election and a referendum be conducted among said employees to determine their desire to be so represented and to also determine their desire as to the authorization of an "All-Union Agreement" between the parties.

Prior to the hearing, the parties agreed that the following people were supervisors and, therefore, were to be excluded from the bargaining unit: Kathy Pasterski, President; Earl Hawley, Vice President and Administrator; Florence Cappart, Licensed Practical Nurse; Satyra Bardwell, Activities Director; and Irene Korpela, Food Service Supervisor. The parties were unable to agree as to the inclusion or exclusion of Briton Housman, Maintenance Supervisor.

At the hearing, the parties agreed that a Registered Nurse who visits patients in the facility operated by the Employer is an independent contractor and not an employee. The parties also stipulated that the Commission has the jurisdiction to conduct the election involved.

Several days before the hearing and then again during the hearing, the Union requested that an election be directed prior to the determination of Housman's status, suggesting that Housman could vote by challenged ballot. The Employer opposed the Union's request and suggestion. The Commission's policy has been to determine all matters concerning unit description and voter eligibility prior to the issuance of a Direction of Election, unless the parties agree to permit specified individuals to vote by challenged ballot. The Commission sees no reason to change this policy in this instance, and, accordingly, denies the Union's request.

The Employer, who has nineteen personnel on its payroll, operates three adjoining facilities in Kenosha, Wisconsin. One of the facilities is a nursing home, while the other two are rooming and boarding houses. The unit includes employees who perform services at all three facilities.

During the course of the hearing, issues arose as to whether Wayne Holmes, a part-time maintenance man, and Briton Housman, classified as a Maintenance Supervisor, should be excluded from the unit. The Union contends that Holmes is a patient and not an employee and therefore should be excluded from the unit. The Union also contends that since Holmes is the only person working under the "direction" of Housman, Housman is not a supervisor since he supervises no "employees". Furthermore, the Union argues that Housman spends a majority of his time performing normal maintenance duties. The Employer contends that Holmes is an employee and not a patient and that Housman is a supervisor.

Holmes has been employed thirty hours per week (six hours per day, five days per week) since the summer of 1975. He was similarly employed for a two year period prior to the summer of 1974. Holmes is presently paid \$2.31 per hour and receives the same fringe benefits received by other employees. Social Security contributions and state and federal taxes are deducted from his earnings. Holmes resides at one of the rooming and boarding houses owned and operated by the Employer, and pays a monthly sum to the Employer for room and board. Said amount is not offset from his wages. Section 111.02(3) of the Wisconsin Employment Peace Act defines an "employee" as ". . . any person, other

than an independent contractor, working for another for hire in the State of Wisconsin in a nonexecutive or nonsupervisory capacity Since Holmes is working for the Employer and getting paid, he, is an employee within the meaning of the above statutory provision and is included in the bargaining unit.

Housman is employed full-time as a maintenance supervisor. He is paid \$2.71 an hour and receives overtime rates when he works overtime. He need not obtain advance permission to work overtime. All other supervisory personnel are salaried. Housman punches a time clock like all other employees. All other supervisory employees do not punch a time clock.

Housman is responsible for the maintenance of the employer's facilities. He cleans, checks bathrooms for needed toilet paper, delivers supplies and performs the same routine work as does Holmes, the only other person who performs maintenance work, according to a procedure previously determined by Earl Hawley, the administrator, in consultation with Housman. He also paints, as does Holmes, schedules major painting and repair work and orders supplies on his own, although sometimes he consults Hawley on what to buy. Housman spends a majority of his time performing routine maintenance tasks. Both Holmes and Housman work five days a week, although they work together only three days; consequently, Holmes works alone two days a week.

Housman does not determine Holmes' regular work schedule, but he may modify it on an occasional basis. Vacation requests go to Housman and then to Hawley where the arrangements are made. In case of a day or two of time off, Holmes would go to Housman who in turn would notify Hawley of the schedule change. If the time off exceeds accrued vacation or sick leave, Hawley himself must be consulted. Housman participates in the semi-annual evaluation of Holmes, which largely consists in reporting to Hawley how Holmes is performing, and can recommend a wage increase. He also directs Holmes' daily work activity. Housman recommended that Holmes be rehired in 1975.

The foregoing facts make it evident that Housman is not a supervisor. He supervises an activity, not people; he directs the performance of work, but does not assign the content of the work; he spends the vast majority of his time working, not supervising; and the amount of judgment exercised independently of Hawley is too miniscule to constitute the power of a supervisor. 1/

Of course, the power to hire, fire and discipline are the principal hallmarks of supervisory status, and Hawley testified that Housman "would do the direct disciplining" of Holmes, would have the authority to recommend Holmes' discharge, would have power to order Holmes off the job, and could order Holmes to punch out early, although there has been no occasion for Housman to do any of the foregoing. Although the tests for supervisory status are disjunctive, and notwithstanding that supervisory status is determined by the existence of power rather than the frequency of its use, nevertheless this record's total absence of the exercise of the indicia of supervisory prerogatives renders Hawley's description of Housman's authority mere "paper power" which cannot overcome the great weight of evidence throughout this record that Housman fits all the criteria of an employee, albeit a lead worker.

1/ For the supreme court's appropriation of these criteria, see City Firefighters Union v. Madison, 48 Wis. 2d 262, 270-271, 179 N.W. 2d 800.

The Employer also requested the Commission to conduct a referendum simultaneously with the conduct of an election. On October 4, 1975, the Wisconsin Employment Peace Act was amended so as no longer to require the conduct of a referendum to authorize a union and employer to enter into an "All-Union Agreement", where the Union has been certified as the collective bargaining representative after an election conducted either by the Commission or the National Labor Relations Board. 2/

Therefore, should the Union be selected as the bargaining representative, the Union and Employer may enter into an "All-Union Agreement" without a referendum. However, should the Employer agree to condition the implementation of an "All-Union Agreement" on a referendum conducted by the Commission, the Commission will entertain a stipulation to that effect, executed by the parties, and will conduct the referendum. The "All-Union Agreement" must be implemented if a majority of the employees voting vote in favor of such implementation. Because of such change in the statute, and since the Employer has declined to implement an "All-Union Agreement" conditioned on a Commission-conducted referendum, that portion of the Employer's petition requesting the conduct of a referendum is dismissed.

Dated at Madison, Wisconsin this *2nd* day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

2/ Chapter 74, Laws of 1975.