

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
AFSCME LOCAL 79-A	:	Case 1
	:	No. 42541 ME-345
Involving Certain Employes of	:	Decision No. 20728-B
	:	
THE HUMAN SERVICES BOARD OF FOREST,	:	
ONEIDA AND VILAS COUNTIES	:	
	:	

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 676, Rhinelander, WI 54501, appearing for the Union.

Mulcahy and Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, P.O. Box 1004, Wausau, WI 54401-1004, appearing for the Employer.

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

On July 12, 1989, AFSCME Local 79-A filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing bargaining unit by including the positions of Mental Health Case Manager and CIP Case Manager. Hearing in the matter was delayed pending attempts to resolve the matter. Hearing in the matter was held in Rhinelander, Wisconsin on October 10, 1989 before Beverly M. Massing, a member of the Commission's staff. A stenographic transcript of the hearing was received on December 5, 1989. The filing of post-hearing briefs was completed on February 8, 1990. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. The Human Services Board of Forest, Oneida and Vilas Counties, herein the Employer, is a municipal employer and has its principal offices at 705 East Timber Drive, Rhinelander, Wisconsin 54501-0897.
2. The Human Services Employees of Forest, Oneida and Vilas Counties, Local 79-A, WCCME, AFSCME, herein the Union, is a labor organization and has its principal offices at P.O. Box 676, Rhinelander, Wisconsin 54501.
3. Pursuant to an election conducted by the Commission, 1/ the Union was certified as the bargaining representative of all regular full-time and regular part-time employes, including professional employes, of the Human Services Center, Northwoods Guidance Center and Koinonia, excluding managerial, supervisory and confidential employes.
4. On July 12, 1989, the Union filed a unit clarification petition with the Commission seeking the inclusion in the bargaining unit set forth in Finding of Fact 3 of the positions of Community Integration Program (CIP) Manager and Mental Health Case (MHC) Manager. The Employer opposes such inclusion on the basis that the positions in question are occupied by independent contractors. The Employer does not contend that the three individuals at issue herein should otherwise be excluded from the bargaining

1/ Decision No. 20728 (WERC, 7/83).

unit if they are found not to be independent contractors. Although at the hearing the Employer reserved the right to argue managerial status of the CIP manager, the Employer did not argue such status in its post-hearing briefs.

5. The CIP program operates solely on federal funds for the purpose of integrating developmentally disabled individuals into the community by relocating them from nursing homes and similar facilities into group residential homes or independent living settings. The CIP program has been in existence for about six years. Initially, the CIP duties were performed by both the Developmentally Disabled Coordinator, a non-bargaining unit position, and the Developmentally Disabled Specialist, a bargaining unit position. However, in order to obtain better coverage for the CIP program, the Employer decided to have one individual provide the CIP services. On January 10, 1989, the Employer entered into an agreement with Lynn Bartling whereby Bartling would provide CIP service to the Employer's clients. Each month, Bartling submits a voucher showing the hours she has worked to Ann Soulier, the Developmentally Disabled Coordinator. Initially, it was expected that Bartling would work about 22-24 hours per week, although those hours have increased to an average of 25-30 hours per week. Soulier reviews Bartling's hours of work to determine both which clients are receiving the most hours of service and to be sure the hours do not result in expenses to the Employer in excess of program revenues. Soulier does not set the number of hours Bartling is to work, although she has the authority to direct Bartling to work less hours if the expenses exceed the revenues of the CIP program. In general, Bartling works from 9:00 a.m. to 3:00 or 4:00 p.m. on Tuesdays and Thursdays, although she can vary her schedule and has not worked every Tuesday and Thursday and has worked on other days. Bartling generally notifies one of the Employer's secretaries if she either will be late or will not be in the office on a Tuesday or Thursday. Secretarial employees of the Employer perform any typing needed by Bartling, route telephone calls to her, and take messages for her. The messages are placed in her mailbox at the Employer's facility. Approximately one-third of Bartling's hours are spent at the Employer's facility where she has a desk in the same office in which Soulier's desk is located. Bartling keeps her files in said office. The rest of Bartling's hours are worked at either her home, the facilities of the contracted agencies, or the residences of clients.

6. In 1984 the Employer received a grant from the State of Wisconsin to establish a program to provide supportive care and case management services to children and adolescent clients who are chronically mentally ill. The Employer entered into an agreement with Kathy Mitchell for her to provide those services. When Mitchell decided to not continue her agreement, the Employer entered into an agreement with David Nelson to provide those services. In September of 1989, Nelson terminated his agreement and the Employer advertised for a replacement. Subsequently, the Employer entered into agreements with Catherine Kaiser and Nancy Schneider to replace Nelson and to function as MHC Managers. Kaiser and Schneider each work 20.5 hours per week. The Employer determined that one individual would work on Mondays, Tuesdays and Wednesdays, while the other individual would work on Wednesdays, Thursdays and Fridays. Kaiser selected the Wednesday, Thursday and Friday schedule and Schneider was then assigned to work the Monday, Tuesday and Wednesday schedule. The MHC Managers work their hours at the Employer's facility, their homes and residences of clients. Each month, Kaiser and Schneider submit vouchers showing their respective hours of work to Dennis Nelson, the Employer's Client and Community Services Coordinator, who reviews the vouchers to verify that the days worked do not result in expenses in excess of program funding. Kaiser and Schneider share an office at the Employer's facility where they keep their files. Secretarial employees of the Employer perform any typing needed for Kaiser and Schneider, route telephone calls to them, and take messages for them, which are placed in their respective mailboxes at the Employer's facility.

7. Bartling, Kaiser and Schneider are paid an hourly rate for their hours worked. They do not receive overtime pay or any of the fringe benefits received by the Employer's employees, except they do receive an Employer-established mileage rate for using their own vehicles in their work. The Employer neither withholds Social Security and/or income tax from their compensation, nor makes unemployment compensation or worker's compensation payments on their behalf. They do not receive paid vacations. If they want to take off some days from work, they do not need the Employer's approval to do so, but rather, arrange their schedules in accordance with the desired days off. For example, Bartling did take off ten days in February, 1989 for a vacation. Bartling advised Soulier that she would be gone for ten days on the day before she left on vacation. In case of an emergency during such time off, the situation would be handled by the other MHC Manager or one of the Employer's employees. The Managers do not attend either the weekly meetings of staff employees on Monday mornings or meetings between the Employer's Medical Director and members of the Employer's staff. The Employer does not conduct evaluations of the performance of the Managers, or observe their performance in the field. While the 1988-89 contract between the parties gives the Employer the right to conduct annual performance evaluations of its employees, the Employer generally does not exercise this right.

8. The 1988-89 contract between the Employer and the Union specifies the normal workweek for regular full-time employees to be "37 1/2 hours, Monday through Friday". Within that time frame, some professional employees are assigned designated hours during which they are to be at the Employer's facilities. The professional employees in the bargaining unit do have flexibility in their work schedules based on the needs and availability of their clients, and, therefore, the work schedules of at least some of them may change from week to week. Employees are expected to attend weekly staff meetings on Monday mornings. The Employer's Medical Director used to meet weekly with employees to discuss certain clients. Those meetings no longer occur on a regular basis. Bargaining unit employees also serve on various community support committees. Bargaining unit employees are paid on a salary basis, and do not submit vouchers or time sheets listing their hours of work. When such employees want to take off time from work, they must get the Employer's approval to do so. For planned absences, the professional employees arrange their duties and client activities so as not to conflict with such time off. The Employer routinely approves the professional employees requests for time off. Pursuant to the 1988-89 contract, bargaining unit employees receive a variety of fringe benefits, such as paid vacations, paid holidays, health insurance, overtime pay, sick leave, etc. For its employees, the Employer makes payments to worker's compensation and unemployment compensation funds and withholds taxes and social security from their checks.

9. None of the three Managers have an agreement with any other employer for the purpose of providing services to the employer's clients. The Employer has contracts with three physicians, two of whom are psychiatrists and the third is a family physician, to provide services to clients at one of the Employer's facilities. The Employer's staff performs typing for these physicians. The physicians use an office and have mailboxes in the Employer's facility. At least one of the psychiatrists has contracts with other employers to provide services to their clients similar to his contract with the instant Employer. The Employer also has entered into contracts with other agencies whereby those agencies provide services to the Employer's clients.

10. Bargaining unit employees perform certain duties which Bartling, Kaiser and Schneider do not perform, such as emergency in-court related case management functions, serving on various community support committees, coordination of supportive care programs for the elderly, review and recommend actions on applications for admission to nursing homes, and authorizing in-patient mental health admissions for clients eligible for Title XIX funding.

11. The Employer exercises sufficient control over the work functions of the CIP Manager and the MHC Managers to warrant the conclusion that said individuals are not independent contractors.

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

CONCLUSION OF LAW

As the Employer exercises sufficient control over the work functions of the CIP manager position, occupied by Lynn Bartling, and of the MHC Manager positions, occupied by Catherine Kaiser and Nancy Schneider, so as to establish that Bartling, Kaiser and Schneider are not independent contractors, said individuals are municipal employes within the meaning of Section 111.70(1)(i) of the Municipal Employment Relations Act.

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

ORDER CLARIFYING BARGAINING UNIT 2/

That the positions of CIP Manager and MHC Manager be, and the same hereby are, included in the bargaining unit set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of July, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

2/ 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.

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2/ 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.

(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.

. . .

(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.

HUMAN SERVICES CENTER/NORTHWOODS GUIDANCE

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

The sole issue in dispute is whether the CIP Manager and the MHC Managers are independent contractors or municipal employees.

POSITION OF THE UNION

The Union contends that the individuals at issue herein are hourly paid employees who should be included in the bargaining unit. Said employees perform the same tasks at the same location under the same supervision with the same clerical support as do bargaining unit employees. CIP and MHC Managers schedule their work in the same manner as do the other professional employees of the Employer, i.e., in accordance with the needs and availability of the clients. The three managers do not have an entrepreneurial investment different from the other professional employees. Both groups have similar education backgrounds and use their own vehicles to service clients for which use a mileage reimbursement is paid. The Employer has retained control of the manner in which the Managers perform their functions.

POSITION OF THE EMPLOYER

The Employer argues that the individuals in question are independent contractors since it has retained control only over the results of the services provided by those individuals and has not retained control over the manner and means by which those results are accomplished. The three individuals have sole control over the days and hours they work. The Employer did not retain any right to control their job performance. The three managers decide when and where to see a client and how to meet the client's needs. The Employer representative neither observes the Managers in the field nor directly supervises their activities. The Managers do not attend staff meetings or receive any fringe benefits, are paid differently than employees, are not subject to discipline or job performance evaluations, can take time off from work without approval, and can allocate resources among clients without the Employer's approval. Finally, an actual financial investment is not required to establish independent contractor status. The Employer does not claim that the position in issue should be excluded on any other basis than their alleged independent contractor status.

DISCUSSION

Section 111.70(1)(i), Stats. defines a municipal employe in pertinent part 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 employe or an independent contractor, the Commission has applied the "right of control" test. This test provides that where the employer for whom the services are performed retains sufficient right to control the manner and means by which the result is accomplished, the relationship is one of employment. Where the employer retains control only as to the result, the relationship is that of independent contractor. The determination of which relationship exists depends on the particular facts of each case and all the relevant indicia of the relationship must be weighed and assessed, with no one factor being dispositive. 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. 3/

In the instant case, the Employer asserts that the three Managers set their own work schedules, are not evaluated and provide their services without supervision.

We acknowledge the three Managers do have somewhat greater flexibility in scheduling their hours and days of work than do the professional employes of the Employer. For instance, the Managers do not attend weekly staff meetings, unlike the employes. However, the managers do not have complete freedom in that respect. When Kaiser and Schneider, the MHC Managers, began working for the Employer, the Employer determined that it wanted one employe to work on Mondays, Tuesdays and Wednesdays, and the other employe to work on Wednesdays, Thursdays and Fridays. The more experienced employe, Kaiser, was allowed to choose one of those schedules: Schneider then was assigned to the other schedule of days. Kaiser and Schneider are expected to generally work 20.5 hours per week each. Bartling, the CIP Manager, generally works from 9:00 a.m. to 3:00 or 4:00 p.m. on Tuesdays and Thursdays and approximately 25-30 hours per week. Although the Employer argues that Bartling has complete freedom to determine how many hours she will work in a week, as long as she does not cause the program expenses to exceed the program revenues, the record does not reveal a wide range in her weekly hours of work. The advertisement, seeking applicants for the position Bartling now holds, specified the successful applicant would begin working 2224 hours per week. Soulier, who reviews Bartling's hours, testified that Bartling is averaging "between 20 - -25 to 30" hours a week. All three Managers can alter, and have altered, their general schedules to accomodate both client needs or availability and the Manager's personal preferences. However, the Employer's professional employes have a similar ability to alter their days and hours of work based on the same factors as long as they meet the 37 1/2 hour workweek requirement and any assignments, such as attending meetings or keeping certain office hours. Since most, if not all, of the professional employes meet with clients and other agencies at places other than the Employer's facilities just as the three Managers do, it is necessary for both the employes and the Managers to have the flexibility to alter their hours and days of work.

We also acknowledge that the Managers have the ability to arrange their schedules so as to be off work without the Employer's approval, whereas the employes must get approval to be off work. However, the employes have the same ability as the Managers have to arrange their schedules so that the Employer will approve their requests for time off. Nothing in the record shows that employe requests for time off are not routinely approved.

Given the foregoing, the Commission concludes that the Employer has retained some degree of control over the work schedules of the three Managers.

The Employer does not send employes into the field to observe the Managers at work. Neither is there any indication in the record that the Employer does field observations of its professional employes. While the 1988-89 contract between the parties provides for annual performance

evaluations of employes, the testimony of the witnesses indicates that the Employer does not have a program of annual formal job performance evaluations. Thus, the absence of performance evaluations of the Managers does not carry any real significance.

While the Employer has the contractual right to discipline employes for just cause, the agreements between the Employer and the individual Managers allow either party to terminate the agreement at any time upon written notice. The agreements do not require just cause for the termination. If the Employer terminated the agreement with one of the Managers, such would be the equivalent of the discharge of an employe. Thus, in our view, the Employer has in effect retained the ability to discipline the Managers, just as it has the right to discipline employes.

Although the Managers appear to have the ability, under the terms of their agreements with the Employer, to hire substitute subordinates to perform the services required under the agreements, none of the present Managers nor their predecessors have ever attempted to do so. Nor can the Commission overlook the fact, that, unlike at least one of the physicians with whom the Employer contracts, none of the three Managers have agreed to provide similar services for other employers. Nor is there any evidence to show that the Managers have solicited such agreements from other employers.

The three Managers are paid in a different manner than are the employer's regular full-time professional employes. In this case, the Managers are paid at a set rate for each hour worked, which is similar to the way other categories of employes, who are less than regular full-time, e.g., part-time, seasonal or temporary, generally are paid. If the Managers' payments were based primarily on results, rather than on time, such an arrangement would have been more supportive of the independent contractor status. Importantly, there is no profit or loss factor applicable to the manner in which the Managers are compensated.

The Managers do not receive the fringe benefits which are received by the Employer's employes. However, such a lack of benefits is not particularly supportive of the Employer's position inasmuch as the financial arrangements between the Employer and the Managers may be the result of other factors, such as labor market conditions, individual worker considerations, etc.

With respect to the financial investment of the Managers, they do use their personal vehicles in performing service for the Employer. Other professional employes of the Employer also use their personal vehicles in the same manner for which they receive a mileage reimbursement, just as the managers receive, although the reimbursement amounts may be different. The Managers also have an investment in their education and experience. However, the record does not establish that their education and experience backgrounds are unique in comparison either to other professional employes of the Employer or to the type of service the Managers are providing to the Employer. Such is a distinguishing factor from the Madison Schools decision relied on by the Employer.

Further, the Employer furnishes the Managers with office space and clerical services without any cost to the Managers, an arrangement which does not support independent contractor status.

Considering all of the foregoing, the Commission concludes that, on balance, there are insufficient indicia present to establish an independent contractor relationship. Particularly important in our view are the facts that none of the managers offer their services to any other employers; that their compensation is more directly related to time worked than result; that the Managers are not responsible for their expenses or support services; and that there is no particular profit or loss potential based upon their efficiency or skill. While the Managers have substantial discretion as to how the work is performed, their discretion is not significantly greater than that of the professional employes in the unit. Thus, we conclude that an employer-employee relationship exists under the "right of control" test and, therefore, the positions of CIP Manager and MHC Manager are occupied by municipal employes and appropriately included in the bargaining unit.

Dated at Madison, Wisconsin this 16th day of July, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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