

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
NORTHWEST UNITED EDUCATORS  
Involving Certain Employees of  
SCHOOL DISTRICT OF BRUCE  
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Case XXI  
No. 30468 ME-2144  
Decision No. 20035-A

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the NUE.  
Coe, Dalrymple, Heathman & Arnold, S.C., Attorneys at Law, by Mr. Edward J. Coe, 24 West Marshall Street, P.O. Box 192, Rice Lake, Wisconsin 54868, appearing on behalf of the District.

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

Northwest United Educators having, on September 20, 1982, filed a petition requesting the Wisconsin Employment Relations Commission to clarify a bargaining unit of certain employees of the School District of Bruce, by determining whether the positions of playground supervisor 1/ and copy machine operator should be included in said unit; and the Commission having, on October 27, 1982, appointed Lionel L. Crowley, a member of its staff, to act as Examiner to conduct a hearing and issue a final decision as provided in Section 227.09(3)(a), Wis. Stats.; and a hearing on said petition having been held in Rice Lake, Wisconsin on December 13, 1982; and the parties having filed briefs by January 31, 1983; and the undersigned, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as NUE, is a labor organization representing employees for the purposes of collective bargaining and has its offices at 16 West John Street, Rice Lake, Wisconsin 54868.
2. That School District of Bruce, hereinafter referred to as the District, is a municipal employer, which maintains and operates a school system for the benefit and education of the inhabitants of the District, and has its offices at Bruce, Wisconsin 54819.
3. That following an election conducted by it on February 9, 1982, the Wisconsin Employment Relations Commission, on February 24, 1982, certified the NUE as the exclusive collective bargaining representative of certain of the District's employees in a bargaining unit described as "all regular full-time and regular part-time non-professional employees, including secretaries, aides, hot lunch, custodial and maintenance employees, bus drivers ... but excluding supervisory, managerial, professional, confidential, and all other employees, ... ." 2/
4. That the instant proceeding was initiated on September 20, 1982, by a petition filed by the NUE, wherein it contended, contrary to the District, that the position of copy machine operator, the duties of which are presently performed

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1/ The parties stipulated at the hearing that the position of playground supervisor was included in the bargaining unit as of October 25, 1982.

2/ School District of Bruce, (19318) 2/24/82.

by LeeAnn Jordan, should be included in the unit; and that the District argues that the position in question is occupied by an independent contractor and therefore should be excluded from the unit.

5. That Jordan performs copying services for the District on the District's premises using the District's equipment with the District supplying the paper and other supplies; that Jordan is paid an hourly rate based on the number of hours actually spent performing copying duties; that Jordan usually works 4-5 hours per day between the hours of 8:00 a.m. to 11:00 a.m. and 12:30 p.m. to 4:00 p.m., usually starting about 8:30 a.m. because there is a regular standing order for bulletins that must be copied between 8:30 a.m. and 9:00 a.m.; that copy orders are submitted by teachers with a due date and Jordan works as long as necessary to get the orders done before said due date; that no deductions for State and Federal taxes, including FICA, are made for Jordan by the District; and that she has not been evaluated by the District.

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

#### CONCLUSION OF LAW

That the District exercises sufficient control over the work function of the copy machine operator, occupied by LeeAnn Jordan, so as to establish that Jordan is not an independent contractor but is a "municipal employee" within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the undersigned makes and issues the following

#### ORDER CLARIFYING BARGAINING UNIT 3/

That the position of copy machine operator be, and hereby is, included in the bargaining unit described in Finding of Fact No. 3.

Dated at Madison, Wisconsin this 15th day of February, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley  
Lionel L. Crowley, Examiner

- 3/ Pursuant to Sec. 227.11(2), Stats., the Examiner hereby notifies the parties that a petition for rehearing may be filed with the Examiner 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.

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 (Continued on Page 3)

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.

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

The sole issue in dispute is whether the copy machine operator is included or excluded from the bargaining unit.

BACKGROUND:

During the 1981-82 school year, the duties of the copy machine operator were performed by a bargaining unit employee who developed a sensitivity to materials used in the duplicating process and would become ill after performing copying. Pursuant to a complaint by NUE, the Department of Industry, Labor and Human Relations did an environmental study of the copy room and found no potential health hazards were present. The bargaining unit employee continued to be very sensitive to the materials and in April, 1982, could no longer perform the duties due to medical problems associated with exposure to them. NUE sent a letter to bargaining unit employees explaining its view of the situation concerning the copy room. The District asked other employees if they would be interested in performing the duties of copy machine operator, but none were. The District then hired Jordan as a substitute to perform these duties from April, 1982, to the end of the school year. Prior to the start of the 1982-83 school year, the District verbally solicited bids to perform the District's copying needs. Two requests for bids were made, one to Jordan, operating under the name Blue Hills Printing, and the other to Woelfinger Press, and each submitted a bid. Jordan's bid was a straight dollar per hour amount to do the copying and was substantially lower than Woelfinger Press. The District accepted her bid on September 13, 1982.

NUE'S POSITION:

NUE contends that the copy machine operator position was in the unit in 1981-82. It argues that the same individual, who the District now asserts is a subcontractor, was an employee of the District since April, 1982, performing the very same duties. It points out that the subcontracting firm has only one employee and only one customer and that the individual performs her duties daily on the District's premises during regular school hours. NUE contends that based on the facts presented in this case, the individual performing copy machine duties is an employee and not an independent contractor.

DISTRICT'S POSITION:

The District notes that a person is an independent contractor if the employer does not control the manner and means by which the job is accomplished. It argues that the individual performing copy work is an independent contractor because she establishes her own hours, is not supervised or evaluated, is not subject to any of the District's personnel policies, and is paid a flat sum with no deductions for withholding taxes or social security taxes. It asserts that the mere fact that Blue Hills Printing has no other customers is not significant because it first commenced business in September, 1982. The District also points out that the work was contracted out because the NUE discouraged bargaining unit employees from performing it. It asserts that no employee was laid off or reduced in hours due to the contracting out. It argues that under the facts of this case the individual performing copying duties is an independent contractor.

DISCUSSION:

Section 111.70(1)(b) defines a municipal employee as any individual employed by a municipal employer other than an independent contractor. When a question has arisen as to whether an individual is an employee or an independent contractor, the Commission has applied the "right of control" test. 4/ This test provides that where the employer for whom the services are performed retains the right to

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4/ Rugene, Inc., (5786) 8/61; Chuck Wagon Industrial Catering Service, (7093-B) 8/66 (Aff. Milw. Co. Cir. Ct. 2/68); Rocky Rococo Corp., (13415) 3/75; Northern Pines Unified Services Center, (17590) 2/80).

control the manner and means by which the result is accomplished, the relationship is one of employment. 5/ Where the employer retains control only as to the result, the relationship is that of independent contractor. 6/ The determination of the relationship depends on the particular facts of each case and all the incidents of the relationship must be weighed and assessed, and no one factor is dispositive. 7/ The earmarks of an independent contractor are that there is usually an engagement in a venture involving a financial investment and an assumption of the risks involved in the undertaking; that profit and loss are dependent on the efficiency and ability of the independent contractor; that pay for services or goods is based on the result rather than solely on the time to reach the result; and that the independent contractor exercises independent judgment and initiative in determining when, where, and how to accomplish the job.

In the instant case, the District furnishes all the equipment and supplies necessary for copying and there is no financial investment on Jordan's part. The job is performed in the District's offices during regular school hours and the number of hours worked are determined by the deadlines established for copies. Jordan is paid on an hourly basis rather than on a per copy basis or complete job basis. These factors support a conclusion that Jordan is an employee.

The District contends that Jordan controls her own hours, is not evaluated, and is paid without any deductions for taxes or social security and these factors support a conclusion that she is an independent contractor. While Jordan's hours are not specifically set by the District, they are limited to regular school hours and are controlled by the work flow so this factor is not dispositive. 8/ Although Jordan is not formally evaluated, her performance is easily ascertainable by reference to the copies and the schedule deadlines. Additionally, the method of payment, while a factor, is not solely determinative of the issue. 9/ The combination of these factors fail to distinguish Jordan's performance of the job from that of an employee.

On balance, the undersigned concludes that there are insufficient indicia present to establish an independent contractor relationship. The District retains sufficient control over the manner and means of Jordan's job performance such that an employer-employee relationship exists under the "right of control" test, and therefore, the position of copy machine operator is occupied by an employee and is appropriately included within the bargaining unit.

Dated at Madison, Wisconsin this 15th day of February, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley  
Lionel L. Crowley, Examiner

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- 5/ Chuck Wagon Industrial Catering Service, (7093-B) 8/66; Rocky Rococo Corp., (13415) 3/75.
- 6/ Northern Pines Unified Services Center, (17590) 2/80.
- 7/ NLRB v. United Insurance Co., 389 U.S. 1028, 67 LRRM 2649 (1968).
- 8/ Rugene, Inc., (5786) 8/61.
- 9/ Prigge's Chartered Buses, Inc., (8061) 6/67.