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In the Matter of the Petition of :  
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CHEQUAMEGON UNITED TEACHERS :  
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Involving Certain Employees of : Case 4  
 : No. 46575 ME-544  
 : Decision No. 15228-A  
SOUTH SHORE SCHOOL DISTRICT :  
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Mr. Barry Delaney, Executive Director, Chequamegon United Teachers,  
Route 1, Box 1055, Hayward, Wisconsin 54843, appearing on behalf of  
the Union.

Weld, Riley, Prenn & Ricci, S.C., P.O. Box 1030, Eau Claire,  
Wisconsin 54702-1030, by Ms. Kathryn J. Prenn, appearing on behalf  
of the District.

On November 11, 1991, Chequamegon United Teachers filed a petition with the Wisconsin Employment Relations Commission asking that the position of Library Aide be included in a bargaining unit of non-teaching employees represented by Chequamegon United Teachers and its affiliated local, South Shore Education Association. A hearing in the matter was held in Port Wing, Wisconsin on February 6, 1992, before Examiner Coleen A. Burns, a member of the Commission's staff. The record was closed on April 10, 1992, upon receipt of post hearing written argument. The Commission, being fully advised in the premises, makes and issues the following

1. Chequamegon United Teachers and its affiliated local, South Shore Education Association, herein collectively referred to as the Union, are labor organizations with an address of Route 1, Box 1055, Hayward, Wisconsin 54843.

2. South Shore School District, herein the District, is a municipal employer with an address of Washington and School Streets, Port Wing, Wisconsin 54865.

3. On April 20, 1977, the Wisconsin Employment Relations Commission, herein Commission, certified the South Shore Education Association as the collective bargaining representative of employees in the collective bargaining unit consisting of all non-certified employees of the District, including cooks, bus drivers, custodians and clerical employees, but excluding contract bus drivers, confidential and supervisory employees. On November 11, 1991, the Union filed a Petition to Clarify Bargaining Unit of Municipal Employees in which the Union requested the Commission to include the position of Library Aide in the collective bargaining unit represented by the Union. The District opposes the inclusion on the basis that the individual occupying the position sought to be included in the collective bargaining unit represented by the Union, i.e., Mary Gustafson, is not a District employee, but rather, is an employee of Green Thumb, Inc.

4. The Senior Community Service Employment Program (SCSEP) operated by Green Thumb, Inc., herein Green Thumb, is an employment and training program for low income, elderly workers. The SCSEP program operated by Green Thumb is authorized by Title V of the Older Americans Act and is funded under a grant provided by the United States Department of Labor. Green Thumb's mission is two-fold: (1) to improve the social and economic condition of older americans by promoting employment and training opportunities for older workers, and (2) to provide essential community services, particularly in rural areas. Participants in the SCSEP program operated by Green Thumb are referred to as "enrollees." The Green Thumb program operates the SCSEP program in accordance with the requirements of the Older Americans Act, Federal Regulations (20 CFR Part 674, dated July 19, 1985), and Green Thumb policy and procedure. As a general rule, individuals seeking to enroll in the Green Thumb program must be 55 years of age or older; must be a resident of the state where the individual is enrolled in the Green Thumb program; and must have an annual family income which is not more than 125% of the established Federal poverty income guidelines. Additionally, Green Thumb must be able to verify eligibility to work in the United States under the Immigration Reform and Control Act.

5. Green Thumb recruits individuals eligible for the SCSEP program and, as positions become available, Green Thumb selects applicants based on specific criteria established by the Washington office. Green Thumb places the selected applicants in qualified nonprofit or public agencies, known as host agencies. An organization is eligible to be a host agency if it is either a private nonprofit organization (other than a political party) that is tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, or a public agency operated by a government unit. Green Thumb encourages host agencies and other members of the public to refer individuals to Green Thumb for consideration as enrollees. Prior to assigning an enrollee to a host agency, Green Thumb staff works with the agency to assess its personnel needs, to develop training/work conditions and to match the host agency with the best qualified enrollee. After Green Thumb selects an enrollee, the host agency, the enrollee and Green Thumb supervisor meet to review the responsibilities of all parties. At any time, the host agency has the right to decide not to utilize Green Thumb's services. The host agency does not have to accept an enrollee or to continue with an enrollee. A host agency may advise Green Thumb that it has an interest in participating in the Green Thumb program, but it does not have the right to insist upon such participation. A host agency's decision to refuse an enrollee, or to not continue with an enrollee, does not serve to terminate the enrollee's participation in the Green Thumb program. The host agency does not have the right to demand a particular enrollee. Under the rules and regulations of the Green Thumb program, host agencies have a responsibility to develop a training work description for the enrollee and adhere to that description; to establish a training work schedule with the enrollee and adhere to that schedule; to designate a worksite supervisor; to provide enrollees with orientation, day-to-day direct supervision, instruction, training and supportive services; to promptly notify Green Thumb of any change in an enrollee's designated supervisor; to furnish any tools, equipment and supplies required by enrollees to perform their assignment with the host agency; to pay for or secure an acceptable yearly free health screening for enrollees and assign duties consistent with medical limitations; to meet with Green Thumb representatives at least annually to discuss host agency rights and responsibilities; to follow policies, procedures and practices established by Green Thumb, Inc.; to assure that enrollees do not volunteer hours; to provide enrollees with a workplace that is safe, healthful, and free of drugs and alcohol; to follow all laws governing workplace safety; to report all on-the-job accidents by calling the Green Thumb State Office within 24 hours, complete a Supervisor's Accident Report, and provide all requested follow-up; to provide auto liability insurance coverage in amounts required by Green Thumb when

enrollees have driving duties; to provide Green Thumb with accurate and timely in-kind reports and time sheets of enrollee hours; to compensate enrollees for all time worked that was not expressly authorized by Green Thumb; to make every effort to assist enrollees in obtaining employment off Green Thumb by providing them with job skills and training, and by considering them for employment when appropriate openings occur; to not displace or replace existing enrollees with an enrollee by reducing hours or employment benefits, laying off, or requiring enrollees to perform the work of persons on layoff; to not impair existing contracts for service or substitute Federal (Green Thumb) funds for other funds; to assure that enrollees are not subjected to discrimination based on age, race, color, religion, sex, national origin, disability, veteran status, political affiliation or any other basis prohibited by law; to assure that enrollees are not assigned to positions that involve political activities on behalf of either partisan or non-partisan groups; to comply with Green Thumb's anti-nepotism policy; to permit enrollees to attend required Green Thumb meetings and training, and when practical, provide transportation or travel reimbursement for enrollees; to assume full responsibility for any investigation into the enrollee's background; and to hold Green Thumb harmless from any liability resulting from the conduct of the host agency employees and representatives. Green Thumb enrollees have the following responsibilities: Cooperate fully with Green Thumb and the host agency to find employment off the program; follow reasonable work rules established by the host agency; follow Green Thumb program guidelines; follow the established training/ work schedule; do all assigned work in a safe and responsible way, free of drugs and alcohol; report any work-related injury immediately to the host agency supervisor and to the local Green Thumb office within 24 hours; inform the host agency and local Green Thumb office of any changes in physical or mental condition that would affect the safe performance of assigned work; submit accurate time sheets promptly at the end of each pay period; attend required Green Thumb meetings and training; give Green Thumb the correct information about age, income, residence and family size at the time of enrollment and recertification; and notify Green Thumb of any changes in income, family size or address as soon as they occur.

6. Annually, the Green Thumb Area Supervisor evaluates each enrollee's education, skills, training and experience to ensure that the enrollee receives the optimum benefit from the program and that the enrollee performs the best job possible for the host agency. There is no limitation as to the length of time that an eligible individual may be enrolled in the Green Thumb program. Annually, Green Thumb representatives recertify an enrollee's eligibility to continue in the Green Thumb program. Green Thumb may reassign an enrollee to a different host agency at any time and for any reason, but would discuss the matter with the host agency before doing so. The host agency determines the work to be performed by the enrollee, subject to the restrictions of the Green Thumb program. Additionally, the Green Thumb Area Supervisor has the authority to review the duties assigned by the host agency and to refuse to allow the assignment of duties which the Area Supervisor deems to be outside of the individual enrollee's skill ability or detrimental to the health of the individual enrollee. Green Thumb, in accordance with its grant agreement and applicable Federal regulations, determines the number of hours to be worked in the Green Thumb program. Presently, enrollees are offered an average of at least 20 hours of Green Thumb work per week up to a maximum of 1300 hours per grant year. As funding permits, the Green Thumb State Director may offer enrollees the opportunity to work more than 20 hours per week. Under the rules and regulations governing the Green Thumb program, enrollees who perform work in the Green Thumb program are paid the higher of the State or Federal minimum wage. Host agencies may not supplement the wages paid to enrollees for work which is compensated by Green Thumb. Under limited circumstances, host agencies may compensate an enrollee for additional time worked beyond the hours authorized by Green Thumb without risking the loss of Green Thumb services.

When the additional compensation paid by a host agency indicates that the host agency is capable of paying for the SCSEP work performed by the enrollee, Green Thumb is required to transfer the enrollee to another agency. When a host agency does undertake to compensate an enrollee for additional work, Green Thumb considers the host agency to be the enrollee's employer for purposes of workers compensation, tax, wage and hour, and other laws governing the employer/employee relationship in that state. Enrollees are not eligible for unemployment compensation. Green Thumb does not provide health insurance for enrollees.

7. Host agencies, in consultation with the Green Thumb Area Supervisor and the enrollee, establish a work schedule for the enrollee, which work schedule is set forth on the "Enrollee Job Description/Work Schedule." For liability purposes, Green Thumb requires the host agency to provide Green Thumb with a work schedule designating the hours to be worked each day. Green Thumb would not approve a schedule which involves more than 8 hours per day or requires an enrollee to work more than 6 hours without a lunch break. Green Thumb requires host agencies to provide 15 minute breaks as appropriate. Enrollees fill out and sign their own time sheets. Host agency supervisors verify and sign the time sheets. In Wisconsin, the verified time sheets are sent to the Green Thumb office located in Neillsville, Wisconsin for payroll processing. The Neillsville office issues a paycheck for all hours worked in the Green Thumb program. Attached to the paycheck, is a stub which identifies the enrollee's leave balances. As a general rule, the host agency is required to notify Green Thumb in writing of any changes to an enrollee's established work schedule at least five days in advance of the change. If the schedule is to be changed for more than 30 days, the enrollee's supervisor is required to submit a revised schedule to Green Thumb. When the host agency is closed due to holidays, weather conditions or emergencies during an enrollee's regular work schedule, Green Thumb allows the enrollee, with the host agency's consent, to make up the work. Under Green Thumb policies, the enrollee may also choose to work the reduced schedule or use personal leave. The host agency worksite supervisor has authority to approve an enrollee's use of personal leave. The host agency has a responsibility for providing day-to-day supervision, including direction and correction, of the enrollee's work. Green Thumb pays enrollees' FICA as required by Federal law. Green Thumb provides worker's compensation, unemployment and disability insurance if required by state law. In Wisconsin, Green Thumb provides worker's compensation insurance and liability insurance for enrollees performing work under the auspices of the Green Thumb program. Green Thumb does not pay for lunch breaks or for time spent traveling to and from work. The Green Thumb program provides enrollees with the following fringe benefits:

Personal leave - all enrollees earn approximately one hour of personal leave every 26 hours paid, up to a maximum of 50 hours.

Leave Without Pay (LWOP) - Enrollees may be granted a leave of absence without pay for up to 30 calendar days for medical, educational, military or personal reasons after all personal leave has been used. LWOP may be extended for a reasonable period, generally not more than 30 days, with the approval of the Green Thumb State Director.

Bereavement leave - an enrollee may take up to three work days of paid bereavement leave if there is a death in his or her immediate family. Green Thumb defines immediate family as parents, spouse, children,

grandchildren, sisters, brothers, or in-laws of the same relationship, aunts, uncles, nieces, nephews, stepparents and stepchildren.

Jury duty leave - if an enrollee is called for jury duty or summoned to court on a scheduled work day, he or she may receive regular pay for a period of up to sixty calendar days unless the enrollee is a defendant or has a financial interest in the proceedings. The enrollee may keep any fees for jury duty in addition to his or her Green Thumb pay.

Personal leave is paid leave that can be used for any purpose as soon as it is earned and approved by the host agency supervisor. A LWOP request for less than four consecutive work days of leave requires only the approval of the host agency supervisor. A LWOP request of four or more consecutive work days requires the approval of both the host agency supervisor and Green Thumb. Green Thumb requests enrollees to provide the host agency supervisor with a completed leave of absence request form at least five days before a scheduled leave. Absent extenuating circumstances, Green Thumb will not intervene in a host agency's decision to approve or disapprove an enrollee's leave. Unless an enrollee becomes suddenly ill or has an emergency, Green Thumb considers an absence from work without prior permission from his/her host agency supervisor to be an unexcused absence which may be cause for disciplinary action, up to and including termination from the program. Green Thumb, and not the host agency, has the authority to discipline enrollees. Green Thumb representatives such as the Area Supervisors have authority to transfer an enrollee to another agency or to suspend an enrollee, but the Green Thumb State Director is the only person who can dismiss an enrollee from the program. An enrollee who believes that he or she is a victim of unfair treatment, discrimination or harassment by a supervisor, manager, co-worker or host agency may follow the Green Thumb grievance procedure of which Step 1 is the Area Supervisor, Step 2 is the State Director, Step 3 is the President of the National Green Thumb program, and Step 4 is the Department of Labor.

8. Mary Gustafson has been a Green Thumb enrollee at the District since March 28, 1983. Audrey Miller is the Green Thumb Area Supervisor of Mary Gustafson. Area Supervisors are generally responsible for the recruitment, selection and placement of enrollees. Green Thumb expects Area Supervisors, such as Miller, to visit the enrollee's worksite a minimum of once a quarter. Lenore Holly, who is a District teacher aide and a member of the Union's bargaining unit, has been designated by the District to be Gustafson's host agency Training/Worksite Supervisor. Gustafson performs Green Thumb work for the District throughout the calendar year. Holly does not work for the District during the summer. During the summer, Diana Reijo, a District secretary, signs Gustafson's Green Thumb time sheets. While being compensated by Green Thumb, Gustafson has performed duties for the District other than those reflected in the work description provided to Green Thumb. Some of the work performed by Gustafson is also performed by members of the Union's collective bargaining unit. If the District Administrator would have a concern regarding Gustafson's work performance, he would contact the Area Supervisor to discuss this concern. The District Administrator does not consider Holly or Reijo to have authority to discipline Gustafson. If the District Administrator considered Gustafson's conduct to be disruptive or a danger to the safety of others, the District Administrator would remove Gustafson from the workplace prior to consulting with Green Thumb representatives concerning Gustafson's work performance. The District Administrator considers Green Thumb to have the responsibility for and the authority to determine whether or not Gustafson would be suspended or otherwise disciplined for misconduct. Gustafson's hours

of work have changed from year to year. Gustafson's schedule is arranged between the Area Supervisor, Gustafson and the host agency supervisor. When Gustafson needs to alter her Green Thumb work schedule, she contacts the District employee who is providing her with supervision and asks permission to alter her schedule. Gustafson has accrued sick leave provided by Green Thumb. The District Administrator approves the use of Gustafson's sick leave.

Green Thumb no longer provides sick leave to enrollees, but does allow enrollees to use accrued sick leave. At times, District employees other than the designated supervisor will ask Gustafson to perform work such as laminating documents or running off copies. Gustafson has performed many of the same duties throughout her placement at the District. When Miller visits the District worksite, she does not observe Gustafson performing work for the District. When Miller visits the District, she speaks with Holly, the District Administrator and Gustafson to see how things are going. Generally, Gustafson does not receive specific work assignments from District employees, but rather does what she thinks needs to be done. Gustafson determines when she takes breaks. At least two years ago, Gustafson performed work for the District which was outside of the Green Thumb program and was compensated for that work by the District. During the last two years, Gustafson has not performed any work for the District which was outside of the Green Thumb program. Currently, Gustafson is not receiving any wages or fringe benefits from the District.

9. The District does not possess or exercise the indicia of employer/employee status in sufficient combination and degree as to warrant the conclusion that Mary Gustafson is an employee of the District.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

#### CONCLUSION OF LAW

Mary Gustafson is not an employee of the District and, therefore, is not appropriately included in the bargaining unit set forth in Finding of Fact 3.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

#### ORDER 1/

The petition for unit clarification is dismissed.

Given under our hands and seal at the City of  
Madison, Wisconsin this 26th day of August,  
1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

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1/ Footnote 1/ found on pages 8 and 9.

William K. Strycker /s/

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William K. Strycker, Commissioner

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- 1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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 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. 77.59(6)(b), 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.

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1/ Continued

(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. 227.57 upon which petitioner contends that the decision should be reversed or modified.

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(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.

SOUTH SHORE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS  
OF FACT, CONCLUSION OF LAW  
AND ORDER DISMISSING PETITION

POSITIONS OF THE PARTIES

Union

Green Thumb identifies participants as enrollees and documents supplied by Green Thumb indicate that the enrollees work for the host agency. The Green Thumb program fulfills only two duties associated with being an employer, *i.e.*, it requires the District to set up a work schedule which averages 20 hours per week for the enrollee and pays the enrollee a minimum wage.

Contrary to the position of the District, Green Thumb does not have sole responsibility for recruiting, screening and selecting the Green Thumb workers. Similar to Job Service and employment agencies, Green Thumb obtains names of individuals who want jobs and the names of employers who want to hire people. While Green Thumb recommends an enrollee to host agencies such as the District, host agencies have the absolute right to either accept or reject an enrollee. Further, the District has the full responsibility of conducting a background check.

The District has the absolute right to determine if the enrollee will continue to work at the District. As with other federally funded programs, if Green Thumb wishes to stop the program, the District has the right to pay Mary Gustafson to continue her work for the District.

The District establishes Mary Gustafson's work duties, as well as the work rules to be followed when performing these duties. Although Green Thumb requires the host agency to advise them of any changes in duties, Gustafson's job duties have been changed by the District without notifying Green Thumb.

The District establishes Gustafson's work schedule and may alter the work schedule, subject to the restriction that the District notify Green Thumb of changes to the work schedule. The District has the right to assign and pay for work outside of the 20 hours compensated by Green Thumb and has done so. The District has the sole authority to approve or disapprove requested leave.

The Green Thumb Area Supervisor supervises the Green Thumb program and not the Green Thumb worker. Green Thumb's annual assessment, for the purpose of determining whether the District can stay in the program and receive subsidized wage benefits, is not an evaluation of Gustafson's work performance.

The evaluation of Mary Gustafson's work performance is conducted solely by employees of the South Shore School District.

It is a District employee who has the responsibility to provide orientation, day-to-day direct supervision, instruction, training and supportive services. If Mary Gustafson were to do something inappropriate on the job site, it is the District which must take the appropriate disciplinary action, including termination.

The Green Thumb program is similar to other programs funded by state and federal governments in which the District receives money for wages and benefits provided that the District follows specific rules and regulations. As in these programs, funding may be discontinued if the District does not follow the funding agency's guidelines. The source of funding is not determinative of the

employer/employee status.

The fact that Mary Gustafson has held the position for nine years militates against a finding that the position is either a temporary or a training position. The District, and not Green Thumb, is the employer of Mary Gustafson. Since Gustafson performs essentially the same work as other members of the collective bargaining unit represented by the Union, she is appropriately included in that collective bargaining unit.

#### District

Evidence demonstrates that the employee/employer relationship is with Green Thumb, Inc. Green Thumb is solely responsible for recruiting, screening and selecting the Green Thumb worker. Green Thumb determines whether or not a host agency will receive an assignment. Green Thumb may reassign a worker to a different host agency at any time for any reason. Contrary to the argument of the Union, the District's decision to serve or not to serve as a host agency is not synonymous with the decision to hire or fire.

Green Thumb conducts an annual assessment of each Green Thumb worker to determine whether the worker is continuing to receive the type of training the worker needs to upgrade his or her skills. Each Green Thumb worker is under the supervision of a Green Thumb Area Supervisor who visits quarterly and performs an annual review of the worker.

A District employee is assigned to work with Mary Gustafson on a day-to-day basis, but the assignment does not carry any of the usual trappings of a bona fide supervisor. In fact, for nine months of the year, the employee assigned to work with Gustafson is Lenore Holly, a member of the support staff bargaining unit. During the summer months, the employee assigned to work with Gustafson is Diana Reijo, another member of the support staff bargaining unit.

Neither Holly nor Reijo have any authority to discipline Gustafson or to change her work schedule. The primary role of the worksite supervisor is to sign the time sheets and serve as a resource person. On a daily basis, Gustafson does what she thinks needs to be done and does not receive instruction as to her job duties.

The District may choose not be a host agency, but has no authority to take disciplinary action against Gustafson. Only Green Thumb, which provides a grievance procedure for Green Thumb workers, has authority to discipline a Green Thumb worker such as Gustafson.

The number of work hours is determined exclusively by Green Thumb, in accordance with its grant agreement and federal regulations. The host agency may not insist upon a work week of less than 20 hours.

Green Thumb has final authority over the job description. While the host agency does have input as to how many hours are scheduled each day, changes in work schedules are to be approved by the Green Thumb State Director. Green Thumb would not approve any schedule if it included a work day of more than eight hours or if there were no lunch breaks. Gustafson decides for herself when she will take breaks.

The enrollee's entire wage and fringe benefit package is determined and provided by the Green Thumb program. Time sheets are submitted each pay period to the state Green Thumb office in Neillsville, Wisconsin and all Green Thumb payroll checks are issued by that office.

Workers compensation and liability insurance are provided by Green Thumb. Green Thumb also pays FICA as required by federal law. Green Thumb workers from Wisconsin are not eligible for unemployment compensation.

Case law relating to CETA positions is readily distinguishable and not precedential. The Union's attempt to draw analogy between the Green Thumb program and the funding the District receives through Special Education and Title programs demonstrates the lack of understanding of the functioning of the Special Education and Title programs. Special Education teachers and aides are recruited, screened and hired by the District and are, for all purposes, employees of the District. There is no outside entity or employer similar to Green Thumb involved in the Special Education or Title programs. The District receives some funding to offset the costs of these programs, but all of the indicia of the employer are invested with the District. An exception would be those cases in which the District may contract with CESA for such services.

The District is not aware that Job Service, or any other employment agency for that matter, has the indicia of employee/employer relationship demonstrated by the relationship between Gustafson and Green Thumb. Contrary to argument of the Union, the record does not demonstrate that the District has sole authority to approve or disapprove leaves. Rather, the record indicates that Green Thumb will not intervene in the host agency's decision absent extenuating circumstances.

Mary Gustafson is a Green Thumb worker because her personal attributes make her eligible for the Green Thumb program. If Gustafson quits Green Thumb or if Green Thumb reassigns Gustafson, the District would not have a vacant position. It is one thing to add a position to a bargaining unit through the unit clarification process, it is quite a different thing to add an employee through the unit clarification process.

Mary Gustafson is not an employee of the District. Accordingly, it would not be appropriate for the Commission to include the position occupied by Gustafson in the collective bargaining unit represented by the Union. Assuming *arguendo*, that the Commission would conclude that Gustafson is an employee of the District, the record demonstrates that she does not share a community of interest with the support staff bargaining unit employees represented by the Union.

#### DISCUSSION

Section 111.70(1)(j), Stats., defines a municipal employer as "any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employee and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied." Section 111.70(1)(i), Stats., defines a municipal employee as "any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee." Neither party disputes the fact that the South Shore School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. Rather, the dispute centers on the question of whether or not the District is the employer of Mary Gustafson.

We have consistently held that when determining whether a municipal employer employs a specific individual, a range of factors relating to the extent of control over the individual's work life are relevant. These include but are not limited to control over the hiring, firing and wages, hours and

conditions of employment. 2/ Thus, the parties correctly argue that the indicia of employer status relevant herein include the right to hire, evaluate, discipline, and discharge; to establish work rules, work schedules and work assignments; to determine compensation and benefits and to otherwise direct the employee's work activity. The parties disagree as to whether the indicia of employer status is predominantly exercised by the District or Green Thumb, Inc.

#### Hiring Authority

It is true that host agencies, such as the District, may refer individuals to the Green Thumb program. However, it is Green Thumb, not the host agency, which has the responsibility to recruit, screen and select the individuals who participate in the Green Thumb program. In determining eligibility for the Green Thumb program, Green Thumb does not rely upon a host agency recommendation concerning any individual, but rather, adheres to policies established by the Washington D.C. office of the Green Thumb program.

Individuals who are selected for the Green Thumb program, hereafter enrollees, are placed in host agencies, such as the District, by representatives of the Green Thumb program. Under the applicable federal rules and regulations, host agencies must be a municipality or nonprofit organization as defined by the Internal Revenue Code. As an eligible host agency, the District may advise Green Thumb that it has an interest in participating in the Green Thumb program, but it does not have the right to insist upon such participation. Rather, the decision to offer a placement to a host agency resides solely within the discretion of Green Thumb.

When making the placement decision, Green Thumb considers both the needs of the host agency and the needs of the enrollee. To that end, Green Thumb seeks to place an enrollee who will do the very best job for the host agency and also benefit from the employment and training opportunities provided by the host agency. While the host agency may refuse a particular enrollee, it does not have the right to insist upon a particular enrollee. A host agency's decision to refuse an enrollee does not serve to terminate the enrollee's participation in the Green Thumb program.

As the Union argues, a host agency such as the District may conduct a background check on an enrollee. It is not evident, however, that Green Thumb relies on this background check when determining the placement of any enrollee.

Contrary to the argument of the Union, Green Thumb does not function in a manner which is similar to Job Service or an employment agency. The more appropriate analogy is that Green Thumb functions in a manner which is similar to a temporary help agency, i.e., Green Thumb determines "worker" eligibility and places the "worker" in the host agency position which Green Thumb deems to be most appropriate.

Subject to restrictions established by Green Thumb, a host agency, such as the District, may compensate an enrollee for time worked beyond the hours authorized by Green Thumb without risking the loss of Green Thumb services. When a host agency does undertake such compensation, Green Thumb considers the host agency to be the enrollee's employer for purposes of worker's

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2/ Seymour Community School District, Dec. No. 23844 (WERC, 7/86); Sheboygan County Unified Board, Dec. No. 23031-A (WERC, 4/86); CESA #14, Dec. No. 1723 (WERC, 8/79).

compensation, tax, wage and hour, and other laws governing the employer/employee relationship.

At least two years ago, the District hired Gustafson to perform work outside of the Green Thumb program and compensated Gustafson for this work. Currently, and for at least two years prior to hearing, Gustafson has not performed any work for the District which was outside of the Green Thumb program. Based on the facts of this case, the Commission does not consider the work performed outside of the Green Thumb program to be relevant to the determination of whether or not Gustafson is currently an employee of the District.

As the Union argues, should Green Thumb decide not to continue placing an enrollee at the District, the District would be free to hire Gustafson to perform the same type of work that she is currently performing under the auspices of the Green Thumb program. This fact, however, is irrelevant to the determination of whether or not the District is currently the employer of Gustafson.

In summary, the Commission is persuaded that, having been selected by Green Thumb as the most appropriate host agency, the District may refuse to accept the enrollee selected by Green Thumb, but has no other control over either the selection or placement of the enrollee. The Commission agrees with the District's assertion that it does not have hiring authority over Green Thumb enrollees such as Mary Gustafson.

#### Evaluation

After placing an enrollee with the host agency, the Green Thumb Area Supervisor, hereafter Area Supervisor, conducts quarterly visits to the work-site to consult with the enrollee and representatives of the host agency. The purpose of these visits is to address any concerns which the host agency or the enrollee may have. The Area Supervisor also conducts an annual assessment to determine if: (1) the enrollee is performing the best job possible for the agency, (2) the enrollee continues to meet the eligibility requirements of the Green Thumb program and (3) the enrollee continues to receive the training needed to upgrade the enrollee's skills. If the host agency is not providing appropriate training, the Area Supervisor has the option to transfer the enrollee to another host agency.

It is not evident that the District prepares any formal evaluation of Gustafson's work performance, nor is it evident that any Green Thumb representative has requested District representatives to formally evaluate Gustafson's work performance. To be sure, when Gustafson's Area Supervisor conducts her quarterly visits, she consults with District representatives to "see how things are going." The record, however, fails to establish the extent to which the Area Supervisor relies upon these consultations to make decisions concerning Gustafson's status as an enrollee. Absent such evidence, the Commission is not persuaded that the District has effective authority to evaluate Gustafson.

#### Discipline

The Green Thumb program does not provide the host agency with the right to discipline enrollees. Nor does the District consider itself to have such a right. As the District Administrator stated at hearing, if he had a concern about Gustafson's work performance, he would contact the Area Supervisor. To be sure, if Gustafson were to engage in disruptive behavior or conduct which endangered the safety of students and District employees, the District Administrator would remove Gustafson from the workplace prior to contacting the Area

Supervisor. The Union argues that, in effectuating such a removal, the District Administrator is exercising an employer's authority to suspend an employee. The Commission disagrees. In effectuating such a removal, the District Administrator would primarily be acting in a reasonably prudent fashion to exercise the District's right to maintain safety and discipline on the District premises, consistent with its legal responsibilities. Green Thumb would determine whether any discipline should ultimately be imposed.

#### Discharge

Upon receiving notification that a host agency is not satisfied with an enrollee, Green Thumb representatives would discuss the matter with the host agency. If a host agency, such as the District, were to insist upon the removal of an enrollee, Green Thumb would remove the enrollee from the host agency. Such a removal, however, would not necessarily result in the enrollee's dismissal from the Green Thumb program. As the Green Thumb representatives deemed appropriate, the enrollee could be transferred to another host agency, suspended from the Green Thumb program, or terminated from the Green Thumb program. Since it is Green Thumb, and not the host agency, which retains the right to determine whether or not an enrollee will continue to work in the Green Thumb program, the District does not have effective authority to discharge Gustafson.

#### Establish Work Rules

As the Union argues, Green Thumb enrollees, such as Gustafson, are expected to follow work rules established by the host agency. However, given the fact that the host agency is required to follow policies and procedures established by Green Thumb, it is apparent that the District does not have an unrestricted right to establish work rules for Gustafson.

#### Work Schedules

It is Green Thumb, and not the host agency, which determines the number of hours that an enrollee is to work each week. For liability purposes, Green Thumb requires the host agency to provide Green Thumb with a work schedule designating the hours to be worked each day. Additionally, Green Thumb requires the District to notify Green Thumb of any changes to the established schedule. Green Thumb would not approve a schedule if it required the enrollee to work more than eight hours per day or more than six hours without a lunch break.

Gustafson's work schedule is arranged by mutual agreement of the District, the Area Supervisor and Gustafson. Consistent with Green Thumb policies and procedures, Gustafson would not alter her established work schedule without first seeking the approval of the District employee who is her worksite supervisor.

Recognizing that there may be instances in which an enrollee can not work the established hours because the host agency is closed due to a holiday or an emergency, Green Thumb has developed a policy which permits the enrollee to choose not to make up the lost hours, to use personal leave to compensate for the loss of time, or, with the consent of the employer, to make up the time outside of the established work schedule.

The District approves Gustafson's use of personal leave and sick leave. It is unclear whether District approval is needed to use bereavement leave or jury duty leave. Requests for LWOP involving less than four consecutive work days requires only the approval of the host agency. Requests for LWOP

involving more than four consecutive work days requires the approval of both the host agency and Green Thumb.

As discussed supra, it is Green Thumb, and not the District, which determines the number of hours which an enrollee will work each week. While the District does exercise some control over Gustafson's work schedule, the control exercised by the District does not rise to the level of control which is normally associated with the employer/employee relationship.

#### Work Assignments

Green Thumb requires that the enrollee's duties be listed on the Enrollee Job Description/Work Schedule, which document is retained by Green Thumb. Green Thumb also requires the Enrollee Job Description/Work Schedule to be updated as duties are changed. The Enrollee Job Description/Work Schedule is signed by the enrollee and the Training/Worksite Supervisor. Gustafson's Training/Worksite Supervisor is Lenore Holly.

As the Union argues, the District has changed Gustafson's job duties without notifying Green Thumb. It is not evident, however, that Green Thumb was aware of these changes. The District's failure to comply with Green Thumb rules and regulations does not persuade the Commission that Green Thumb does not have effective authority to control work assignments.

While a host agency, such as the District, has a great deal of latitude in assigning work duties to enrollees, host agencies do not have the sole responsibility to determine enrollee work assignments. Under the rules and regulations which govern the Green Thumb program, the District may not request, require, nor permit an enrollee to operate a vehicle or run errands without prior, written approval from the Green Thumb State Director. Additionally, enrollees may not be assigned to perform work that causes displacement of host agency employees or reduces their hours of non-overtime work, wages or employment benefits; impairs existing contracts for service or results in the substitution of Federal (Green Thumb) funds for other funds in connection with work that would otherwise be performed; benefits profit-making organizations; promotes sectarian religious worship or instruction or involves the construction, operation or maintenance of a facility to be used as a place of religious worship or instruction; involves political activities on behalf of either a partisan or nonpartisan group; or places an enrollee in a host agency in which a member of the enrollee's immediate family works in an administrative capacity. In addition to the preceding restrictions, which apply to all Green Thumb enrollees, the Area Supervisor has the authority to review the duties assigned by the District and to refuse to allow the assignment of duties which the Area Supervisor considers to be outside of the individual enrollee's skill ability or detrimental to the health of the individual enrollee.

Clearly, the District has discretion in determining the duties which are assigned to enrollees such as Gustafson. However, in exercising this discretion, the District must comply with the requirements of the Green Thumb program. The Commission is not persuaded that the control exercised by the District in assigning duties to enrollees such as Gustafson rises to the level of control which is normally associated with the employer/employee relationship.

#### Compensation and Benefits

In accordance with applicable federal rules and regulations, Green Thumb is required to compensate enrollees at the Federal or state minimum wage rate,



whichever is higher. Green Thumb also provides enrollees with personal leave, bereavement leave, jury duty leave, and leave without pay (LWOP). 3/ If required by state law, Green Thumb provides enrollees with worker's compensation coverage and unemployment and disability insurance. As required by Federal law, Green Thumb pays the enrollee's FICA.

In Wisconsin, enrollees, such as Gustafson, are required to submit time sheets, verified by a representative of the host agency, to the Neillsville office of Green Thumb. The Neillsville office issues Gustafson a paycheck for all hours worked in the Green Thumb program. Attached to the pay check, is a stub which identifies her leave balances.

As discussed above, should an enrollee, such as Gustafson, leave the Green Thumb program, a host agency, such as the District, would be free to employ that enrollee in the same manner as it would employ any other individual. However, as long as Gustafson is an enrollee, the District's use of Gustafson is circumscribed by the rules and regulations of the Green Thumb program. For example, these rules and regulations forbid enrollees, such as Gustafson, from volunteering time to the host agency. Green Thumb also forbids host agencies from supplementing the wages paid to enrollees for work performed in the Green Thumb program and sets limitations upon the manner in which a host agency may employ an enrollee to perform work outside of the Green Thumb program.

It is Green Thumb, and not the host agency, which establishes and provides the wage and benefit package received by enrollees for performing work in the Green Thumb program. While it is true that the District has some discretion to employ Gustafson to perform work outside of the Green Thumb program, Gustafson has not performed such work for at least two years prior to hearing. Currently, the District is not paying any compensation to Gustafson, nor is the District providing Gustafson with any fringe benefits.

#### Direction of Work Activity

As a host agency, the District has the responsibility to assign a Training/Worksite Supervisor to provide on-site, day-to-day direct supervision, instruction and training. The Training/Worksite Supervisor has authority to assign work to an enrollee within the parameters of the Enrollee Job Description/Work Schedule and to correct this work.

While host agencies, such as the District, do have some authority to direct the work activity of enrollees, such as Gustafson, such control does not rise to the level which is normally associated with the employer/employee relationship. Rather, the control over the direction of work activity is similar to the control an employer would exercise over an individual who performs work for the District under the auspices of a subcontractor.

#### Conclusion

As the Union argues, the Commission has previously determined that the source of the funding for a position is not a sufficient ground for the

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3/ At the time of hearing, Gustafson was entitled to use sick leave which had been provided by Green Thumb. Green Thumb no longer provides sick leave for enrollees.

exclusion of a position from a collective bargaining unit. 4/ In the present case, however, Green Thumb does not fund a position for the District. Rather, Green Thumb places an enrollee of the Green Thumb program in the District for the purpose of receiving training and work experience. To be sure, Gustafson's tenure with the District extends beyond the period of time which one normally associates with a training program. However, it is Green Thumb, and not the Commission, which has the responsibility to determine whether or not Gustafson's continued placement is consistent with the requirements of the Green Thumb program.

Upon consideration of the above, and the record as a whole, the Commission has concluded that the District does not exercise the indicia of employer/ employe status in sufficient combination and degree to warrant the conclusion that Mary Gustafson is an employe of the District. Since Mary Gustafson is not an employe of the District, she is not appropriately included in the collective bargaining unit represented by the Union.

Dated at Madison, Wisconsin this 26th day of August, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

William K. Strycker /s/  
William K. Strycker, Commissioner

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4/ School District of Solon Springs, Dec. No. 18200 (WERC, 10/80).