

STATE OF WISCONSIN

IN CIRCUIT COURT

WASHBURN COUNTY

**LOCAL 2816, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Petitioner**

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

Decision on Motion
Case No. 97CV108

Case 16
No. 53060
ME-792

Decision No. 21674-B

PROCEDURAL BACKGROUND

This is an appeal by Local 2816, American Federation of State, County and Municipal Employees, AFL-CIO (herein, Local 2816 or AFSCME) from a decision of the State of Wisconsin Employment Relations Commission (WERC) determining that the positions of Foster Care Coordinator, Family Based Specialist, Family Intervention Specialist, Family Assistance Worker and Community Development Coordinator are not Washburn County Employees. Local 2816 petitioned the WERC on September 8, 1995 for clarification of the bargaining unit. The Local's petition recited the description of the prior bargaining unit as:

All regular full time and regular part time employees employed in 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.

This bargaining unit has been previously certified by the WERC decision of July 9, 1984, number 21674. A copy of that decision however has not been incorporated as part of this record.

The hearing before the WERC was conducted on May 14, 1996. After the parties filed legal memoranda, the WERC issued its decision on July 28, 1997. This timely appeal followed.

ISSUES

1. Are the factual findings of the WERC supported by the substantial evidence?
2. Is Gemini Leasing a municipal employer as defined by Wisconsin Statutes Sec. 111.70(1)(j)?
3. Is Section 2.02 of the labor agreement the exclusive first remedy as between these parties where the issue is the County's right to subcontract services?

DISCUSSION

STANDARD FOR REVIEW

This proceeding for bargaining unit clarification requires the interpretation of various provisions of Sec. 111.70 Stats. The review however is limited to those requirements of Sec. 227.57 Stats. Specifically, the two subparagraphs to which the Court is concerned are:

(2) Unless the Court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The Court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Our Supreme Court has established a legal standard for substantial evidence in *MUSKEGO - NORWAY C.S.J.S.D. v. WERC*, 35 WIS.2D 540, 558, 151 N.W.2D 570 (1966). There, citing *COPELAND v. DEPARTMENT OF TAXATION*, 16 WIS.2D 543, 114 N.W.2D 858 (1962) the

Court said:

The term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other had, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

The Circuit Court's function in this case is to determine if, on the basis on the entire record, there exists substantial evidence to support the WERC's decision.

The Court finds that based upon the entire record, there is substantial evidence to support the WERC's decision. The WERC concludes as a matter of law that the Gemini employees were not employees of Washburn County." That conclusion was based upon a thorough analysis of the evidence submitted at the administrative hearing. That evidence includes:

1. The hiring process by Gemini and the relationship between Washburn County and Gemini management.
2. Working conditions including office location, rules, times, duration, supplies and other general factors relating to job performance and functions.
3. Salary, benefits, vacation, "on call" and the other financial relationship between Gemini and the employees in question.
4. Various other regulatory obligations typical to the employer and employee relation.

After reviewing and analyzing these factors, the WERC determined that even though the contracted employees were performing professional social services, they were employees of Gemini. The contracted social workers received their wages from Gemini. The employees benefit package was determined by Gemini, not Washburn County. Gemini had a job supervision process in place whereby the employee was accountable to the contracting company. Gemini is a private corporation. On all of the evidence, it cannot be said that the findings were unreasonable. The inferences and findings are therefore supported by the evidence.

Local 2816, in its supplemental brief, argues that the WERC decision is flawed because the agency erroneously applied Sec. 227.57(5) Stats., in that the agency's exercise of discretion is inconsistent with a prior agency ruling. Specifically, the union argues that the WERC misapplies the rule of WISCONSIN COUNCIL 40, AFSCME V. SHEBOYGAN COUNTY UNIFIED BOARD, #55833, ME-2520 DECISION 23031-A (1986). (Commonly referred as "SHEBOYGAN" by both the counsel throughout this proceeding). The argument is that if the WERC had correctly applied its prior ruling in this set of facts, the conclusions required a finding that the employees were employees under Sec. 111.70(1)(i) Stats.

SHEBOYGAN was a prior decision of the WERC which addressed this same employee contracting company's relationship to certain employees of Sheboygan County's residential treatments centers. The issue arose by reason of the union's request for unit clarification and the exclusion of various subcontracted aids as

members of the bargaining unit. The WERC determined that the home aids were not municipal employees primarily because the contracting company had ". . . authority to hire, fire and settle wage and working condition matters affecting the house aids . . . and the County and its unified board do not." NUMBER 23031-A AT PAGE 6. Here, Local 2613 argues that because Gemini did not have a local supervisor and the County made the hiring selection, the factual distinctions warrant a contrary finding. The argument is unpersuasive. The WERC decision noted the distinction between the employees of Sheboygan County versus those positions at issue here. SHEBOYGAN COUNTY involved nursing home facility aids. Those employees were required to perform various on site duties in providing care services for residents of a community based residential facility. The aids were not classified as professionals and the decision does not include a recitation as to the employees' education or experience requirements of employment. In this case, the WERC noted that specific distinction between the employees of Sheboygan County and those of Washburn County. Here, the employees are considered professional employees. The work is not always "on site". Employees are required to have as prerequisites to employment, a certain educational background. Tasks performed by the workers vary from case to case and the employees are required to exercise discretion in the provision of services. As a consequence, the conclusion that the professional employees of this case are afforded different working conditions than those of Sheboygan County is supported by substantial

evidence. Therefore, the conclusions of the WERC that the employees are not municipal employees is affirmed.

B. Is Gemini Employee Leasing Inc. a Municipal employer as defined by Wisconsin Statutes Sec. 111.70(1)(j), Stats.?

The WERC did not address this issue in its findings, conclusions or order. After the submission of AFSCME's original brief on November 17, 1997, the Court requested that counsel address this issue in their briefs. In its supplemental brief, AFSCME now suggests that the Court find that Gemini is a municipal employer pursuant to Sec. 111.70(1)(j), Stats. Plaintiffs argue that the statutory phrase ". . . any person acting on behalf of a municipal employer. . ." includes those subcontractors such as Gemini. AFSCME cites no authority for that proposition and concedes that MERA does not elaborate on this specific statutory phrase.

The County also concedes that there are no reported decisions which address this issue. Counsel cites however a number of administrative decisions where public entities were found to be employers. Respondent then argues that given those prior findings, ". . . even for another public entity to be declared a public employer, it must be a potential subdivision or be created pursuant to statute and empowered by statute to act on behalf of a municipality." Respondent's brief page 14. The Court is not persuaded by either argument.

Sec. 220.57(9), Stats. states:

(9) The Court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the Court sets aside agency action or remands the case to the agency for further proceedings, it may make such

interlocutory order as it finds pending further proceedings or agency action.

The WERC is primarily concerned with the application and implementation of MERA. Its findings, conclusions and orders are to be afforded great weight by Circuit and Appellate Courts. Although the Courts are not bound by the WERC's interpretation of the law, the agency's interpretation is to be afforded considerable weight. Given the importance of this issue to the parties and to the development of the law, the Court remands this case to the WERC for further proceedings. Specifically, the Court directs the WERC to consider the status of Gemini as a municipal employer given the following facts:

1. The interviewing process for the contracted services employees was essentially performed by the County's personnel.
2. The hiring decision was for all practical purposes based upon the decision of the County.
3. Job supervision was performed by the County. Although Gemini did contractually retain the right to supervise its employees, it has not significantly performed that function.
4. Historically, job reclassification decisions were essentially determined by the County.
5. The contracted employees performed professional social worker services which although not specifically the same as the County's professional social workers, are sufficiently similar so as to be considered as the same.
6. The contracted employees must have the appropriate credentials for hire into such positions.

The WERC may also consider any other such facts as may be relevant to render its decision. The agency need not revisit those issues previously addressed. The record, as noted above supports those findings and is affirmed.

CONTRACTUAL PRE-EMPTION

The Court also requested that the parties brief whether paragraph 2.02 of the labor agreement is the exclusive remedy available to the union. The parties responded by agreeing that unit clarification is not the same as the relief sought under Section 2.02. The Court agrees with that proposition. Unit clarification *is not* the same as the grievance procedure. Nevertheless, the question remains: Does Section 2.02 provide the exclusive remedy to AFSCME?

Section 2.02 of the labor contract provides:
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 WERC decision mentions the contractual provision at page 3 of its decision and then says nothing more except recognizing that the union had not filed a grievance. The "Verb" of the contractual language is "shall". Shall, in contract law, usually requires compliance. If the contractual language means that which is commonly understood by lawyers, the union's first course of action is not a proceeding for unit clarification but, process through the grievance procedure. If the WERC chooses to address this issue on remand, the Court will consider its findings if need be. If the WERC does not address the issue, then the Court may

may address the issue on reconsideration if that is necessary.

Dated this 4th day of March, 1998.

BY THE COURT:

/s/ Eugene D. Harrington
Hon. Eugene D. Harrington
Circuit Court Judge