

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :  
WISCONSIN COUNCIL 40, :  
AFSCME, AFL-CIO :  
Involving Certain Employees of : Case 28  
MONROE COUNTY (DEPARTMENT : No. 22627 ME-1511  
OF SOCIAL SERVICES) : Decision No. 16280-B  
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Appearances:

Mulcahy and Wherry, S.C., Attorneys at Law, by Mr. Stephen L. Weld,  
21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702, appearing  
on behalf of the Employer.  
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME,  
AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on behalf of the  
Petitioner Union.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT

Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition on June 20, 1984, with the Wisconsin Employment Relations Commission, requesting the Commission to clarify an existing bargaining unit represented by the Petitioner so as to include within said unit 13 Community Support Workers and 4 Adolescent Support Workers. A hearing was held on August 15, 1984 in Sparta, Wisconsin, before Hearing Examiner Christopher Honeyman. A transcript was made, both parties filed briefs, and the record was closed on November 30, 1984. The Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, hereby issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Monroe County is a municipal employer with its offices in Sparta, Wisconsin, and operates various departments; and that among these is the Department of Social Services, which among other functions administers a Community Support Program and an Adolescent Support Program.

2. That Wisconsin Council 40, AFSCME, AFL-CIO, referred to herein as the Union, is a labor organization and is the certified bargaining representative of all regular full-time and regular part-time employees, including professional employees, of the Monroe County Social Services Department, excluding supervisory and confidential employees.

3. That the Department of Social Services operates a Community Support Program and an Adolescent Support Program, which are largely similar in their operation and staffing; that 13 individuals work as Community Support Workers, and 4 others work as Adolescent Support Workers; that all of these individuals have signed contracts, terminable at any time, with the County for provision of services to the County; that the record shows that these individuals receive hourly pay according to a standard salary schedule, receive no fringe benefits, have no substantial investment in equipment or tools, and work with clients of the Department of Social Services on an individual basis; that the record shows that the Community and Adolescent Support Workers are supervised by employees of the Department, and that the Department maintains a substantial measure of control over the manner and means by which their work is performed; and that the record further shows that the Community and Adolescent Support Workers have certain differences in working conditions as compared with those of employees in the bargaining unit, but that they share a community of interest with them.

Based on the above Findings of Fact, the Commission issues the following

CONCLUSION OF LAW

That the 13 Community Support Workers and the 4 Adolescent Support Workers noted above are municipal employees of the County and not independent contractors within the meaning of Sec. 111.70(1)(b), Stats.; that it is appropriate under Sec. 111.70(4)(d)2, Stats., to place said positions in the existing bargaining unit of County Department of Social Services employees represented by Petitioner.

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

ORDER CLARIFYING BARGAINING UNIT 1/

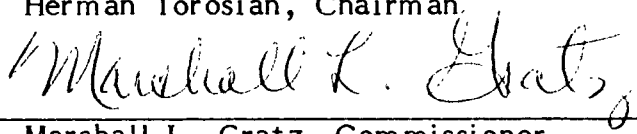
That the bargaining unit described in Finding of Fact 2 above and represented by Petitioner is clarified as including the positions of Community Support Worker and Adolescent Support Worker.


Given under our hands and seal at the City of  
Madison, Wisconsin this 20th day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

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- 1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

(Footnote 1 continued on Page 3)

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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.

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

. . .

(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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER  
CLARIFYING BARGAINING UNIT

The Petitioner contends that the Community Support Worker and Adolescent Support Worker positions are employee positions which share a community of interest with the regular part-time and full-time employees currently represented by the Petitioner.

The County contends that the Community Support Workers and Adolescent Support Workers are independent contractors, but that if they are found to be employees, they have no community of interest with employees in the bargaining unit.

The decisional standards for distinguishing municipal employee from independent contractor status involve a variety of factors most of which relate directly or indirectly to the locus of control of the manner in which the work is performed. Below, we analyze the evidence in light of such relevant factors.

The Community Support Workers are employed to carry out a "Community Support Program," which is overseen by a bargaining unit Social Worker of the Department. Prospective employees are interviewed by the Social Worker in charge, and are effectively hired by that individual, although some consultation with higher levels of management takes place. They sign a written contract agreement, which contains no expiration date. Although the Department's Deputy Director testified that the Department negotiates salary with these individuals directly, it is apparent from other testimony in the record and from the list of salaries that the County in fact has a standard salary scale which is paid to all but one of these individuals; that one has greater responsibilities and a substantially higher wage, at \$6.30 an hour; starting rate for the job is \$4.00. This compares with a 1984 wage rate starting at \$4.88 for the lowest rated classification in the bargaining unit and \$5.26 for Homemaker-Service Aide I, the lowest rated classification which performs work closely related to what these individuals do. Unlike the employees currently included in the bargaining unit, the disputed individuals receive no benefits. A term of their contracts is that the Support Worker assumes responsibility for payment of all federal and State taxes, including social security tax, and indemnifies the County against payment of "such income taxes, social security taxes, unemployment insurance and workman's compensation insurance." The "workers" are required to provide a certification of automobile insurance and to hold harmless the County from any liability arising out of their work performance. In at least one case, however, the Department of Industry, Labor and Human Relations has required the County to pay unemployment compensation benefits for a laid off Community Support Worker.

The Community Support Workers are paid hourly and are reimbursed for mileage and for certain other expenses. Principal among these is reimbursement for meals eaten in company with the Department's "clients," whose care is the Support Worker's function. With the exception of the liability for accidents stipulated in the individual contract, the workers assume no responsibility for profit or loss and do not undertake to do a job for a price.

The functions assumed by the Community Support Workers are varied and depend in large part on the individual needs of the particular clients. Most of the clients are either chronically mentally ill or developmentally disabled. Among the various activities of a Community Support Worker could be shopping with a client, taking a client out for a restaurant meal, making and keeping doctor appointments with and for a client, and taking a client or a group of them to a baseball game. A distinguishing feature of the Community Support Workers is that they are paid for time spent on all of these activities even if the shopping being performed is the worker's own. It is left largely up to the discretion of the worker which restaurant, store, etc., will be visited, but case managers, who are professional employees of the Department, plan the overall regimen of each client. Community Support Workers normally attend a Monday morning Department meeting with supervisors and bargaining unit employees at which all of the County's 88 clients are discussed individually. The general directions for the week's activities flow from decisions made by the case managers at and as a result of this meeting. The timing of various activities, however, is largely within the worker's discretion,

and if a worker pronounces herself unavailable for a particular occasion, the County undertakes to find another. Each of the workers works with a number of clients, and no client works only with one worker.

No worker has ever hired another individual to do the work in turn. With the exception of a car, no tools or materials are supplied by the worker, except that some of the activities done with a client may take place at the worker's home. The workers have no office at the Department, but they do some work there in borrowed offices, primarily phone calls and filling out forms, and they occasionally have typing services performed by the Department's clerical staff. One of the workers has a separate contract with the County to operate a group home. Others have at times had other employment while working for the County as a Community Support or Adolescent Support Worker, but none is known to provide a similar service for other employers.

The employees currently in the bargaining unit are paid biweekly; Support Workers are paid monthly, on a County voucher check. There has been a small amount of job interchange in both directions, but in neither case was there any transference of wages or benefits, and the former Community Support Worker who was hired by the County for a bargaining unit position went through the standard hiring process.

The case managers have direct contact from time to time with the same clients who are serviced by the Support Workers, and the "team" approach of service to the clients keeps the case managers well aware of the Support Workers' functions, according to all of the record evidence Support Workers also submit a weekly log showing activities, hours spent, and costs incurred to the Department. While Community Support Workers are not formally evaluated, Adolescent Support Workers are evaluated annually. This appears to have been started at their request.

The Adolescent Support Program's work and working conditions are similar to the Community Support Program's, except that Adolescent Support Workers are limited to 80 hours per month and they do not use the "team approach." The Adolescent Social Worker in charge decides what services an adolescent needs, but she can allocate her time as she sees best. While Community Support Workers can and have refused to work with particular clients, Adolescent Support Workers do not, and there is testimony in the record that Adolescent Support Workers are expected to give two weeks' notice in writing of vacation or time off. Vacations are unpaid for all Adolescent and Community Support Workers.

It is apparent that the working conditions of the Community Support Workers and Adolescent Support Workers are different from those of employees in the bargaining unit; by and large, they receive far fewer benefits, but in certain respects they receive benefits not paid to employees in the unit. These include County payment for meals not only for the Support Worker but for an accompanying member of the Support Worker's family, when eaten accompanying a client to a restaurant. The County also pays mileage to and from the Department's office for the Support Workers. There is no substantial amount of interchange between Support Workers and unit employees, and the hiring process for Support Workers is much less rigorous than that used for employees in the unit. Moreover, the written contract which Support Workers execute explicitly places liability for taxes, worker's compensation, and unemployment insurance on the individual. The fact that the County was required to pay unemployment insurance by the Department of Industry, Labor and Human Relations in an instance of layoff does not rebut these contractual terms, because, as the Employer persuasively argues, unemployment compensation payments to alleged independent contractors are not governed by the "right of control" test relevant herein, but rather by a different standard expressed in Sec. 108.02(3), Stats.

Upon balancing the foregoing factors as they bear on the employee vs. independent contractor question, we conclude that the more substantial factors favor a finding of employee status here. The Support Workers have virtually none of the "entrepreneurial" characteristics of a typical independent contractor, such as the right to hire substitute or subordinate employees and/or make a profit. Much of the work they do is similar to the kinds of caring and maintenance services performed by social workers and social service aides. It is apparent from the record that the Department is at all times in close contact not only with the Support Workers but directly with the clients they serve. Because of the team approach, and because of independent access to the clients and frequent written reports and logs, as well as through the weekly general meeting, the Department exercises effective control over the means by which the Support Workers perform their functions.

The County cites Northern Pines Unified Services Center 2/ in support of its contention that the employees here are independent contractors. We find that several factors distinguish the facts herein from Northern Pines. Chief among these are that the on-call counselors at issue there worked on a rotating schedule for one week a month, that they did not report regularly to the employer or attend staff meetings, and that they were not evaluated or supervised on any regular basis. Moreover, we note that a number of the factors on which the County relies to show independent contractor status and/or a lack of community of interest are under the sole control of the County. In particular, the working conditions here fail to show any significant element of individual negotiation with Support Workers, and the evidence concerning working methods shows that the County retains effective control over how the work is performed. The fact that the Support Workers are largely free to determine exactly when they will perform a given service for a given client is a factor favoring the County's position, but cannot be given great weight where it is apparent that from week to week the Department controls the work performance to a substantial degree. It is clear that the degree of control the County had exercised is a far cry from giving general, result-oriented directions such as to "keep the client healthy" or to "take steps to assist the client to assimilate into community life." The degree of discretion allowed the Support Worker may extend to where or exactly when a pair of shoes, for example, will be purchased for a client; but it can hardly be said that the overall social services regimen of the client is left to the Support Worker's judgement; indeed, the decision to buy a pair of shoes in a particular week is made at the departmental level.

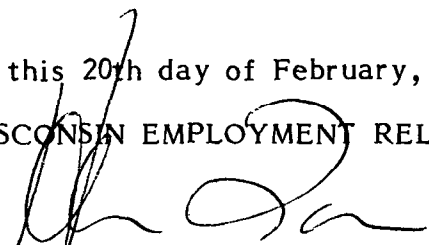
For these reasons, we conclude that the factors of effective control of the details of the work to be performed, substantial supervision of the means by which the work is performed, control over and establishment of a standardized hourly wage schedule, and ability of the Department at any time to abrogate or terminate an individual Support Worker's contract outweigh the factors noted above which would favor a finding of independent contractor status. We conclude, accordingly, that the County maintains a right of control over the manner and means by which the Support Workers' work is completed and not simply over the goal to be pursued or the result to be reached. The Support Workers are therefore municipal employees within the statute's meaning.

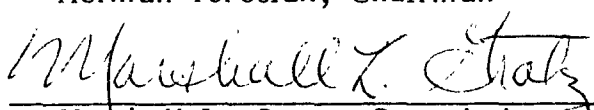
With respect to the County's contention that the Support Workers have no community of interest with the employees already in the bargaining unit, we note that a number of factors have been cited above showing that the Support Workers work closely in conjunction with bargaining unit employees. Furthermore, Sec. 111.70(d)(2)(a), Stats., admonishes the Commission to "whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force." In view of the factors favoring a finding of community of interest, the lack of factors strongly militating against such a finding, and the statutory policy against fragmentation, we are satisfied that these employees are appropriately included in the existing bargaining unit represented by Petitioner. We therefore clarify the unit accordingly. This Order does not, however, have the effect of automatically extending the terms of any existing collective bargaining agreement to the Community and Adolescent Support Workers.

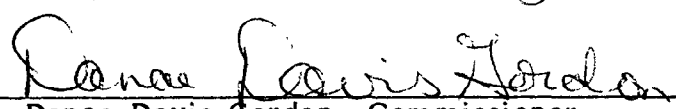
Dated at Madison, Wisconsin this 20th day of February, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

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2/ Dec. No. 17590 (WERC, 2/80).