

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
AFSCME LOCAL 2816
Involving Certain Employees of
WASHBURN COUNTY

Case 16
No. 53060 ME-792
Decision No. 21674-A

Appearances:

Mr. Steven Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of the Union.
Weld, Riley, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the County.

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

Local 2816, AFSCME, AFL-CIO filed a petition on September 8, 1995 with the Wisconsin Employment Relations Commission to include the positions of Child Support Clerk, Family Support Coordinator, Foster Care Coordinator, Family Based Social Worker and Family Intervention in an existing bargaining unit of Washburn County employees represented by Local 2816.

A hearing on the petition was held in Shell Lake, Wisconsin on May 14, 1996, a stenographic transcript of the proceedings was prepared by May 29, 1996, and both parties filed briefs and reply briefs, the last of which was received by March 13, 1997.

The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Washburn County, hereafter the County, is a municipal employer with offices at the Washburn County Courthouse, 110 West 4th Avenue, Shell Lake, Wisconsin 54871.
2. Local 2816, AFSCME, AFL-CIO, hereafter the Union, is a labor organization with offices c/o Steven Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751.

3. On September 8, 1995, the Union filed a petition for a unit clarification with the Commission to include within an existing unit five named positions in the Department of Social Services. The County opposes inclusion of these positions on grounds that it is not the employer of the employees involved. At the hearing, the names of the positions at issue were corrected, and they were stipulated to be the following:

Foster Care Coordinator, Family Based Specialist, Family Intervention Specialist, Family Assistance Worker, Community Resource Development Coordinator.

The parties stipulated that all of these positions are professional positions.

4. The Union and County are signatory to a 1993-95 collective bargaining agreement which defines the exclusive bargaining relationship as covering the following bargaining unit:

All regular full-time and regular part-time employees employed by Washburn County in the Courthouse, Department of Social Services and related departments, including professional employees, but excluding Highway Department "blue collar" employees, law enforcement employees, elected officials, supervisory, managerial, confidential and casual employees.

5. Article 2 of the collective bargaining agreement referred to above specifies in part as follows:

Section 2.01. The Board possesses the sole right to operate the County and all management rights repose in it, subject to the provisions of this agreement and applicable law. These rights include, but are not limited to the following:

...

H. To determine the methods, means and personnel by which County operations are to be conducted.

...

J. To subcontract out for goods or services with established businesses and agencies, provided such action shall not result in the layoff or reduction in hours of bargaining unit personnel.

...

L. To determine the kinds and amounts of services to be

performed as pertains to County operations.

Section 2.02. Whether or not the Employer has been reasonable in the exercise of these management rights shall be subject to the grievance procedure.

The Union has not filed a grievance protesting the manner of employment or contracting of the five positions at issue.

6. Four of the five positions at issue were filled at the time of the hearing, and the fifth (Family Resource Development Coordinator) was subject to an advertisement for applicants. The County, contrary to the Union, maintains that the sole employer of the employees involved is Gemini Employee Leasing, Inc., a firm located at 1044 St. Augustine Road, Hubertus, Wisconsin 53033. Gemini Employee Leasing, Inc. leases employees to 22 Wisconsin counties and some private employers, and has 450 employees under contract. Gemini offers its own benefit package, including insurance and mileage reimbursement but no pension plan, and makes payments to both Workers' Compensation and Unemployment Compensation funds on behalf of employees contracted to it. The employees at issue all have signed employment contracts with Gemini.

All five of the positions are funded by grant monies obtained by the County as types of employment which are expendable in the event that outside funding ceases to be available. None of these employees perform substantially the same duties as bargaining unit employees, and the job duties of bargaining unit employees were rearranged to center those duties on functions which the County considered to be ongoing and central to the mission of the Department of Social Services. In filling each of the positions at issue, the County set specifications for qualifications, and Gemini advertised for applicants. Gemini screened resumes and forwarded a subset of facially qualified applicants for the County's consideration. Interviews were conducted on site at Washburn County by a panel of County officials, with no Gemini representative present. The County then advised Gemini which applicant(s) the County would prefer be hired. A separate interview was conducted in each case by a Gemini manager by telephone. The employees were then hired by Gemini under contracts providing for varying lengths of employment.

7. Gemini manager Kathy Oberbreckling contacts each employee at Washburn County approximately eight to twelve times a year by telephone, discussing matters raised either by Gemini or by the employee which primarily focus on administrative issues such as insurance, vacation or sick leave. There have been no substantive discussions by Gemini's management with the County concerning issues related to the work performed by any of Gemini's contracted employees at Washburn County. Although Gemini has systems for discipline and evaluation of contracted employees, there has not been any discipline or discussion of possible discipline involving any of the positions at issue here and evaluations by Gemini personnel of Washburn County employees is cursory. At least one employee was not evaluated at all in two years' employment prior to the hearing.

There is contact between the employees at issue and regular bargaining unit employees of

Washburn County. The employees at issue share office space with regular County employees, and have desks, phones and other accoutrements of employment provided by the County which are facially indistinguishable from County employees.

Gemini reserves the rights (and at other work locations has exercised the rights) to: refuse to hire an employe favored after interview by the client; remove an employe whom the employer did not wish removed; and offer reassignment at another facility under contract to Gemini to employes which a given client had demanded be removed from its facility.

8. When an employe in one of the disputed positions is ill, he or she reports this in two ways: by telephone to the County's Social Services Department to advise the department that he or she will not be in to work, and by notation on a time sheet kept by the employe. The time sheets are turned in to Gemini and payment is made based on the time sheets. The Gemini contracted employes do not punch a time clock; the County's regular Social Workers do.

One of the employes at issue wished to be promoted from Social Worker I to Social Worker II. Oberbreckling, upon inquiry by the employe, referred the employe to Social Services Department Director Dennis Boland. Boland determined the promotion was appropriate according to the County's usual standards; the County agreed to an increase in the contracted rate paid to Gemini accordingly; and the employe received the increase.

The actual hourly wage rates paid by Gemini to Washburn County contracted employes closely match rates paid pursuant to the Union's contract covering regular employes, but without the pension. Gemini maintains a health insurance program separate from the County's, for which the employes at issue are eligible like other Gemini contracted employes.

Unlike Social Workers in the bargaining unit, Gemini employes do not receive overtime pay. Instead, they are instructed to apply their hours as necessary to meet client needs at any hour of the day, but to make sure that their hours total 37.5 per week. Significant amounts of evening work are involved for several of the positions.

9. Gemini's standard contract form with Washburn County provides, among other matters, for indemnification by Gemini of Washburn County against "any and all loss, damages, and costs or expenses which purchaser (Washburn County) may sustain, incur, or be required to pay by reason of any eligible client's suffering, personal injury, death or property loss resulting from participating in or receiving the care and services to be furnished by the provider (Gemini). . .". Gemini's contract also requires Gemini to provide a liability insurance policy covering its contracted employes, to meet equal employment opportunity requirements under Title 6 of the Civil Rights Act of 1964 and other laws, and to adhere to specified audit requirements.

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

CONCLUSION OF LAW

The occupants of the position of Foster Care Coordinator, Family Based Specialist, Family

Intervention Specialist, Family Assistance Worker and Community Resource Development Coordinator are employees of Gemini Employee Leasing, Inc. and are not employees of Washburn County. They are accordingly not municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT 1/

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

The positions identified in Finding of Fact 3 are not appropriately included in the Union bargaining unit identified in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin, this 28th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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,

(Continued)

1/ (Continued)

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 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.

Washburn County

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

Although five named positions are technically at issue here, it is clear that the nature of the positions contracted between Gemini and Washburn County changes from time to time, and that the fundamental question is whether the nature of the employment relationship is such that Gemini is the sole employer; Washburn County is the sole employer using Gemini for administrative convenience; or the two are joint employers of the employees under such contracts.

Position of the Union:

The Union contends that under the "right of control" test, the fundamental question is whether the employer for whom the services are performed retains sufficient right to control the manner and means by which the result is accomplished so that the relationship is one of employment. Where the employer retains control only as to the result, the relationship is that of independent contractor. The Union, citing Madison Metropolitan School District, 2/ notes that the Commission has stated that "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." The Union contends that the relationship between Washburn County and Gemini fails several of these tests. The Union argues that in this instance, Gemini's control over the employees is purely administrative in nature, and the employee contacts made by Gemini manager Oberbreckling are trivial in content, while all of the essential work-related and professional discussions occur with County employees and supervisors.

The Union contends that the County is responsible for determining when the employee will work, where he or she will work, which clients are served, who the employee will work with, what work is to be performed, and how the work is to be performed (including determination of care plans), and that there is no on-site supervision by Gemini at all. The Union notes the evidence that Hubertus, near Milwaukee, is the work location of Kathy Oberbreckling, and that not only is this hundreds of miles from Washburn County but that Oberbreckling has never been to Washburn County.

The Union argues that the discipline and annual performance review evidence offered by the County are unimportant in nature because there has been no actual incidence of discipline

2/ Dec. No. 6746-E (WERC, 12/86).

against which to test this evidence, and because the annual performance reviews appear not to

have been performed at all in at least one instance. The Union further notes that David Hergert, the County's supervisor most immediately responsible for the relationship with Gemini, testified that his contact with the contract manager amounts to phone calls eight to twelve times per year for an average time of two minutes apiece.

With respect to wage rates, the Union argues the evidence in the record establishes that rates paid by Gemini to its contracted employees in four positions revealed in County Exhibits 6 to 9 match to the penny the rates which would be paid to employees at their respective levels under the Union's contract with the County as of each respective date. The Union argues that if Fowler's testimony as to the independence of Gemini's rate setting decisions is taken seriously, this would be an odd coincidence. The Union also notes testimony that when the Foster Care Coordinator wished to move from Social Worker I to Social Worker II, which the Union notes is a logical construct created by and within the Union's contract with the County, she was told by Oberbreckling to "negotiate" with Social Services Director Boland. She did so and her rates were subsequently adjusted to match the contractual Social Worker II rates.

In its reply brief, the Union contends that there is no such thing as a "professional employer" as contended by the County, because an employer is someone who has work which needs to be performed. Here, the Union contends, there is no underlying task to be performed on Gemini's behalf, and the concept that Gemini might be any kind of an employer was a sufficiently radical departure from the normal and common sense definition of employer and employee that the Unemployment and Worker's Compensation laws had to be amended to accommodate the concept. The Union contends that there has been no similar change in Wisconsin Statute 111.70. The Union argues that in Sheboygan County, 3/ the Commission found "relatively close" a case in which employees were found employed not by Sheboygan County but by Gemini's predecessor, then called TSS, Inc. The Union argues that significant distinguishing facts between Sheboygan County and this case favor a finding that in this case, Washburn County is the employer. The Union notes that in Sheboygan County, TSS not only employed working aides of the two nursing homes involved, but also working supervisors, and above them, a "primary house supervisor, to whom house aides are to bring questions and complaints and through whom the TSS office is to maintain its liaison with the facilities." The Union points out that in this instance, those functions are performed by Washburn County Social Worker Supervisor Hergert. The Union further comments that in Sheboygan, TSS was responsible for providing 24-hour coverage in the facility and for quality of staff performance, as well as overtime. Here, Gemini has no control over the scheduling of employees or responsibility for their day-to-day performance of tasks. The Union accordingly contends that the relationship between Gemini and Washburn County amounts in reality merely to the contracting out of a personnel function, and not an independent employment relationship at all.

3/ Dec. No. 23031-A (WERC, 4/86).

In the alternative, the Union contends that the Commission has found joint employer status to exist in cited cases where two employers exert significant control over the same employees.

The Union requests that the employees be included within the bargaining unit represented by the Union.

Position of the County

The County contends first that Gemini is a recognized employe leasing company in business since 1981 with many clients and many employees. The County notes that Gemini fits many of the characteristics of an independent business, including payment of Workers' Compensation and Unemployment Compensation, completion of the immigration and naturalization form I-9 for all of its employees, completion of forms with respect to lobbying activities, civil rights compliance and affirmative action compliance plans, payment of FICA, issuance of W2's, and provision of professional liability insurance for all of its employees including those at issue here. The County further contends that the evidence shows that Gemini recruits, hires, fires, disciplines, and evaluates its employees.

The County asserts that this case is very similar to Sheboygan County and that the Commission previously concluded that TSS was the employer of the house aides in Sheboygan County even though the county exercised considerable influence on the selection of house aides, the wage rates were nearly identical to those paid to the individuals prior to TSS's involvement, the county exercised a measure of control over day-to-day supervision of house aides and the county retained full program and treatment control. The County notes that the Commission gave greater weight to TSS's authority to exercise ultimate control of employe discipline and discharge, the fact that each house aide signed an agreement with TSS, the fact that the employment agreement recognized TSS's right to terminate immediately for cause or upon 30-day notice without cause, the fact that the fringe benefits were not tied to Sheboygan County's benefit package, and the fact that TSS's director handled the employment contract matters. The County argues that these factors are similar or even more compelling for the County's position in the present case. The County argues that in establishing wage rates, Fowler considers regional differences as well as the amount of money available from the grant, and that in testimony she flatly stated that "we set the wage."

The County argues that Oberbreckling coordinates the interviews of the employe, and the ultimate decision regarding whom to hire is Gemini's, as is control of disciplinary and evaluation processes. The County argues that Gemini's employment contract and employe handbook differ in material respects from the County's collective bargaining agreement, including not providing for a probationary period and specifying that the employe may be terminated at any time with or without cause. The County notes that there is evidence that Gemini has in other employment settings actually used a provision of its contract with the employe to the effect that if the contract or the position is terminated, the employe may be offered another position with Gemini at a different location.

The County cites CESA 14 4/ to the effect that the Commission has found that though CESA 14 was involved in an interview process, that did not compel the conclusion that CESA 14 was the employer.

With respect to differences in employment terms, the County notes that Gemini offers personal leave while the County does not; the County offers longevity payments while Gemini does not; health insurance contribution rates differ; the County offers sick leave payout upon termination while Gemini does not; and Gemini employees are not subject to a pension plan.

The County argues that a comprehensive array of forms and schedules establishes the nature of the relationship between the employee and his or her employer as being exclusively with Gemini for all standard employment purposes except work assignment and some reporting.

In its reply brief, the County argues that the reporting requirements on the employee in the event of sick leave, etc. are not dispositive, nor is the fact that County employee Hergert signs time sheets of Gemini employees, since the purpose of the signature is merely to verify days and hours for which the County should be billed.

The County asserts that contrary to the Union, the pay rates of employee Penny Allar were not identical to Union contract rates, because at the time of the hearing Allar's wage rate was \$12.99 per hour, the 1995 starting wage rate for a Social Worker II even though the hearing was held May 14, 1996. The County further notes that Allar's wage rate was to be increased to \$13.60 per hour effective July 1, 1996, but that that rate was equal to the 1995 six-month wage rate under the collective bargaining agreement, while Allar had then been employed by Gemini and the County for two years. Thus, the County contends that Gemini wage rates do not mimic the collective bargaining agreement as the Union alleges.

The County alleges that the Union's reliance on the Madison case is misplaced because the County is not contending that Gemini employees are independent contractors, but that they are employees of an employer who does not happen to be the County.

4/ Dec. No. 17235 (WERC, 8/79).

The County contends further that Washburn County and Gemini Employee Leasing, Inc., are neither a single employer nor joint employers of the employees involved, citing NLRB vs. Western Temporary Services 5/ and other cases. The County adds that under the rules applied by the NLRB, even where joint employer status exists, the NLRB will deny inclusion of jointly employed employees in the unit of a single employer, absent consent of both employers.

The County requests that the employees at issue be found to be employees of Gemini alone and found not to be municipal employees.

Discussion

We find that this case fits squarely within the principles that we have established in Sheboygan County. We acknowledge that there are differences which at first sight favor the Union's position. Indeed, there is far less involvement of Gemini supervision over the employees involved here than was true in Sheboygan County. Further, it is true that the control exercised by Gemini on a day-to-day basis is rudimentary compared to that exercised under the close supervision characteristic of the Sheboygan County nursing home employees.

We are untroubled by these facts, however, because we believe that they reflect inherent differences between non-professional and professional employees, as well as the numbers of employees at issue in the two cases. Here, only a small group of contracted employees is involved, not sufficient to support a supervisor on site. Furthermore, the employees in question are professionals. It is axiomatic that professionals operate with a degree of discretion and independent judgment, as well as freedom of movement in action, not characteristic of non-professional employees. This is part and parcel of the "professional" employee definition in the Municipal Employment Relations Act. It is accordingly not surprising that there would be little opportunity or need for exercise of day-to-day control of labor relations-related issues for these employees. The fact that there has been no discipline and little evaluation by Gemini reflects the professional independence of the employees.

As reflected in Sheboygan County, the identity of the employer is determined by establishing who exercises ultimate decision making authority in the critical areas of hiring, discipline and compensation. As was true in Sheboygan County, we are satisfied that although the County has significant involvement in these areas, the County is not the ultimate decision maker. Instead, the record establishes that Gemini makes the hiring and disciplinary decisions and determines the wages and fringe benefits which will be paid to the employees.

We accordingly find that the relationship between Gemini and Washburn County is fundamentally similar to the relationship between Gemini's predecessor TSS, Inc. and Sheboygan County, and conclude that the employees at issue here are employees only of Gemini and not of Washburn County. We therefore have concluded the employees cannot appropriately be placed in a

5/ 125 LRRM 2787, 2794 (7th Circuit, 1987).

unit of Washburn County employes.

Dated at Madison, Wisconsin, this 28th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner